manitoba**LawJournal**

2023 Volume 46(5), Special Issue

Criminal Law Edition (Robson Crim)

Faculty Editors-in-Chief
RICHARD JOCHELSON LL.B., LL.M. PHD.
PROFESSOR, FACULTY OF LAW, UNIVERSITY OF MANITOBA
BRANDON TRASK J.D., LL.M.
ASSISTANT PROFESSOR, FACULTY OF LAW, UNIVERSITY OF MANITOBA
REBECCA JAREMKO BROMWICH J.D., LL.M. PHD.
LAWYER
JAMES GACEK PHD.
ASSISTANT PROFESSOR, DEPARTMENT OF JUSTICE STUDIES, UNIVERSITY OF REGINA

Lead Student Editor
Vicky Liu B.Sc., J.D. (2024)

Assistant Student Editors
Eliza Bell B.B.A., J.D. (2024)
Richmond Eshikena B.A., J.D. (2023)
Diana Gutierrez B.A. (Hons), J.D. (2024)

Cover Image
BRIAN SEED

With thanks to MLJ Executive Editors-in-Chief
BRYAN P. SCHWARTZ, LL.B., LL.M., J.S.D.
ASPER PROFESSOR OF INTERNATIONAL BUSINESS AND TRADE LAW, FACULTY OF LAW, UNIVERSITY OF MANITOBA
DARCY L. MACPHERSON, LL.B., LL.M.
PROFESSOR, FACULTY OF LAW, UNIVERSITY OF MANITOBA

PUBLICATION INFORMATION

Copyright © 2023 Manitoba Law Journal
Cite as (2023) 46:5 Man LJ
Printed in Canada on recycled and acid-free paper.
Published annually on behalf of the Faculty of Law, University of Manitoba.
Annual Subscription Rate: Canada: $35.00 CDN; Foreign: $35.00 U.S.
Back issues available from: Manitoba Law Journal
4th Floor Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2
E-mail: lawjournal@umanitoba.ca

ACKNOWLEDGEMENTS

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

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

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

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

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

REFEREE AND PEER REVIEW PROCESS

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

INFORMATION FOR CONTRIBUTORS

The editors invite the submission of unsolicited articles, comments, and reviews. The submission cannot have been previously published. All multiple submissions should be clearly marked as such and an electronic copy in Microsoft Word should accompany the submission. All citations must conform to the *Canadian Guide to Uniform Legal Citation*, 10th Edition. Contributors should, prior to submission, ensure the correctness of all citations and quotations. Authors warrant that their submissions contain no material that is false, defamatory, or otherwise unlawful, or that is inconsistent with scholarly ethics. Initial acceptance of articles by the Editorial Board is always subject to advice from up to three (or more) external reviewers.

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

Manuscripts and communications should be directed to:

Criminal Law Special Edition (Robson Crim)

Richard Jochelson
Brandon Trask
Manitoba Law Journal
466 Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2
E-mail: info@Robsoncrim.com

Regular MLJ

Editors-in-Chief
Manitoba Law Journal
466 Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2
E-mail: lawjournal@umanitoba.ca

manitoba**LawJournal**

2023 Volume 46(5), Special Issue

Criminal Law Edition (Robson Crim)

CONTENTS

1 Limitations of the Common Law Adversarial Process: How Independent Judicial Research Could Have Avoided the Wrongful Conviction in *R v Mullins-Johnson*
HEATHER HUI-LITWIN

34 Ending Human-Animal Maltreatment Cycles Through the Use of Trauma-Informed Therapy
JESSICA A. CHAPMAN

113 Obstructed Gynecology: Inaccess to Reproductive Health Care for Incarcerated Women as a Violation of Section 7 of the *Charter*
MEGAN MACKINNON

131 Vitiating Consent for Sexual Assault Causing Bodily Harm: Should *Jobidon* Apply to Sexual Activities
MONA ABDOLRAZAGHI

155 Civil Forfeiture and the *Charter*
MARK SOO

206 Ushering in a New Era: Assessing the Reasonable Expectation of Privacy vis-à-vis Cryptocurrency and Blockchain Data
NOAH LESIUK

CALL FOR PAPERS: Closes April 2, 2024
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. 46(4), 46(5), and 46(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
- Comparative criminal law analyses

- Criminal law, popular culture, and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

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

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

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

SUBMISSIONS

We will be reviewing all submissions on a rolling basis with final submissions due by April 2, 2024. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

Submissions should generally be under 20,000 words (inclusive of footnotes) and, if possible, conform with the Canadian Guide to Uniform Legal Citation, 10th ed. (Toronto: Thomson Carswell, 2023) – the "McGill Guide". Submissions must be in Word or Word compatible formats and contain a 250-word or less abstract and a list of 10–15 keywords.

Submissions are due April 2, 2024 and should be sent to info@robsoncrim.com. For queries, please contact Professors Richard Jochelson or Brandon Trask, at this email address.

THE JOURNAL

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

Peer Review
We generally use a double-blind peer review process to ensure that the quality of our publications meets the requisite academic standards. Articles are anonymized and then, after editorial review, reviewed by anonymous experts. Occasionally, the identity of the author is intrinsic to evaluating the article (e.g., an invited distinguished lecture or interview) and the reviewers will be aware of it. Articles are accepted with revisions, encouraged to revise and resubmit, or rejected.

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

Limitations of the Common Law Adversarial Process: How Independent Judicial Research Could Have Avoided the Wrongful Conviction in *R v Mullins-Johnson*

HEATHER HUI-LITWIN*

ABSTRACT

It is often believed that the common law adversarial process performs efficiently to ensure the truth comes out and that justice is served. However, this was not the case in *R v Mullins-Johnson*. This paper argues that the common law adversarial trial process can actually contribute to wrongful convictions if judicial passivity is strictly adhered to. If the trial judge could have learned about the unreliability of the Crown expert testimony through independent research, he could have intervened to avoid a wrongful conviction.

Keywords: Wrongful Conviction; expert evidence; scientific evidence; forensic pathology; Goudge Inquiry; fact-finding; criminal trials; role of judge; judicial intervention; judicial neutrality.

Note in Style: To avoid confusion and improve readability, judges are referred to as "he." However, it should be noted that our judiciary is composed of all genders.

---

* Ph.D. (University of Toronto, Chemistry); J.D. (Osgoode Hall); LL.M. (University of Toronto). Heather is the founder of Litigation Help-Public Legal Education (youtube.com/litigationhelp). The author wishes to thank Professors Kent Roach and Hamish Stewart for their guidance during her master's thesis, on which this paper is based. The author would also like to thank her colleagues, Mick Hassell and Monick Grenier for sharing their experience as litigators, and to Sandrine Ampleman-Tremblay, Amanda Sierra and Douglas Tompson for proofreading this manuscript and for their invaluable comments.

I. INTRODUCTION

(Note that this paper is based on the author's LL.M. thesis, Hui-Litwin, H. W.-S. (2018). *The Role of the Judge in Wrongful Convictions: R v Mullins-Johnson.*[1])

Scientific expert evidence is frequently relied upon nowadays in both civil and criminal court proceedings. Unfortunately, there have been many wrongful convictions as a result of flawed Crown expert testimony. For example, in the United Kingdom, Sally Clark was wrongly convicted of murdering her infants, based on the expert opinion that the chances of two incidents of Sudden Infant Death Syndrome ('cot death') happening to a single family were one in 73 million.[2] In another case, a Dutch nurse, Lucia de Berk was convicted of murdering the infants under her care by poisoning them with digoxin. What led to her arrest was the perception that there was an unusually high frequency of deaths that occur during her shifts. A prosecution expert testified the chances of all the deaths occurring naturally was one in 34 million. This opinion was later debunked after Ms. De Berk spent five years in jail.[3] In Canada, it was discovered that there were many wrongful convictions as a result of the flawed opinions of a pathologist by the name of Dr. Charles Smith. Indeed, the Inquiry into the Pediatric Forensic Pathology in Ontario ('Goudge Inquiry')[4] was created to review the pediatric forensic pathology system.

It is often believed that the common law adversarial process performs efficiently to ensure the truth is revealed and that justice is served. However, this was not the case in *R v Mullins-Johnson.*[5] In this paper, I argue that the

---

1 Hui-Litwin, H W-S (2018). The Role of the Judge in Wrongful Convictions: R v Mullins-Johnson. University of Toronto (Canada) ProQuest Dissertations Publishing, 2018. Online: <hdl.handle.net/1807/91764>.

2 'Sally Clark, mother wrongly convicted of killing her sons, found dead at home' Article in The Guardian https://www.theguardian.com/society/2007/mar/17/childrensservices.uknews; Erica Beecher-Monas also referenced this tragic case in her book Evaluating Scientific Evidence, (New York: Cambridge University Press, 2007), p. 12. It is interesting to note that defence called two expert statisticians on appeal to reveal the flaws in the prosecutor's expert pediatrician's evidence, only to be dismissed by the appeal court. It was not until it was discovered that the pathologist had failed to disclose evidence of the infant's infection that Ms. Clark was acquitted in a second appeal.

3 Jeffrey Rosenthal, 'Probability, Justice, and the Risk of Wrongful Conviction' vol. 12, no. 1, 2 & 3 (2015) The Mathematics Enthusiast, 11. Online:<http://probability.ca/jeff/ftpdir/probjusticepub.pdf>.

4 Commission of Inquiry into Pediatric Forensic Pathology, Report (Toronto: Ontario Ministry of the Attorney General, 2008) [Report of Goudge Inquiry].

5 *R v Mullins-Johnson*, 2007 ONCA 720 (CanLII), 87 O.R. (3d) 425 [Mullins-Johnson].

common law adversarial trial process can actually contribute to wrongful convictions if judicial passivity is strictly adhered to. I argue that the trial judge would likely have learned about the unreliability of the Crown expert testimony through independent research and that he could have intervened to avoid a wrongful conviction. I argue that judicial neutrality should not be synonymous with judicial passivity.

The paper will open with an outline of the *Mullins-Johnson* litigation and a brief introduction of what I believe led to the wrongful conviction.

The third part of the paper introduces the debate on independent judicial research. It includes a commentary on the case *R v Bornyk.*[6] This case is of interest because the British Columbia Court of Appeal was highly critical of the trial judge's use of independent research. I use this case as an opportunity to reflect on the pros and cons of judicial research. I end this section with a suggestion on how independent judicial research can still be included while taking into account the Court of Appeal's concerns.

The fourth part of the paper will provide a detailed look at what happened during the *Mullins-Johnson* trial, I will discuss how the trial judge could have learned that the Crown trial expert's opinion on the time and cause of death were based on faulty foundations if he had accessed the textbooks that were cited at trial. Expert testimony will be analyzed with the help of trial transcript excerpts.

The fifth part of the paper will conclude with my suggestions on how a judge could have intervened in the *R v Mullins-Johnson* hearing in such a way that balances competency in handling scientific expert evidence while preserving judicial neutrality.

II. MISCARRIAGE OF JUSTICE IN *R V MULLINS-JOHNSON*: BACKGROUND OF THE CASE

On September 21, 1994, William Mullins-Johnson was convicted of first-degree murder. The events began when Mr. Mullins-Johnson was asked to babysit his brother's children one summer evening. The next morning, one of the children, Valin Johnson, was found dead in her bed by her mother. An autopsy was performed by a pathologist, named Dr. Bhubendra Rasaiah. He consulted with several doctors, including Dr. Charles Smith.[7] Less than twelve hours[8] later, Mr. Mullins-Johnson was arrested for first-degree murder, based on the pathologist's opinion that Valin had been

---

6 *R v Bornyk*, 2013 BCSC 1927 [*Bornyk* 2013].

7 *Mullins-Johnson, supra* note 5 at para. 43.

8 *Ibid* at para. 4.

manually asphyxiated[9] during an episode of anal rape. The pathologist also concluded that the attack took place roughly around 8 to 10 p.m. the evening before. Mr. Mullins-Johnson was the only adult who was with the child at the time, therefore he had the exclusive opportunity to murder the child. Twelve years after his conviction, Mr. Mullins-Johnson was acquitted. It was discovered that the Crown's expert opinions were flawed. According to judgement[10] rendered by the Court of Appeal in 2007, there was insufficient evidence to conclude there was any murder. The fresh expert evidence presented on appeal was so overwhelmingly in favour of the accused that the Crown conceded to the acquittal.

This case shows how flawed testimony can appear to be highly convincing at first glance. There is a natural tendency for a judge (or a jury) to be deferential to an expert of spectacular credentials and accept their testimony without challenge. The Crown expert evidence on the time of death was highly significant in this case, as Mr. Mullins-Johnson was alone with Valin from about 7 p.m. to 9:30 p.m. on the evening before she was discovered dead. Crown expert Dr. Rasaiah's testified that the time of death fell within a narrow two-hour window, which would provide the prosecution with a convincing case of exclusive opportunity for Mr. Mullins-Johnson to commit the alleged murder. Furthermore, when Crown experts testified that the physical evidence such as a bruise on the neck and pinpoint bleeding in the eyelids point to manual strangulation, it is difficult not to conclude the child was murdered. It is interesting to note that the information given by the expert to educate the court (as opposed to his interpretation of the scientific observations) contradicted the existing knowledge already documented in textbooks. This contradiction could have been caught by a judge if he had conducted judicial research. This will be elaborated on in Part IV.

III. PROS AND CONS OF INDEPENDENT JUDICIAL RESEARCH

A. Introduction to Judicial Independent Research

An active engagement of a judge in assessing the substance of the expert evidence is crucial to ensuring adjudication based on the merits. Naturally, to do so, a judge must be able to comprehend the expert evidence itself. Currently, organizations such as the National Judicial Institute and the

---

9 While the precise definition of the term 'asphyxia' has been debated, in this case, I will use it to denote what was meant by Dr. Bhubendra Rasaiah, the pathologist who performed the autopsy. His definition of asphyxia refers to a mechanical obstruction of airways, such as suffocation, strangulation or chest compression.

10 *Mullins-Johnson, supra* note 5 at para. 6.

Canadian Judicial Council offer courses and resources to help judges handle scientific evidence.[11] However, if the judge had received specialized education on forensic pathology, how would he bring that knowledge into the trial process? Furthermore, can he supplement his knowledge while presiding on a trial to refresh his learning and to keep up to date with the most current scientific knowledge? The common law is content with granting a judge the power to *exclude* evidence (gatekeeping). However, if a judge were allowed to introduce information into the trial process through independent research, would this not appear to be *adding* evidence to the trial process by a judge?

While it is beneficial for a judge to have some basic education in the various areas of sciences, it would be impractical for judges to be well-versed in all forensic disciplines. There are several ways in which judges acquire specialized knowledge. One is from what they "learned" in previous trials that they presided over. A second way is through continuing professional education courses ("CLE") as mentioned above. A third way, and the most controversial one, is that judges may gain knowledge through their own research while they are presiding over a trial. A judge will often be tempted to conduct independent research if he is motivated to fully understand the evidence at hand for two reasons: (1) CLE's will often only provide basic and generalized knowledge in a particular scientific area, and hence, specific details on a particular topic may require more tailored research; (2) ever-evolving scientific progress means that what a judge learned a few years ago at a CLE may be obsolete by the time they preside at a trial.

According to the literature,[12] opinions are divided amongst judges themselves over whether they should do their own independent research. Some argue that a judge (and jury) should have access to the whole picture. Therefore, if the parties were unable to provide this, due to a lack of resources or incompetence, then surely a judge should be allowed to do his own research to ensure that all relevant information is available for a fair analysis of the facts. Others argue that allowing independent research violates some of the most basic tenets in the trial process, including the party

---

11 The National Judicial Institute webpage on judicial education. Online:< https://www.nji-inm.ca/index.cfm/judicial-education/judicial-education-in-canada/?langSwitch=en>; Canadian Judicial Council webpage on seminars. Online: < https://cjc-ccm.ca/en/what-we-do/professional-development>.

12 Edward K. Cheng, "Should judges do independent Research on Scientific Issues?" (2006) 90:2 Judiciature 58. *28 Rev. Litig. 131 (2008-2009;* Elizabeth Thornburg, "The Curious Appellate Judge: Ethical Limits on Independent Research" 28 Rev. Litig. 131 (2008); Wayne K. Gorman,"How much Independent Judicial Research is Appropriate?" 52 Ct. Rev. 4 (2016).

prosecution principle, judicial neutrality, and that a judge should only act as an adjudicator, and not also as a witness and an advocate.

B. Advantage of Judicial Independent Research

In a common law trial, facts are introduced in a trial through a very limited and controlled manner. A judge is only allowed to consider the evidence before him, and cannot bring in any knowledge or information from his own research. Hence, there is a risk that any gap in the factual record (either intentional or inadvertent) has no way of being filled. The process works if both sides are equally well-resourced and can provide the court with all the necessary and relevant information. It also assumes the rules of procedure and evidence would expose any shortcomings in expert opinions. Indeed, in *Daubert*, the court was of the opinion that "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[13] However, if the parties fail to provide all the relevant information required for fair adjudication, the court will be forced to make a decision with incomplete facts. In addition, as mentioned previously, studies have shown that trial safeguards have been ineffective in exposing flawed expert opinions.[14] Therefore, it seems sensible that one should allow the judge to conduct research that will fill in gaps of knowledge in cases where parties were unable to provide full information. However, there are some drawbacks, as will be discussed below.

C. Drawbacks of Independent Judicial Research

1. Uncertainty and Inconsistency

Allowing judges to conduct their own research creates uncertainty and inconsistency. Firstly, it is impossible to know beforehand what they will discover,[15] and as a result, it becomes very difficult for parties (counsel) to prepare to respond to the information that the judge has learned. Although one may argue that fairness would be achieved if the judge is transparent and discloses all the information he found, with all parties given time to respond, there is no guarantee that the judge will necessarily disclose every single detail he discovered. There is also the problem of inconsistency

---

13 *Daubert v Merrel Dow Pharmaceutical, Inc.*, 509 US 579 at 596.

14 G. Edmond, David Hamer and Emma Cunliffe, "A Little Ignorance is a dangerous thing: engaging with exogenous knowledge not adduced by the parties" (2016) 25:3 Griffith Law Review at 385.

15 Thornburg, *supra* note 12 at 184.

among judges. Judges are not trained scientists, who will have varying levels of scientific competence. Moreover, if judges resort to internet searches, they may not recognize which sources are truly reliable. All these factors contribute to the uncertainties generated by judicial independent research.

2. Lack of Fair Notice

Another danger in allowing judicial independent research is the potential of inadequate notice. For example, the *Criminal Code of Canada*, s.657.3(3)[16] provides that when parties rely on experts, they are to supply the expert reports beforehand, so that the opponent has time to formulate a rebuttal or make an informed decision on litigation or negotiation strategy. This is particularly important for expert opinions, as counsel will often need time to consult with their own experts. Questions posed by a judge at expert witnesses during trial may have the effect of turning the judge into an advocate, especially if the expert being challenged by the questions is not given time to prepare a full response to the information.

3. Misinterpretation of the information due to bias and/or lack of skill

There is the danger that a judge may inadvertently research only the sources that confirm his own biases.[17] In areas of science where there are controversies, there is a danger that the judge may choose sources that present only the side that he prefers. When a judge consults dictionaries, it is easy to see there should not be any disputable matters. However, even in medical encyclopedias and authoritative texts, there is concern that the information has since been superseded with more up-to-date research, that is only available in specialized journals. Usually, only experts would be knowledgeable as to the authoritativeness of a text. Furthermore, there is also the danger of a lay judge misinterpreting or misunderstanding technical information.[18]

4. Undermining of Party Prosecution Principle

Allowing a judge to do independent research also creates a question as to who has the burden of adducing evidence. One of the foundations in the adversarial process is the party prosecution principle: the parties bear the ultimate burden of providing all the evidence necessary for fact-finding. Introducing the possibility that judges can also contribute to fact-finding will add increased uncertainty to the parties, as they are no longer in control

---

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

17 Thornburg, *supra* note 12, at 184 and 198. Judges, like experts, can also be prone to confirmation bias.

18 *Ibid* at 185 and at 199.

of the evidence. Parties will not know what a judge might find in their own research, and they cannot control how that external research may influence the judge's mind, especially if the judge does not disclose the entirety of their research.[19]

Having reviewed the pros and cons of independent judicial research above, we now examine briefly the trial and appellate decisions in *R v Bornyk*.[20] This case is relevant because the trial judge discovered information that he believed to have undermined the reliability of the Crown expert, which he used to come to an acquittal. The Court of Appeal overturned his decision. I will take this opportunity to learn from this case to derive an approach in which a judge can rely on independent research in such a way that addresses the Court of Appeal's concerns.

D. Unique Case of Trial Judge relying on independent research: *R v Bornyk*

R v Bornyk serves as a good example of how a judge who has been educated on the limitations of a forensic method was able to recognize the many weaknesses in an expert opinion. He actively engaged in critical analysis of the substance of the expert's opinion, and acquitted the defendant, after finding that the expert evidence was unreliable. Unfortunately, his diligence was not rewarded, as the B.C. Court of Appeal overturned his decision.

This is a break-and-enter case. A home in Surrey B.C. was broken into while the homeowners were away on vacation. The entire house had been ransacked, but the police found only one latent fingerprint on the plastic wrap of a toy box in the house. A large portion of the print was located in a rippled area of the wrap, resulting in only a partial part of the fingerprint that could be used for analysis.[21] The print was run on a computer against a database of known prints called the Automated Fingerprint Identification System (AFIS). Although there was no positive result when the print was first run in July 2010, one did arrive in early May 2011. The latent print was found to match known prints obtained from the accused in 2006. Alerted to this result, the RCMP fingerprint expert, Corporal Wolbeck did a comparison but using another set of prints from the accused which was taken in 2010.[22] He testified that he used the ACE-V method in his analysis, that he has never made mistakes and his result was verified by another

19 *Ibid* at 184.

20 *Bornyk* 2013, *supra note* 6 and *R v Bornyk*, 2015 BCCA 28 [*Bornyk* 2015].

21 *Ibid* at para. 9.

22 Presumably, the accused had been arrested for some other crime, once in 2006 and once in 2010, which resulted in his prints being taken and entered into AFIS.

RCMP officer. Corporal Wolbeck described how fingerprint comparisons are done: individualization can be accomplished by comparing details such as the paths of the friction ridges, whether they split off or just ends, etc. According to Corporal Wolbeck, he concluded that the latent print and the known print both came from the accused's finger.

This trial is striking for two reasons. Firstly, the accused was linked to the crime by one piece of evidence only: a single latent fingerprint found at the home. Also unique in this trial was the great length to which the judge engaged in the scientific evidence. This was a judge-only trial. As such the judge has dual roles of assessing the admissibility and weight of the evidence. When the case was on reserve, the trial judge, Justice Funt became aware of scholarly articles which described the limitations of fingerprint analysis. He learned that there is an inherent subjectivity to the interpretation. Comparisons are not as simplistic as one may expect. For example, even when the same finger is used to make two prints in a row, they will not perfectly match. Thus, when an examiner analyses two prints to decide whether there is a match "within tolerance", his conclusion has a subjective element, as it is dependent on his experience and knowledge.[23]

In applying what he learned from the articles, Justice Funt pointed out the existence of many "troubling aspects" of the evidence, such as institutional bias; the use of a photocopy of the print instead of the original; non-disclosure of the lab notes to defence; omission of calling the verification of the other RCMP agent as witness amounted to hearsay; possible existence of exculpatory aspects in the areas of the print that was not used; whether the conclusion of a "match" meant that there was zero possibility the latent print could not have come from someone other than the accused; why only the 2006 set of known prints were used, over the 2010 prints, and why not use both; and finally, the discrepancy between the two prints, which consisted of two gaps.[24] In other words, instead of complacently trusting the Crown expert's opinion and assuming fingerprint evidence must be reliable due to their long history of use in courts,[25] he

---

[23] *Bornyk 2013, supra* note 6 at para. 36.

[24] As per Justice Funt's reasons: If one goes to the ridge immediately to the left of the respective red dots marking the centre of the delta on the latent and the known fingerprints and traces a line towards the top of the page, on the known fingerprint there is a continuous ridge, whereas on the latent fingerprint there is a gap, a further ridge, another gap, and then a further ridge. See *Bornyk* 2013, *supra* note 20 at para. 56.

[25] G. Edmond notes that judges prefer to rely on past decisions and commentary instead of scrutinize long established techniques, such as fingerprint evidence. Gary Edmond, "Pathological Science? Demonstrable Reliability and Expert Forensic Pathology Evidence" Research Paper for the Commission of Inquiry Into Pediatric Forensic Pathology, 2007 at 14.

critically evaluated the expert's conclusion with questions that would not have been apparent to a lay judge who is ignorant of the issues particular to fingerprint evidence. Moreover, he examined the actual evidence himself. He saw that there were clear discrepancies between the known print from the accused and the latent print. This is the kind of substantial engagement that goes to the very heart of the evidence. He is not simply relying on secondary indicia, such as the credentials of the expert. Indeed, this sort of engagement of the substance of an expert's opinion was what was recommended by the Scottish Fingerprint Inquiry, which stated:

> It is recommended that the test be adopted that features (or 'events') on which examiners rely should be demonstrable to a layperson with normal eyesight as being observable in the mark. The fact-finder can trust the evidence of his own eyes: either he sees some 'event' in the location indicated or he does not. If not, the evidence of the examiner on that point can be discounted.[26]

Unfortunately, Justice Funt's diligence was not rewarded. The B.C. Court of Appeal set aside the acquittal, citing that several fundamental principles of the trial process were violated. One was the party prosecution principle: the only evidence that a fact-finder is entitled to is that which is presented by the parties.[27] Another principle that was violated was that the trial judge cannot simultaneously be the adjudicator, a witness and an advocate. A judge in the common law trial remains above the fray and stays neutral by being the passive observer. The Court observed that the act of self-directed research causes a judge to assume "the multi-faceted role of 'advocate, witness and judge.'"[28]

As to the use of textbooks and other articles, the Court of Appeal cites from *R v Marquard*:

> The proper procedure to be followed in examining an expert witness on other expert opinions found in papers or books is to ask the witness if she knows the work. If the answer is "no", or if the witness denies the work's authority, that is the end of the matter. Counsel cannot read from the work, since that would be to introduce it as evidence. If the answer is "yes", and the witness acknowledges the work's authority, then the witness has confirmed it by the witness's own testimony. Parts of it may be read to the witness, and to the extent they are confirmed, they become evidence in the case.[29]

---

[26] *Bornyk 2013, supra* note 6 at para. 38.

[27] As commented by Elizabeth Thornburg, counsel selects the evidence to be adduced, as such, the factfinder will rarely ever see the whole truth. Indeed, in the Mullins-Johnson case, as mentioned in Part IV, even when the jury asked specific questions, the court declined to have them answered. The jury asked whether Dr. Rasaiah took another temperature reading.

[28] *Ibid* at para. 10.

[29] *R v Marquard*. 1993 CanLII 37 (SCC), [1993] 4 S.C.R. 223 at 251, 108 D.L.R. (4th) 47.

The Court of Appeal noted the danger of a trial judge misapplying what he learned from these articles.[30] After all, this is precisely why the expert is sought in the first place. In particular:

> While it may be desirable that a judge personally observe the similarities and differences between the latent point and known point, such examination should be guided by a witness so as to avoid the trier of fact forming a view contrary to an explanation that may be available if only the chance were provided to proffer it. [31]

In sum, the Court of Appeal was mainly concerned with two issues: that Justice Funt relied on evidence not adduced by the parties and not properly tested in court, and that he performed his own analysis of the fingerprints without the aid of the expert.

E. Judicial Intervention: Learning from *R v Bornyk*

In a common law trial, the roles of the judge, witness and advocate are distinct. Each must be taken on by entirely separate individuals. Furthermore, the fact finder is restricted to base its decisions solely on the evidence adduced by the parties. This principle works well when only lay witness testimony is involved. Lay testimony is based on direct observations made by witnesses in an ordinary sense, without the use of any specialized equipment. Lay testimony can be understood and assessed by a factfinder without any specialized knowledge.

Expert testimony, on the other hand, has an additional layer of complexity. The technical nature of expert evidence makes it difficult for lay factfinders to comprehend. It also creates a risk that experts could mislead the factfinder by taking advantage of the latter's ignorance. This vulnerability is one of the main reasons why educational programs are offered to enhance judicial scientific literacy. However, it is doubtful that such programs will cover whatever fine technical details applicable to the case at hand. Therefore, the judge would likely need to conduct research at the time when he is presiding over a trial in order to supplement his knowledge. In addition, since science is continuously evolving, the judge would require up-to-date knowledge of the latest advances in the area in question. Therefore, a judge who aims to fully engage in the technical aspects of the evidence would necessarily need to supplement CLE knowledge with current research. Forbidding judges to conduct independent research while presiding over a trial is inconsistent with the values and goals behind judicial education in scientific literacy. Ignorance about the forensic method at issue can lead the judge to reliance on

---

30 *Bornyk 2015, supra* note 20 at para. 14.

31 *Ibid* at para. 18.

common sense, or any inaccurate scientific knowledge they gained from previous trials.

As we will learn from the Mullins-Johnson case, common sense is insufficient in evaluating scientific evidence, and there is no guarantee that the scientific teachings given by experts in a trial setting are accurate and reliable. Ignorance can also lead a judge to be unquestioningly deferential to the expert, resulting in blind acceptance of the expert's teachings or conclusions. Had Justice Funt not learned about the subjectivity inherent in the process from his own research,[32] or that the Scottish Fingerprint Inquiry had recommended that any feature used in comparison should be demonstrated to the lay fact-finder so that he can see it for himself, he may well have believed that fingerprint comparisons may be completely beyond the capability of a layperson, and that the expert's conclusion was totally accurate. It is difficult not to simply accept an expert's opinion when he testified that he has "never made an error"[33] or he would have been removed from the RCMP's program.

On the other hand, as articulated in *Bornyk* 2015, independent research raises the spectre of judicial partisanship. Bringing in the independent research which caused Justice Funt to doubt the expert's opinion appears to be advocating for the defence. There is also the danger that a lay judge may misunderstand the scientific knowledge gleaned from textbooks. How then can we ensure a judge's ability to adjudicate competently, which necessitates his need to consult independent sources, and preserve judicial neutrality?

In my view, I argue that Justice Funt was right to transparently raise his concerns about the expert evidence to counsel and to cite the sources which led him to his reasons. After all, he could have rejected the expert's conclusion without referring to any independent articles he consulted. Indeed, he could also have simply rejected the expert's conclusion based on common knowledge, citing the discrepancies in the prints as support for reasonable doubt to merit an acquittal. Instead, he frankly disclosed what sources he used. His reason for rejecting the expert's evidence was not just based on the difference of the prints alone. It was also based on the many procedural factors which cast doubt on the reliability of the conclusion.

Even though I am in favour of Justice Funt's diligence in engaging with the merits of the evidence, I argue that the expert witness should have been recalled and given the chance to address his concern over the discrepancies

---

[32] Justice Funt learned of the uncertainties due to examiner subjectivity from "Expert Working Group on Human Factors in Latent Print Analysis. Latent Print Examination and Human Factors. U.S. Department of Commerce, National Institute of Standards and Technology, Washington, D.C. 2012. See Bornyk 2013, para. 36.

[33] Bornyk 2013, supra note 6 at para. 23.

between the two prints. Although he gave time for counsel to respond to his concerns, I agree with the Court of Appeal that there is a danger that the discrepancies in the prints had a valid explanation, which Justice Funt did not consider because the expert was never given the chance to respond. After all, fingerprint analysis is specialized knowledge. Fairness requires a judge to consider a response from both sides. How impartiality in the judicial role can be preserved in independent judicial research will be discussed further in Part V of this paper, after we examine the *R v Mullins-Johnson* case in detail below.

IV. *R v Mullins-Johnson* Expert Evidence

In this Part, I will present both the Crown's trial expert evidence and the Appeal expert evidence on the time of death and cause of death. I will discuss how independent research could have allowed a trial judge to flush out the evidence necessary to avoid a miscarriage of justice. Before proceeding I will first introduce the reader to the basic concepts behind the three commonly used indicators to determine the time of death.

A. Time of Death: Livor, Rigor and Algor Mortis

Forensic science relies on three indicators to determine the time of death: livor, rigour and algor mortis. The information is based on two textbooks on forensic pathology used at trial, Werner Spitz's textbook titled 'Spitz and Fisher's Medicolegal Investigation of Death', 3rd edition, published a year before the trial,[34] and 'The Essentials of Forensic Medicine', authored by Knight, Polson and Gee, published less than 10 years before the trial.[35]

There are three methods used to estimate the time of death based on the rate of physical and chemical changes in the body after death:[36]

> (1) Livor Mortis: the purplish skin discoloration caused by post-mortem settling of blood

---

[34] Werner Spitz (editor), 3rd edition Spitz and Fisher's *Medicolegal Investigation of Death. Guidelines for the Application of Pathology to Crime Investigation* (Springfield, Illinois: Charles C Thomas Publisher, 1993) [Spitz, *Guidelines*].

[35] C Polson, B Knight and D McGee, *The Essentials of Forensic Medicine*, 4th ed (Pergammon Press, 1985) [Polson, *Essentials*].

[36] These three methods are still being taught to forensic science students as being currently used. The author was enrolled in the Introductory Forensic Science course at University of Toronto in 2016. The textbook used, (Saferstein, Richard. *Criminalistics. An Introduction to Forensic Science*, 11th ed. (Pearson Education, 2015)) also described these methods used to estimate time of death, at 108-110.

(2) Rigor Mortis: onset and fading of the stiffness of muscles
(3) Algor Mortis: the rate of cooling of the body of the deceased

1. Livor Mortis

When a person dies, the circulation of the blood stops. The blood then settles and accumulates in blood vessels due to gravitational forces. Such accumulation in the blood vessels (capillaries) under the skin causes the skin to take on a purple or red-purple colour.[37] This phenomenon is known by various terminology.[38] In this paper, I will use the terms lividity and livor mortis. If the deceased's body is lying on its back, the settling of the blood will give rise to a generalized purple colour on the back of the body, except in areas where the body is pressed on the supporting surface, such as the shoulder blades and buttocks.[39] Similarly, if a body was lying such that the face and the front of the body face the ground, ('prone' position), lividity will be present in the front ('anterior') areas of the body. Livor mortis has been documented to be apparent anywhere from 20 minutes to several hours after death[40] and is complete anywhere from 6 to 12 hours.[41] The colouring may shift in the early stages. This means that if the body was moved, the discoloration will move to other areas of the skin. It also means that the purple colour on the skin could be 'blanched', that is, the purple colour disappears upon points of compression. It is 'fixed' after 8 to 12 hours.[42] In addition, the tiny capillaries under the skin could burst, giving rise to pin-point bleeds or petechiae hemorrhages, called 'Tardieu Spots.'[43]

2. Rigor Mortis

The stiffening of the muscles and joints is another time-dependent process that occurs after death. This phenomenon is known as post-mortem rigidity or 'rigor mortis.' When a body dies, the muscles become relaxed, or 'flaccid'[44] but then become stiff or rigid, which then 'freezes the joints.'[45] The time of onset varies, with different textbooks citing different time

---

37 C Polson et al note that livor mortis occurs not only in blood vessels under the skin, but also in the blood vessels of organs. This is significant, as lividity can be misinterpreted as injury or other symptoms of disease. Polson, *Essentials* at 13.

38 Other names include post-mortem hypostasis, postmortem lividity, postmortem staining, suggilation, livor mortis. Spitz, *Guidelines supra* note 34 at 23; Polson, *Essentials supra* note 35 at 13.

39 Polson, *Essentials supra* note 35 at 13.

40 Spitz, *Guidelines, supra* note 34 at 24.

41 Polson, *Essentials supra* note 35 at 13.

42 Spitz, *Guidelines supra* note 34 at 24.

43 *Ibid* at 24.

44 *Ibid* at 26.

45 *Ibid.*

frames, anywhere from within half an hour to 4 hours after death.[46] The process maximizes within 12 hours.[47] It gradually wanes, although the time taken for this to occur also varies, anywhere from 12 hours[48] to 60 hours.[49] It is clear that the time frame in which livor and rigor mortis occurs varies widely. Nevertheless, the fact that there is a time dependence makes it tempting for pathologists to use the observations of livor and rigor mortis to estimate the time of death.

3. Algor Mortis

Finally, there is the use of post-mortem body temperature as a method of estimating the time of death. The theory is that the deceased body cools down and comes to an equilibrium temperature with its surroundings. The process has been termed 'post-mortem cooling' or 'algor mortis.' Hence, if one assumes a starting body temperature of 98.6°F, one could theoretically perform a retrograde estimation of the time of death, given the temperature of the deceased and the time that the temperature was taken. As intuitive and appealing as this may be, academic literature has observed numerous factors that can affect this rate of cooling, such as environmental temperature, clothing of the deceased, size of body, position of body etc.[50] Rates of cooling have been quoted to be anywhere from 1°F to 2.5°F per hour.[51]

B. Trial Expert Evidence on the Time of Death: Livor and Rigor Mortis

Crown trial expert, and pathologist Dr. Rasaiah, testified that the time of death was between 8-10 p.m. the night before Valin was discovered dead. His testimony consisted of both general teaching of the scientific concepts and his application of these concepts to the case at hand. (To distinguish when his testimony is a "teaching" versus when it is an opinion based on his analysis, I will use the terms "teach" and "opine" respectively instead of "testify"). He taught that livor mortis 'begins normally around two hours and said to be fixed around 12 hours' from the time of death.[52] Applying to the case at hand, he opined as follows: "All I can say is that from the post mortem, fixed post mortem staining of the front of the body, that the body

46 *Ibid*; Polson, *Essentials supra* at note 35 at 15.
47 Spitz, *Guidelines supra* note 34 at 26.
48 *Ibid* at 26.
49 Polson, *Essentials supra* note 35 at 15.
50 Spitz, *Guidelines*, *supra* note 34 at 22-23.
51 *Ibid* at 22.
52 Trial Transcript of *R v Mullins-Johnson*, Evidence of Dr. B. Rasaiah, at 284, lines 15-20.

had been in that position in excess of 12 hours."[53] Despite his comment on the lividity being fixed, he also noted that the staining had shifted when he saw the body the day after the autopsy:[54]

> Q: When you examined the body, you did the post mortem examination, where was the staining?
> A: The fixed staining was in the front of the face, chest and abdomen, and there was minimal blue staining on the back, which was not fixed.
> Q: Well, did you see the body the next day?
> A: Yes.
> Q: Did you note where the staining was the next day?
> A: Yes, the next day the staining was more prominent in the back, because the body has been lying on its back.

His opinion on the time of death also took into account the observed rigor mortis:[55]

> Q: How long does it [rigor mortis] take, when does it start?
> A: It …usually rigor mortis appears in about one-and-a-half to two hours, and become maximal around, is easily detected and maximal around 12 hours. And after 12 hours or so, you begin to get relaxation of the smaller muscles of the face, neck.
> Q: When did you see the body…at what time?
> A: at 12:55 pm on the 27th.
> Q: And rigor was where?
> A: There was no rigor mortis in the face or neck but was present in the upper limbs and lower limbs, and my estimation was that post mortem death interval would be an estimate and the range would be 15-17 hours.
> Q: 15-17 hours from when?
> A: From the post mortem examination.

Dr. Rasaiah thus estimated the time of death to be 8-10 p.m. on June 26, based on his observation that the rigor mortis was beginning to fade in the face and neck, and his teaching that rigor mortis fades after 12 hours of death. He did not give any reason as to why he chose the particular interval of 15-17 hour mark as the range for the time of death.

At trial, both defence experts testified that these methods are highly unreliable to the time of death as these processes are variable and prone to subjective interpretation.[56] Similarly, at the 2007 appeal, the defence experts all agreed with the trial defence experts in that these methods could not be used to arrive at a time of death window as precise as 8-10 pm. One of the

---

53 *Ibid* at 287 lines 20-25.

54 *Ibid* at 287 lines 1-15

55 *Ibid* at 289, lines 1-5.

56 Trial Transcript of *R v Mullins-Johnson*, Evidence of defence expert Dr. F. Jaffe, at 575, lines 18-25, at 575, lines 10-15. Frederick Jaffe, Report, Exhibit #32, Trial transcript of *R v Mullins-Johnson*.

appeal defence experts, Prof. Bernard Knight, cited a study[57] that noted that these benchmarks all suffer from extreme variability, where fixation can occur between 1 to 20 hours. As for rigor mortis, Prof. Knight cited a study that opinions on the timelines of rigor vary widely.[58]

Another defence expert, Dr. Butt also cited from a 2001 textbook[59] that fixation of lividity occurring at the 8-12 hour is only a generalization.[60] In analyzing photographs which showed the actual lividity pattern on Valin's body,[61] he noted that there had been movement of the lividity onto Valin's back. This means that Dr. Rasaiah's conclusion that the time of death was more than 12 hours based on his observation of fixation was unreliable. (Recall Dr. Rasaiah's own testimony above where he stated that he had observed the shifting of the lividity the following day at the morgue.) As for rigor mortis, Dr. Butt noted a possible confounding factor in using rigor mortis as time estimation. The absence of rigor in the face and neck may be because the body had been moved several times, rather than a consequence of the natural relaxation process. His opinion was that lividity and rigor cannot be used to estimate the time of death.

C. How independent research by a judge would have exposed the unreliability in evidence on livor and rigor mortis

To arrive at a guilty verdict, the jury must have given significant weight to Dr. Rasaiah's opinion that the time of death was between 8-10 p.m., since that time interval coincided with the time Mr. Mullins-Johnson was alone with Valin. Recall that no other experts supported the use of these three methods to give a narrow two-hour window as a time of death. Therefore, we now ask: why was the trial defence experts' opinion not accepted, but the appeal defence opinions were?

One important factor may be that the appeal experts' knowledge of the variability was supported by independent academic literature. Prof. Knight and Dr. Butt cited various textbooks on the nature of the extremely wide variability in livor and rigor mortis, which supported why such methods could give no meaningful time of death estimates.

In contrast, at trial, none of the experts cited specific independent sources on the issue of livor and rigor mortis as a time of death estimate.

---

57 *Ibid* at 5.

58 *Ibid* at 4.

59 *R v Mullins-Johnson*, 2007 ONCA 720, 87 OR (3d) 425, (John C.Butt, Report, June 1, 2006, in 'Joint Record Vol.2. Pathologists' Reports and Correspondence (And Related Report of Dr. Zehr)').

60 See section A.i.in Dr. Butt's report at 1.

61 See p.2 of report, which noted that it was photo VMJ 37.

Dr. Rasaiah's opinion was presented to the court dogmatically. He taught that lividity starts around 2 hours and is fixed around 12 hours, but did not give any independent support as to why one should accept that this calculation is accurate. He provided no details as to the variations well known in the pathology field, nor the source of his knowledge. Indeed, years after the trial, in response to the review of his opinion for the 2007 appeal, he repeated his claim that the three methods are used all over internationally. Nevertheless, he did not give any specific sources, nor provide the actual Report from the Coroner's Act that he claimed relies on estimations from these methods.[62] Rebuttal from the trial defence experts also suffered from a lack of independent support. Pitting bare opinions against each other forces a factfinder to pick between them, based on indirect factors (heuristics), such as who has better credentials, or the experts' general demeanour. To assess whether livor and rigor can be used to estimate the time of death, a factfinder needed substantiation that this method actually works and has been tested. Looking at the trial testimony, neither side gave independent support that what they are saying is accurate and reliable. There was no testimony related to whether the knowledge they are relying on is the up to date, state-of-the-art knowledge reflected in the forensic pathology community. For example, in this case, the judge could have asked the experts for independent support (which was not asked by the opposing counsel), rather than being completely passive.

We see the importance of independent support in the appeal defence expert evidence. Hence, it follows that to evaluate an expert opinion, it matters whether the opinion (the knowledge it is based on) is supported by independent literature. It should be noted here that if the trial judge had been allowed to review the textbooks used by counsel, such as the textbook by Spitz, he would have learned that the current knowledge on livor and rigor mortis was contradictory to Dr. Rasaiah's evidence. Spitz noted that fixation of lividity occurred in as little as 8 hours[63], not 12 hours as Dr. Rasaiah suggested. Spitz noted that there was great variability in the time it takes for the stiffness to fade, which leads one to wonder what basis Dr. Rasaiah had to support his time of death estimate to the narrow window of "15-17 hours." Spitz wrote: "The variability of postmortem rigor makes its use as a postmortem clock rather tenuous, to be considered only in

---

[62] *R v Mullins-Johnson*, 2007 ONCA 720, (Bhubendra Rasaiah. Letter and Report to Director of the Ministry of the Attorney General, Kenneth Campbell (September 19, 2005) 'Joint Record Vol.2. Pathologists' Reports and Correspondence (And Related Report of Dr. Zehr)') at 4.

[63] Spitz, *Guidelines*, *supra* note 34 at 24.

conjunction with other timing indices."[64] The Polson text noted that rigor is established in 6 hours and lasts about 36 hours. It also noted that factors such as temperature, humidity and air currents and the type and volume of muscle affect the rate of onset and disappearance ('passing off') of rigor.[65] If this independent information on rigor mortis had been presented and brought to the factfinder's attention, it would have raised doubt about Dr. Rasaiah's opinion that the time of death was 15-17 hours from the time of autopsy (1 p.m.).

D. Rate of Body Cooling (Algor Mortis): Trial testimony

As seen in the previous section, factors determining livor and rigor mortis are highly variable, and their interpretation is prone to the subjectivity of the observer. Therefore, it may seem that quantitative data, such as the body temperature of the deceased's body would offer a more accurate and objective estimate of the time of death. In addition, the availability of a mathematical formula that could be applied to describe the cooling rate further adds to the perception that this method of estimating the time of death has a higher degree of accuracy. However, there is also controversy about the reliability of this method. As in the case of livor and rigor mortis, it was only Dr. Rasaiah who was confident that the deceased's body temperature could give a 2-hour estimate of the time of death.

Dr. Rasaiah opined that the time of death occurred between 8 to 10 p.m. He explained that the temperature of the deceased can be measured and applied in a simple mathematical formula to give the post-mortem interval: "The calculation is that for every hour there's a drop in the body temperature of 1.5 degrees Fahrenheit. So for every hour the body cools 1.5 degrees Fahrenheit. So by using that a figure is arrived at as to estimated post mortem death interval."[66] The relationship can be expressed this way (also known as the Moritz formula):

$$No. hours\ since\ death = \frac{ante\ mortem\ body\ temp - deceased\ body\ temp}{Rate\ of\ cooling\ of\ deceased\ body}$$

In other words, the formula depends on a constant (or fixed) rate of cooling. He subtracted the rectal temperature of 82°F which was taken by

---

64 *Ibid* at 28.

65 Polson, *Essentials*, *supra* note 35 at 15.

66 Trial Transcript of *R v Mullins-Johnson*. Evidence of Dr. B. Rasaiah at 281, lines 10-15 [Trial Transcript].

the Coroner[67] at around 8 a.m. at the Johnson home from the normal, *average* body temperature of 98.4°F, *not* Valin's actual antemortem[68] body temperature, which was unknown. The difference was divided by the constant rate of 1.5°F per hour, giving an answer of 11 hours since the time of death. Counting backwards from 8 a.m., the time the rectal temperature was taken, the time of death was thus approximately 9 p.m. the evening.[69] Dr. Rasaiah testified that even though the room temperature was not measured, the estimate was valid, because the internal temperature of the body is not affected unless the room temperature was extreme, and the fact that Valin did not test positive for any natural disease.[70]

E. How Independent Research by a Judge Could Have Exposed the Flaws in Crown Expert Evidence on Post-mortem Body Cooling

Dr. Rasaiah's evidence on the time of death based on the rate of cooling of the deceased body was compelling. His opinion was further supported by his observations of lividity and rigor to corroborate the time of death interval to be 8-10 p.m. It may at first glance appear that it could be difficult to challenge his opinion. He provided a positive, concrete answer: a two-hour time range that seemed plausible. Dr. Rasaiah's evidence may have carried more weight than the other experts because of its relative simplicity in presentation, compared with the opinions of the other defence experts. Dr. Rasaiah's opinion was simple, direct, and easy to understand. He did what an expert was expected to do: provide a tangible answer to the court on a time range of when death occurred. In contrast, all the other experts claimed the time of death cannot be estimated at all, and offered no definitive, clear understanding of the range of error one can expect. Even though variables such as body mass, and position of the body have been cited as factors that could affect the cooling, no expert gave the jury any information on how much the change could be. For example, what is the difference between the adult rate versus a child's rate? Would it only be a small percentage difference? Merely telling the jury the various factors that *could* affect the rate does not provide them with enough useful information to critically evaluate Dr. Rasaiah's definitive opinion.

How would one critically evaluate Dr. Rasaiah's opinion? If the trial judge had been previously educated in forensic pathology in a CLE, or had

---

67 *Ibid* at 281, lines 20-25.

68 'Ante-mortem' and 'pre-mortem' means before death.

69 *Ibid* at 282, lines 10-15.

70 *Ibid* at 281, lines 1-5.

access to the textbooks cited by counsel (both Crown and defence counsel cited forensic textbooks), he would have learned that deceased bodies do not cool at a constant rate. One line of questioning that would have helped understand the substance of the expert opinions is to seek the foundation of his opinion, that is, to elicit the reasoning or logic or evidence supporting the expert opinion. With respect to the rate of cooling, one can question the validity of the Moritz formula, which describes the falling of the body temperature in a linear fashion with time, given the complicated behaviour of cooling as shown in independent texts.[71] In general, a layperson with a high school mathematics education would recognize that the Moritz formula would be incorrect and insufficient in describing non-linear cooling behaviour.[72]

Another way that would assist in the critical assessment is to seek out any assumptions in an expert's opinion or theory. This is once again best accomplished with the help of independent texts in academic literature. It would have been useful to ask Dr. Rasaiah to identify the basis for his use of the rate of 1.5°F/hr. It is interesting that Spitz's textbook also explained the complexity of post-mortem cooling, including the non-linear rate of cooling. Indeed, the initial cooling rate suggested by Spitz was 2.0- 2.5°F/hr during the 'first hours' and an average rate of 1.5-2.0°F/hr in the first 12 hours.

Using information from Spitz, a judge could have tested Dr. Rasaiah on his assumptions. A judge could have asked Dr. Rasaiah to demonstrate that just by changing the rate of cooling by <u>half a degree,</u> that is, by taking 2.0°F, instead of 1.5°F, one would arrive at 8.2 hours as the number of hours since death, instead of Dr. Rasaiah's result of 11 hours! In other words, the time of death, using a rate of 2.0°F/hr, would give 11:48 p.m. as the time of death, not 9 p.m. as Dr. Rasaiah suggested. A half-degree difference in which rate you take as the denominator, even in Dr. Rasaiah's simple formula, gives a substantial difference in the resulting time of death estimate. Indeed, according to the Spitz text, the rate could have varied between 2.5 to 2.0°F/hr,[73] which means that it was conceivable that the body could have been cooling at 2.5°F. Applying a rate of 2.5°F/hr would give a much later time of death. When a rate of 2.5°F is used, instead of Dr.

---

[71] The complexity and low accuracy of the body cooling method was well explained in Spitz's text, Spitz, *Guidelines*, *supra* note 34 at 22-23. It is also well explained in Polson, *Essentials*, *supra* note 35 at 10.

[72] When an object cools in a non-linear fashion, it means that the rate of cooling is not constant over time. In a graph depicting the temperature of the object over time, the curve is thus not a simple straight line, ie. not 'linear'.

[73] Spitz, *Guidelines supra* note 34 at 22.

Rasaiah's rate of 1.5°F, one would arrive at 6.5 hours as the number of hours since death, instead of 11 hours. The time of death, counting back 6.5 hours from 8 a.m. would take us to around 2 a.m. Therefore, even changing the cooling rate by as little as half to one degree can yield substantially different time of death results. A factfinder having access to this independent information on the range of cooling rates would recognize that Dr. Rasaiah had chosen one particular rate out of a range of choices. Understanding that this is a choice on the part of the expert leads one to ask the next question: what is the basis for such a choice, especially when these choices return such different time ranges for the time of death? The time of death evidence was crucial in supporting the Crown's exclusive opportunity theory. It was therefore important that this estimate was critically evaluated. In this case, such an approach would have demanded Dr. Rasaiah to explain his choice in using his formula in the face of uncertainty documented in textbooks to alert the jury to the possibility of confirmation or professional bias.

F. Cause of Death

As in the time of death testimony, Dr. Rasaiah and Dr. Smith were confident in their opinions that Valin was murdered while being sexually assaulted. The physical evidence that they relied on to support the conclusion of asphyxia fall under three main categories:

> -pinpoint bleeds (petechiae) on her eyelids, face, chest and shoulders and on the surfaces of the organs (heart, lungs, thymus)
> - bruises on her lips, chest, on the left side of her neck
> - fluid accumulation and bleeding in the lungs, rupture of air sacs

Dr. Rasaiah testified that the external examination revealed a number of "injuries and it consisted first of all of pinpoint hemorrhages of the upper eyelids, the sides of the forehead, the centre of the chest, the upper part and front of the shoulder and the upper and front part of the left chest showed small pinpoint hemorrhages, and then in the centre of the chest there was 17 separate bruises over an area meshing 9 by 6 centimeters."[74]

When he was asked to explain what petechiae is, Dr. Rasaiah's teaching was as follows:

> Q: And how sir, does that come about? How do these petechiae arise?
> A: Because as a result of lack of oxygen. As a result of lack of oxygen.
> Q: Lack of oxygen.
> A: Yes, we use the term by asphyxia.
> ..
> Q: When somebody has a lack of oxygen these marks appear?

---

74 *Trial Transcript*, *supra* note 66 at 268, lines 5-10.

> A: Yes.
> Q: Where did you see those marks?
> A: In the eyelids, the face, the shoulders front and the upper chest.
> Q: And did that…what is the significance of that, sir?
> A: It means that there's a lack of oxygen to the person. The person is not getting oxygen.

In addition, Dr. Rasaiah testified that he observed bruising in the mouth and lip area, and a hematoma (blood clot) on "the left side of the neck with bleeding around the thyroid gland."[75] He also observed some abnormalities in the lungs, such as hemorrhaging and fluid in the air spaces, as well as rupturing of the air spaces.[76]

Dr. Rasaiah concluded as follows:

> A: Yes, the conclusion was that there was a mechanical obstruction either to the nose and mouth, neck or upper chest. The upper chest did show bruising and on reflecting the skin in the upper chest there was marked subcutaneous hemorrhaging. So these are areas where I felt there was some form of mechanical obstruction.[77]

Dr. Rasaiah further opined this could have been caused either by the nose and mouth being obstructed by "smothering, pressure, gagging' or by compression of the neck, such as 'manual strangulation, … compression of the upper chest, pressure on the upper chest so that the rib cage cannot move in and out."[78]

In addition to performing the autopsy, Dr. Rasaiah had also ordered several lab tests. He found no evidence of natural cause:

> First of all, sections were taken from all the tissues of the body and all the organs to look for underlying disease and I found nothing. And, secondly, I took culture studies, swabs were taken and tissue was submitted for culture for bacteria and viruses. Brain tissue and lung tissue were taken and they were cultured and they were all negative for bacteria and viruses.[79]

When Dr. Rasaiah was challenged on the inherent difficulty of distinguishing between post-mortem staining (livor mortis) and bruising he gave the example of a person who suffered from an assault on his face and who died afterwards. He explained that while bruises from the assault would overlap with post-mortem staining, histological sections would clearly allow one to distinguish the two.[80]

---

75 *Ibid* at 271, lines 25-30.
76 *Ibid* at 272, lines 15-20.
77 *Ibid* at 272 lines 20-25.
78 *Ibid* at 272 lines 30-35; at 273 lines 1-10.
79 *Ibid* at 291 lines 10-20.
80 *Ibid* at 357-358.

In addition to petechiae, Dr. Rasaiah also relied on the observation of a bruise on the neck as well as bruises on the lips to support the theory of asphyxia.[81] According to Dr. Rasaiah, bruises are always formed before death.[82] His teaching was that one can determine the age of bruises by the presence or absence of white blood cells. A 'recent' bruise, is one that was caused within 12 hours of death, "if there are red cells present and there's no evidence of any white cells, significant number of white cells present in the tissue, then you will call that a recent bruise under 12 hours old."[83]

Dr. Smith agreed with Dr. Rasaiah. Dr. Smith based his conclusion on several observations: petechiae on the surfaces of the organs in the chest (heart, lungs, thymus), the presence of fluid in the lungs[84] as well as petechiae in the eyelids and signs of injury to the neck.[85] Dr. Smith's teaching was that specific findings of hemorrhage into the neck tissues and petechiae in the eyelids are "typical findings in an asphyxial mode of death":

> ...petechial hemorrhages or the pinpoint, pinhead size hemorrhages I should say that are found on the surface of the organs in the chest, that is, the heart, the lungs, the thymus. And with that, there is congestion of the lungs and fluid accumulation in the lungs, or pulmonary edema which may be the term that you've heard. And so those are the ...those are the typical internal findings in an asphyxial mode of death.[86]

He was confident in his opinion that there was a "clear cause of death.'"[87] He testified that "it is reasonable to assume that this death occurred as a result of a manual strangulation."[88] He testified that "we're dealing with an unnatural event with a physical event that somehow or other her oxygen supply to the tissues of her body and most noticeably the brain was interrupted."[89]

G. How Independent Research Could Have Exposed the Unreliability of Crown Expert Evidence in Cause of Death Evidence

At first glance, the Crown's theory of manual asphyxiation seemed to have strong physical evidentiary support: the swelling of the organs, the

---

81 *Ibid* at 271 lines 25-30.
82 *Ibid* at 275 lines 1-5.
83 *Ibid* at 278 lines 1-10.
84 *Trial Transcript*, *supra* note 66 at 483:1-15.
85 *Ibid* at 484 lines 1-10.
86 *Ibid* at 483 lines 1-20.
87 *Ibid* at 490 lines 1-10.
88 *Ibid* at 485 lines 1-5.
89 *Ibid* at 482 lines 25-35.

bruises and pinpoint bleeds, the rupturing of the air sacs in the lungs. The jury was shown graphic photographs of Valin's body taken at autopsy. The many red and blue-tinged skin discolorations resembled bruises and signs of injury to a lay person. The Crown experts' conclusions sounded persuasive. They provided a positive, tangible, easy-to-understand cause of death. Furthermore, Dr. Rasaiah testified that he had over 20 years of experience in forensic pathology and performed over 4500 autopsies.[90] Dr. Smith's credentials are equally impressive. He was the director of the Ontario Pediatric Forensic Pathology Unit at the Hospital for Sick Children. He has been invited to give lectures on forensic pediatric pathology, including lectures to the Ministry of the Solicitor General.[91] Trial Crown counsel argued in closing argument that Dr. Rasaiah and Dr. Smith were not hired guns. Crown counsel said in his closing to the jury:

> First of all, Doctor Rasaiah, well, how did Dr. Rasaiah get involved in this case? Did somebody call him in from some place?...No. Dr. Rasaiah is working at the hospital. He's a pathologist at the hospital, that's what he does. He's there, he's at the hospital. That's how he becomes involved, because he's there, and nobody has asked him about an opinion or anything else or called him in especially because he is directly involved.[92]

Fortunately, Mr. Mullins-Johnson had the benefit of Dr. Pollanen and other experts to submit rebuttal opinions in the appeal in 2007. However, the trial judge could have recognized the flaws of the Crown expert opinions, but only if he had learned about the state of existing forensic pathological knowledge on asphyxial deaths through some independent means, such as a continuing education course or conducted independent research. The following section details the existing research on the signs of asphyxia.

1. Does petechiae arise solely due to a lack of oxygen?

Dr. Rasaiah's teaching on using petechiae as a specific sign of asphyxia was clearly contrary to existing knowledge on petechiae. It is noteworthy the Spitz textbook explicitly stated that the presence of pinpoint bleeding, often called 'Tardieu spots' was once erroneously thought to be indicative of asphyxia. Spitz noted that it has since been shown that such pinpoint bleeds are not conclusive of suffocation, "...it has been shown that petechial hemorrhages are by no means conclusive evidence of death by suffocation...Pinpoint hemorrhages about the face and eyelids may also be found following cardiopulmonary resuscitation, independent of the

---

[90] *Trial Transcript*, *supra* note 66 at 264, lines 15-30.
[91] *Ibid* at 477-478.
[92] *Trial Transcript*, *supra* note 66 at 786 at lines 25-35.

mechanism of death."[93] With respect to strangulation Spitz noted as follows, "pinpoint and slightly larger hemorrhages are often noted in the face of a strangled victim, especially in the conjunctivae and eyelids. The presence of so-called Tardieu spots is supportive evidence of death by asphyxiation, but as a sole finding must not be considered conclusive." Even pinpoint bleeds that have similar appearances to Tardieu spots can be observed in the "reflected scalp" (scalp pulled back during autopsy) which are caused by the tearing of blood vessels during the separation of the scalp from the skull, hence has no probative value as to the cause of death.[94] The Polson text was also cautious of using petechiae as indicators of asphyxia. It noted that petechiae "may be seen in circumstances other than those of mechanical asphyxia."[95] Petechial hemorrhages found in other locations (pleura and pericardium) were no longer considered to be diagnostic of mechanical asphyxia. Although they should be considered to indicate a possibility of asphyxia, Polson cautioned, "Clearly the time has come to disregard these hemorrhages as diagnostic of mechanical asphyxia."[96]

2. Does a body bruise after death?

One compelling piece of evidence to support manual strangulation was the presence of the neck bruise. Dr. Rasaiah taught that all bruises are premortem[97] and the presence of a neck bruise supported the theory that Valin was strangulated. Whether the bruises can only be premortem is significant. If one assumes bruises can only be caused during life, then that means that the bruise was likely caused just before death, making the theory of murder likely. However, if bruises can also be caused post-mortem, the bruise could have occurred when Valin's father performed CPR on her or caused during the autopsy procedure (i.e., artefacts).

The Polson text noted that bleeding and bruises can occur after death.[98] This was confirmed in a more recent studies.[99] Dissection artefacts have also been documented much earlier in 1951 by Pinsloo and Gordon[100] who

---

93 *Ibid* at 460.

94 *Ibid* at 469.

95 Polson, *Essentials, supra* note 35 at 354.

96 *Ibid*.

97 *Trial Transcript*, *supra* note 66 at 275, lines 1-5.

98 Polson, *supra* note 35 p. 140.

99 Dominick DiMaio and Vincent DiMaio. Forensic Pathology,2nd edition, CRC Press, New York, 2001, p. 102. These authors stated that bruises can form after death. They cited an older study by I. Robertson (*J. Forensic Medicine* 1957; 4:2-10) which studied ante and post mortem bruises. N.E. Langlois and G.A. Gresham, "The ageing of bruises: A review of colour changes with time" Forensic Science International, 50 (1991) 227 – 238.

100 I Pinsloo and I Gordon, "Post mortem dissection artefacts of the neck and their

described how procedures performed during autopsy can give rise to what appears to be premortem bruising. In that study of 51 cases, the authors discovered that artefacts could not be distinguished from pre-mortem bruises by visual inspection or microscopic evaluation (histology examination).

In the Goudge Report, it was suggested that one of the factors a trial judge should consider was limitations in an expert's opinion, such as whether the method meets standards.[101] The effectiveness of this approach would depend on the objectivity, cooperativeness, and competence of the expert. This case study shows that one cannot rely on an expert to be fully objective.

Consider the following example. When Dr. Rasaiah was asked about the reliability of using the rate of body cooling to estimate the time of death, he testified that this was the standard method used. During his cross-examination, he said, 'We are using an approach that is used internationally by all pathologists.'[102] In fact, he remained steadfast in this position even in 2005, when the case was being reviewed again in preparation for the 2007 appeal. He responded that 'The criteria of temperature, rigor mortis and post-mortem lividity are used internationally and are in all textbooks including the Report Form of the Coroner's Act of the Province of Ontario, which we normally use to complete after post-mortem examinations.'[103] A better question might be to ask Dr. Rasaiah to name the specific sources he relied on, instead of accepting his testimony without question that his methods are used 'internationally.' However, even this question may draw a biased answer if the expert chose to reveal only sources that do use livor and rigor mortis or obtain out-of-date textbooks that support the use of these methods. For example, in his Response Letter in 2005, Dr. Rasaiah cited Prof. Knight from an *older* edition of Forensic Medicine, which supported the use of petechiae as markers of asphyxia, even though there were more recent editions in existence which taught that this was no longer held to be true.

Instead of relying on the expert to provide the court with information related to any limitations and weaknesses inherent in their opinion, a judge could have learned about the weaknesses by doing his own independent research. It can be seen in this case that the textbook by Spitz contained

---

differentiation from ante-mortem bruises." (1951) 25 S. Africa Med.J. 358-361.

101 Report of the Goudge Inquiry, Vol.3, at 495.

102 *Trial Transcript*, *supra* note 66 at 330, lines 30-35.

103 B. Rasaiah. Letter and Report, (September 19, 2005) (in Appeal Record for *R v Mullins-Johnson*, 2007 ONCA 720 (CanLII), 87 O.R. (3d) 425) 'Joint Record Vol.2. Pathologists' Reports and Correspondence (And Related Report of Dr. Zehr)' at 4.

information that was contradictory to Dr. Rasaiah's testimony. Recall that the Spitz text contradicted Dr. Rasaiah's teaching of post-mortem body temperature cooling. The same text noted: "Under average conditions, the body cools at a rate of 2.0°F to 2.5°F per hour during the first few hours and slower thereafter, with an average loss of 1.5°F to 2°F during the first twelve hours, and 1°F for the next twelve to eighteen hours. Studies under controlled conditions have shown that the decrease in the post-mortem body temperature is not rectilinear but sigmoid in shape with a plateau at the beginning and at the end of the cooling process."[104] This information contradicted what was taught by Dr. Rasaiah, who assumed a cooling rate constant of 1.5°F/hr.

Had the judge performed independent research, he would have realized that existing scientific knowledge was contradictory to what Dr. Rasaiah taught. This information would have cast doubt on the reliability of Dr. Rasaiah's opinion. Ideally, it should be the cross-examining counsel who has caught these crucial sections. It is unclear why the trial defence counsel did not do this in this case. It could be that he was reluctant to do his own scientific research, and funding made it impossible for him to seek the help of a consulting expert. It could also be that the defence counsel himself was convinced that Crown experts must be correct in their diagnosis of asphyxia, who decided to strategically raise reasonable doubt by implicating Valin's father, Paul Johnson as a possible suspect, which led counsel away from further attempts at scrutinizing the science. As Justice Rosenberg said, if such information was not brought to the attention of the factfinder, the judge should 'prod lawyers' to ask the right questions.[105] The judge could have alerted counsel to such information so that it can be tested in open court.

Critical analysis demands evaluating whether there is a valid foundation supporting an opinion. It seeks a true understanding of the reasoning behind an expert's opinion, instead of accepting it without question. Dr. Rasaiah taught that rigor mortis begins to fade after 12 hours. Against this teaching, he concluded without explanation the time of death be 15-17 hours from the autopsy, which just happened to match the very time the accused was alone with Valin. Furthermore, Dr. Rasaiah used the Moritz formula to arrive at a time of death of 9 p.m., with an error range of an hour before and after. This testimony would be highly probative towards guilt, *only if* this *two-hour* estimate was reliable. If the judge had access to the very textbook (Spitz) that Dr. Rasaiah admitted as authoritative, he would have learned that the rate of cooling could vary anywhere between 1.5 to 2.5°F

104 Spitz, *Guidelines supra* note 34 at 22.
105 Report of Goudge Inquiry, *supra* note 4 at 239.

/hour in the first 12 hours after death. The judge could have discovered that the time of death could vary by as much as 4.5 hours, just by being one degree off. As such a small difference in temperature could lead to such a different time estimate, the judge should have raised the issue of clarifying the basis for the use of 1.5°F.

In addition, the judge who had been independently educated that bodies do not cool at a linear rate, but rather, cool according to a complex non-linear curve, would have recognized the invalidity of using a formula that only applies if the body cools at a constant rate. According to the textbook by Spitz, 'Careful studies under controlled conditions have shown that the decrease in the post-mortem body temperature in not rectilinear but sigmoid in shape with a plateau at the beginning and at the end of the cooling process.'[106] As such, the cooling rate must necessarily change with time, rather than remain constant at 1.5°F/hour. Therefore, Dr. Rasaiah should have been asked to explain why he chose 1.5°F/hour as the rate, as there did not appear to be a way to discern which stage of the body cooling Valin's body was in at 8 a.m. It would have brought out to the jury's attention the lack of foundation for the use of the Moritz formula, which would only be applicable if the body truly cools at the same rate from the time of death to the time the rectal temperature was taken. A judge using an evidence-based approach and armed with the knowledge that the body cooling rate could take on values other than 1.5°F/hr (obtained from the independent textbook, Spitz), would have recognized that supportive evidence was missing in Dr. Rasaiah's definitive opinion that the time of death could be confined to a two-hour window. However, it is also important to note that this recognition could only have taken place after the judge had heard all rebuttal testimony, or if he had performed independent research. Thus, it is likely that any realization by the trial judge to raise these issues would only materialize towards the end of the trial process after expert testimony from both sides has been heard.

We see above that a trial judge certainly could have raised questions to flush out weaknesses or gaps in the Crown expert testimony. Even if defence experts or defence counsel had not adduced evidence from sources of text that show that Crown expert knowledge was out of date or inaccurate, the trial judge should have introduced this into the trial process and allowed for both sides to respond with full opportunity. Ideally, in the common law process, it should be counsel who raises all the questions, both in direct and cross-examination. However, counsel may either strategically or

[106] Spitz, *Guidelines supra* note 34 at 22. This was also in agreement with defence experts Dr. Ferris and Dr. Jaffe's teaching.

inadvertently omit to raise all the questions, leaving crucial gaps of evidence that will lead to miscarriages of justice.

A judge who has done independent research would have probably caught the gaps. On the other hand, a judge who is not allowed to do this would have zero chance of catching these flaws. Judicial neutrality demands a full exploration and critical analysis of the facts and opinions raised by *both* sides of the litigation. Raising issues by a judge with any gaps in knowledge or contradictory information in pathology textbooks ensures a fuller fact record. In a jury trial, this should be done in the presence of the jury in an open court, so that all comments from the judge are subsequently reviewable on the record. Counsel should also be given time to respond and consult with their experts (adequate notice). Response to the issues raised by the judge will likely mean that experts have to be recalled to court. However, given today's technology in video conferencing, this is a minor inconvenience, and a small price to pay to avoid wrongful convictions.

V. BALANCING INDEPENDENT JUDICIAL RESEARCH WITH JUDICIAL NEUTRALITY

The concept of an interventionist judge applying independently acquired scientific knowledge is perceived to be counter to judicial neutrality in the adversarial process. Firstly, as seen in *Bornyk* 2015, there are many reasons why judges should not introduce or apply independent research into the trial. Doing so erodes judicial impartiality by causing the judge to adopt multiple roles of being the witness, advocate and judge; raises the danger of the judge misapplying the specialized knowledge; deprives the parties of fair notice of what evidence the judge might uncover; removes control over what evidence is adduced by the party for strategic reasons (party prosecution). Secondly, aside from independent research, a judge in an adversarial process is limited to asking only clarifying questions directly to witnesses *during* their examination. This is to prevent judges from becoming an advocate in confronting or intimidating the witness.[107] A judge who has become inquisitorial has in effect caused the court to be composed of two opposing advocates against the expert witness, with no judge to rule on objections. For example, if the judge himself confronts the expert witness, the counsel who called the expert has no neutral referee to appeal to for objections.

---

[107] Hamilton H. Hobgood. "When Should a Trial Judge Intervene to Question a Witness?" (1981) 3:1 Campbell Law Review at 74.

Although there is a common perception that judicial passivity is the norm in the adversarial process, judges are not completely passive either. In motions, appeals and closing arguments at judge-only trials, judges routinely ask counsel challenging questions.[108] The purpose of this is to test out each party's position. Therefore, elements of active judicial participation are already present in the current system. In addition, appeal courts can appoint special commissioners, such as a trial judge, to investigate the facts, including the interviewing of witnesses.[109] Moreover, in the context of expert witnesses, the purpose of these questions is consistent with the role of the experts as impartial assistants to the court in understanding technical facts.

How should a trial judge intervene so that judges can competently engage in the substance of the expert evidence without sacrificing judicial neutrality? I propose that in cases of expert evidence, the judge should be allowed to review any materials from professional CLE courses. I would suggest that the judge ask questions *after* the examination of witnesses but *before* closing arguments. This way of proceeding preserves the traditional adversarial procedure, which is to allow the full opportunity for counsel to present their case and test out the opponent's case. It prevents the judge from taking over the role of opposing counsel during the examination phase. It is only where the judge recognizes that the trial process did not subject expert evidence to a robust critical analysis that guiding questions should be posed to counsel, subject to allowing counsel enough time to prepare a response and recalling the experts where necessary. Expert evidence usually involves technical subject matter that often requires more time and effort in analysis than normal evidence from lay witnesses. A judge may not know what issues to raise until at least the expert examination is over. Therefore, a judge should ask clarifying questions before closing arguments.

Where the judge's concerns are triggered by independent research, he should name the source of the research, including any CLE materials he used as mentioned above. However, to be more cautious about the reliability of the source, he should have asked the experts to verify whether the source is authoritative. This sequence of proceeding, therefore, gives fair notice to counsel, giving them enough time to consult with their experts to return a properly considered and prepared answer to the judge's questions.

---

[108] The author thanks lawyers Monick Grenier and Mick Hassell for their insight on trial experience.

[109] Kent Roach. "Wrongful Convictions: Adversarial and Inquisitorial Themes" (2010) 35 *North Carolina Journal of International Law and Commercial Regulation*, at 428-430.

It also allows counsel to craft their closing arguments, taking into consideration the judge's questions and any answers subsequently provided by experts.

When a judge frankly raises any issues arising from his own specialized knowledge, it allows for open and thorough testing in open court. It will expose any outdated learning, or mistaken understandings of the scientific concepts, *both* on the part of the judge and the experts. It also allows the parties' experts to correct any misunderstandings the judge may have from his independent research. For example, Justice Funt in *R v Bornyk* (Part III) noticed the prints did not match, a fact that supports the inference that the print from the crime scene did not belong to the accused. However, it may also be the case that the mismatch may be due to artifacts. It is known that even when the same finger makes two consecutive prints in a row, the two prints will not be completely identical. Therefore, Justice Funt should have raised his concerns so that the expert can be given a chance to address them. Asking an expert to explain is not necessarily a leading question, used by opposing counsel to undermine an opponent's witness. This is because the expert could potentially have a valid explanation for the mismatch. Asking the expert for an explanation means that the judge is seeking to fully understand and test the robustness of the expert's opinion.

As the Court of Appeal held in *Boran v Wenger,* 'We do not for a moment suggest that the trial judge has not the right-it may often be the duty- to obtain from witnesses evidence in addition to that brought by counsel- but this is adjectival, to clear up, to add to what counsel has brought out.'[110] Asking such questions satisfies the judge's duty to reduce any ambiguities in the testimony and to ensure the factfinder has enough information to perform a critical evaluation of the opinion. Such questions should be posed in the presence of both counsel and should be on the record. The purpose of these questions is to assist in the full understanding of the expert evidence, rather than simply undermining it. The answers to these questions should have the potential to not only expose the weaknesses, but also *strengthen* an expert's opinion. As such, they are not the leading questions which are asked with the sole purpose of undermining a witness.

In this paper, I argued that independent research by a judge is necessary to ensure accurate fact-finding and hence avoid wrongful convictions. Excerpts from current textbooks on pathology contradicted the knowledge base that was the foundation of the Crown experts' opinions. A trial judge could have easily accessed this information from the textbooks used by

---

[110] *Boran v Wenger* [1942] DLR at 529.

counsel. He could have raised questions about the foundation of the experts' opinions, which would have revealed the unreliability at trial. While this paper is based on a case study, it still provides many valuable lessons to be learned. It is hoped that this one case study will incentivize further research and debate about the passive versus inquisitorial nature of the role of the judge.

While experts retained by parties may always be biased to some extent, even if they were advised of their duty to the court, a judge is retained by the state, who must remain neutral. His goal is to ensure that objective truth is brought out at trial. In cases where the truth of what happened cannot be ascertained, this must result in an acquittal. Active engagement should thus be encouraged for a judge in understanding the substance of the opinion. He should be encouraged to ask for clarifying evidence which allows a full picture to emerge in cases where a judge recognizes that the factual record is incomplete. If such questions are not asked by opposing counsel, and the judge is muzzled from raising these questions that bring out the full picture, the jury will be left with a one-sided, distorted, and biased opinion, as was the case in the trial of Mr. Mullins-Johnson. When evidence required to evaluate the facts is missing, no one else in the courtroom, other than a judge has the power to ensure that this evidence is included.

The onus is on a judge to ensure a fair trial which leads to the right result. This has to be balanced against the equally important principle of judicial neutrality. A judge who realizes that gaps of fact exist caused either intentionally (counsel selectively presenting evidence) or inadvertently (counsel's inability in engaging with the technical content), fulfils his role of neutrality by asking questions to fill in any gaps in knowledge or bringing attention to any misinformation to be explained. Indeed, it is the judge who recognizes that there are gaps or misinformation led by experts, and who nevertheless *chooses* to allow the trial process to unfold in the name of passivity that does a disservice to the justice system. Ultimately, the judge has a duty to the public to ensure that all evidence, even scientific ones, is competently adjudicated. Only when cases are truly tried on the accurate substance can we have full confidence in our justice system.

Ending Human-Animal Maltreatment Cycles Through the Use of Trauma-Informed Therapy

JESSICA A. CHAPMAN*

ABSTRACT

This article proposes that many individuals who commit maltreatment (cruelty or abuse/acts of commission, neglect/acts of omission, or violence) against animals are doing so in reaction to trauma they experienced earlier in their lives. This trauma may have come from events in which individuals experienced direct maltreatment or observed maltreatment, which such individuals then adopted as a way of managing their trauma-induced symptoms and/or trauma-induced mental illness, particularly Post Traumatic Stress Disorder. Legal, mental health, and social work fields should develop an interconnected program that can 1) curb the presence of the human-animal (and hopefully human-human) abuse cycle (or maltreatment cycle) in society; 2) heal or resolve individuals of their underlying, trauma-induced reasons for committing maltreatment; and 3) protect would-be victims from future maltreatment by using trauma-informed therapies like Cognitive Processing Therapy and Eye Movement Desensitization and Reprocessing Therapy.

I. INTRODUCTION

William Hogarth (1697-1764), an English pictorial satirist and social critic, theorized that four stages of cruelty may be present within certain human-animal-society relationships. Through an effort to inspire Britain to take action against animal cruelty, Hogarth depicted cruelty against animals

* JD, LLM. Criminal Justice Program Fellow, Animal Legal Defense Fund. I would like to thank Lewis & Clark's Center for Animal Law Studies, my Criminal Justice Program team, and the Animal Legal Defense Fund for their support in my writing and publishing this article. The views expressed herein are solely those of the author and do not necessarily reflect the views of the Animal Legal Defense Fund or any client. This article is published for informational purposes only and is not legal advice.

and humans alike—as juxtaposed and hellishly intermingled—in four engraved prints (1751).[1] During Stage One, Hogarth's main character, Tom Nero, is a boy who commits physical violence—actions people today would consider animal cruelty—against another boy's companion dog.[2] In Stage Two, Tom Nero is an adult who commits violence against the horse who draws his carriage (full of lawyers who ignore Tom Nero's violence).[3] In Stage Three, Tom Nero has murdered his pregnant lover.[4] And, in Stage Four, society has executed Tom Nero as a method for society to ensure Nero accounts for his cruelty and violence.[5] Society subjects Tom Nero to scientific dissection, which leads him to his ultimate fate to exist as a skeleton on display, rather than receiving the dignity of a proper burial.[6] Simply stated, society asserts "justice." This justice creates an ironic twist to the story because society punishes Tom Nero using condoned physical violence—a variation of the violence Tom Nero committed that society previously identified as a crime. The abuser becomes the abused, the oppressor becomes the oppressed. Rather than finding an alternative method to end these perpetually expanding cycles of maltreatment and oppression, Tom Nero's execution prevents society, and Tom Nero, from looking for an alternative solution of restitution that could end Tom Nero's and society's cyclical actions and prevent future cruelty from occurring in microscopic and macroscopic scales.

I propose that an additional stage of cruelty, for which William Hogarth did not account, exists in society on microscopic and macroscopic scales: A pre- stage, or Stage Zero. This stage is the period during which Tom Nero may have first experienced trauma, which influenced his decision to commit violence during Stages One, Two, and Three. Practically applying this concept, Stage Zero occurs when a person first experiences maltreatment or an event from which they experienced trauma. In this article, I propose some individuals' reaction to trauma manifests as their maltreatment

---

1 Regarding his Four Stages prints, Hogarth said "The prints were engraved with the hope of, in some degree, correcting that barbarous treatment of animals, the very sight of which renders the streets of our metropolis so distressing to every feeling mind. If they have had this effect, and checked the progress of cruelty, I am more proud of having been the author, than I should be of having painted Raphael's cartoons." William Hogarth, *Anecdotes of William Hogarth, Written by Himself* (London, UK: J B Nichols and Son, 1833) at 65.

2 "The Four Stages of Cruelty" (last visited 10 May 2022), online: *The History of Art* <www.williamhogarth.org/four-stages-of-cruelty/> [perma.cc/NTH8-GAUP].

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

(cruelty or abuse/acts of commission, neglect/acts of omission, or violence) of others—Stages One through Three. A person's commission of maltreatment may be an unrecognized coping mechanism they consciously or unconsciously employ to manage the pain and suffering they feel from untreated trauma and ensuing mental illnesses,[7] such as Post Traumatic Stress Disorder (PTSD).[8]

Consequently, the maltreatment a person commits toward others during Stages One through Three creates new victims. The individual who commits maltreatment not only perpetuates their personal exposure to the maltreatment cycle, they also introduce their victim to the maltreatment cycle. I suggest the person who commits the maltreatment relives their initial trauma during their maltreatment of others, and so, not only victimizes others, but also revictimizes themself during the maltreatment process. I also propose that if society works with individuals to address traumatic event(s) that instigated their motivation to mistreat other beings, and society helps those individuals resolve their trauma and subsequent trauma-induced mental health issues, society can help end—or at least curb—the maltreatment cycle by alleviating individuals of the root cause of their original suffering. In turn, society could help alleviate the manifestation of trauma-exposed individuals' suffering as seen through their maltreatment of others. As a result, society could protect would-be victims from experiencing future violence and maltreatment. And society could protect trauma-

---

7 "Serious mental illness is often defined as a cognitive, behavioural, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities." Byron R Johnson, Sung Joon Jang & Matt Bradshaw, "New Hope for Offender Rehabilitation: Assessing the Correctional Trauma Healing Program" (2021) at 9, online (pdf): *American Bible Society* <1s712.americanbible.org/baylor-prison-study/baylor-prison-study/ABS-Baylor-Research-Study.pdf> [perma.cc/2WVD-UK3V] [Johnson, Jang & Bradshaw], citing "2017 Methodological Summary and Definitions" (2018) at 62, online (pdf): *Substance Abuse and Mental Health Services Administration* <www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHMethodSummDefs2017/NSDUHMethodSummDefs2017.pdf> [perma.cc/Y5PM-HTKM].

8 "The Effects of Trauma Do Not Have to Last a Lifetime" (16 January 2004), online: *American Psychological Association* <www.apa.org/research/action/ptsd#:~:text=Untreated%20PTSD%20from%20any%20trauma,work%20and%20interact%20with%20others> [perma.cc/3LVX-VC97]; "Exhibit 1.3-4 DSM-5 Diagnostic Criteria for PTSD, Trauma-Informed Care in Behavioural Health Services" (last visited 11 May 2022), online: *National Center for Biotechnology Information* <www.ncbi.nlm.nih.gov/books/NBK207191/box/part1_ch3.box16/> [perma.cc/H5TF-59NV].

affected individuals from re-victimizing themselves by alleviating their motivation to mistreat other beings.

This strategy may also provide the added benefit of decreasing incarceration rates:[9] Should trauma be the underlying reason a person committed maltreatment, and the legal system incarcerated the person for that crime, if those individuals heal from their trauma, they will cease having the motivation to commit future maltreatment and so, decrease their interactions with the legal system, which could prevent future incarceration for violent crimes. This prevention method could also help heal individuals of their trauma who have committed maltreatment, before their first interaction with the legal system. This proactive strategy could protect myriad individuals from becoming incarcerated and from losing rights because of a criminal record. In sum, I suggest that society could use trauma-informed therapy alternatives to decrease the prevalence of the maltreatment cycle, rather than employing historical forms of punishment—including incarceration, fines, probation, etc.—that perpetuate the maltreatment cycle through legal, systemic oppression.[10]

Incorporating trauma-informed therapy into the criminal justice system is an approach that would serve to identify and resolve existing trauma for individuals who commit maltreatment (IWCMs).[11] Trauma-informed

---

9 This article does not discuss the underlying political and capitalist variables that have supported a pro-carceral culture in the United States (or U.S.), particularly of Black Americans. *See generally* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 10th Anniversary ed (New York: New Press, 2020); Kara Gotsch & Vinay Basti, "Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons" (2 August 2018), online: *The Sentencing Project* <www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/> [perma.cc/NJ88-PHYD]. More information regarding incarceration rates in the U.S. and its systemic maltreatment of marginalized individuals can be found at "Issues: Incarceration" (last visited 25 October 2021), online: *The Sentencing Project* <www.sentencingproject.org/issues/incarceration/> [perma.cc/J3MB-TRF8].

10 *See generally, e.g.*, Kelly Hayes & Marianne Kaba, "A Jailbreak of the Imagination: Seeing Prisons for What They Are and Demanding Transformation" (8 January 2019), online: *Prison Legal News* <www.prisonlegalnews.org/news/2019/jan/8/jailbreak-imagination-seeing-prisons-what-they-are-and-demanding-transformation/> [perma.cc/Y855-SKYN]; Bruce Western & Becky Pettit, "Incarceration & social inequality" (2010) 139:3 Dædalus 8; Ronnie K Stephens, "Trauma and Abuse of Incarcerated Juveniles in American Prisons" (28 May 2021), online: *Interrogating Justice* <interrogatingjustice.org/prisons/trauma-and-abuse-of-incarcerated-juveniles-in-american-prisons/> [perma.cc/G5Q3-EKXE] (providing different examples of the way the carceral system treats incarcerated individuals that lead to long-term damage for those affected).

11 Ideally, we will create a world in which we do not have prisons and in which we can

therapy acknowledges and focuses on the ways that traumatic experiences may impact a person's "mental, behavio[u]ral, emotional, physical, and spiritual well-being."[12] Through the interconnection of the legal, mental health, and social work fields, professionals can work together, and can work with IWCMs, to heal them of their trauma-induced mental suffering and any related mental illnesses, so they do not feel the need to hurt or mistreat others. If society (we) approach IWCMs with trauma backgrounds as individuals who were once victimized, we can translate/analogize and apply the literature and research that surrounds domestic violence and maltreatment victims to individuals who committed that violence and maltreatment. In turn, we can use analogistic discussions and strategies to heal IWCMs of their trauma, to prevent them from committing violence and maltreatment against other beings in the future. Though situations may exist in which someone mistreated another being for reasons that are not influenced by trauma, I propose that trauma plays a larger role in the maltreatment cycle than we realize or choose to accept. I will further discuss this concept in subsequent sections.

To establish the context for discussing trauma-informed therapies to heal IWCMs, in Part II, I will discuss the causes of trauma and trauma's role in developing PTSD; PTSD's development from direct maltreatment or observed and learned violence; and PTSD's relationship to other forms of mental illness. In Part III, I will discuss trauma and PTSD's connection to the maltreatment of other beings. In Part IV, I will discuss the insufficiencies in the current criminal justice system's approach to ending animal maltreatment and available trauma-informed therapies that heal PTSD and could prevent future maltreatment. In Part V, I will propose research, anticipated uses of the research's results, and ways to incorporate trauma-informed therapies into the legal system to help decrease the prevalence of the maltreatment cycle.

I use the following concepts in this discussion: 1) I will refer to individuals who have transgressed against other beings as "individuals who committed maltreatment"/IWCMs, rather than 'abuser' or 'offender,' because all individuals are more than the acts they committed. 2) I will refer to beings whom the scientific community does not identify as homo

---

provide individuals the care they need without using historical forms of punishment—such as incarceration—that have proven ineffective. For now, the incorporation of trauma-informed therapy into the current criminal legal system could help society get one step closer toward developing a roadmap that transforms the criminal legal system into one in which we do not incarcerate individuals.

[12] "What is Trauma-Focused Therapy" (last visited 10 November 2021), online: *Center for Child Trauma Assessment, Services and Interventions* <cctasi.northwestern.edu/trauma-focused-therapy/> [perma.cc/5NUS-PLZM].

sapiens[13] (human) as 'animal.' I will use the term 'maltreatment' to refer to cruelty, abuse/acts of commission, neglect/acts of omission, violence, and/or any other act that causes injury[14] (including proactive human behaviours that are meant to induce pain and suffering).[15] The terms 'cruelty,' 'abuse,' 'neglect,' and 'violence' have multiple legal, legislative, and personal definitions. Though the term 'maltreatment' may not reflect the intensity of the harmful actions it represents or the common legal term 'cruelty' that legislation uses, this umbrella term ensures that all forms of harm that trauma may induce, and that I discuss, are represented.[16] 3) My perspectives in this article are one shade of myriad perspectives that deserve representation in their effort to heal people and end the maltreatment cycle. This discussion deals with complex topics. However, trauma, trauma-derived mental illness, and trauma's effects permeate society; complex and sometimes seemingly uncomfortable conversations are necessary to approach these topics. The National Council for Behavioral Health reported that seventy percent of adults in the United States (or U.S.) have experienced a traumatic event at least once during their lifetime.[17] Resolving trauma and ending the maltreatment cycle are long-discussed topics and bourgeoning research fields.[18] Therefore, these discussions and studies require many voices and perspectives in order to provide comprehensive

---

13 For a discussion regarding the reasons why the term 'human' is problematic as it relates to *whom* mainstream society considers human (versus animal) and the term's constructive exclusion of marginalized communities, *see generally* Aph Ko & Syl Ko, *Aphro-ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters*, 1st ed (New York: Lantern Publishing & Media, 2020).

14 For more information regarding the term 'maltreatment,' *see* Gary Patronek, "Animal Maltreatment as a Social Problem" in Lacey Levitt, Gary Patronek & Thomas Grisso, eds, *Animal Maltreatment: Forensic Mental Health Issues and Evaluations* (New York: Oxford Academic, 2015) at 25–30.

15 *Ibid* at 33.

16 *Ibid* at 32–33 ("[W]hen the term 'animal maltreatment' is used, it is intended to encompass any type of cruelty, abuse, torture, abandonment, or neglect, regardless of the degree of underlying motivation or intent (or lack thereof) on the part of the offender. This is consistent with the broadening of the term 'child abuse' to 'child maltreatment' . . . . We feel this global term is advantageous because it does not appear to be as burdened by inconsistent or conflicting usage as are these other terms. It also allows us to discuss animal maltreatment without being encumbered by differences in the statutory definition, or lack of definition, of a particular term across 50 different states in the United States." (Internal citations omitted)).

17 "How to Manage Trauma" (2013), online (pdf): *National Council for Behavioural Health* <www.thenationalcouncil.org/wp-content/uploads/2013/05/Trauma-infographic.pdf?daf=375ateTbd56> [perma.cc/GNP2-2257].

18 *See generally* Johnson, Jang & Bradshaw, *supra* note 8 (discussing research Baylor University designed to heal incarcerated individuals of their trauma and PTSD).

and necessary coverage to resolve all the issues that arise with maltreatment cycles, emotional trauma, and trauma-informed care. 4) Animals are victims.[19] The human-animal maltreatment relationship may differ from the human-human maltreatment relationship. In other words, the perception and relationship the IWCM holds towards the animal they mistreated may be different from the perception they have toward a human who can respond through forms of human communication. However, the maltreatment cycle still victimizes any being who experiences maltreatment. 5) In reference to point 4, research has established a correlation between animal maltreatment and human maltreatment.[20] An IWCM who harms an animal may harm a human as well, though this relationship is not a guarantee.[21] The legal, mental health, and social work fields refer to this correlation as 'the Link.'[22] 6) Even though this discussion focuses on healing IWCMs, everyone must still be accountable for their choices and actions, which includes accountability for harming others. This therapeutic proposal is not in lieu of accountability, but it could help people make progress in changing their mental state and behaviours for their benefit and for the benefit of current and would-be victims. This introspection and resulting mental and emotional healing could be another method for IWCMs to take accountability for their transgressions, but in a safe space that helps them maintain self-respect and dignity, as well as develop respect and compassion toward their victims. In turn, this approach could help heal IWCMs, so they

---

[19] "Animals as Crime Victims: Development of a New Legal Status" (last visited 24 January 2022), online: *Animal Legal Defense Fund* <aldf.org/article/animals-as-crime-victims-development-of-a-new-legal-status/#:~:text=Both%20federal%20and%20state%20courts,for%20animals%20and%20for%20justice> [perma.cc/L4R3-D49A].

[20] "The Link Between Cruelty to Animals and Violence Toward Humans" (last visited 24 January 2022), online: *Animal Legal Defense Fund* <aldf.org/article/the-link-between-cruelty-to-animals-and-violence-toward-humans-2/#:~:text=Research%20Shows%20the%20Link%20Between,abuse%20and%20other%20violent%20behavior> [perma.cc/Q3ZT-U24R].

[21] *Ibid.* This dynamic is, however, complex. *See* Charlie Robinson & Victoria Clausen, "The Link Between Animal Cruelty and Human Violence" (20 August 2021), online: *Federal Bureau Investigation*, *Law Enforcement Bulletin* <leb.fbi.gov/articles/featured-articles/the-link-between-animal-cruelty-and-human-violence> [perma.cc/G9FT-VWWF], *and infra* Part III(b)(i).

[22] Frank R Ascione, Teresa M Thompson & Tracy Black, "Childhood Cruelty to Animals: Assessing Cruelty Dimensions and Motivations" (1997) 10:4 Anthrozoös 170 at 170–77; "About Us" (last visited 11 April 2021) online: *Colorado Link Project* <coloradolinkproject.com/about-us/> [perma.cc/W6HB-3NFC]; "What is the Link?" (last visited 24 January 2022), online: *National Link Coalition* <nationallinkcoalition.org/what-is-the-link> [perma.cc/MM7P-JCNW] [Colorado Link Project].

no longer use maltreatment approaches to maintain power and control.[23] 7) This article exists to provide discussion toward approaches that could protect victims, both animal and human. However, humans create and perpetuate the maltreatment cycle by intentionally committing maltreatment and violence against animals and other humans. Animals do not intentionally mistreat others. Therefore, to protect animals and humans from maltreatment and violence, the discussion and solutions need to focus on the human actor's initiation and perpetuation of the maltreatment cycle.

This article focuses on individuals who commit maltreatment. However, the end goal of this project is to protect animals (and humans) from any victimization. This discussion does not intend to minimize the experience of maltreatment that animal and human victims encounter in any way. Rather, this discussion exists to end the maltreatment cycle so that beings no longer must endure violence and maltreatment.

II. BACKGROUND: TRAUMA AND ITS MANIFESTATION OF MALTREATMENT

I propose that a common cycle develops within individuals who experience traumatic events (such as maltreatment) that continues into the development of PTSD, the development of other mental illnesses, and the need to maintain power and control, which results in the maltreatment of others.[24] A person may experience a traumatic event or a series of traumatic

---

[23] *See, e.g.*, "Understanding the Power and Control Wheel" (last visited 24 January 2022), online: *Domestic Abuse Intervention Programs* <www.theduluthmodel.org/wheels/understanding-power-control-wheel/> [perma.cc/GE8Y-Y7AS] (describing the various methods people who commit maltreatment use to maintain power and control) [Domestic Abuse Intervention Programs].

[24] Timothy Gallimore, "Unresolved Trauma: Fuel for the Cycle of Violence and Terrorism" in Chris E Stout, ed, *Psychology of Terrorism: Coping with the Continuing Threat* (Connecticut: Praeger Publishers, 2004) at 67–93; "Effects of child abuse and neglect for adult survivors" (January 2014), online: *Australian Institute of Family Studies* <aifs.gov.au/cfca/publications/effects-child-abuse-and-neglect-adult-survivors> [perma.cc/S638-J4U7]; Matthew Tull, "The Connection Between PTSD and Domestic Violence" (updated 16 January 2020), online: *Very Well Mind* <www.verywellmind.com/ptsd-and-domestic-violence-2797405#:~:text=Childhood%20Abuse%20and%20Relationship%20Violence&text=People%20with%20PTSD%20also%20have,and%20women%20with%20the%20disorder> [perma.cc/Q9XV-UFM6]; Domestic Abuse Intervention Programs, *supra* note 24. Though some of the studies and commentary in this citation focus on children, an extrapolation between the findings of studies that focus on children could likely exist for individuals who experience their initial traumatic event (such as maltreatment)

events through direct maltreatment and observed violence.[25] Direct maltreatment or violence involves a person being the direct recipient of another's aggression. Observed violence occurs when a person witnesses another person being violent to someone else.[26] Examples of observed violence may include a person watching a family member harm another family member, the family's companion animal, or another animal. Observation of this violence teaches the person—particularly in cases involving children—that this violence is acceptable, or at least normal behaviour, which then makes it learned violence.[27] The impact of learned violence is particularly significant on children's mental development.[28] In response to that traumatic event, the person may develop PTSD.[29]

---

during adulthood.

25 Jayne O'Donnell & Mabinty Quarshie, "The startling toll on children who witness domestic violence is just now being understood", *USA Today* (29 January 2019), online: <www.usatoday.com/story/news/health/2019/01/29/domestic-violence-research-children-abuse-mental-health-learning-aces/2227218002/> [perma.cc/HK6S-NBP2]; "Post-Traumatic Stress Disorder" (last revised May 2019), online: *National Institute of Mental Health* <www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd#:~:text=Anyone%20can%20develop%20PTSD%20at,some%20point%20in%20their%20lives> [perma.cc/MCN5-TQME] [National Institute of Mental Health on *PTSD overview*]. Most research regarding observed violence that manifests into maltreatment focused on child victims who become adults, who may develop a propensity to mistreat. Though child and adult psychologies differ, the studies on children's development who are exposed to maltreatment can continue the conversation for the effects of individuals' psychologies who observe violence when they are adults. *See also* Substance Abuse & Mental Health Administration, "Trauma-Informed Care in Behavioural Health Sciences: Treatment Improvement Protocol (TIP) Series 57" (2014) at 50–51, online (pdf): *Substance Abuse and Mental Health Services Administration* <store.samhsa.gov/product/TIP-57-Trauma-Informed-Care-in-Behavioral-Health-Services/SMA14-4816> [perma.cc/339N-MYCM] (discussing the effects of observed trauma, which can also instigate trauma within the observer) [*TIP 57*].

26 See generally Leonard Berkowitz, "Situational Influences on Reactions to Observed Violence" (1986) 42:3 J Soc Issues 93 (for a working definition of the concept 'observed violence' and the effects of this type of violence on observing bystanders).

27 "Social Learning Theory and Family Violence" (last visited 11 April 2021), online: *Criminal Justice* <criminal-justice.iresearchnet.com/crime/domestic-violence/social-learning-theory-and-family-violence/> [perma.cc/J285-FRWC] [Criminal Justice].

28 Wake Forest University Baptist Medical Center, "Violence Is A Learned Behaviour, Says Researchers At Wake Forest University", *Science Daily* (9 November 2000), online: <www.sciencedaily.com/releases/2000/11/001106061128.htm> [perma.cc/2KXG-NPRJ] [Wake Forest University].

29 "Causes – Post-traumatic stress disorder" (last reviewed 27 September 2018), online: *National Health Services* <www.nhs.uk/mental-health/conditions/post-traumatic-stress-disorder-ptsd/causes/#:~:text=Post%2Dtraumatic%20stress%20disorder%20(PTSD)%20can%20develop%20after%20a,physical%20or%20sexual%20assault> [perma.cc/FT44-

PTSD can affect anyone.[30] PTSD may cause fear and anxiety to occur, induce the person into reliving the traumatic event or related intrusive thoughts, alter the person's cognition and mood, among other symptoms, which may result in the person's experience of emotional pain and suffering from these symptoms.[31] PTSD frequently induces adverse physical reactions, such as making a person feel "stuck"[32] and believing they cannot escape traumatic memories.[33] Additionally, PTSD frequently creates triggers in a person's mind that make the person relive the traumatic event or emotions tied to the traumatic event.[34] These triggers, and the automatic reactions triggers provoke, are tied to "unconscious emotions of pain, fear, and shame."[35] When PTSD goes untreated, its symptoms can influence a person's development of skewed perspectives toward themselves, the world, and others.[36] Simultaneous to the development of PTSD, a trauma-affected person may also develop additional forms of severe mental illness.[37]

A person may react to trauma-induced symptoms and illnesses in unhealthy ways to maintain power and control.[38] This fight for power and

---

XXHT].

30 National Institute of Mental Health on *PTSD overview*, *supra* note 26.

31 "What is Posttraumatic Stress Disorder?" (last reviewed August 2020), online: *American Psychiatric Association* <www.psychiatry.org/patients-families/ptsd/what-is-ptsd> [perma.cc/NX48-YRED] [American Psychiatric Association on *PTSD*].

32 Feeling 'stuck' is an emotional, psychological, and physical condition that impedes "self-regulation and adaptive decision-making," which inhibits an individual's ability to plan and, therefore, feel hopeful, for the future. These feelings and perspectives leave the individual feeling trapped within their present experience. *See* June Gruber et al, "Feeling stuck in the present? Mania proneness and history associated with present-oriented time perspective" (2012) 12:1 Emotion 13 at 14.

33 "Getting Stuck In Your Trauma or PTSD" (last visited 27 January 2022), online: *Oxford Development Center* <www.oxforddevelopmentcentre.co.uk/getting-stuck-in-your-trauma-or-ptsd/> [perma.cc/5Z5T-5JJY].

34 A trigger is an innocuous situation—smells, sounds, circumstances, tastes, words, or media—that causes a person to re-experience the traumatic event and trauma-induced symptoms. "PTSD Triggers" (last visited 25 October 2021), online: *Trauma Practice* <traumapractice.co.uk/ptsd-triggers/> [perma.cc/YD4G-TTDV] [Trauma Practice]. *See infra* Part II(c) for further discussion of triggers.

35 TEDx Talks, "Emotional laws are the answer for better relationships: Diana Wais at TEDxThessaloniki" (20 June 2014), online (video): *YouTube* <www.youtube.com/watch?v=gTZgfyOW-DA> [perma.cc/E33Q-PEMD] [TEDx Talks].

36 Matthew Kimble et al, "Negative World Views after Trauma: Neurophysiological Evidence for Negative Expectancies" (2018) 10:5 Psychological Trauma 576 at 577–78 [Kimble et al].

37 *TIP 57*, *supra* note 26 at 85–89.

38 Baylor University's trauma study collected participant data that showed interpersonal aggression was a natural response for individuals who were suffering from trauma. Johnson, Jang & Bradshaw, *supra* note 8 at 23.

control may be a survival mechanism the person uses to capture any semblance of personal safety they can retain.[39] In other words, the need to maintain power and control becomes the person's mechanism for self-preservation. As a result, I posit that a person may choose to mistreat another being to maintain power and control to sustain their own well-being, despite the harm it causes to the being who receives the maltreatment.[40] Though these actions harm others, the choice seems logical to the person attempting to regain control of their lives because the PTSD and its symptoms have skewed their perspective.[41] Arguably, these harmful actions may effectively make the person feel more in control. Engaging in harmful actions against others is an unhealthy and dangerous coping mechanism. But it is a coping mechanism all the same and it works, which is why the person may repeat this behavioural pattern. If violence against others is successful in this way, then society needs to provide the person with an alternative, safer, and healthier coping mechanism that supplants the person's harmful actions and helps resolve the person's reactions to underlying trauma.

When the trauma and PTSD-affected person mistreats another being, the maltreatment and simultaneous trauma they inflict victimizes the receiver of the maltreatment. But the affected person may also victimize themself because they engage in violence, which re-enacts the trauma or triggers emotions they experienced from their first traumatic event. That revictimization may act as a new traumatic event, which could add a new layer of additional trauma. As a result, the PTSD-affected person who mistreated another being may reinitiate their trauma-PTSD-maltreatment cycle. And, they may have initiated the trauma-maltreatment cycle for the being they mistreated. The cycle may then continue for both individuals who may continue to re-victimize themselves as they cope with their layered trauma, introduce new victims to the trauma-maltreatment cycle, and so on.

---

[39] Lauren A Leotti, Sheena S Iyengar & Kevin N Ochsner, "Born to Choose: The Origins and Value of the Need for Control" (2010) 14:10 Trends in Cognitive Sciences 457 at 457.

[40] *See* Andrew M. Campbell, "The Intertwined Well-Being of Children and Non-Human Animals: An Analysis of Animal Control Reports Involving Children" (2022) 11:2 Soc Sciences 1 at 4, citing Jeremy Wright & Christopher Hensley, "From animal cruelty to serial murder: Applying the graduation hypothesis" (2003) 47:1 Intl J Offend Therapy & Comp Criminology 71 at 71–88 (whose study's conclusions, with support from cited a study, suggest that children who were victims of harm felt powerless to stop their perpetrator, and in turn, began injuring animals who were more vulnerable than the victimized child).

[41] Jasmeet P Hayes, Michael B VanElzakker & Lisa M Shin, "Emotion and cognition interactions in PTSD: a review of neurocognitive and neuroimaging studies" (2012) 6:89 Frontiers Integrative Neuroscience 1 at 1.

This section delves into the elements of each part of this cycle and further details their relationship to each other and the perpetuation of animal (and human) maltreatment.

A. Defining Trauma and Identifying its Elements

Trauma, generally. Trauma is an emotional response to something that the exposed individual perceives as being terrible.[42] A person may experience trauma in reaction to "an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being."[43] In turn, trauma challenges a person's ability to understand their life through healthy perspectives and prevents the person from creating and maintaining healthy relationships with family members and their community.[44] Trauma is a universal experience.[45] It transcends "age, gender, socioeconomic status, race, ethnicity, geography, [and] sexual orientation."[46] In fact, more than half the United States' population has suffered from at least one traumatic event in their lives.[47]

Individuals who have undergone trauma may experience shock and denial in the short term.[48] However, long-term reactions may include "unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea."[49] In turn, individuals who have undergone trauma may experience challenges moving on from the traumatic event or processing their reactions to that event.[50] Though trained mental health professionals can help individuals work through their reactions to traumatic events, some individuals may not have access to these

---

42 "Trauma" (last visited 11 April 2021), online: *American Psychological Association* <www.apa.org/topics/trauma/> [perma.cc/7MAJ-NCML] [*Trauma* – American Psychological Association].

43 Substance Abuse and Mental Health Services Administration, "SAMHSA's Concept of Trauma and Guidance for a Trauma-informed Approach", (2014) at 7, online (pdf): *Substance Abuse and Mental Health Services Administration* <ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf> [perma.cc/LP8W-CCV3] (emphasis in the original) [SAMHSA].

44 *Ibid* at 5.

45 *Ibid* at 2.

46 *Ibid.*

47 Katherine Carter, "Helping people through trauma-informed care" (15 March 2019), online: *American Psychological Association* <www.apa.org/members/content/trauma-informed-series> [perma.cc/2CTA-R7F5].

48 *Trauma* – American Psychological Association, *supra* note 43.

49 *Ibid.*

50 *Ibid.*

mental health resources,[51] realize resources exist, or realize they are experiencing symptomatic responses to trauma that need attention, in order to heal. Research shows that individuals who experience trauma may create "impaired neurodevelopmental and immune systems responses and subsequent health risk behavio[u]rs [that result] in chronic physical or behavio[u]ral health [illnesses]."[52] Furthermore, mental health professionals have realized that trauma transcends sectors beyond behavioural health services.[53] Trauma affects "child welfare, criminal justice, primary health care, peer-run and community organizations[,]" and inhibits effective outcomes in those sectors.[54] For this reason, many mental health professionals have been working to address trauma through their behavioural health services.[55]

Elements of Trauma. The three primary elements that establish a person's trauma are 1) the initial event; 2) the person's individualized, unique experience to that event, which caused an adverse reaction; and 3) adverse effects and subsequent symptoms the person manifests in reaction to their experience of the event.[56]

The initial event "may include the actual or extreme threat of physical or psychological harm," such as natural disasters or violence, including sexual violence, family violence, and non-domestic violence.[57] Events may be single occurrences or repeat throughout short or long periods of time.[58] Events may occur in childhood or adulthood.[59] However, the person may

---

51 *Ibid.*

52 SAMHSA, *supra* note 44 at 2, citing Vincent J Felitti et al, "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults The Adverse Childhood Experiences (ACE) Study" (1998) 14:4 American J of Preventive Medicine 245 at 245–58; Robert F Anda et al, "Adverse Childhood Experiences and Chronic Obstructive Pulmonary Disease in Adults" (2008) 34:5 American J of Preventive Medicine 396 at 396–403; Bruce Perry, "Understanding Traumatized and Maltreated Children: The Core Concepts," DVD: *Living and Working With Traumatized Children* (The Child Trauma Academy, 2004); Jack P Shonkoff et al, "The Lifelong Effects of Early Childhood Adversity and Toxic Stress" (2012) 129:1 Pediatrics 232 at 232–46; Katie A McLaughlin et al, "Childhood Adversity and Adult Psychiatric Disorder in the US National Comorbidity Survey" (2009) 40:4 Psychological Medicine 847 at 847–59.

53 *Ibid* at 9.

54 *Ibid.*

55 *Ibid* at 2.

56 *Ibid* at 8.

57 *Ibid.*

58 *Ibid.*

59 "Trauma and Violence" (2 August 2019), online: *Substance Abuse and Mental Health Services Administration* <www.samhsa.gov/trauma-violence> [perma.cc/H7CX-5NMU] [SAMHSA on *Trauma and Violence*].

react to the event differently depending on their age and developmental stage.[60]

A person's perceived experience of the event, or events, determines whether the event is traumatic.[61] The person's cultural, familial, socio-economic backgrounds, and personal experiences prior to the instigating event may shape a particular experience.[62] Furthermore, a person's unique, subjective interpretation of the events they experienced will influence whether the person finds the event traumatic.[63] Therefore, an experience may be traumatic for one individual, but not for another individual.[64] People tend to experience events as being traumatic if the actor that initiates the event (i.e., human aggressor, nature, unknown variable) creates a power dynamic that the person perceives takes power away from them.[65] Therefore, a person may perceive an event as being traumatic because in that situation they believe they have lost their ability to maintain power and control over their safety. The affected person may feel powerless and may question the reasons they were subjected to the event.[66] In turn, they may begin to feel "humiliation, guilt, shame, [and] betrayal."[67] Or the trauma-affected person may feel oppressed and develop a perceived inability to escape the trauma, particularly if other people force the person's silence about the event when the person wants to discuss the event to process it.[68]

Many hypotheticals can illustrate the way trauma lingers in a person's life. For instance, a trauma-affected person may have experienced the event as an adult and did not recognize or have the opportunity to process the event and its trauma on their terms and in a safe way. Alternatively, a person may have experienced the event as a child. But the child or the child's parents may not have recognized the event was traumatic. Or parents or guardians may have forced the child's silence about the event—a dynamic that frequently occurs in domestic violence situations—which then makes the child fearful to seek help.[69] For any reason, the child may not have had access to resources that could help them process their emotions and perspectives about the trauma-inducing experience. Instead, the child may have had to relive the event and their perspective of the event for years. In

---

60 SAMHSA, *supra* note 44 at 8.
61 *Ibid.*
62 *Ibid.*
63 *Ibid.*
64 *Ibid.*
65 *Ibid.*
66 *Ibid.*
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*

turn, they may have been unable to escape unwanted memories and their manifested symptoms of trauma and so, carry the memories and symptoms with them into adulthood.

Symptoms of trauma manifest in different ways, depending on each affected person's distinct background.[70] In turn, each person will uniquely respond to trauma's long-term symptoms.[71] These adverse effects are critical to whether an event becomes traumatic.[72] Adverse effects may include coping with stresses and strains of daily living; trusting and benefiting from relationships; managing cognitive processes, such as memory attention and thinking; regulating behaviour; and controlling and expressing emotions.[73] In addition to these more visible effects, a person may suffer from changes in their neurobiology, general health, and general well-being.[74] Therefore, these effects are able to lay the groundwork for a person to believe hurting another being is an appropriate—and perhaps the only effective—reaction toward managing their own trauma-derived pain and suffering. Furthermore, these effects may lay the groundwork for individuals' development of other mental illnesses that mental health and social work communities have connected to humans' choices to commit violence against animals and humans.[75]

Affected individuals' trauma symptoms may manifest immediately, and the individual may quickly recognize these manifestations.[76] Or, the effects

---

70 *Ibid* at 9.

71 SAMHSA on *Trauma and Violence*, *supra* note 60.

72 SAMHSA, *supra* note 44 at 8.

73 *Ibid.*

74 *Ibid.*

75 Tori DeAngelis, "Mental illness and violence: Debunking myths, addressing realities" (1 April 2021), online: *American Psychological Association* <www.apa.org/monitor/2021/04/ce-mental-illness> [perma.cc/NXY2-UTL8] [DeAngelis]; Substance Abuse and Mental Health Services, "Serious Mental Illness and Trauma: A Literature Review and Issue Brief" (9 May 2018) at 1, online: <www.samhsa.gov/sites/default/files/programs_campaigns/childrens_mental_health /samhsa-smi-and-trauma-lit-review-and-issue-brief.docx> [perma.cc/D26Y-K496] (explaining that trauma is a "significant risk factor" for, and possibly initiates the subsequent development of, "serious mental illnesses," of which SAMHSA includes major depression, schizophrenia, and bipolar disorder), citing S L Matheson et al, "Childhood adversity in schizophrenia: a systematic meta-analysis" (2013) 43:2 Psychological Medicine 225 at 225–38; Jessica Agnew-Blais & Andrea Danese, "Childhood maltreatment and unfavorable clinical outcomes in bipolar disorder: a systematic review and meta-analysis" (2016) 3:4 The Lancet Psychiatry 342 at 342–49; Valentina Nanni, Rudolf Uher & Andrea Danese, "Childhood Maltreatment Predicts Unfavorable Course of Illness and Treatment Outcome in Depression: A Meta-Analysis" (2012) 169 American J Psychiatry 141 at 141–51 [SAMHSA on *Serious Mental Illness and Trauma*].

76 SAMHSA, *supra* note 44 at 8.

may develop after some delay from the person's exposure to the initial event.[77] This delay in manifested effects may prevent affected individuals from realizing the adverse symptoms they start experiencing—as though the unanticipated emotions, thoughts, and feelings occurred without reason—began because of the initial trauma.[78] Consequently, affected individuals may believe something is suddenly wrong with them, but they do not have any idea what that 'wrong' is, the way it started, or healthy ways they can manage and resolve the unrecognizable symptoms. The unrecognized trauma may continue to exist, the symptoms may continue to worsen, and the individual may begin to develop PTSD and other trauma-induced mental illnesses without understanding the root cause of these internal experiences.[79]

B. Development of Mental Illness from Traumatic Experiences

Studies show that the effects of trauma manifest as other mental illnesses in individuals who were exposed to trauma.[80] This connection means that many individuals who appear to have mental illnesses, that proximately instigated their maltreatment toward animals and humans, may not actually have been the original cause of the harm. One study found that most public health clinics do not perform routine trauma history assessments for incoming clients.[81] The study, which focused on community-based mental health providers in four states found that forty-two percent of the client sample "met diagnostic criteria for PTSD."[82] However, records indicated that the centers identified the PTSD diagnosis on only two percent of clients' medical records.[83] Therefore, an IWCM's motivation to hurt or mistreat others may have stemmed from a mental illness—a mental illness that developed from previous trauma, which PTSD

---

77 *Ibid.*

78 *Ibid.*

79 SAMHSA on *Serious Mental Illness and Trauma*, *supra* note 76.

80 B Christopher Frueh et al, "Clinicians' Perspectives on Cognitive Behavioral Treatment for PTSD Among Persons With Severe Mental Illness" (2006) 57:7 Psychiatric Services 1027 at 1027 [Frueh et al]; *TIP 57*, *supra* note 26 at 10.

81 *Ibid.*

82 *Ibid.*

83 *Ibid.* Many individuals who experienced trauma in their lives, particularly as children, develop severe mental illnesses including borderline personality disorder and dissociative identity disorder. Martin H Teicher, "Wounds That Time Won't Heal: The Neurobiology of Child Abuse" (1 October 2000), online: *Cerebrum Dana Foundation* <dana.org/article/wounds-that-time-wont-heal/> [perma.cc/W67F-MTN3] [Teicher].

then exacerbated. This situation differs from an individual being born with a mental illness that, alone, instigates a person to hurt others.

Public sector clinicians have frequently expressed the need to provide individuals who have severe mental illnesses with trauma-related services that could heal their clients of PTSD.[84] If the legal, social work, and mental health fields can collaborate and develop programs and support systems that provide trauma-informed therapy for individuals with PTSD as well as individuals with other diagnosed mental illnesses, individuals with PTSD and other mental illnesses could likely heal from these multiple mental burdens. Furthermore, individuals who appear to be 'broken,' or who seem to have been born with a mental illness that caused them to harm others, could become healthy, emotionally stable, and mentally stable individuals who do not choose to hurt others in the future.

Not all individuals who have mental illnesses mistreat or harm other beings.[85] But, many people who experienced trauma, which then manifested into other mental illnesses, may have turned to hurting others as a fear-based reaction to trying to manage untreated PTSD as a survival mechanism.[86] By supporting people who have mistreated animals and humans with trauma-informed therapies, like Cognitive Processing Therapy (CPT)[87] and Eye Movement Desensitization and Reprocessing Therapy (EMDR),[88] society could give these individuals a second chance at a healthy life, rather than dismissing them and convincing itself these individuals are irreparable. In turn, society could heal these individuals from their prior victimization and trauma. And, society could protect other animals and humans from future victimization and subsequent trauma.

Some critics may argue that individuals exist who have mental illnesses and who commit violence against animals and humans simply because they were born with these genetic dispositions. I acknowledge that people from

---

84 Frueh et al, *supra* note 81 at 1027.

85 DeAngelis, *supra* note 76; E Fuller Torrey et al, "Treat or Repeat: A State Survey of Serious Mental Illness, Major Crimes and Community Treatment" (September 2017) at 31, online (pdf): *Treatment Advocacy Center: Office of Research & Public Affairs* <www.treatmentadvocacycenter.org/storage/documents/treat-or-repeat.pdf> [perma.cc/4TFP-TQQR] ("The 200,000 individuals with serious mental illness who have committed major crimes and are living in the community are thus approximately 2% of the total number of people with serious mental illness.").

86 John Montgomery, "Emotions, Survival, and Disconnection", *Psychology Today* (30 September 2012), online: <www.psychologytoday.com/us/blog/the-embodied-mind/201209/emotions-survival-and-disconnection> [perma.cc/DPT5-P2CN]. In many situations, "angry outbursts" are reactions to feelings of fear. TEDx Talks, *supra* note 36.

87 *See infra* Part IV(b)(i) (defining and discussing CPT).

88 *See infra* Part IV(b)(ii) (defining and discussing EMDR).

all genetic predispositions exist. However, other philosophical camps could just as easily argue that no one is irreparably 'broken,' nor is anyone born with a predisposition to mistreat others. Rather, this philosophical camp could posit that individuals who commit maltreatment against other beings do so because they experienced some form of trauma through direct maltreatment or observed maltreatment. For example, a review regarding the prevalence of brain injuries experienced by incarcerated individuals showed that more than half the incarcerated participants reported a history of traumatic brain injury, which was more than the reported rate of traumatic brain injuries by non-incarcerated populations.[89] This review suggests the "relationship between head injury and offending is likely reciprocal, whereby individuals who commit crimes are more likely to have experienced head traumas resulting from physical maltreatment as children and physical assaults as teens and adults."[90] Other instigating factors may also have influenced a person to act violently who also happens to have a mental illness.[91] In turn, this philosophical camp could argue that trauma from those experiences developed into PTSD or another trauma-induced mental illnesses that motivated the affected individual to mistreat others. This violence is a reaction to the trauma as an unhealthy coping or survival mechanism.[92] To support this notion, some researchers hypothesize an individual's development of PTSD does influence their development of other psychiatric illnesses.[93] These hypotheses support the idea that the desire to mistreat others is not an inherent personality trait, but perhaps, a reactive mechanism that developed from untreated trauma. These perspectives do not exculpate individuals of the harm they caused others. But these hypotheses could provide potential reasons behind individuals' motivations to mistreat, which justifies the need to explore further inquiries

---

89 Danielle L Boisvert, "Biosocial Factors and Their Influence on Desistance" in Amy L Solomon & Jennifer Scherer, eds, *Desistance from Crime: Implications for Research Policy, and Practice* (Washington DC: United States Department of Justice Office of Justice Programs: National Institute of Justice, 2021) at 50.

90 *Ibid*, citing Cathy Spatz Widom, "The Cycle of Violence" (1989) 244:4901 Science 160 at 160–66 (emphasis added).

91 *See* Stephanie R Penny, Andrew Morgan & Alexander I F Simpson, "Assessing illness- and non-illness-based motivations for violence in persons with major mental illness" (2016) 40:1 L & Human Behaviour 42 at 42.

92 Charles Siebert, "The Animal-Cruelty Syndrome", *The New York Times* (11 June 2010), online: www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html [perma.cc/Y73Z-QXEJ] [Siebert].

93 *See generally* Kim T Mueser et al, "Trauma, PTSD, and the course of severe mental illness: an interactive model" (2022) 53:1-2 Schizophrenia Research 123 at 123–43 [Mueser et al].

and conduct research that attempts to resolve those motivations so that these individuals do not mistreat others in the future.

C. Defining PTSD

PTSD is an anxiety-ridden mental illness some people develop after experiencing an "extremely traumatic" or "shocking, scary, or dangerous event."[94] PTSD occurs when people who encountered trauma continue to experience fear, or feel afraid and experience their body's natural fight or flight response because of a traumatic situation, even after the situation ceases to exist.[95] Anyone can develop PTSD, and it can occur at any age.[96] People who have experienced combat, physical or sexual assault, maltreatment, an accident, a disaster, other serious events, or who witnessed violence or death may develop PTSD.[97] Therefore, people can develop PTSD when the traumatic event directly affected them, or if they witnessed the traumatic event, as is the case with observed violence or learned violence (two distinct concepts). The National Center for PTSD's research shows that seven or eight of every one hundred people will experience PTSD in their lifetime.[98]

D. Development of PTSD from Traumatic Experiences

Traumatic events are common, and people respond to trauma in different ways. Studies by the National Center for PTSD indicate that sixty percent of men and fifty percent of women experience at least one traumatic event during their lifetime.[99] Some people recover from trauma quickly with little lasting emotional effect.[100] Those individuals are able to process the

---

94 "Post-traumatic Stress Disorder" (last visited 11 April 2021), online: *American Psychological Association* <www.apa.org/topics/ptsd/> [perma.cc/E899-NYCC] [*PTSD* – American Psychological Association]; *see generally* "Post-Traumatic Stress Disorder" (revised 2020), online: *National Institute of Mental Health* <www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/index.shtml> [perma.cc/GJ82-LV5C] [National Institute of Mental Health on *PTSD*].

95 National Institute of Mental Health on *PTSD*, *supra* note 95.

96 *Ibid.*

97 *Ibid*; "About CPT" (last visited 11 April 2021), online: *Cognitive Processing Therapy* <cptforptsd.com/about-cpt/> [perma.cc/SH34-2XR4] [Cognitive Processing Therapy].

98 National Institute of Mental Health on *PTSD*, *supra* note 95, citing "PTSD: National Center for PTSD", (last visited 11 April 2021), online: *United States Department of Veteran Affairs* <www.ptsd.va.gov/> [perma.cc/2X6Q-D6LZ] [United States Department of Veteran Affairs].

99 Johnson, Jang & Bradshaw, *supra* note 8 at 24, citing United States Department of Veterans Affairs, *supra* note 99.

100 SAMHSA on *Trauma and Violence*, *supra* note 60.

trauma-induced symptoms after their exposure to the trauma-causing event, so that symptoms do not become a long-term problem.[101] Other individuals experience challenges in moving forward with their lives after events occur that they perceive as traumatic.[102] This dynamic happens for several reasons, including the person's inability to process the trauma or their lack of recognition that they experienced trauma, which can lead to the long-term development of trauma-induced, adverse effects and subsequent manifested symptoms.[103] Research shows that these untreated effects and manifested symptoms lead to the development of mental illnesses, particularly PTSD.[104] PTSD commonly exists in people who suffer from other mental illnesses, including bipolar disorder, schizophrenia, and major depression.[105] Studies show that people who suffer from these severe mental illnesses experienced high rates of trauma throughout their lives and suffer from PTSD in addition to their severe, diagnosed mental illness.[106] Research also shows that people can heal from trauma and trauma-induced symptoms with appropriate levels of support and intervention.[107]

As previously mentioned, people develop PTSD by directly experiencing or witnessing a traumatic event, or series of traumatic events, particularly ones that involve direct maltreatment or violence, or observed violence, which creates trauma-induced symptoms from which they are not able to recover.[108] People may exhibit PTSD symptoms when they are no longer in danger.[109] PTSD symptoms include "intrusive memories, flashbacks and nightmares; avoid[ing] anything that reminds them of the trauma; and hav[ing] anxious feelings they didn't have before that are so intense their lives are disrupted."[110] Events or circumstances that occurred after the trauma-inducing event may trigger a person's PTSD symptoms and

---

[101] "How to cope with traumatic stress" (30 October 2019), online: *American Psychological Association* <www.apa.org/topics/trauma/stress> [perma.cc/23K3-27LD] [American Psychological Association on *Coping with Traumatic Stress*].

[102] *Ibid.*

[103] *Trauma* – American Psychological Association, *supra* note 43.

[104] SAMHSA, *supra* note 44 at 2.

[105] *See generally* Weili Lu et al, "Cognitive-Behavioral Treatment of PTSD in Severe Mental Illness: Pilot Study Replication in an Ethnically Diverse Population" (2009) 12:1 American J Psychiatric Rehabilitation 73 at 73–91.

[106] *Ibid*, Johnson, Jang & Bradshaw, *supra* note 8 at 10, citing Robyn L Gobin et al, "Lifetime trauma victimization and PTSD in relation to psychopathy and antisocial personality disorder in a sample of incarcerated women and men" (2015) 11:2 Intl J Prisoner Health 64 at 64–74.

[107] SAMHSA, *supra* note 44 at 2.

[108] American Psychological Association on *Coping with Traumatic Stress*, *supra* note 109.

[109] Wake Forest University, *supra* note 29.

[110] *PTSD* – American Psychological Association, *supra* note 95.

cause them to feel stress, fear, or believe they are in danger, as they had in reaction to the PTSD-causing event.[111] Triggers occur when a person has not fully processed their trauma because the brain responds to the trigger as though it is the original threat or traumatic event.[112] Triggers may include people, places, objects, situations, and sensory stimuli that remind a person of the traumatic event, even when a connection between the trigger and the original event is not explicit.[113] Internal triggers may include memories of the event, anxiety, anger, sadness, pain, muscle tension, and feeling "overwhelmed, vulnerable, abandoned or out of control."[114] External PTSD triggers include seeing people who were part of the traumatic event; interacting with someone who may have similar traits or characteristics as someone who was part of the traumatic event and so, acts as a reminder of the event; media, including television shows, movies, or news that remind the person of the traumatic event; specific sounds, such as yelling or sirens that were part of the traumatic event; visual stimuli related to the traumatic event, including colours, pieces of clothing, buildings, or infrastructure; smells that were part of the traumatic event, such as smoke; particular words or phrases; and the anniversary of the traumatic event.[115]

E. Reasons Individuals Mistreat Others

The "one who has been raised in pain, known pain all [their] life, may be acting in pain because that's all [they] can comprehend."[116] For a traumatized person, the need to mistreat an animal or human may come from a skewed perspective that the maltreatment will help the person gain control of the animal, person, or situation—a metaphor for the control the person thought they lost for themself. Because of their untreated trauma—and subsequent PTSD—the person may perceive some external actor takes away their personal control over their life, control that they strive to maintain. However, the person may misidentify the actor as the cause of these emotions and may not realize trauma is the cause of their feelings of lack of control and their resulting frustration. And so, the person reacts to the actor—an animal, person, or situation—in an extreme way, and with a skewed perspective, i.e., violently. Yet, the person may think the violence is

---

[111] "Recognizing PTSD Triggers" (last visited 11 April 2021), online: *International Association of Fire Fighters* <www.iaffrecoverycenter.com/blog/recognizing-ptsd-triggers/> [perma.cc/7JMW-2X5J] [International Association of Fire Fighters].

[112] *Ibid.*

[113] *Ibid*, Trauma Practice, *supra* note 35.

[114] International Association of Fire Fighters, *supra* note 112.

[115] *Ibid.*

[116] Paul Selig, *Beyond the Known: Realization: A Channeled Text*, 1st ed (United Kingdom: St. Martin's Publishing Group, 2019) at 217.

necessary to regain control of their life and well-being. This skewed belief may cause the person to use the same force toward other beings that they experienced during the initial traumatic event that initially 'stole' the person's power and control. Therefore, the person's desperation to maintain power and control as a survival mechanism for self-preservation may manifest into actions society would consider maltreatment.

When perceiving maltreatment as a manifested, reactionary symptom to trauma, a person's abusive behaviour may actually be a coping mechanism "designed to survive adversity and overwhelming circumstances" that happened in the past, are currently manifesting, or indicate emotional distress in reaction to another person's first-hand experience of trauma.[117] Therefore, people who have experienced trauma, particularly maltreatment or violence, may employ such aggressive coping strategies in order to maintain power and control over their lives as a survival mechanism. Unfortunately, the person may attempt to assert this need to regain power and control over a being with whom they share a close relationship.[118] In turn, these forceful actions may impede the other being's ability to preserve their own bodily integrity and so, become maltreatment.[119] This cycle is prevalent between humans and animals, so much so that some researchers of animal maltreatment consider the maltreatment a "power-and-control crime."[120]

As previously mentioned, people who experience traumatic events and PTSD may also experience feelings of shame, guilt, and anger.[121] Therefore, the commission of maltreatment may be an outpouring of the internalized shame, guilt, and anger an IWCM feels about the mistreatment or learned violence to which they were originally exposed.[122] Therefore, the maltreatment of others may be an attempt to manage or suppress that shame and vulnerability by the IWCM who is trying to assert control over their emotions. However, I propose that an IWCM may actually experience more shame, guilt, and anger—or did at one time—rather than heal those emotions when they engage in abusive actions. As a result, they victimize themselves while also victimizing their target of the maltreatment, because the

117 SAMHSA, *supra* note 44 at 9.
118 Natalie J Sokoloff & Ida Dupont, "Domestic Violence at the Intersection of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities" (2005) 11:1 Violence Against Women 38 at 44 [Sokoloff & Dupont].
119 Domestic Abuse Intervention Programs, *supra* note 24.
120 Siebert, *supra* note 93.
121 American Psychiatric Association on *PTSD*, *supra* note 32.
122 *See* Sokoloff & Dupont, *supra* note 119 at 44.

maltreatment exacerbates the emotions from which they are trying to free themselves, rather than making those emotions disappear. Consequently, the individual who commits maltreatment not only perpetuates the maltreatment cycle on themselves, but they also introduce their victim into the maltreatment cycle, which instigates feelings of shame, guilt, anger, and vulnerability in the victim. In response, that victim may mistreat others as a strategy to manage or suppress their shame, anger, guilt, and vulnerability from their abusive, traumatic experience. If these emotions go untreated in both individuals, two IWCMs may exist who continue the maltreatment cycle on new victims.

III. ANALYSIS: THE RELATIONSHIP BETWEEN TRAUMA FROM PRIOR MALTREATMENT OR OBSERVED VIOLENCE AND THE DECISION TO MISTREAT ANIMALS

Individuals who commit maltreatment are still accountable for their actions. However, if we understand the root cause of IWCMs' emotions and thoughts that motivated their reasons for committing maltreatment, we can work with these individuals to resolve those root causes. Consequently, we may be able to help them heal their emotional wounds. In turn, we can protect future victims from maltreatment, pain, and suffering. Based on Part II's discussion of trauma, mental illness, and trauma symptoms that may manifest as the commission maltreatment, the following analysis proposes the perspective that many IWCMs were victims before they hurt others. I also propose the perspective that while some IWCMs may have become victims through maltreatment or violence they experienced directly, other IWCMs may have become victims through observed and learned violence in animal-exploitative industries, animal-harming cultural practices, or domestic violence.

Though this article focuses on maltreatment toward animals, the analysis likely applies to maltreatment of humans too, because of the correlation between violence against animals and violence against humans.[123]

---

[123] *See generally* Carter Luke, Arnold Arluke & Jack Levin, *Cruelty to Animals and Other Crimes: A Study by the MSPCA and Northeastern University* (Massachusetts: Massachusetts Society for the Prevention of Cruelty to Animals, 1997), online (pdf): <support.mspca.org/site/DocServer/cruelty-to-animals-and-other-crimes.pdf?docID=12541> [perma.cc/MWP2-HN2M].

A. Individuals Who Commit Maltreatment May Have Been Victims First

Particularly studied in children, but arguably applicable to anyone who directly experienced previous trauma, "[p]hysical, sexual, and psychological trauma . . . may lead to psychiatric difficulties" that appear later in life.[124] Trauma victims may internalize their "anger, shame, and despair," which creates, "depression, anxiety, suicidal ideation, and post-traumatic stress."[125] However, the victim may turn their anger, shame, and despair outward, as aggression toward others or external situations.[126] Specifically, victims who develop PTSD may "experience increased arousal[,] . . . irritability or outbursts of anger, . . . hyper vigilance, and an exaggerated startle response."[127] Furthermore, individuals who experienced trauma may develop "abnormalities," which include sudden, unexpected emotional outbursts comprised of "sadness, embarrassment, anger, . . . [and] fear."[128] These skewedly developed, volatile, psychological reactions exist beyond premeditation,[129] which may also be symptoms of acute stress disorder.[130] In other words, many individuals may commit these transgressions in a way they believe is a logical means to interact with the world, because trauma derailed their healthy mental development. Again, people are always accountable for their actions toward others. However, this maladjusted reasoning may explain the reasons some trauma-affected individuals believe their maltreatment towards others is acceptable or well-reasoned. These individuals may have been living in a victimized state since the trauma first caused their PTSD and related mental illnesses. Their reactions to spontaneous and untreated trauma-induced emotional charges, which could come from unexpected triggering, may influence these individuals to

---

124 Teicher, *supra* note 84 at 3.

125 *Ibid.*

126 *Ibid.*

127 *Ibid* at 5.

128 *Ibid* at 6.

129 *Ibid* at 11–13 (discussing subsequent brain development and associated symptoms for adolescents who experience maltreatment); Kimble et al, *supra* note 37 at 2 (discussing the skewed perspectives people who experience trauma may develop); *TIP 57*, *supra* note 26 at 65–66.

130 Acute Stress Disorder may develop after someone experiences a traumatic event. People who develop Acute Stress Disorder do not always develop PTSD, and vice versa. "Acute Stress Disorder vs. PTSD: What's the Difference?" (updated 31 August 2021), online: *Recovery Village* <www.therecoveryvillage.com/mental-health/acute-stress-disorder/acute-stress-disorder-vs-ptsd/#:~:text=Acute%20stress%20disorder%20refers%20to,lasted%20longer%20than%20a%20month> [perma.cc/KS48-HA79].

harm others to ameliorate the victimization they experience from those emotional charges. Devastatingly, their impulsive reactions to these emotional charges create victims out of other beings if the reactions are violent or abusive. Therefore, when trauma-affected victims commit maltreatment, it may be a reaction to the maltreatment or learned violence they experienced, and so, their maltreatment re-victimizes themselves and others.

This transfer from victimization to victimizer may be particularly apparent in people who experienced direct or observed violence as children and then either 1) committed violence against animals during their childhood, or 2) committed violence against animals or adults during their adulthood.[131]

B. The Connection Between Direct Maltreatment, Observed Violence, and Learned Violence to Future Animal Maltreatment

Studies show that "[c]hronic and prolonged" violence can develop into a "dysfunctional routine," which families and communities may perpetuate, depending on the context in which the violence exists.[132] This dysfunctional routine can also apply to exposure to chronic and prolonged violence.[133] This relationship between violence—family and/or community—and trauma development, connect violence that an individual experienced to violence that same individual later commits.[134] Trauma "appears to be the connecting factor" through an individual's experienced and perpetuated violence.[135] Therefore, I support the perspective that people develop trauma by experiencing direct maltreatment or violence, and that trauma may manifest into future maltreatment. Additionally, I propose the perspective that people may develop trauma by watching, or participating in, maltreatment or violence against animals. An inexhaustive list of examples of such maltreatment may include treatment of animals in animal-exploitative industries, culturally accepted practices that harm animals like

---

131 To note, research indicates that a child's violence against animals is not always a prediction for that person's violence against humans as an adult. This (becoming outdated) theory is called the 'graduation hypothesis.' For more discussion on the limits of this theory and alternative perspectives, *see Laura* A Reese, Joshua J Vertalka & Cassie Richard, "Animal Cruelty and Neighborhood Conditions" (2020) 10:11 Animals 1 at 3.

132 Vittoria Ardino, "Offending behavior: the role of trauma and PTSD" (2012) 3:1 European J Psychotraumatology 1 at 1–4.

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

hunting or animal fighting, or observations of family or community members harming animals.[136] These observations may influence the trauma-affected individual to continue that violence through a misguided method of managing their trauma. This method, therefore, becomes the individual's unhealthy attempt to regain power and control of themself.[137] The trauma-affected individual may also continue the maltreatment and violence because they believe these practices are accepted and expected by their communities and/or cultures. However, I propose that their re-enactment of this maltreatment and violence builds on the trauma the individual experienced from their first observation of violent acts. In turn, the individual re-victimizes themself, which likely plays a role in their development of PTSD and other mental illnesses and victimizes the animal within their control.

1. Direct Maltreatment's Role in Future Animal Maltreatment

Some studies illustrate a connection may exist between a person being the target of maltreatment or violence, and in turn, abusing another being.[138] Specifically for sexual maltreatment, thirty-five percent of men and one percent of women who experience maltreatment tend to mistreat others.[139] Though much of the available research is limited to sexual maltreatment, the research does illustrate potential trends for the mistreated-becomes-mistreater cycle in other forms of maltreatment. Dr. Randall Lockwood focuses on this cycle of maltreatment through the National Link Coalition.[140] Dr. Lockwood explained in one interview—focusing on domestic violence and children—that "[c]hildren who have witnessed such maltreatment or been victimized themselves frequently engage in what are known as 'abuse reactive' behavio[u]rs."[141] A child may

---

136 *Infra* Part III(b)(ii).

137 *Supra* Part II(e). *See, e.g.*, *See* Ivya Shiue, "Violence Pathology, Epidemiology, Risks and Rehabilitation: a Global Challenge in the next Century" (2014) 2 Planet@Risk 386 at 387–88 (explaining a similar cycle between violent environments and the need for the victim to assert authority as a survival mechanism in response to exposure to violent environments, which lead to the victim's conscious and unconscious decision to commit violence against others, to promote the victim's self-interests that the original violent environment disregarded) [Shiue].

138 *See, e.g.,* M Glasser, "Cycle of child sexual abuse: Links between being a victim and becoming a perpetrator" (2001) 179:6 British J Psychiatry 482 at 482–94 (showing that a slight correlation exists in males who were mistreated when they were young, who then mistreat others in adulthood).

139 *Ibid* at 482.

140 "Home" (last visited 11 April 2021), online: *National Link Coalition* <nationallinkcoalition.org/> [perma.cc/6275-944V].

141 Siebert, *supra* note 93. Other variables may influence this connection in addition to

re-enact the maltreatment they experienced on individuals over whom they can take away power and control, in the same way the person who mistreated the child took away the child's individual power and control.[142] The mistreated child's younger siblings and companion animals become convenient targets[143] because they cannot effectively defend themselves in the same way the child committing the maltreatment could not defend themself from the maltreatment they experienced. Though studies regarding the mistreated-becomes-mistreater cycle focus on children and their development, I posit that this cycle also occurs with adult victims.[144]

2. Observed Violence and Learned Violence's Role in Future Animal Maltreatment

Though direct maltreatment may play a significant role in instigating maltreatment against animals, I propose that observed and learned violence play an even more insidious role in the trauma-induced human-animal maltreatment cycle because accepted violence against animals is prevalent in many cultures and profit-driven industries that use animals. To reiterate, observed violence occurs when a person witnesses another person commit violence. In turn, learned violence occurs when someone observes violence, believes violence is normal or acceptable, and so, commits violence toward others.[145]

---

direct maltreatment.

142 *Ibid.*

143 *Ibid.* Note, however, that this relationship—harmed child harms animals—does not mean violence against animals is a *step* IWCMs graduate through before harming humans. Rather, current research suggests that people who engage in anti-social violence are unlikely to restrict themselves to one victim or one species of victims. *See generally* Eleanora Gullone, "An Evaluative Review of Theories Related to Animal Cruelty" (2014) 4:1 Journal of Animal Ethics 37 at 37–57; Emily G Patterson & Heather Piper, "Animal Abuse as a Sentinel for Human Violence: A Critique" (2009) 65:3 Journal of Social Issues 589 at 589–614; Clifton P Flynn, "Examining the links between animal abuse and human violence" (2011) 55 Crime L & Soc Change 453 at 453–68; Cassie Richard & Laura A Reese, "The Interpersonal Context of Human/Nonhuman Animal Violence" (2019) 32:1 Anthrozoös 65 at 65–87. As Pamela Frasch explains, society should "Recogniz[e] the Link for what it truly is—an observation of a correlation between differing classifications of violent conduct with some predictive value." Pamela Frasch, "Examining Anticruelty Enhancements: Historical Context and Policy Advances" in Lori Gruen & Justin Marceau, eds, *Carceral Logics* (United Kingdom: Cambridge University Press, 2022) at 86.

144 *See* Teicher, *supra* note 84 at 7 (explaining that participants in his work—who experienced physical and/or sexual maltreatment—showed similar physical symptoms in the study's limbic scans, regardless of whether participants experienced maltreatment before they were eighteen-years-old or after they were eighteen-years-old).

145 Criminal Justice, *supra* note 28.

Learned violence may occur through socio-cultural practices or intimate familial conflicts that society does not currently acknowledge as violence.[146] In other words, the learned violence involves harm to others that objectively causes injury, pain, suffering, etc., but the violence is so normalized that society subjectively does not identify the harm as a problem. Therefore, a victim/observer may not realize the actions they witness are maltreatment because the sociocultural context has normalized/accepted the anti-social and objectively injurious behaviour. To illustrate this point, some experts in the social work field suggest that alternative means should exist that identify and measure types of domestic violence,[147] which would align with the 'intimate familial conflict' concept. These alternative measurements should exist because "mainstream measures of domestic violence" have "major limitations" that "lack sociocultural contexts."[148] As an example, "[w]hat is considered domestic violence or a specific meaning a woman may give to her partner's act is partly based on the [woman's] viewpoint shaped by her sociocultural background."[149] To illustrate: Cisgender Woman A in Community A grew up with the cultural expectation that her cisgender husband slapping her for not cleaning the house is acceptable. However, cisgender Woman B in Community B would consider her cisgender husband slapping her for not cleaning the house as maltreatment and inexcusable, because Community B's culture deems that behaviour as unacceptable and violent.

Therefore, one person may consider an act of violence as normal—society has subjectively normalized an act so that society does not consider it a problem, but the act is objectively violent because of the injury, pain, suffering, etc. it causes—because it is a common response within that person's socio-cultural background. But another person who is not conditioned to that violent act as a normative response may consider the act inappropriate and abusive. Regardless of whether an individual considers the violent act normal or abnormal, the person who experiences the violence may still develop trauma. The issue becomes whether the person recognizes the trauma, or if the trauma and its manifested symptoms integrate into the person's life and disguise as personality traits. If the trauma and symptoms become part of the person's conditioning, the person

---

146 Other examples of learned violence may also exist.

147 Sokoloff & Dupont, *supra* note 119 at 42.

148 *Ibid.*

149 *Ibid*, citing Mieko Yoshihama, "Domestic violence against women of Japanese descent in Los Angeles: Two methods of estimating prevalence" in Mangai Natarajan, ed, *Domestic Violence: The Five Big Questions*, 1st ed (London: Routledge, 2007) at 869–97.

may then enable and perpetuate the conditioned violence and trauma into their family, local community, and culture.[150]

This relationship between implicit violence and normative, violent cultural practices could translate to an individual's perspective of maltreatment and violence toward animals, based on socio-cultural norms and expectations surrounding the use/exploitation of animals. Furthermore, manifested trauma, particularly trauma derived through socio-culturally influenced learned violence toward animals, could influence the methods humans choose to manage their trauma and PTSD. These methods may turn into further maltreatment of animals and humans. In short, people who commit maltreatment may not realize their actions towards animals and other humans are maltreatment because they have witnessed other humans act out this behaviour without repercussions, because the actions are socio-cultural or economic norms. However, and without the individual realizing it, those norms may create and perpetuate unrecognized trauma for that individual and the beings on the receiving end of the conditioned behaviours. The individual's most readily available option to deal with the pain and suffering the trauma causes is to act in a way that makes them feel in control, because they do not understand the origins of their pain and suffering. They do not understand the origins because they grew up within a culture that accepted the trauma-inducing practices.[151] As a result, the individual cannot articulate the reasons they feel a sense of loss and control; they cannot pinpoint specific actions that their culture has condoned as appropriate violence. And so, the individual copes with their desire to regain control by treating animals and humans in the same way these individuals have watched others—who are also likely dealing with trauma—use violence to interact with animals and humans.

This collective agreement may create a culture that individuals do not recognize as maltreatment, which then transcends communities and creates multi-generational trauma and normalized, abusive practices. For instance, studies show that slaughterhouse workers experience trauma and subsequently develop PTSD from their time working in slaughterhouses and killing animals.[152] Studies have also found that some slaughterhouse workers commit crimes, including rape and sexual offences and offences against family members, which the studies have correlated to such

---

150 *See* Shiue, *supra* note 138 at 387 (discussing similar observations regarding the effects of conditioned violence in families, communities, and cultures).

151 'Culture' could be any form of communal/shared experience, including macro-cultures such as 'Western Culture,' or micro-cultures such as individual households.

152 "Confessions of a slaughterhouse worker", *BBC News* (6 January 2020), online: <www.bbc.com/news/stories-50986683> [perma.cc/HA88-ZXJZ].

individuals' working environments.[153] This cycle seems to integrate learned violence into communities and models abusive behaviours for younger generations. In reaction to the normalized violence, these groups may experience trauma from observing the actions of individuals they respect. They may not recognize the observed violence is unacceptable and use the same forms of violence to try to manage their new feelings of loss of control or to imitate modelled behaviour. They hurt others by re-enacting the modelled behaviour and then create victims by hurting others in misperceived, socially accepted, or acculturated ways. And so, the observed and learned violence and the maltreatment cycle continue.

Some examples of such normative practices may include:

Animal Exploitative Industries	**Animal-Based Food Industry**[154] Meat industry through forced animal reproduction methods, growing, transporting, and slaughtering animals, and unnecessary maltreatment that stems from industry culture. Animal by-product production through forced animal reproduction, growing and transporting animals, animal extraction, killing unwanted animals such as male chicks and male calves, slaughtering animals who no longer produce raw materials for by-products, and unnecessary maltreatment that stems from industry culture. **Research and Experimentation Industry**

[153] *See, e.g.*, Jessica Slade & Emma Alleyne, "The Psychological Impact of Slaughterhouse Employment: A Systematic Literature Review" (2021) 0:0 Trauma, Violence, & Abuse 1 at 5 (stating "[t]he link between crime rates and slaughterhouse employment when controlling for social disorganization variables" include an "[i]ncrease in total arrests (22%), rape (166%), [and] offences against the family (90%)").

[154] Cheryl Leahy, "Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement" (2011) 4 J Animal L & Ethics 63 at 91.

	Any experimentation or studies that involve animals, manipulating animals in any way, hurting or killing animals for any reason, holding animals in facilities or keeping them in isolation, etc. **Retail** Breeding, raising, managing, killing animals, and removing body parts from animals (dead or alive) for fur, skin, organ donations, or other resources. **Entertainment** Breeding, raising, managing, selling, trading, exhibiting, or killing animals for or in shows, movies, rodeos, zoos, roadside zoos and menageries, fairs, etc. Arguably, observed depictions of violence towards animals through art, movies, video games, etc., even when the animals in those depictions are not actual, living beings.
Cultural Practices	Trophy hunting and subsistence (non-trophy) hunting. Sport fishing and subsistence (non-sport) fishing. Animal Fighting (dog, cock, bull, fish, interspecies, etc.). Cuisine. Use in military combat. Euthanization of shelter animals. Tethering dogs outside/ Believing dogs should only live outside.

	4-H programs[155] and animal experimentation in primary and secondary education.

Regarding the proposed idea that cultural practices that harm animals induce trauma: Generally, the legal, mental health, and social work fields, and my proposed research must recognize that systemic forms of oppression influence communities' cultural experiences of violence.[156] These forms of oppression may include racism, colonialism, economic and animal exploitation, and heterosexism.[157]

Domestic Violence	Adult Human to Adult Human. Adult Human to Animal. Child Human to Child Human. Child Human to Animal.

Regarding the proposed idea that observed and learned violence can occur through violence at home: The legal, mental health, and social work fields, and my proposed research must approach maltreatment and violence in a way that does not simplistically analyze the role of domestic violence.[158] Additionally, different definitions of domestic violence exist for different cultures, as do varying perspectives regarding actions that constitute mild and severe maltreatment.[159]

Children who are exposed to domestic violence (direct or observed) may have a propensity to commit violence against animals.[160] This propensity may exist for several reasons. One study from the 1980s showed that seven-to-ten-year-olds identified two companion animals, on average, whom they felt were important to their lives.[161] As Dr. Lockwood states, "One way to think of what animal abuse does to a child might simply be to consider all

155 4-H animal programs focus on youth development and focus on children raising farmed animals and then sending those animals into the animal agriculture industry. *See* "4-H Animal Programs" (last visited 10 November 2021), online: *Pennsylvania State College of Agricultural Sciences* <animalscience.psu.edu/outreach/youth> [perma.cc/6DY2-KRNG].

156 Sokoloff & Dupont, *supra* note 119 at 45.

157 *Ibid.*

158 *Ibid* at 46.

159 *Ibid* at 42.

160 *See generally* Colorado Link Project, *supra* note 23, *and* Frank Ascione, ed, *International Handbook on Animal Abuse and Cruelty: Theory, Research, and Application*, 1st ed (Indiana: Purdue University Press, 2008).

161 Siebert, *supra* note 93.

the positive associations and life lessons that come from a child's closeness to a pet . . . and then flipping them so that all those lessons and associations turn negative."[162] Another reason children choose to mistreat—or eventually mistreat animals as adults—is because of the children's need to "overcome powerlessness and gain control" that another person took away from them.[163] Dr. Lockwood explains,

> [C]hildren who witness the family pet being abused have been known to kill the pet themselves in order to at least have some control over what they see as the animal's inevitable fate. Those caught in such a vicious abuse-reactive cycle will not only continue to expose the animals they love to suffering merely to prove that they themselves can no longer be hurt, but they are also given to testing the boundaries of their own desensitization through various acts of self-mutilation. In short, such children can only achieve a sense of safety and empowerment by inflicting pain and suffering on themselves and others.[164]

We can likely extrapolate these feelings and motivations to adults as well. Though children's developmental stages and cognitive processes have not fully formed compared to those of adults, some adults still feel the need to assert power and control when they feel someone or something has deprived them of their personal agency.[165] Furthermore, many children who witness violence against animals in their families may not have the opportunity to resolve the trauma that maltreatment caused, and so, the children mature into adults who then may feel motivated to hurt animals (and humans)—as the only way they know how—to process the trauma and trauma-induced symptoms they have been trying to manage for years.

IV. ANALYSIS: THE CURRENT JUSTICE SYSTEM AND THERAPY'S ROLE IN ENDING ANIMAL MALTREATMENT

Three primary theories exist regarding the criminal justice system's management of crime and enforcement of punishment. The 'retributive justice theory' argues that people who committed crimes should receive a punishment that is proportionate to the crime they committed and the pain and suffering the victim(s) experienced during the crime's commission.[166] 'Restorative justice' focuses on the crime victim's participation in resolving the conflict the crime caused, works to 'repair' the harm the crime caused,

---

162 *Ibid.*

163 *Ibid.*

164 *Ibid.*

165 *Supra* Part II.

166 "The Three Theories of Criminal Justice" (last visited 8 November 2021), online: *CriminalJustice.com* <www.criminaljustice.com/resources/three-theories-of-criminal-justice/> [perma.cc/GWN7-PSAA].

and facilitates community-based experiences for the person who committed the crime to seek redemption.[167] The third theory, 'transformative justice,' focuses on identifying root causes of the crime by identifying inequalities that might exist systemically (i.e., social, political, and economic systems).[168] Transformative justice perceives the criminal justice system as being systemically unjust through its victim-offender dichotomy.[169] Furthermore, this theory argues the traditional criminal justice system revictimizes the crime victim and victimizes criminal offenders.[170] I argue that the historical approach to regulating animal maltreatment has been primarily retributive, which re-victimizes the crime victim, victimizes the IWCM, and perpetuates systemic oppression rather than effectively preventing future maltreatment. To prevent future maltreatment, we should move away from retributive justice and instead, adopt transformative justice. Transformative justice partnered with trauma-informed therapy programs, such as CPT and EMDR,[171] could identify and resolve the root causes for individuals' motivations to mistreat others (i.e., trauma-induced symptoms, trauma-induced PTSD, and other trauma-induced mental illnesses), enable IWCMs to be accountable for their actions through personal empowerment by helping them take control of their personal healing, protect maltreatment victims from further victimization, and prevent future animal and human maltreatment.[172]

A. Insufficiencies Within the Current Justice System to End Animal Maltreatment

The judicial system's historically retributive approach toward punishing IWCMs for maltreatment they commit against animals is insufficient and perpetuates the maltreatment cycle and systemic oppression. The system operates through fear of imposing fines, animal possession bans, incarceration, ostracization, and separation of an IWCM from their community. Many of these sentences do protect animals and prevent animal maltreatment from occurring. However, I propose that traditional sentences—without resources that address the potential historic and

---

167 *Ibid.*

168 *Ibid.*

169 *Ibid.*

170 *Ibid.*

171 *Infra* Part IV(b).

172 The concept of using cognitive-focused therapies to rehabilitate offenders is developing momentum in other countries. *See* Osebor Ikecukwu Monday, "Ethics of Cognitive Restructuring: A Rehabilitation of Rape Victims and Offenders" (2021) 6 Voices in Bioethics 1 at 1 [Monday].

recurring trauma individuals who offended may have experienced—create a system that takes more power and control away from a trauma-affected IWCM by imposing these punishments. This system then likely exacerbates the IWCM's previous feelings of fear, lack of power, and control. In turn, the system invokes in the IWCM feelings of guilt, shame, anger, and vulnerability, which are feelings that their original traumatic event invoked in them.[173] If we argue that entering the legal system is itself a traumatic event,[174] then we could argue that the IWCM has experienced layered trauma through 1) their initial traumatic event; 2) the maltreatment or violence they committed; and then 3) law enforcement, a judge, and attorneys controlling the IWCM's future through the process of charging, convicting, and possible incarceration or other punishment. To underscore this point, studies show that histories of personal trauma exist within many incarcerated individuals in the criminal system and the juvenile system.[175] Experiencing the court system adds another layer of trauma to these individuals' psyches, who are already challenged by previous trauma with which they were not able to healthily cope.

The current legal system's creation of more trauma for these individuals, and the system's inability or decision to not provide opportunities for traumatized individuals to heal through therapeutic programs may recycle these individuals' fears and increase their motivations for abusing animals and humans. Therefore, the legal system's retributive approach and lack of rehabilitative resources may perpetuate the maltreatment cycle and create more victims. In fact, the Substance Abuse and Mental Health Services Administration (SAMHSA) states that "organizational practices"—which may include the existing legal and incarceration systems—"may trigger painful memories and re-traumatize clients with trauma histories."[176] Non-incarceration examples of re-traumatization through organizational practices may include restraining sexual maltreatment victims or putting child victims of neglect in seclusion rooms.[177] Arguably, much of the legal system operates in the same way as organizational practices that do not use trauma-informed approaches, but rather, focus on retributive measures for crimes committed.[178] For instance,

---

173 *Supra* Parts II(c) and (e) (describing the symptomatic emotions individuals feel who experienced traumatic events, which induced PTSD development).

174 SAMHSA, *supra* note 44 at 2.

175 *Ibid.*

176 *Ibid* at 10.

177 *Ibid.* To note, these examples of organizational practices would not be part of trauma-informed therapy.

178 Michelle S Phelps, "Rehabilitation in the Punitive Era: The Gap between Rhetoric and Reality in US Prison Programs" (2011) 45:1 L & Society Rev 33 at 33.

an IWCM's initial traumatic event likely deprived them of their sense of power and control. In turn, the retributive legal system seeks justice by enforcing punishments that deprive the IWCM of their power and control by preventing their interactions with animals, or confining them to prison, as examples. In short, the legal system enforces punishments, which reinforce the same emotions and belief systems with which the IWCM was already struggling. Therefore, this retributive system is, arguably, inherently abusive: It enforces punishments that tend to inflict pain and suffering similar to the pain and suffering the victim experienced from the convicted person's original crime. (Stage Four of Hogarth's theory). Consequently, when the IWCM has 'repaid' their debt to society by completing the punishment, they leave the experience with the same sense of powerlessness and loss of control as they developed from their original traumatic experience, which will likely induce them to mistreat again.

The retributive system continues the maltreatment cycle, but on a macroscopic scale. As previously explained, this system arguably re-victimizes the IWCM. The current legal system, therefore, may act as a triggering system that motivates the punished individual to commit future maltreatment because of 1) their re-victimization; 2) new and additional trauma from their experience with the legal system; and 3) their reactive shame, frustration, anger, fear, and need to regain power and control to protect themselves from these reactions to the legal system. Therefore, when retributive systems focus on punishment and incarceration, such systems arguably victimize IWCMs, and facilitate environments that create more animal and human victims whom IWCMs mistreat, to ameliorate their pain and suffering from their experience within this system.

Incarceration. First, incarceration by itself is not an effective form of rehabilitation.[179] For example, a 2014 Australian survey showed that 45.8 percent of previously incarcerated individuals re-offended and became incarcerated again, within two years of their initial release.[180] Despite the Australian Government's assertion of resources to reduce crime and recidivism, rates of individuals re-offending within twelve months from their previous release from incarceration increased by 3.7 percent between 2012 and 2018.[181] Second, incarceration without supportive, psychological

---

[179] Aimee Pitt, "The Functions of Incarceration and Implications for Social Justice" (2021) 4:1 Soc Work & Policy Studies: Social Justice, Practice & Theory 1 at 10 [Pitt].

[180] *Ibid*, citing Austl, New South Wales, Audit Office of New South Wales, *New South Wales Auditor-General's Report*, (Financial Audit Volume 7 2015) (Sydney: Audit Office of New South Wales, 2015).

[181] *Ibid*, citing Austl, New South Wales, Audit Office of New South Wales, *Justice 2018*, (Financial Audit) (Sydney: Audit Office of New South Wales, 2018).

rehabilitation is ineffective for individuals who suffer from trauma and trauma-induced mental illnesses. It may also further perpetuate the maltreatment cycle. In fact, studies show that incarceration detrimentally affects individuals with mental illnesses.[182] Specifically, many incarcerated individuals enter the prison system with undetected and, therefore, untreated PTSD, a mental illness that 1) inhibits individuals from being successful in rehabilitative prison programs, and that 2) has an association with higher rates of future offending.[183] To note, approximately twenty percent of incarcerated individuals suffer from serious mental illness.[184] And, fifty percent of incarcerated men and seventy-five percent of incarcerated women in state prisons, and sixty-three percent of incarcerated men and seventy-five percent of incarcerated women in state jails, experience "broad-based" forms of mental illness that require therapy or treatment.[185] Third, the theory that people "age out"[186] of crimes may not work with people who committed crimes based on trauma. A person's trauma and trauma-induced symptoms perpetuate themselves and increase when a person cannot process them in a healthy, safe way.[187] Therefore, incarceration without support that would help heal the trauma and PTSD would not fix the IWCM's illnesses, but could, in fact, exacerbate them.[188]

For these reasons, incarcerated individuals who suffer from trauma and trauma-induced mental illness—thirty to sixty percent of incarcerated men,

---

[182] Christopher Wildeman, "The Impact of Incarceration on the Desistance Process Among Individuals Who Chronically Engage in Criminal Activity" in Amy L Solomon & Jennifer Scherer, eds, *Desistance from Crime: Implications for Research Policy, and Practice* (Washington DC: United States Department of Justice Office of Justice Programs: National Institute of Justice, 2021) at 87, citing Michael Massoglia & William Alex Pridemore, "Incarceration and Health" (2015) 41 Annual Rev Sociology 291 at 291–310; Kristin Turney, Christopher Wildeman & Jason Schnittker, "As Fathers and Felons: Explaining the Effects of Current and Recent Incarceration on Major Depression" (2012) 53:4 J Health & Social Behavior 465 at 465–81.

[183] Clare S Allely & Bob Allely, "Post traumatic stress disorder in incarcerated populations: current clinical considerations and recommendations" (2020) 10:1 J Criminal Psychology 30 at 30.

[184] Johnson, Jang & Bradshaw, *supra* note 8 at 9, citing US, Bureau of Justice Statistics, Office of Justice Programs, *Mental Health Problems of Prison and Jail Inmate* (Washington, DC: US Department of Justice, 2006).

[185] *Ibid.*

[186] Dana Goldstein, "Too Old to Commit Crime?" (20 March 2015), online: *The Marshall Project* <www.themarshallproject.org/2015/03/20/too-old-to-commit-crime> [perma.cc/63R2-PA22].

[187] *Supra* Part II.

[188] Johnson, Jang & Bradshaw, *supra* note 8 at 9, citing Gresham Sykes, *The Society of Captives: A Study of Maximum Security Prison*, (Princeton, NJ: Princeton University Press, 1958).

compared to three to six percent of the "general male population"[189]—need trauma-informed therapy resources to help them heal so that they do not commit the same violence and maltreatment against other beings when they re-enter their communities.[190] Furthermore, these individuals may need strong support systems from their communities within and outside of prison.[191] These support systems could propel IWCMs' continued healing after they finish their incarceration periods and as they reintegrate into society.[192] These community support systems would need to exist to prevent triggers from instigating adverse memories or emotions that could cause IWCMs to revert to their former survival mechanisms to maintain power and control, which could lead them to commit violence or maltreatment once more.

Psychological Evaluations. Psychological evaluations for people who suffer from trauma, without supportive rehabilitation are insufficient. Evaluations may identify the fact that the person who committed maltreatment is suffering from a mental illness, will likely identify that mental illness, and offer treatment recommendations.[193] However, the evaluation, without

---

189 *Ibid* at 10.

190 *See generally* Sarah M Pringer & Nathaniel J Wagner, "Use of Trauma-Informed Care With Incarcerated Offenders" (2020) 41:1 J Addictions & Offender Counseling 52 at 52–64; Victoria Jackson et al, "Trauma-informed sentencing of serious violent offenders: an exploration of judicial dispositions with a gendered perspective" (2021) 28:5 Psychiatry, Psychology & L 748 at 748–73; Karen Gueta et al, "Trauma-oriented recovery framework with offenders: A necessary missing link in offenders' rehabilitation" (2022) 63 Aggression & Violent Behavior 101678 at 101678; Dana Lehrer, "Trauma-Informed Care: The Importance of Understanding the Incarcerated Women" (2021) 27:2 J Correctional Health Care 121 at 121–125 (discussing various studies that show the benefit of trauma-informed treatment for incarcerated individuals' healing and coping with life in and outside of prison).

191 For instance, one study on First Nations people who have been incarcerated showed that these individuals have cultural needs that the prison system does not address. These individuals' loss of family and culture exacerbate their trauma, mental illnesses, and physical health issues. Pitt, *supra* note 180 at 7, citing Leda Sivak et al, *Model of Care for Aboriginal Prisoner Health and Wellbeing for South Australia—Final Report*, (South Australia: Wardliparingga Aboriginal Health Research Unit, 2017) at 13, online: <www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/resources/sa+prison+health+service+model+of+care+for+aboriginal+prisoner+health+and+wellbeing+for+south+australia> [perma.cc/WF44-G54C].

192 *See* Johnson, Jang & Bradshaw, *supra* note 8 at 33 (explaining that people who do not have a strong—or perceive to not have a strong—community and support system tend to react more severely to trauma than individuals who do have a strong—or perceive they have a strong—community and support system).

193 "Understanding psychological testing and assessment" (2013), online: *American Psychological Association* <www.apa.org/topics/testing-assessment-measurement/understanding> [perma.cc/2U8N-SN4C].

treatment, does not resolve the root causes of the mental illness. Furthermore, many psychological assessments do not adequately screen for trauma or PTSD symptoms.[194] Yet, adequate screening is essential in helping mental health professionals recognize and record trauma and PTSD symptoms in their clients.[195] In fact, mental health professionals have expressed the need to provide individuals who have severe mental illnesses with trauma-related services that could heal these individuals of their PTSD and co-existing, severe mental illnesses.[196]

Treatment. Treatment without evaluating the IWCM for trauma and PTSD is insufficient. SAMHSA generally critiques public institutions and public services for individuals who suffer from trauma because they are "often themselves trauma-inducing."[197] This critique suggests that systems that exist to 'fix' IWCMs' mental health issues, but that do not address trauma that may have been the root cause of IWCMs' committed maltreatment, could re-trigger their reaction to trauma through the therapy process. Therefore, treatment without an evaluative component to identify potential, extant trauma could contribute to an IWCM's choice to commit maltreatment again. However, the IWCM's need to regain control, maintain self-preservation, and protect themselves from experiencing adverse effects would come from the very system that was supposed to alleviate them from their emotional and mental pain and suffering.

This dynamic in which therapy potentially reinforces trauma[198] requires society—and all professional sectors involved in animal and human violence—to re-evaluate its current system of treating IWCMs. To avoid the pitfalls treatment insufficiencies cause, local governments and communities should provide trauma-informed therapy options for IWCMs, especially for IWCMs who show signs of suffering from PTSD. Trauma-informed therapy could help stop IWCMs' trigger cycle by healing IWCMs of their PTSD and trauma-induced reactions that manifest as violence.[199] The healing of these trigger reactions would then stop the maltreatment cycle and protect animals and humans from future maltreatment.

---

[194] SAMHSA, *supra* note 44 at 9.

[195] *Ibid.*

[196] Frueh et al, *supra* note 81 at 1027.

[197] SAMHSA, *supra* note 44 at 2.

[198] *Ibid* at 3.

[199] *See generally* Jon Taylor & Kerensa Hocken, "Hurt people hurt: using a trauma-sensitive and compassion focused approach to support people to understand and manage their criminogenic needs" (2021) 23:3 J Forensic Practice 301 at 301–15 (exemplifying calls for systemic changes in therapy to address the underlying reasons that cause the motivations of individuals to harm others).

B. The Need for Trauma-Informed Therapies to Heal PTSD and Prevent Future Maltreatment

Trauma presents itself in different ways and at different times in people's lives, sometimes seemingly without rhyme or reason in relationship to healing. Healing is not linear.[200] Working with an individual to heal their trauma, trauma-induced symptoms, and trauma-induced mental illness, like PTSD, allows them to heal from and resolve their trauma at the core of where the maltreatment occurred. Many mental health practitioners help clients work through their trauma using trauma-informed therapy.[201] Some trauma-informed therapies exist within the therapy umbrella of Cognitive Behavioural Therapy (CBT), which focuses on changing unhelpful ways of thinking, changing patterns of unhelpful behaviour to beneficial behaviour, and teaching healthy coping mechanisms to relieve symptoms from psychological challenges.[202] To note, studies show that some CBTs effectively reduce recidivism when legal systems implement them for intervention programs for individuals who have offended.[203] Trauma-informed therapy "realizes the widespread impact of trauma and understands potential paths for recovery; **recognizes** the signs and symptoms of trauma in clients, families, staff, and others involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization."[204] A trauma-informed approach includes six principles to heal the trauma-affected individual: 1) safety; 2) trustworthiness and transparency; 3) peer support; 4) collaboration and mutuality;

---

[200] The Michigan State University Center for Survivors uses this phrase when working with clients. For more information on the center, *see* "MSU Center for Survivors" (last visited 2 November 2, 2022), online: *Michigan State University Center for Survivors* <centerforsurvivors.msu.edu/> [perma.cc/9J5B-SKQX] [MSU Center for Survivors].

[201] *TIP 57*, *supra* note 26 at 11–13.

[202] For more information on CBT, *see* "What is Cognitive Behavioural Therapy?" (last visited 17 November 2021), online: *American Psychological Association* <www.apa.org/ptsd-guideline/patients-and-families/cognitive-behavioural#> [perma.cc/8HTJ-3HAN].

[203] Kristofer Bret Bucklen, "Desistance-Focused Criminal Justice Practice" in Amy L Solomon & Jennifer Scherer, eds, *Desistance from Crime: Implications for Research Policy, and Practice* (Washington DC: United States Department of Justice Office of Justice Programs: National Institute of Justice, 2021) at 122 [Bucklen]. Results of CBT's effectiveness vary by the target population (juveniles versus adults, the types of crimes the offender who participates in CBT committed, *ibid*, and likely the specific type of CBT program in which the offender participates).

[204] SAMHSA, *supra* note 44 at 9 (emphasis in the original).

5) empowerment, voice, and choice; and 6) cultural, historical, and gender issues.[205]

Studies show therapy programs that focus on healing PTSD, and so, are trauma-informed, in individuals are successful. For instance, one study used a CBT, PTSD-focused program for clients who were experiencing "substance dependence, suicidal ideation, cognitive impairment, psychotic symptoms, [and] acute psychosocial stressors" and whom medical practitioners diagnosed with PTSD, as well as bipolar disorder and schizoaffective disorder.[206] All the clients who participated in the study completed the therapy program.[207] The study's results showed that participating clients significantly decreased their PTSD and that two-thirds of the clients no longer met the criteria for having PTSD at their three-month check-in.[208] Participating clients also showed improvements in other psychiatric symptoms they exhibited when they first began the program.[209] These results show that trauma-informed therapies can help individuals heal from their trauma as well as severe mental illnesses. If these forms of therapy can end the stress-inducing symptoms and psychological causes that may lead individuals to commit violence against others, then we may be able to prevent the maltreatment cycle from occurring in people who commit maltreatment in reaction to their trauma. To note, youth treatment is different than adult treatment.[210] Therapy and its application need to be sensitive to clients' ages, as well as their cultural, language, and socio-economic backgrounds.

Two notable trauma-informed therapies exist that specifically treat PTSD and ameliorate PTSD symptoms:[211] CPT and EMDR. Mental health practitioners frequently use these therapies to help maltreatment victims heal from the PTSD they developed from traumatic experiences. I propose that mental health practitioners can use CPT and EMDR with many IWCMs who were once maltreatment victims, and who developed trauma before they committed maltreatment against others.

---

205 *Ibid* at 10.

206 Jessica L Hamblen et al, "Cognitive-Behavioral Treatment for PTSD in People with Severe Mental Illness: Three Case Studies" (2004) 7:2 American J Psychiatric Rehabilitation 147 at 147–70.

207 *Ibid* at 147.

208 *Ibid.*

209 *Ibid.*

210 Institute for Human-Animal Connection, "Interconnected: Forensic Animal Maltreatment Evaluations (FAME) & Animal Abuse Risk Assessment Tool" (4 April 2018), online (video): *YouTube* <www.youtube.com/watch?v=KtRiN8s-kpA> [perma.cc/55BL-UZNJ].

211 Email from Stephanie Stanley, Therapist, Michigan State University Center for Survivors, to author (11 January 2021, 10:35 PST) (on file with author) [Stanley].

CPT and EMDR are evidence-based therapies, which means practitioners track the treatment plans' progress and provide clients with concrete evidence of the programs' efficacy.[212] In addition to individual assessments of effectiveness, evidence-based therapies have proven to be effective in peer-reviewed studies.[213] Medical practitioners can rely on these therapies to help their clients heal from trauma and to increase the quality and accountability of treatment their clients receive.[214]

1. Cognitive Processing Therapy (CPT)

CPT exists within the CBT umbrella because it centers healing on changes in thoughts and feelings, behaviour, and bodily sensations.[215] CPT exists specifically to address PTSD.[216] As previously mentioned, CPT is an evidence-based therapy that has undergone rigorous research.[217] CPT has proven to be effective in reducing PTSD symptoms that come from traumatic events, including "child abuse, combat, rape and natural disasters."[218] The American Psychiatric Association, the U.S. Department of Veterans, the U.S. Department of Defense, and the International Society of Traumatic Stress Studies endorse CPT as "a best practice for the treatment of PTSD."[219] Organizations throughout the world have used CPT, even outside of English-speaking and Western cultures.[220] Since trauma is a universal experience, CPT's developers designed its therapeutic strategies and tools so that people from any country and any culture can

---

212 *Ibid*; Joaquín Selva, "What is Evidence-Based Therapy: 3 EBT Interventions" (28 October 2017), online: *Positive Psychology* <positivepsychology.com/evidence-based-therapy> [perma.cc/KJK4-RFEQ] [Selva].

213 Selva, *supra* note 213.

214 *Ibid.*

215 Cognitive Processing Therapy, *supra* note 98.

216 *Ibid*; "Cognitive Processing Therapy (CPT)" (last visited 11 April 2021), online: *American Psychological Association* <www.apa.org/ptsd-guideline/treatments/cognitive-processing-therapy> [perma.cc/WQ9B-TWMC] [*CPT - American Psychological Association*].

217 S M Murray et al, "The impact of Cognitive Processing Therapy on stigma among survivors of sexual violence in eastern Democratic Republic of Congo: results from a cluster randomized controlled trial" (2018) 12:1 Conflict & Health 1 at 1–9 [Murray et al].

218 Cognitive Processing Therapy, *supra* note 98.

219 "Welcome" (last visited 4 November 2022), online: *Cognitive Processing Therapy* <cptforptsd.com/> [perma.cc/XL42-AB5Y].

220 Murray et al, *supra* note 218 at 1–9; "Cognitive Processing Therapy" (last visited 1 February 2022), online: *Johns Hopkins Bloomberg School of Public Health* <www.jhsph.edu/research/centers-and-institutes/global-mental-health/talk-therapies/cognitive-processing-therapy/> [perma.cc/2KGV-Y3NJ] [Johns Hopkins Bloomberg School of Public Health].

translate and use the materials for their clients.[221] This design approach ensures that anyone who suffers from PTSD, anywhere in the world and from any culture or background, can receive the help and support they need.[222]

CPT is a tool that clients can use to understand the difficulties that exist in recovering from traumatic events and the PTSD symptoms that affect daily life.[223] CPT helps clients understand the way a traumatic experience can affect their perspectives of themselves and the world, and that thoughts can influence their feelings and behaviours,[224] which may result in skewed or unhealthy reactions to events or people that exist in their lives. CPT helps clients overcome these skewed beliefs, including the belief that they are 'stuck,' a belief that frequently prevents individuals from healing from traumatic events and PTSD.[225] The goals of CPT are to 1) improve a client's understanding of PTSD; 2) reduce a client's distress regarding memories of their trauma; 3) decrease a client's "emotional numbing," or present inability to feel emotions, and avoidance of factors that may trigger trauma symptoms; 4) decrease a client's feelings of being tense or "on edge"; 5) decrease a client's present "depression, anxiety, guilt or shame"; and 6) improve a client's general and day-to-day quality of life.[226]

The goals of CPT to heal victims of traumatic events could be the same goals to heal IWCMs because many of them were once victims of traumatic events too. Few studies seem to exist that delve into the internal thoughts and mental processing of IWCMs towards animals and other humans.[227] One study focused on researching the motivations that adolescents felt inspired their decision to commit animal maltreatment.[228] The study's

---

221 *See*, *e.g.*, Judith K Bass et al, "Controlled trial of Psychotherapy for Congolese Survivors of Sexual Violence" (2013) 368 The New England J Medicine 2182 at 2184 (explaining that the study's translators translated the CPT materials into five local languages—each language representing groups of people with unique cultures and backgrounds, but who experienced similar forms of trauma through sexual violence).

222 *See* Johns Hopkins Bloomberg School of Public Health, *supra* note 221 (listing the various world locations in which practitioners used CPT to help individuals in those regions heal from trauma and PTSD); Patricia Resick et al, "Cognitive Processing Therapy (CPT)" (2016), online: *International Society for Traumatic Stress Studies* <istss.org/clinical-resources/treating-trauma/treatment-materials/cognitive-processing-therapy-(cpt)> [perma.cc/S65M-HN4M] [Resick et al].

223 *Ibid.*

224 *Ibid.*

225 Cognitive Processing Therapy, *supra* note 98.

226 *Ibid.*

227 Current research that exists delves into motivations of maltreatment, which focuses on individuals who abuse substances and individuals who sexually mistreated others.

228 *See generally* Christopher Hensley & Suzanne E Tallichet, "Animal Cruelty Motivations: Assessing Demographic and Situational Influences" (2005) 20:11 J Interpersonal

results indicated that anger, control, dislike for the animal, fear of the animal, revenge against another person, sex, and entertainment were common factors that fueled the children's motivations.[229] However, the study did not research the reasons these individuals had the anger, fear, desire for control, or thought that form of entertainment was acceptable, in the first place.

Deeper research may indicate that the causes for individuals' emotions and thoughts that lead to motivations for hurting animals and others stem from trauma and PTSD symptoms. A study regarding intimate partner violence showed that individuals—particularly men—who committed maltreatment had significant rates of PTSD symptoms and mental illnesses.[230] The study's researchers hypothesized these illnesses may have developed from the adult IWCMs experiencing "frequent trauma symptoms" that surfaced because of negative thoughts connected to maltreatment from their parents, including "coldness/rejection and physical abuse."[231] These symptoms resulted in IWCMs exhibiting increased rates of anger and emotional maltreatment towards their partners.[232] Discussion is necessary to extrapolate this study's results to the perspective that IWCMs who mistreat animals are doing so as a result of experiencing frequent trauma symptoms and PTSD. However, through this extrapolation, CPT's goal to resolve PTSD-based suffering for current victims could extend to resolve IWCMs' trauma and PTSD-based suffering, because of their original victimization.

Process. Licensed therapists who become trained and certified in CPT can provide the program to their clients. CPT lasts twelve therapy sessions, for twelve weeks.[233] During each week, the program's curriculum helps the client address the meaning behind their traumatic events, helps the client identify thoughts and feelings associated with their traumatic events, and helps the client address and heal trust issues, safety issues, power and control issues, esteem issues, and intimacy issues.[234] During each session, the client participates in, and takes control of, their healing process: They receive information about common reactions and symptoms to trauma and they work with their therapist to identify and resolve beliefs that do not

---

Violence 1429 at 1429–43.

229 *Ibid.*

230 Donald G Dutton, "Trauma symptoms and PTSD-like profiles in perpetrators of intimate abuse" (1995) 8:2 J Traumatic Stress 299 at 299–316.

231 *Ibid.*

232 *Ibid.*

233 Cognitive Processing Therapy, *supra* note 98.

234 *Ibid.*

serve their emotional well-being.[235] For each session, the client completes an assignment that applies the information they gained during the previous session's discussion.[236] This process is introspective. The client uses each assignment to identify and analyze experiences that caused their PTSD. These assignments also give the client time to process memories and reactions to those memories on their own, which empowers the client to manage their healing on their terms. During the next session, the client can discuss with their therapist the thoughts and feelings that arose while completing the assignment. During this session, the client can discuss specific experiences in their history that arose during the assignment's completion, and they can review their reactive emotions and thoughts that developed from those experiences, which created the trauma. By working through these experiences, the client can process their emotions and thoughts, which helps disassemble the trauma and initiates emotional and mental healing. Through this process, the client regains power and control of their life because they lead their healing process with the support of—rather than the direction of—their therapist.

Lastly, CPT therapy centers that treat PTSD ask their clients to complete a PTSD evaluation form[237] before their weekly session.[238] This survey includes several questions that measure the client's experience of PTSD symptoms during the previous week. The survey's results help the therapist record the client's progress and healing of PTSD symptoms. This evaluative tool acts as an evidence-based mechanism that shows whether CPT is effective for the client.

2. Eye Movement Desensitization and Reprocessing Therapy (EMDR)

EMDR is a therapy technique that helps clients "alleviate the distress associated with traumatic memories."[239] The therapy works by supporting clients in identifying and working through traumatic memories and difficult experiences and then helping them form an "adaptive resolution" in

---

[235] *Ibid.*

[236] *Ibid.*

[237] This evaluation form may include the Clinician-Administered PTSD scale. Centers may also use the Structured Clinical Interview for DSM-IV, the Beck Depression Inventory, and the Trauma-Related Guilt Inventory to assess a client's current PTSD levels. *See* P A Resick et al, "A comparison of cognitive-processing therapy with prolonged exposure and a waiting condition for the treatment of chronic posttraumatic stress disorder in female rape victims" (2002) 70:4 J Consulting & Clinical Psychology 867 at 867–79.

[238] For more information on one center that uses this evaluation method, *see* Michigan State University's Center for Survivors. MSU Center for Survivors, *supra* note 201.

[239] "What is EMDR?" (last visited 11 April 2021), online: *EMDR Institute, Inc* <www.emdr.com/what-is-emdr/> [perma.cc/HH2D-9NKS] [EMDR Institute].

response to the trauma-induced PTSD they developed.[240] EMDR's goals are to relieve affective distress, reformulate negative beliefs, and reduce physiological arousal.[241] EMDR is different from CPT because it does not exist within the umbrella of CBT.[242] However, like CPT, its focus is also to heal clients of their PTSD symptoms.[243]

Similar to CPT, each EMDR session helps the client identify emotionally disturbing material.[244] However, EMDR only lasts eight sessions. During each session, the client physically works through memories, rather than the client identifying experiences and issues through take-home assignments. The therapist then leads the client through directed eye movement, which evokes in the client memories and emotions surrounding their trauma.[245] The EMDR founder's hypothesis is that the physical, rapid eye movement helps access the client's memory network, which then enhances the client's processing of their traumatic memory's information.[246] The therapist works through the following protocol for each session: 1) the client encounters and works through past events that caused their trauma, which allows their brain to create new associative links to those memories; 2) the client identifies current events that have caused them distress, and the therapist works with the client to desensitize internal and external triggers that instigate that distress; and 3) the therapist works with the client to create "templates" of healthy reactions to future events to prevent the client from becoming triggered in the future.[247] Through physical eye movement, the client can create new associations between the traumatic memory that caused their PTSD and more adaptive memories and information that stabilize their thoughts and emotions.[248] In turn, the client develops new perspectives toward the traumatic experience.[249] This adaptive technique enables the client to process all the information available to them regarding the traumatic memory, not just the memory's harming aspects.[250]

---

240 *Ibid.*

241 *Ibid.*

242 Stanley, *supra* note 212.

243 "Eye Movement Desensitization and Reprocessing (EMDR) Therapy" (last visited 11 April 2021), online: *American Psychological Association* <www.apa.org/ptsd-guideline/treatments/eye-movement-reprocessing> [perma.cc/TM2R-EHEM] [*EMDR - American Psychological Association*].

244 EMDR Institute, *supra* note 240.

245 *Ibid.*

246 *Ibid.*

247 *Ibid.*

248 *Ibid.*

249 *Ibid.*

250 *Ibid.*

The client leaves the program with the skills to create new associations, which enables the client to completely process experiences and received information, eliminate emotional stress, and develop insights into their cognition.[251]

3. Benefits of CPT and EMDR

Evidence-based. Multiple studies show that CPT is effective at helping clients heal from PTSD and subsequently alleviate their PTSD symptoms. Therapists have used CPT to help individuals, including veterans[252] and individuals who recently experienced combat,[253] sexual assault survivors,[254] and survivors of childhood maltreatment,[255] heal from PTSD. Furthermore, studies have shown that people who experienced trauma, and who developed PTSD through prolonged exposure to trauma-inducing events, were able to heal using CPT.[256] Lastly, CPT has proven to be successful at helping individuals heal from PTSD in diverse cultures and in multiple languages.[257] Therefore, anyone who is interested in working through the CPT program will likely be successful in healing, regardless of their cultural and socio-economic background. Studies have also shown that the program's administration can be flexible (i.e., the client may not need to participate in the program for a full twelve weeks).[258] A therapist can work with their client to determine the appropriate number of sessions that address the client's healing needs. The therapist and client can choose to bypass repetitive sessions if the client shows they are progressing through the program faster than the program's designed expectations, or if the client has less than twelve weeks to complete the program.

EMDR is also evidence-based. Therapists use evaluative scales that allow them to determine changes in the client's emotion and cognition as they

---

251 *Ibid.*

252 Candice M Monson et al, "Cognitive processing therapy for veteran with military-related posttraumatic stress disorder." (2006) 74:5 J Consulting and Clinical Psychology 898 at 898–907.

253 David H Barlow, ed, *Case Study in Clinical Handbook of Psychological Disorders*, 4th ed (New York: The Guilford Press, 2014) at 80–113, online (pdf): <www.apa.org/ptsd-guideline/resources/cognitive-processing-therapy-example.pdf> [perma.cc/22WC-BR5G].

254 Patricia A Resick & Monica K Schnicke, "Cognitive processing therapy for sexual assault victims" (1992) 60:5 J Consulting & Clinical Psychology 748 at 748–56.

255 Kathleen M Chard, "An evaluation of cognitive processing therapy for the treatment of posttraumatic stress disorder related to childhood sexual abuse" (2005) 73:5 J Consulting & Clinical Psychology 965 at 965–71.

256 Resick et al, *supra* note 223.

257 *See generally* Murray et al, *supra* note 218.

258 Tara E Galovski et al, "Manualized therapy for PTSD: Flexing the structure of cognitive processing therapy." (2012) 80:6 J Consulting & Clinical Psychology 968 at 968–81.

progress with each session.[259] With the start of each session, the therapist evaluates the client's present mental state, determines whether the client has been able to maintain the effects of their previous therapy sessions, identifies any memories that have emerged for the client since the previous session, and then works with the client to determine the current session's focus.[260] The client becomes empowered through this process because they can determine which topics or memories they would like to focus on for the session. Additionally, at the end of each session, the client completes a self-assessed body scan to observe their physical responses to the memories and emotions through which they worked, which can help them identify improvements within their system.[261]

Researchers have conducted more than thirty controlled outcome studies on EMDR with high success rates. One study showed that eighty-four to ninety percent of individuals who experienced one isolated traumatic event no longer had diagnosable PTSD after three ninety-minute sessions.[262] A second study showed that one hundred percent of individuals who experienced one traumatic event and seventy-seven percent of individuals who experienced multiple traumatic experiences no longer had diagnosable PTSD after six fifty-minute sessions.[263] A third study showed that seventy-seven percent of combat veterans no longer had diagnosable PTSD after twelve sessions.[264] Therapists have used EMDR to resolve PTSD in veterans,[265] as well as PTSD from domestic violence,[266] childhood trauma,[267] workplace trauma,[268] observed violence/attacks,[269] and PTSD

---

259 *EMDR - *American Psychological Association, *supra* note 244.

260 *Ibid.*

261 *Ibid.*

262 EMDR Institute, *supra* note 240; Marco Pagani et al, "Pretreatment, Intratreatment, and Posttreatment EEG Imaging of EMDR: Methodology and Preliminary Results From a Single Case" (2011) 5:2 J EMDR Practice & Research 42 at 42–56.

263 *Ibid.*

264 *Ibid.*

265 E C Hurley, "Effective Treatment of Veterans With PTSD: Comparison Between Intensive Daily and Weekly EMDR Approaches" (2018) 9:1458 Frontiers in Psychology 1 at 1–10.

266 Kristin M Phillips et al, "EMDR Treatment of Past Domestic Violence: A Clinical Vignette" (2009) 3:3 J EMDR Practice & Research 192 at 192–97.

267 Mehmet Karadag, Cam Gokcen & Ayse Sevde Sarp, "EMDR therapy in children and adolescents who have post-traumatic stress disorder: a six week follow-up" (2020) 24:1 Intl J Psychiatry in Clinical Practice 77 at 77–82.

268 Christine Rost, "EMDR Treatment of Workplace Trauma A Case Series" (2009) 3:2 J EMDR Practice & Research 80 at 80–90.

269 Steven M Silver et al, "EMDR Therapy Following 9/11 Terrorist Attacks: A Community-Based Intervention in New York City" (2005) 12:1 Intl J Stress

that co-exists with substance abuse issues[270] and severe mental illnesses.[271] Like CPT, EMDR has proved successful in alleviating PTSD symptoms for individuals from various cultures and backgrounds.[272] Associations, including the American Psychiatric Association, the World Health Organization, and the Department of Defense endorse EMDR as "an effective treatment of trauma."[273]

Programs' short duration. CPT lasts twelve weeks and EMDR lasts eight weeks. Therapists and researchers, therefore, can quickly determine whether CPT and EMDR are effective at resolving individuals' trauma and PTSD. For research purposes, this brevity facilitates a quick production of raw data to measure CPT and EMDR's success for clients. The program's length would allow a research team to design customizable programs specific to trauma-affected IWCMs to determine whether CPT and EMDR are effective for this group. Furthermore, clients can viscerally experience their healing process and observe the changes they feel toward themselves and the world every week, which illustrates the rapidity at which individuals can improve their emotional and mental well-being.

Transcend racial, gender, cultural, language, and socio-economic barriers. Since trauma is a universal experience that does not have "boundaries with regard to age, gender, socioeconomic status, race, ethnicity, geography or sexual orientation,"[274] trauma-based therapies can also provide a universal healing

---

Management 29 at 29–42; Mevludin Hasanović et al, "Development of EMDR Therapy in Bosnia and Herzegovina – Education by Supervision to Accreditation" (2021) 33:1 Psyciatria Danubina 4 at 4–12 [Hasanović et al].

270 Claire Kullack & Jonathan Laugharne, "Standard EMDR Protocol for Alcohol and Substance Dependence Comorbid With Posttraumatic Stress Disorder: Four Cases With 12-Month Follow-Up" (2016) 10:1 J EMDR Practice & Research 33 at 33–46.

271 *See generally* Benito Daniel Estrada Aranda, Nathalí Molina Ronquillo & María Elena Navarro Calvillo, "Neuropsychological and Physiological Outcomes Pre- and Post-EMDR Therapy for a Woman With PTSD: A Case Study" (2015) 9:4 J EMDR Practice & Research 174 at 174–87; Ana M Gomez, *EMDR Therapy and Adjunct Approaches with Children*, 1st ed (United States: Springer Publishing Company, 2013); Paul William Miller, *EMDR Therapy for Schizophrenia and Other Psychoses*, 1st ed (United States: Springer Publishing Company, 2015); David P G van den Berg & Mark van der Gaag, "Treating Trauma in psychosis with EMDR: A pilot study" (2012) 43:1 J Behav Therapy and Experimental Psychiatry 664 at 664–71; Dolores Mosquera, Andrew M Leeds & Anabel Gonzalez, "Application of EMDR Therapy for Borderline Personality Disorder" (2014) 8:2 J EMDR Practice & Research 74 at 74–89.

272 *See generally* Hasanović et al, *supra* note 270; Ignacio Jarero et al, "EDMR Therapy Humanitarian Trauma Recovery Interventions in Latin America & the Caribbean" (2014) 8:4 J EMDR Practice & Research 260 at 260–68; Sushma Mehrotra, "Humanitarian Projects and Growth of EMDR Therapy in Asia" (2014) 8:4 J EMDR Practice & Research 252 at 252–59

273 EMDR Institute, *supra* note 240.

274 SAMHSA, *supra* note 44 at 2.

experience. Therefore, these programs can help clients work with, rather than ignore, complexities that might arise with their unique backgrounds and break down the "structures of oppression"[275] that may have helped perpetuate their initial trauma. Furthermore, causes and manifestations of maltreatment are unique to every individual.[276] Without generalizing the type of maltreatment that occurs, manifestations of maltreatment may exist in every culture in one form or another. Because CPT and EMDR's designs cater to focusing on each client's unique history and current needs, every client can effectively heal on their terms, regardless of their traumatic experience's details. Therefore, CPT and EMDR's ability to help people heal from their unique trauma will also likely help people from many marginalized and oppressed groups.

V. A Proposed Solution: Using Trauma-Informed Therapy to End the Maltreatment Cycle

A system that ends the maltreatment cycle should operate with love, compassion, empathy, and dignity toward IWCMs. It must also facilitate collaboration and partnerships between the legal, mental health, and social work fields. The system must still hold individuals who committed maltreatment accountable for their actions, which are harmful, damaging, and traumatic for their victims and their victims' families. However, to truly stop maltreatment, rather than masking the symptoms of maltreatment through punishment, such as incarceration, our system must respect individuals who mistreat for their being human, and for having the same feelings and thoughts other sentient beings have. Our system must recognize that justice through further violence as punishment for the IWCM does not heal the IWCM or serve their community in the long term.[277] Instead, the system should understand each IWCM has a unique and specific background and experience that led to their damaging actions. Therefore, the system should approach these individuals the same way society approaches maltreatment victims and work to resolve their trauma, PTSD, and emotions they encounter from their traumatic experiences because many IWCMs were at one-time maltreatment victims themselves, either through direct maltreatment or through observed maltreatment.

Professionals who are involved in the legal system should interact with IWCMs, understand the reasons they committed maltreatment, and use the

---

[275] Sokoloff & Dupont, *supra* note 119 at 45.

[276] *Ibid* at 41.

[277] Monday, *supra* note 173 at 1.

same therapy techniques that mental health professionals use on maltreatment victims who developed trauma. Treating the individual who committed maltreatment with dignity and resolving their trauma may end their maltreatment cycle if trauma is the core reason the person initially committed maltreatment. Our society created the current justice system because it seemed to work, based on the information society had at the time it needed a response to crime. However, our society now has the opportunity to grow. Society has the opportunity to develop research and discover new information that could enable legal, mental health, and social work systems to use more humane methods of treatment and support that could help everyone heal, who is involved in the maltreatment cycle.

A. Proposed Research

"As Socrates observed more than two thousand years ago, the best we can do under such conditions is to acknowledge our own individual ignorance."[278] This article presents several perspectives about the context in which individuals become IWCMs. As discussed, IWCMs may have explicitly experienced direct or indirect maltreatment, which manifested into trauma, PTSD, and abusive actions. Alternatively, IWCMs may also not believe, recognize, or be aware they experienced trauma. When these IWCMs commit maltreatment or violence against another being, they—and observing society— may be ignorant of trauma they did in fact experience, and that that unrecognized trauma initiated the internal machinations that motivated them to commit such maltreatment or violence. To compound this lack of recognition, society may have misidentified IWCMs' abusive behaviours as occurring without a cause, occurring because of genetics or a mental illness that is not trauma related, or because society deems that some individuals are malicious simply because they are malicious without underlying reasons. Instead of relying on misidentification of an IWCM's reasons for harming others as the status quo, I take the perspective that the best strategy to understanding an IWCM's internal machinations is to investigate those machinations. We need to gain insight directly from the people who have committed maltreatment and whom society is quick to dismiss.

We should develop research that uses a collaborative approach between researchers within the legal, mental health, and social work fields and IWCMs. Through this dialogue, we can work to understand the proposed Stage Zero of Hogarth's theory of cruelty (maltreatment). We can work with

---

[278] Yuval Noah Harari, *21 Lessons for the 21st Century*, 1st ed (Ireland: Random House Publishing Group, 2019) at 228–29.

IWCMs in a way that preserves their dignity and respect, and engages them as knowledgeable, empowered participants. Through this teamwork, perhaps we can develop a program that heals IWCMs of their trauma, trauma-induced symptoms, and related mental illness, and restore their feelings of safety and security. In turn, they can heal, engage with other IWCMs to support their healing, and no longer feel the need to mistreat other beings.

1. Research

Research. This initial research proposal is simple, but it has the flexibility to develop depth and expand over time with the results it produces and the needs that arise for the IWCM community. The research's initial goal would be to find IWCMs who are interested in working with the interdisciplinary research team. The collaboration would help the research team understand the IWCMs' perspectives of their world, their pasts, their expectations for the future, their roles in society, their roles in committing violence against others, and their reasons for committing that violence.

Through this voluntary participation, the team would interview IWCMs to screen for traumatic events in their lives. The team would also screen IWCMs for trauma-induced symptoms, PTSD and PTSD symptoms, and any other forms of mental illness. The research team would then determine whether any mental illnesses the IWCMs have, have been shown to develop from traumatic events in other studies (i.e., bipolar, schizophrenia, or depression). Then, the team would listen to the IWCMs' reasons they committed maltreatment or violence and ask about the IWCMs' thoughts regarding the motivations for those reasons (i.e., the traumatic event). The team would then evaluate each IWCM using a PTSD scale to determine whether the person is suffering from PTSD. If they are, the team can offer each IWCM the option of pursuing the twelve-week CPT therapy or the eight-week EMDR therapy. Each IWCM would only enter the program if they voluntarily chose to do so, to ensure the IWCM maintains their dignity and their personal power and control. If the IWCM chooses to enroll in the program, each week, the IWCM would complete the same PTSD evaluation they completed at the beginning of their therapy. This evaluation tool would allow the therapist and the IWCM to monitor the IWCM's rate of healing throughout the program.

Recidivism Rates. Recidivism rates[279]—whether they decrease or increase through trauma-informed therapy's incorporation—would be important to

[279] Recidivism rates would most likely apply to maltreatment against victims, animals and humans alike. Though, recidivism rates might also apply to non-maltreatment crimes.

include in this research. This data may help determine whether trauma-informed therapy heals IWCMs of their trauma and deters them from committing future maltreatment. This data could also help determine whether that trauma was the cause of the IWCM's decision to commit animal maltreatment, human violence, or other crimes, based on whether IWCMs continue to mistreat others or commit crimes after they complete trauma-informed therapy.[280]

Should trauma-informed therapy decrease recidivism rates, not only would the therapy benefit the IWCMs who participated in the program, and past and future victims, the therapy may also decrease crime within communities that previously experienced high recidivism rates. One study found that overcrowded prisons predicted parole violations by individuals who lived in those overcrowded conditions after their prison release.[281] The study concluded this result did not occur in less crowded prisons because such prisons experienced less violence and had more access to mental health services, among other effective variables.[282] If therapy programs help decrease the amount of people in prisons because those individuals no longer commit maltreatment, and court systems do not fill their absence, then the decreased populations may positively affect other individuals in those same prisons. Through better access to resources due to decreased prison populations, currently incarcerated individuals may feel less motivated to commit offences that continue their exposure to the prison system.

The research team would also need to track 'redemption benchmarks' for IWCMs, which are periods that mark lengths of time during which

---

The investment in research to determine whether rehabilitative measures decrease the rates of all forms of crime, not just the types of crimes for which an individual first received charges/convictions/sentences, would be helpful and relevant.

[280] Though recidivism rates would likely provide insight on desistance from animal maltreatment, recidivism data would also reflect the legal system's response to animal maltreatment. Therefore, the collected data may not fully illustrate the success of the therapy changing IWCMs' behaviour. The research team would need to measure other variables involved in the therapy process (i.e., weekly measurements of IWCMs' diagnosable PTSD symptoms) to form a comprehensive image of the therapy's positive effects on reducing animal maltreatment. For a deeper discussion regarding desistance and measuring recidivism rates, *see* Bucklen, *supra* note 204 at 111.

[281] *See generally* Michael A Ruderman, Deirdra F Wilson & Savanna Reid, "Does Prison Crowding Predict Higher Rates of Substance use Related Parole Violations? A Recurrent Events Multi-Level Survival Analysis" (2015) 10:10 PLOS One 1 at 1–19.

[282] *Ibid* at 2. *See also, generally,* William Arbour, Guy Lacroix & Steeve Marchard, "Prison Rehabilitation Programs: Efficiency and Targeting" (2021) SSRN 1 at 1–43, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3761992> [perma.cc/EY5F-U4V5] (discussing additional studies that have shown rehabilitative programs in prisons improve recidivism).

individuals do not re-offend.[283] These benchmarks would help indicate whether IWCMs still maintain tendencies toward perpetuating criminal behaviour, compared to individuals who have never been involved in the criminal legal system.[284] This information could inform the research team as to whether the trauma-informed therapy effectively prevents IWCMs from committing maltreatment in the long term.

Research Awareness. This research proposal exists within the following points of awareness: 1) In order for this research to be successful, we must recognize "the solution to a violent society does not lie in the characterization of the victim but in the characteristics of the offender."[285] Therefore, if we can work with IWCMs, learn the reasons they exist as they do, and support them in their healing, we can move one step closer toward alleviating the violence in our society. 2) We must prevent research findings from being "misconstrued or deliberately used against vulnerable populations, even when [we] make every effort to represent their findings in a favourable light."[286] Our research methods must be "participatory, empowering, and based in a community action model."[287] 3) The research must exist with the expectation and understanding that IWCMs participate in a crucial way. The research team and society need to collaborate with IWCMs in a way that can help everyone heal. The research team would need to move away from working through a critical, punishing lens that could further ostracize IWCMs, further divide communities, and further perpetuate systemic oppression. If we can make this research collaborative, inclusive and "culturally competent," we can positively, directly affect everyone who exists within the maltreatment cycle.[288]

This research must take the approach that individuals with different perspectives, with different experiences, and from disciplines are

---

283 Bucklen, *supra* note 204 at 117–18.

284 *Ibid.*

285 Charlotte A Lacroix, "Another Weapon for Combating Family Violence: Prevention of Animal Abuse" (1998) 4 Animal L 1 at 3.

286 Sokoloff & Dupont, *supra* note 119 at 48.

287 V Kanuha, "Domestic violence, racism, and the battered women's movement in the United States"
in J L Edleson & Z C Eisikovits, eds, *Future interventions with battered women and their families* (London: Sage, 1996) at 45. A Community Action Model is an approach that works to improve the health and environment of a community through the participation of that community in the improvement efforts. *See* "Community Action Model" (last visited 18 November 2021), online: *Conduent Healthy Communities Institute* <cdc.thehcn.net/promisepractice/index/view?pid=30159> [perma.cc/B52K-QDV4].

288 Sokoloff & Dupont, *supra* note 119 at 48–49.

necessary.[289] This approach will help alleviate the concern that this research relies only on mainstream literature and academic thought.[290] This approach will also likely improve the research team's response to IWCMs from diverse backgrounds because the research team's cultural perspective would be that the IWCMs' experiences and their backgrounds provide depth and value to the results.[291] IWCMs, like all humans and animals, will provide value to this research, and to any other project or community within which they participate because of their inherent value as a being and a member of this global community.

The "convergence of trauma on the survivor's perspective with research and clinical work has underscored the central role of traumatic experiences in the lives of people with mental . . . conditions."[292] As mentioned, this article and research proposal exist within the perspective that no one is broken, even though this perspective challenges some mainstream societal narratives that claim some people are broken and cannot improve themselves or their lives. Yet, the need to heal is not synonymous to existing in an irreparable state. And so, though this article and research proposal do recognize that perhaps not everyone who mistreats other beings was directly mistreated or observed violence during a previous time in their lives, the hope is that this research will provide insight into the degree at which trauma influences individuals to hurt others and methods we can use to ameliorate seemingly broken cases to prevent future suffering.

2. Results for Program Development

Establishing Trauma-Informed Programs for IWCMs. The hope for this research and its results is to develop programs for IWCMs that support their healing and empowerment, and deter them from believing they need to mistreat others, or from believing maltreatment is acceptable, in order to protect would-be animal (and human) victims. These therapy programs could exist in prisons (until we determine how to operate without carceral systems); exist in communities for individuals whom courts convicted of maltreatment, but whom courts did not incarcerate; or for individuals who self-identify as having committed maltreatment and who search for the programs on their own.

Advocacy groups in other fields that work with individuals who suffer from trauma have found that they can maximize their efforts to help heal individuals when the healing occurs within an "organizational or

---

289 *Ibid* at 49.

290 *Ibid.*

291 *Ibid.*

292 SAMHSA, *supra* note 44 at 5.

community context."[293] Therefore, the goal for this research is also to create community support programs that support former IWCMs who completed their trauma-informed therapy. These community support programs can provide support groups for IWCMs. These support groups may help IWCMs find healthy outlets in working through their thoughts and emotions while they heal, develop a unique community through relationships they foster with other IWCMs, and support each other through their healing process. This support group approach might look similar to support systems such as Alcoholics Anonymous and its community-based support groups.[294] These support groups would also exist to protect former IWCMs from encountering triggers that may remind them of their initial traumatic event or the maltreatment they committed. The support groups could be a buffer between former IWCMs and triggers that would otherwise provoke their need to commit maltreatment as a self-defence mechanism to manage unwanted thoughts, memories, or emotions. This support system—to protect individuals from triggers—may be especially important for former IWCMs who enrolled in trauma-informed therapy during incarceration and then re-entered their community once their incarceration period ended. While incarcerated, these former IWCMs likely experienced a rigid schedule. Distinct forms of power and control likely existed within the carceral infrastructure. And, former IWCMs could likely predict schedules and interpersonal relationships from one day to the next. Incarceration, in its own oppressive way, may have created a sense of security on which former IWCMs could rely while working through their healing. However, the world outside of the carceral infrastructure is unknown and unpredictable, even when it offers desired forms of liberation. Therefore, these support groups can help formerly incarcerated IWCMs maintain structure in their newly liberated lives so that when they do encounter variables that act as trauma triggers, the IWCMs have a strong support system, structure, and a community of other former IWCMs working through the same issues, on which they can rely.

Examples of funded trauma-informed programs do exist and have proven to be effective. For instance, SAMHSA established the Jail Diversion Trauma Recovery Grant Program, which supports "the local implementation and State/Tribe-wide expansion of trauma-integrated jail diversion programs to address the needs of individuals with mental illness such as [PTSD] and trauma related disorders involved in the justice

293 *Ibid* at 2.

294 Homepage (last visited 11 April 2021), online: *Alcoholics Anonymous* <aa.org/> [perma.cc/6XJD-RCG4].

system."[295] One of the program's goals is to "address gaps in mental health prevention and treatment of services" and to help advocacy organizations "help specific populations [with] emerging mental health problems."[296] This program's existence indicates that advocacy groups recognize the connection between experienced trauma, developing PTSD, and subsequent crime. The program's existence also shows that groups believe that healing individuals' PTSD through trauma-informed therapy can prevent their future substance abuse and crime commissions. A different study through Baylor University—which focused on trauma-informed therapy for incarcerated individuals—also had results that showed the treatment group's PTSD scores "substantially reduced" and were "significantly lower" than the control group's average PTSD score, after therapy.[297] These programs' research and treatment success rates may forecast the success of using trauma-informed therapies for individuals who experienced trauma, which led to PTSD, and who manifested their trauma as maltreatment on animals and/or humans. If so, then the application of trauma-informed therapies on individuals who committed maltreatment could possibly decrease maltreatment incidents, incarceration rates, and heal this population.

Voluntary Admission for Therapy Programs. Requiring people to receive therapy is a sensitive issue. Demanding a person receive treatment for a mental or physical health issue may harm the individual, and subsequently the community, rather than healing the wounds the individual experienced from those mental health issues, or the wounds the individual created through their offences. Forcing a person to enter treatment may provoke shame, guilt, fear, or other emotions that cause individuals to become defensive and act in ways that protect their survival and maintain their individual power and control. These reactions are the same survival instincts and trauma-induced emotions that may have caused the individual to mistreat others, originally. Therefore, forcing someone who committed maltreatment to go into treatment could further traumatize that individual—by removing any semblance of power and control they tried to reclaim through their abusive actions—and motivate them to mistreat again to regain the power and control they lost. Furthermore, forced participation

---

295 SAMHSA, *supra* note 44 at 4; Erica Meade & Linda Mellgren, "Overview and Inventory of HHS Efforts to Assist Incarcerated and Reentering Individuals and Their Families" (31 January 2011), online: *Office of the Assistant Secretary for Planning and Evaluation* <aspe.hhs.gov/reports/overview-inventory-hhs-efforts-assist-incarcerated-reentering-individuals-their-families-0> [perma.cc/ZQS7-5RGC] [Office of the Assistant Secretary for Planning and Evaluation].

296 Office of the Assistant Secretary for Planning and Evaluation, *supra* note 296.

297 Johnson, Jang & Bradshaw, *supra* note 8 at 25.

may make individuals poor research participants if they feel coerced into treatment and subsequently provide false answers and raw data, which would lead to the therapy's results being inaccurate.

Studies and academic literature regarding treatment for people with mental illnesses support the idea that mandatory treatment is not particularly effective in healing mental health issues or alleviating the need for accommodations for people with mental health concerns. One study found that "compulsory treatment appears to be a broadly used intervention . . . [that] is ineffective at reducing readmission."[298] And, one literature review of mandatory treatment therapy programs found "little evidence of effectiveness in terms of health service use, social functioning, mental state, quality of life or satisfaction with care" for participants.[299] The review concluded that forced treatment could undermine an individual's practice of self-determination and their ability to reclaim a meaningful life.[300] In short, mandatory treatment does not respect the individual as a "citizen of society."[301] Rather, it may act as a form of systemic oppression that does not support a person's efforts to heal and re-join society. To note, these studies specifically focus on individuals with mental health issues rather than individuals who have mistreated other beings. However, since this article's theoretical perspective is that many individuals committed maltreatment against other beings in reaction to their mental health issues—the trauma they experienced that developed into PTSD[302]—these studies are relevant for this proposed research. In addition, some researchers posit that "PTSD influences psychiatric disorders both directly . . . and indirectly."[303] Therefore, studies that investigate the effects of forced treatment on individuals with mental illnesses may be, and likely are, appropriate to use to determine whether forced behaviour therapy for individuals who committed maltreatment is effective.

---

298 Mike Slade et al, "Uses and abuses of recovery: implementing recovery-oriented practices in mental health systems" (2014) 13:1 World Psychiatry 12 at 13, citing Tom Burns et al, "Community treatment orders for patients with psychosis (OCTET): a randomized controlled trial" (2013) 381:9878 Lancet 1627 at 1627–33.

299 *Ibid*, citing *generally* Steve R Kisely, Leslie A Campbell & Richard O'Reilly, "Compulsory community and involuntary outpatient treatment for people with severe mental disorders" (2017) 3:CD004408 Cochrane Database of Systematic Reviews 1 at 1–63.

300 *Ibid.*

301 *Ibid.*

302 *See* "Diagnostic and Statistical Manual of Mental Disorders (DSM-5)" (last visited 11 April 2021), online: *American Psychiatric Association* <www.psychiatry.org/psychiatrists/practice/dsm?_ga=1.8367346.1782582538.1481136819> [perma.cc/ZU4T-ZN8R] (listing PTSD as a mental illness).

303 Mueser et al, *supra* note 94 at 123.

For these reasons, voluntary enrollment of trauma-informed therapy may be a more approachable way for IWCMs to seek treatment. Voluntary enrollment in therapy may exist as part of a plea deal,[304] therapy for individuals who are already incarcerated, or therapy that individuals seek independently of the court system. This advocacy approach to support individuals through trauma-informed therapy is not the fastest way to enroll IWCMs in treatment. However, this approach empowers individuals to seek healing therapy through self-determination, in a way that supports their ability to regain their individual power and control in a healthy and safe way. Communities and law enforcement do not force victims of maltreatment to seek trauma-informed therapy immediately after they experience the maltreatment. Their choice to seek help frequently comes from a desire to heal. Society should not doubt that IWCMs, who were likely once victims too, have the same desire to heal when they discover support systems exist that will empower them rather than condemn them for their past transgressions.

B. Incorporating Research and Trauma-Informed Therapies into the Legal System

Fortunately, local, state, and federal agencies have increased their awareness regarding the "pervasiveness of trauma and its connections to physical and behavioural health and well-being," which has encouraged organizations to respond and provide services to trauma-affected individuals to help them heal.[305] Ideally, the programs that come from my proposed research would exist in a form that allows IWCMs to utilize trauma-informed therapy before entering the legal system. However, should an IWCM encounter the legal system before gaining access to these therapy programs, the hope is that prosecutorial parties within the legal system could integrate trauma-informed therapy programs into their decision-

---

[304] Enrollment in a therapy program as part of a plea deal may not seem like a genuinely voluntary decision. However, the option to enroll in therapy as an alternative to incarceration does still provide the IWCM with a choice they were able to make on their own. This choice can help preserve the individual's sense of autonomy and control, while also acknowledging the offence they committed toward another being. As a result, the individual's therapy results will likely be genuine, and the individual will benefit from the program. *See* Bruce J Winick, "Applying the Law Therapeutically in Domestic Violence Cases" (2000-2001) 69 U Missouri-Kansas City L Rev 33 at 63–64 (explaining that "experiencing choice and a sense of self-determination is often vital to an individual's sense of [their] own locus of control and may be essential to emotional well-being" and "[p]eople given choice rather than made to feel coerced respond better, with greater satisfaction and with more motivation and effective performance.").

[305] SAMHSA, *supra* note 44 at 6.

making when working through an IWCM's animal (or human) maltreatment charge.

For this research and the application of its results and proposed programs to be successful, it needs the support from all parties who exist within the legal system that address animal (and human) maltreatment. Judges, prosecutors, and defence attorneys would need to believe trauma-informed therapies work and would need to agree to propose these programs during the prosecution process. Since state governments and agencies have started to prioritize trauma as a critical variable that affects their communities,[306] state courts may increase their focus on trauma as well. This support could encourage judges, prosecutors, and defence attorneys to 'buy-in' to trauma-informed therapy programs and perhaps use these programs as effective alternatives to incarceration. These alternatives could enable IWCMs to feel empowered in taking control over their futures and so, retain their personal power that the legal system tends to take way, and help them heal. In turn, judges, prosecutors, and defence attorneys could also participate in ending maltreatment cycles and protecting animals (and humans) from becoming future victims. Providing therapy as an alternative to incarceration, or as an option that could reduce an IWCM's sentence may not provide an IWCM with complete freedom in determining their future. However, the option for an IWCM to voluntarily choose their own path (healing therapy that has proven to be successful versus incarceration) provides more options than an IWCM would have if their only choice was incarceration. Furthermore, the option between healing therapy or incarceration recognizes the legal system and society's hope for justice (even if misguided) and so, still makes an IWCM accountable for their actions against their victim(s).

C. Challenges to Research and Proposed Solutions

Some challenges exist in conducting research to determine whether using trauma-informed therapies to heal IWCMs from trauma is successful. These factors include funding sources, finding IWCMs who are willing to participate, and support for the research from courts, prisons, as well as legal, mental health, and social work professionals.

Finding funding. Funding for this research may be difficult because the justice system has historically been incarceration-focused, especially towards individuals who mistreated or harmed animals. However, organizations do exist that support incarceration alternatives. Though these programs

---

[306] *Ibid* (listing different governments and government agencies that have developed incorporated trauma-informed activities within their systems and policies).

historically focused on incarceration alternatives for individuals with substance abuse concerns, their projects focused on helping a target audience with a particular challenge receive necessary, healing treatment while also preventing further oppression through incarceration.[307] This overarching goal aligns with the article's proposed work, which provides hope that this proposed research may find similar funding. Alternatively, organizations already exist that fund research to investigate the healing effects of trauma-informed therapies, to resolve incarcerated individuals' trauma and PTSD.[308] My proposal is analogous to these programs, and so, could be eligible for similar funding. Furthermore, studies that reviewed the cost benefit of treating individuals who sexually maltreated children concluded that the cost of keeping an individual incarcerated for these acts was thirty percent more expensive than helping an individual rehabilitate as an outpatient, non-incarcerated client.[309] If we analogize these conclusions to IWCMs, then helping IWCMs heal through therapeutic measures, without carceral measures, would decrease government spending on prisons. If society values efforts to exist in a world free of prisons, funding towards this type of research is appropriate and necessary.

Gaining access to IWCMs who are interested in or eligible for trauma-informed therapy. Finding ways of working with IWCMs who are interested in and qualify as candidates for trauma-informed therapy[310] may occur through multiple avenues. Every avenue should demonstrate to potential participants that the research and therapy is safe, inclusive, healing, and beneficial to their health and well-being. One study researched the motivations and inhibitions that individuals who committed sexual assault provided for participating in or avoiding therapy.[311] This study interviewed individuals who committed sexual maltreatment and proposed developing customized therapy programs that specifically aligned with the target clients' needs.[312] The proposed customizations of these therapy programs addressed the concerns clients had that they believed prevented therapy from being effective. Some of these concerns included "the outcome of confrontations

---

307 Office of the Assistant Secretary for Planning and Evaluation, *supra* note 296.

308 Johnson, Jang & Bradshaw, *supra* note 8 at 22–24.

309 Jona Lewin et al, "A community service for sex offenders" (1994) 5:2 The J Forensic Psychiatry 297 at 307.

310 To receive PTSD therapy from some organizations, a potential client must complete a survey that measures their PTSD levels. If the client's PTSD level exceeds a base score, the client is eligible to receive PTSD therapy.

311 Martin Drapeau et al, "A Plan Analysis of Pedophile Sexual Abusers' Motivations for Treatment: A Qualitative Pilot Study" (2005) 49:3 Intl J Offend Therapy & Comp Criminology 308 at 309.

312 *Ibid.*

with the therapists, a tendency to isolate and over comply [or, comply beyond the clients' preferred level of action], guilt related to the maltreatment, a need for a stable environment, and a need to be accepted."[313] My research proposal suggests developing a similar customized approach to the research's interactions with clients. The hope is that the alleviation of these common concerns will be attractive to individuals who commit maltreatment toward animals and others. In turn, the research and therapy will provide a safe, inclusive environment for these individuals, which will demonstrate that voluntary therapy will benefit them in the long-term. In other words, if potential participants understand this research and its results exist to create a customized program that will help them heal from trauma they never had the opportunity to address, and the research is designed to promote each participant's dignity and respect, empower them to heal, and empower them to help others in the future, they may be more willing to participate.

Support from courts, legal, mental health, and social work professionals. As referenced in Part V(b) of this article, establishing 'buy-in' from the court systems, prosecutors, and defence attorneys may be difficult. However, the fact that courts in some parts of the United States are starting to prioritize trauma as a possible cause of crimes provides hope that courts will implement trauma-informed systems to help heal individuals and prevent future crimes.[314] Providing evidence-based data that shows IWCMs who completed trauma-informed therapy subsequently ceased to commit violence or maltreatment against animals (and humans), will likely be the leading way to convince judges, prosecutors, and defence attorneys that trauma-informed therapy works. Data regarding recidivism rates, and maltreatment or crime rates in counties that implement these programs will also be necessary. If one county is willing to be the test case for this proposal, this research's team would be able to determine whether these hypotheses are true. Mental health and social work professionals will likely need less convincing, since many professionals in these fields recognize that trauma is a significant cause of severe mental illness. However, trauma-informed therapy's evidence-based results will help prove trauma's role in the specific relationship between IWCMs and animal maltreatment.

---

313 *Ibid* at 316.

314 *See, e.g.*, "AG Racine Statement on OAG's Prosecution of Juvenile Violent Crime" (28 January 2022), online: *Office of the Attorney General for the District of Columbia* <oag.dc.gov/release/ag-racine-statement-oags-prosecution-juvenile-0> [perma.cc/XB5E-5TVG] (describing Washington D.C.'s decision to incorporate trauma-informed care to address underlying causes for commissions of crime and incarceration alternatives that improve mental health and decrease future crime rates).

D. Benefits to Proposed Research

Ending the maltreatment cycle at its core, and other crimes. This program could heal individuals who commit maltreatment of their trauma and realign the skewed perspectives they have of themselves, the world, and others. In turn, this healing could provide an opportunity for individuals to re-examine their relationship with animals and others in their lives, and develop healthy connections with these beings that do not lead to future maltreatment. Returning to Hogarth's cruelty (maltreatment) cycle theory, this healing could create a new Stage Four—one that does not oppress the IWCM and perpetuate further victimization, maltreatment, and oppression. This program could apply to people who commit domestic violence as well as people who hoard, and any other crimes that involve trauma. By curbing the maltreatment cycle, this proposed program could help former IWCMs heal from their trauma, PTSD, and other trauma-related mental illnesses. And, the program could protect animals (and likely humans) from future maltreatment, violence, and victimization.

Twelve-week and eight-week programs provide raw data quickly. A significant benefit for using CPT and EMDR for individuals who committed, or were convicted of, maltreatment is that the research will provide tangible results in quick periods of time. CPT's established results show that individuals who suffered from PTSD—regardless of the level of PTSD they had at the beginning of the program—will heal their PTSD at the end of the twelve-week period. The quick, twelve-week program may also help the legal system collect data on recidivism rates as well as rates regarding animal maltreatment, other violence, and other crimes that trauma and trauma-induced symptoms may have instigated. Furthermore, the brevity of CPT and EMDR's programs enable interested parties to more quickly track trauma-induced crimes that IWCMs—who completed the program—did or did not commit, and their potential return to incarceration.

Facilitating interconnected collaboration between professionals in multiple fields and supporting diversity. This program cannot occur without collaboration between the legal, mental health, and social work fields. Therefore, this program welcomes the participation of multiple perspectives, including the perspectives of IWCMs. Because CPT and EMDR have proven to be successful in different languages, countries, cultures, and genders, this research can occur and promote diversity, equity, and inclusion. People can use these programs in ways that work best for them and include their unique backgrounds and experiences in their healing, their renewed perspectives of themselves, their relationships with animals (and humans), their communities, and their world.

Restorative Justice. This proposed program could heal individuals, which could support advocates of restorative justice theories in their missions to heal victims and communities. Restorative justice focuses on the victim and brings together all parties involved in the offence to have a "safe and honest conversation" to discuss the harm the offence caused.[315] Trauma-informed therapy can create a safe space for IWCMs who choose to participate in restorative justice. Otherwise, restorative justice might trigger the IWCM into previous feelings of trauma, guilt, and shame that led to their initial, violent actions. Therefore, trauma-informed therapy could be one step before restorative justice that gives the IWCM space to heal on their terms. Then, when they have worked through their trauma and PTSD, they may be at an emotional place where they would be willing to meet with the person against whom they transgressed, or the victim's representative, to discuss the offence. Trauma-informed therapy can act as a preparation measure to help heal the IWCM, the victim, and the community, without victimizing the IWCM by putting them in a situation of feeling forced to face their actions in a way that deprives them of their own dignity. This preparatory step could protect the victim from further victimization too. It could empower the IWCM to acknowledge their transgressions without feeling defensive or feeling the need to lash out at the victim during the restorative justice meeting, as a method to retain their control. This proposed therapy, in conjunction with restorative justice measures, may help reunify healed IWCMs with their animals, their family members, and their community.

If restorative justice is about restoring the victim, and individuals who commit animal cruelty and interpersonal violence were victims first, who did not receive the help and care they needed at the victim recovery stage, then society owes these individuals the necessary help and care to restore them and help them heal through appropriate therapy and trauma-based considerations first, before it asks—and expects—them to restore victims and communities they harmed.

VI. Concluding Thoughts

"A community in love [in other words, compassion, understanding, empathy, and acceptance], a culture in love, does not harm, does not shame, does not starve, does not exclude any of its members. It heals and teaches

---

315 "Restorative Justice Program" (last visited 11 February 2022), online: *Office of the Attorney General for the District of Columbia* <oag.dc.gov/public-safety/restorative-justice-program> [perma.cc/PV8U-L8KL].

and supports change in love . . . ."[316] This discussion and the suggested use of trauma-informed therapy to help heal IWCMs of their trauma, aims to support such a community and to protect all beings—who are caught or could get caught in the trauma- maltreatment cycle—from experiencing future violence.

We, as a society, need to employ incarceration alternatives and therapy programs that approach IWCMs as more than offenders. Otherwise, the legal system will continue to perpetuate the maltreatment cycle because its use of incarceration and punishment, without more, is inherently abusive. We must employ compassion, respect, and the perspective that someone's story runs deeper than the harm they committed and their initial reasons for committing that harm. If we can identify the causes that motivated those reasons—the Stage Zero of William Hogarth's stages of cruelty (maltreatment)—perhaps we can resolve those causes. And, in turn, we can heal individuals so that they no longer have a desire or reason to harm others. This resolution and healing could end the maltreatment cycle at its core for individuals who commit maltreatment or violence in reaction to prior trauma and untreated mental illnesses they experience. Ending the maltreatment cycle at its core, therefore, prevents revictimization of the IWCM and protects animals and humans from becoming future victims. Furthermore, ending the cycle prevents society's recurring and current traumatization through its skewed perspective that violence as a form of justice is acceptable.

Through the many voices that develop strategies to end the pain and suffering of individuals who experience the maltreatment cycle, we must ensure that our methods preserve the dignity and respect for everyone involved, including individuals who committed violence. The dichotomy between victims and IWCMs does not have to exist because many IWCMs were once victims. But they were victims who may never have had the chance to manage their trauma in a healthy, safe way. Everyone who commits violence against another being must maintain accountability for their actions. However, developing trauma-informed therapy programs for IWCMs, such as CPT and EMDR, may safely ensure accountability because the IWCM has decided to take action to change. They can regain their personal power and control so that they no longer feel the need to mistreat others. If these programs are successful, countries throughout the world may be able to provide their communities with resources to end the maltreatment cycle and subsequent pain and suffering for IWCMs and future animal and human victims.

---

[316] Paul Selig, *The Book of Freedom*, 1st ed (United States: Penguin Publishing Group, 2018) at 56.

We need to act with love in our approach to ending the maltreatment cycle, rather than fear. Our historical approach has been to use actions that utilize fear and control over IWCMs and everyone else who is part of the maltreatment cycle. To end the pain and suffering for all requires society to create a new system that works to support everyone's movement toward healing and restores everyone's place within their community.

Bibliography

Journal Articles

Agnew-Blais, Jessica & Andrea Danese, "Childhood maltreatment and unfavorable clinical outcomes in bipolar disorder: a systematic review and meta-analysis" (2016) 3:4 Lancet: Psychiatry 342.

Allely, Clare S & Bob Allely, "Post traumatic stress disorder in incarcerated populations: current clinical considerations and recommendations" (2020) 10:1 J Criminal Psychology 30.

Arbour, William Guy Lacroix & Steeve Marchard, "Prison Rehabilitation Programs: Efficiency and Targeting" (2021) SSRN 1 at 1-43, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3761992> [perma.cc/EY5F-U4V5].

Ardino, Vittoria, "Offending behaviour: the role of trauma and PTSD" (2012) 3:1 European J Psychotraumatology 1.

Ascione, Frank R, Teresa M. Thompson & Tracy Black, "Childhood Cruelty to Animals: Assessing Cruelty Dimensions and Motivations" (1997) 10:4 Anthrozoös 170.

Bass, Judith K et al, "Controlled trial of Psychotherapy for Congolese Survivors of Sexual Violence" (2013) 368 The New England J Medicine 2182.

Berkowitz, Leonard, "Situational Influences on Reactions to Observed Violence" (1986) 42:3 J Social Issues 93.

Burns, Tom et al, "Community treatment orders for patients with psychosis (OCTET): a randomized controlled trial" (2013) 381:9878 Lancet 1627.

Campbell, Andrew M, "The Intertwined Well-Being of Children and Non-Human Animals: An Analysis of Animal Control Reports Involving Children" (2022) 11:2 Social Sciences 1.

Chard, Kathleen M, "An evaluation of cognitive processing therapy for the treatment of posttraumatic stress disorder related to childhood sexual abuse" (2005) 73:5 J Consulting & Clinical Psychology 965.

Dutton, Donald G, "Trauma symptoms and PTSD-like profiles in perpetrators of intimate abuse" (1995) 8:2 J Traumatic Stress 299.

Estrada Aranda, Benito Daniel, Nathalí Molina Ronquillo & María Elena Navarro Calvillo, "Neuropsychological and Physiological Outcomes Pre- and Post-EMDR Therapy for a Woman With PTSD: A Case Study" (2015) 9:4 J EMDR Practice & Research 174.

Drapeau, Martin et al, "A Plan Analysis of Pedophile Sexual Abusers' Motivations for Treatment: A Qualitative Pilot Study" (2005) 49:3 Intl J Offend Therapy & Comp Criminology 308.

Flynn, Clifton P, "Examining the links between animal abuse and human violence" (2011) 55 Crime, L & Soc Change 453.

Frueh, B Christopher et al, "Clinicians' Perspectives on Cognitive Behavioral Treatment for PTSD Among Persons With Severe Mental Illness" (2006)

57:7 Psychiatric Services 1027.

Galovski, Tara E et al, "Manualized therapy for PTSD: Flexing the structure of cognitive processing therapy." (2012) 80:6 J Consulting & Clinical Psychology 968.

Glasser, M, "Cycle of child sexual abuse: Links between being a victim and becoming a perpetrator" (2001) 179:6 British J Psychiatry 482.

Gruber, June et al, "Feeling stuck in the present? Mania proneness and history associated with present-oriented time perspective" (2012) 12:1 Emotion 13.

Gueta, Karen et al, "Trauma-oriented recovery framework with offenders: A necessary missing link in offenders' rehabilitation" (2022) 63 Aggression & Violent Behavior 101678.

Gullone, Eleanora, "An Evaluative Review of Theories Related to Animal Cruelty" (2014) 4:1 Journal of Animal Ethics 37.

Hamblen, Jessica L et al, "Cognitive-Behavioral Treatment for PTSD in People with Severe Mental Illness: Three Case Studies" (2004) 7:2 American J Psychiatric Rehabilitation 147.

Hasanović, Mevludin et al, "Development of EMDR Therapy in Bosnia and Herzegovina – Education by Supervision to Accreditation" (2021) 33:1 Psyciatria Danubina 4.

Hayes, Jasmeet P, Michael B. VanElzakker & Lisa M Shin, "Emotion and cognition interactions in PTSD: a review of neurocognitive and neuroimaging studies" (2012) 6:89 Frontiers Integrative Neuroscience 1.

Hensley, Christopher & Suzanne E Tallichet, "Animal Cruelty Motivations: Assessing Demographic and Situational Influences" (2005) 20:11 J Interpersonal Violence 1429.

Hurley, E C, "Effective Treatment of Veterans With PTSD: Comparison Between Intensive Daily and Weekly EMDR Approaches" (2018) 9:1458 Frontiers in Psychology 1.

Jackson, Victoria et al, "Trauma-informed sentencing of serious violent offenders: an exploration of judicial dispositions with a gendered perspective" (2021) 28:5 Psychiatry, Psychology & L 748.

Jarero, Ignacio et al, "EDMR Therapy Humanitarian Trauma Recovery Interventions in Latin America & the Caribbean" (2014) 8:4 J EMDR Practice & Research 260.

Karadag, Mehmet, Cam Gokcen & Ayse Sevde Sarp, "EMDR therapy in children and adolescents who have post-traumatic stress disorder: a six week follow-up" (2020) 24:1 Intl J Psychiatry in Clinical Practice 77.

Kimble, Matthew et al, "Negative World Views after Trauma: Neurophysiological Evidence for Negative Expectancies" (2018) 10:5 Psychological Trauma 576.

Kisely, Steve R, Leslie A Campbell & Richard O'Reilly, "Compulsory

community and involuntary outpatient treatment for people with severe mental disorders" (2017) 3:CD004408 Cochrane Database of Systematic Reviews 1.

Kullack, Claire & Jonathan Laugharne, "Standard EMDR Protocol for Alcohol and Substance Dependence Comorbid With Posttraumatic Stress Disorder: Four Cases With 12-Month Follow-Up" (2016) 10:1 J EMDR Practice & Research 33.

Lacroix, Charlotte A, "Another Weapon for Combating Family Violence: Prevention of Animal Abuse" (1998) 4 Animal L 1.

Leahy, Cheryl, "Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement" (2011) 4 J Animal L & Ethics 63.

Lehrer, Dana, "Trauma-Informed Care: The Importance of Understanding the Incarcerated Women" (2021) 27:2 J Correctional Health Care 121.

Leotti, Lauren A, Sheena S. Iyengar & Kevin N. Ochsner, "Born to Choose: The Origins and Value of the Need for Control," (2010) 14:10 Trends in Cognitive Sciences 457.

Lewin, Jona et al, "A community service for sex offenders" (1994) 5:2 The J Forensic Psychiatry 297.

Lu, Weili et al, "Cognitive-Behavioral Treatment of PTSD in Severe Mental Illness: Pilot Study Replication in an Ethnically Diverse Population" (2009) 12:1 American J Psychiatric Rehabilitation 73.

Massoglia, Michael & William Alex Pridemore, "Incarceration and Health" (2015) 41 Annual Rev Sociology 291.

Matheson, S L et al, "Childhood adversity in schizophrenia: a systematic meta-analysis" (2013) 43:2 Psychological Medicine 225.

Mehrotra, Sushma, "Humanitarian Projects and Growth of EMDR Therapy in Asia" (2014) 8:4 J EMDR Practice & Research 252.

Monday, Osebor Ikecukwu, "Ethics of Cognitive Restructuring: A Rehabilitation of Rape Victims and Offenders" (2021) 6 Voices in Bioethics 1.

Monson, Candice M et al, "Cognitive processing therapy for veteran with military-related posttraumatic stress disorder." (2006) 74:5 J Consulting and Clinical Psychology 898.

Mosquera, Dolores, Andrew M. Leeds & Anabel Gonzalez, "Application of EMDR Therapy for Borderline Personality Disorder" (2014) 8:2 J EMDR Practice & Research 74.

Mueser, Kim T et al, "Trauma, PTSD, and the course of severe mental illness: an interactive model" (2022) 53:1-2 Schizophrenia Research 123.

Murray, S M et al, "The impact of Cognitive Processing Therapy on stigma among survivors of sexual violence in eastern Democratic Republic of Congo: results from a cluster randomized controlled trial" (2018) 12:1 Conflict & Health 1.

Nanni, Valentina, Rudolf Uher & Andrea Danese, "Childhood Maltreatment

Predicts Unfavorable Course of Illness and Treatment Outcome in Depression: A Meta-Analysis" (2012) 169 American J Psychiatry 141.
Pagani, Marco et al, "Pretreatment, Intratreatment, and Posttreatment EEG Imaging of EMDR: Methodology and Preliminary Results From a Single Case" (2011) 5:2 J EMDR Practice & Research 42.
Patterson, Emily G & Heather Piper, "Animal Abuse as a Sentinel for Human Violence: A Critique" (2009) 65:3 Journal of Social Issues 589.
Penny, Stephanie R, Andrew Morgan & Alexander I.F. Simpson "Assessing illness- and non-illness-based motivations for violence in persons with major mental illness" (2016) 40:1 L & Human Behavior 42.
Phelps, Michelle S, "Rehabilitation in the Punitive Era: The Gap between Rhetoric and Reality in US Prison Programs" (2011) 45:1 L & Society Rev 33.
Phillips, Kristin M et al, "EMDR Treatment of Past Domestic Violence: A Clinical Vignette" (2009) 3:3 J EMDR Practice & Research 192.
Pitt, Aimee, "The Functions of Incarceration and Implications for Social Justice" (2021) 4:1 Social Work & Policy Studies: Social Justice, Practice & Theory 1.
Pringer, Sarah M & Nathaniel J. Wagner, "Use of Trauma-Informed Care With Incarcerated Offenders" (2020) 41:1 J Addictions & Offend Counseling 52.
Reese, Laura A, Joshua J. Vertalka & Cassie Richard, "Animal Cruelty and Neighborhood Conditions" (2020) 10:11 Animals 1.
Resick, P A et al, "A comparison of cognitive-processing therapy with prolonged exposure and a waiting condition for the treatment of chronic posttraumatic stress disorder in female rape victims" (2002) 70:4 J Consulting & Clinical Psychology 867.
Resick, Patricia A & Monica K Schnicke, "Cognitive processing therapy for sexual assault victims" (1992) 60:5 J Consulting & Clinical Psychology 748.
Richard, Cassie & Laura A Reese, "The Interpersonal Context of Human/Nonhuman Animal Violence" (2019) 32:1 Anthrozoös 65.
Rost, Christine, "EMDR Treatment of Workplace Trauma A Case Series" (2009) 3:2 J EMDR Practice & Research 80.
Ruderman, Michael A, Deirdra F Wilson & Savanna Reid, "Does Prison Crowding Predict Higher Rates of Substance use Related Parole Violations? A Recurrent Events Multi-Level Survival Analysis" (2015) 10:10 PLOS One 1.
Shiue, Ivya, "Violence Pathology, Epidemiology, Risks and Rehabilitation: a Global Challenge in the next Century" (2014) 2 Planet@Risk 386.
Silver, Steven M et al, "EMDR Therapy Following 9/11 Terrorist Attacks: A Community-Based Intervention in New York City." (2005) 12:1 Intl J Stress Management 29.

Slade, Jessica & Emma Alleyne, "The Psychological Impact of Slaughterhouse Employment: A Systematic Literature Review" (2021) 0:0 Trauma, Violence, & Abuse 1.

Slade, Mike et al, "Uses and abuses of recovery: implementing recovery-oriented practices in mental health systems" (2014) 13:1 World Psychiatry 12.

Sokoloff, Natalie J & Ida Dupont, "Domestic Violence at the Intersection of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities" (2005) 11:1 Violence Against Women 38.

Spatz Widom, Cathy, "The Cycle of Violence" (1989) 244:4901 Science 160.

Taylor, Jon & Kerensa Hocken, "Hurt people hurt: using a trauma-sensitive and compassion focused approach to support people to understand and manage their criminogenic needs" (2021) 23:3 J Forensic Practice 301.

Turney, Kristin, Christopher Wildeman & Jason Schnittker, "As Fathers and Felons: Explaining the Effects of Current and Recent Incarceration on Major Depression" (2012) 53:4 J Health & Social Behav 465.

Van den Berg, David P G & Mark van der Gaag, "Treating Trauma in psychosis with EMDR: A pilot study" (2012) 43:1 J Behav Therapy and Experimental Psychiatry 664.

Western, Bruce & Becky Pettit, "Incarceration & social inequality" (summer 2010) 139 Dædalus 8.

Winick, Bruce J, "Applying the Law Therapeutically in Domestic Violence Cases" (2000-2001) 69 U Missouri-Kansas City L Rev 33.

Wright, Jeremy & Christopher Hensley, "From animal cruelty to serial murder: Applying the graduation hypothesis" (2003) 47:1 Intl J Offend. Therapy & Comp Criminology 71.

Books

Alexander, Michelle, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 10th Anniversary ed (United States: New Press, 2020).

Ascione, Frank, ed, *International Handbook on Animal Abuse and Cruelty: Theory, Research, and Application*, 1st ed (Indiana: Purdue University Press, 2008).

Barlow, David H, ed, *Case Study in Clinical Handbook of Psychological Disorders*, 4th ed (New York: The Guilford Press, 2014), online: <www.apa.org/ptsd-guideline/resources/cognitive-processing-therapy-example.pdf> [perma.cc/22WC-BR5G].

Harari, Yuval Noah, *21 Lessons for the 21st Century*, 1st ed (Ireland: Random House Publishing Group, 2019).

Hogarth, William, *Anecdotes of William Hogarth, Written by Himself* (London, UK: J B Nichols and son, 1833).

Ko, Aph & Syl Ko, *Aphro-ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters*, 1st ed (New York: Lantern Publishing & Media, 2020).

Selig, Paul, *Beyond the Known: Realization: A Channeled Text*, 1st ed (United Kingdom: St. Martin's Publishing Group, 2019).

Selig, Paul, *The Book of Freedom*, 1st ed (United States: Penguin Publishing Group, 2018).

Chapters

Boisvert, Danielle L, "Biosocial Factors and Their Influence on Desistance" in Amy L Solomon & Jennifer Scherer, eds, *Desistance from Crime: Implications for Research Policy, and Practice* (Washington DC: United States Department of Justice Office of Justice Programs: National Institute of Justice, 2021).

Bucklen, Kristofer Bret, "Desistance-Focused Criminal Justice Practice" in Amy L Solomon & Jennifer Scherer, eds, *Desistance from Crime: Implications for Research Policy, and Practice* (Washington DC: United States Department of Justice Office of Justice Programs: National Institute of Justice, 2021).

Frasch, Pamela, "Examining Anticruelty Enhancements: Historical Context and Policy Advances" in Lori Gruen & Justin Marceau, eds, *Carceral Logics* (United Kingdom: Cambridge University Press, 2022).

Gallimore, Timothy, "Unresolved Trauma: Fuel for the Cycle of Violence and Terrorism" in Chris E Stout, ed, *Psychology of Terrorism: Coping with the Continuing Threat* (Connecticut: Praeger Publishers, 2004).

Kanuha, V, "Domestic violence, racism, and the battered women's movement in the United States" in J L Edleson & Z C Eisikovits, eds, *Future interventions with battered women and their families* (London: Sage, 1996).

Patronek, Gary, "Animal Maltreatment as a Social Problem" in Lacey Levitt, Gary Patronek & Thomas Grisso, eds, *Animal maltreatment: Forensic Mental Health Issues and Evaluations* (New York: Oxford Academic, 2015).

Wildeman, Christopher, "The Impact of Incarceration on the Desistance Process Among Individuals Who Chronically Engage in Criminal Activity" in Amy L Solomon & Jennifer Scherer, eds, *Desistance from Crime: Implications for Research Policy, and Practice* (Washington DC: United States Department of Justice Office of Justice Programs: National Institute of Justice, 2021).

Yoshihama, Mieko, "Domestic violence against women of Japanese descent in Los Angeles: Two methods of estimating prevalence" in Mangai Natarajan, ed, *Domestic Violence: The Five Big Questions*, 1st ed (London: Routledge, 2007).

Reports

Fuller Torrey, E et al, eds, *Treat or Repeat: A State Survey of Serious Mental Illness, Major Crimes and Community Treatment*, 1st ed (Virginia: Treatment Advocacy Center: Office of Research & Public Affairs, 2017), online: <www.treatmentadvocacycenter.org/storage/documents/treat-or-repeat.pdf> [perma.cc/4TFP-TQQR].

Gomez, Ana M, *EMDR Therapy and Adjunct Approaches with Children*, 1st ed (United States: Springer Publishing Company, 2013); Paul William Miller,

EMDR Therapy for Schizophrenia and Other Psychoses, 1st ed (United States: Springer Publishing Company, 2015).

Johnson, Byron R, Sung Joon Jang & Matt Bradshaw, *Rehabilitation: Assessing the Correctional Trauma Healing Program* (Waco: Baylor University, 2021), online: <1s712.americanbible.org/baylor-prison-study/baylor-prison-study/ABS-Baylor-Research-Study.pdf> [perma.cc/Y5PM-HTKM].

Luke, Carter, Arnold Arluke & Jack Levin, *Cruelty to Animals and Other Crimes: A Study by the MSPCA and Northeastern University*, 1st ed (Massachusetts: Massachusetts Society for the Prevention of Cruelty to Animals, 1997), online: <support.mspca.org/site/DocServer/cruelty-to-animals-and-other-crimes.pdf?docID=12541> [perma.cc/MWP2-HN2M].

Sivak, Leda et al, *Model of Care for Aboriginal Prisoner Health and Wellbeing for South Australia–Final Report*, 1st ed (South Australia: Wardliparingga Aboriginal Health Research Unit, 2017), online: <www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/resources/sa+prison+health+service+model+of+care+for+aboriginal+prisoner+health+and+wellbeing+for+south+australia> [perma.cc/WF44-G54C].

Substance Abuse & Mental Health Administration, *Trauma-Informed Care in Behavioural Health Sciences: Treatment Improvement Protocol (TIP) Series 57*, 1st ed (Maryland: Substance Abuse and Mental Health Services Administration, 2014), online: <store.samhsa.gov/product/TIP-57-Trauma-Informed-Care-in-Behavioural-Health-Services/SMA14-4816> [perma.cc/339N-MYCM].

Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-informed Approach*, 1st ed (Maryland: Substance Abuse and Mental Health Services Administration, 2014), online: <ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf> [perma.cc/LP8W-CCV3].

Substance Abuse and Mental Health Services, "Serious Mental Illness and Trauma: A Literature Review and Issue Brief" (9 May 2018), online: <www.samhsa.gov/sites/default/files/programs_campaigns/childrens_mental_health/samhsa-smi-and-trauma-lit-review-and-issue-brief.docx> [perma.cc/D26Y-K496].

Online News Articles

"Confessions of a slaughterhouse worker", *BBC News* (6 January 2020), online: <www.bbc.com/news/stories-50986683> [perma.cc/HA88-ZXJZ].

Montgomery, John, "Emotions, Survival, and Disconnection", *Psychology Today* (30 September 2012), online: <www.psychologytoday.com/us/blog/the-embodied-mind/201209/emotions-survival-and-disconnection>

[perma.cc/DPT5-P2CN].

O'Donnell, Jayne & Mabinty Quarshie, "The startling toll on children who witness domestic violence is just now being understood", *USA Today* (29 January 2019), online: <www.usatoday.com/story/news/health/2019/01/29/domestic-violence-research-children-abuse-mental-health-learning-aces/2227218002/> [perma.cc/HK6S-NBP2].

Charles Siebert, "The Animal-Cruelty Syndrome", *The New York Times* (11 June 2010), online: <www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html> [perma.cc/Y73Z-QXEJ].

Wake Forest University Baptist Medical Center, "Violence Is A Learned Behaviour, Says Researchers At Wake Forest University", *Science Daily* (9 November 2000), online: <www.sciencedaily.com/releases/2000/11/001106061128.htm> [perma.cc/2KXG-NPRJ].

Online Sources

American Psychiatric Association

"What is Posttraumatic Stress Disorder?" (last reviewed August 2020), online: *American Psychiatric Association* <www.psychiatry.org/patients-families/ptsd/what-is-ptsd> [perma.cc/NX48-YRED].

"Diagnostic and Statistical Manual of Mental Disorders (DSM-5)" (last visited 11 April 2021), online: *American Psychiatric Association* <www.psychiatry.org/patients-families/ptsd/what-is-ptsd> [perma.cc/NX48-YRED].

American Psychological Association

"Cognitive Processing Therapy (CPT)" (last visited 11 April 2021), online: *American Psychological Association* <www.apa.org/ptsd-guideline/treatments/cognitive-processing-therapy> [perma.cc/WQ9B-TWMC].

"Eye Movement Desensitization and Reprocessing (EMDR) Therapy" (last visited 11 April 2021), online: *American Psychological Association* <www.apa.org/ptsd-guideline/treatments/eye-movement-reprocessing> [perma.cc/TM2R-EHEM].

"How to cope with traumatic stress" (30 October 2019), online: *American Psychological Association* <www.apa.org/topics/trauma/stress> [perma.cc/23K3-27LD].

"Post-traumatic Stress Disorder" (last visited 11 April 2021), online: *American Psychological Association* <www.apa.org/topics/ptsd/> [perma.cc/E899-NYCC].

"The Effects of Trauma Do Not Have to Last a Lifetime" (16 January 2004), online: *American Psychological Association* <www.apa.org/research/action/ptsd#:~:text=Untreated%20PTSD%20from%20any%20trauma,work%20and%20interact%20with%20others> [perma.cc/3LVX-VC97].

"Trauma" (last visited 11 April 2021), online: *American Psychological Association* <www.apa.org/topics/trauma/> [perma.cc/7MAJ-NCML].

"Understanding psychological testing and assessment" (2013), online: *American Psychological Association* <www.apa.org/topics/testing-assessment-measurement/understanding> [perma.cc/2U8N-SN4C]>.

"What is Cognitive Behavioural Therapy?" (last visited 17 November 2021), online: *American Psychological Association* <www.apa.org/ptsd-guideline/patients-and-families/cognitive-behavioural#> [perma.cc/8HTJ-3HAN].

Carter, Katherine, "Helping people through trauma-informed care" (15 March 2019), online: *American Psychological Association* <www.apa.org/members/content/trauma-informed-series> [perma.cc/2CTA-R7F5].

DeAngelis, Tori, "Mental illness and violence: Debunking myths, addressing realities" (1 April 2021), online: *American Psychological Association* <www.apa.org/monitor/2021/04/ce-mental-illness> [perma.cc/NXY2-UTL8].

Animal Legal Defense Fund

"Animals as Crime Victims: Development of a New Legal Status" (last visited 24 January 2022), online: *Animal Legal Defense Fund* <aldf.org/article/animals-as-crime-victims-development-of-a-new-legal-status/#:~:text=Both%20federal%20and%20state%20courts,for%20animals%20and%20for%20justice> [perma.cc/L4R3-D49A].

"The Link Between Cruelty to Animals and Violence Toward Humans" (last visited 24 January 2022), online: *Animal Legal Defense Fund* <leb.fbi.gov/articles/featured-articles/the-link-between-animal-cruelty-and-human-violence> [perma.cc/G9FT-VWWF].

Cognitive Processing Therapy

"About CPT" (last visited 11 April 2021), online: *Cognitive Processing Therapy* <cptforptsd.com/about-cpt/> [perma.cc/SH34-2XR4].

"Welcome" (last visited 4 November 2022), online: *Cognitive Processing Therapy* <cptforptsd.com/> [perma.cc/XL42-AB5Y].

Office of the Attorney General for the District of Columbia

"AG Racine Statement on OAG's Prosecution of Juvenile Violent Crime" (28 January 2022), online: *Office of the Attorney General for the District of*

Columbia <oag.dc.gov/release/ag-racine-statement-oags-prosecution-juvenile-0> [perma.cc/XB5E-5TVG].

"Restorative Justice Program" (last visited 11 February 2022), online: *Office of the Attorney General for the District of Columbia* <oag.dc.gov/public-safety/restorative-justice-program> [perma.cc/PV8U-L8KL].

The Sentencing Project

"Issues: Incarceration" (last visited 25 October 2021), online: *The Sentencing Project* <www.sentencingproject.org/issues/incarceration/> [perma.cc/J3MB-TRF8].

Gotsch, Kara & Vinay Basti, "Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons" (2 August 2018), online: *The Sentencing Project* <www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/> [perma.cc/NJ88-PHYD].

Youtube

Institute for Human-Animal Connection, "Recording: Interconnected: Forensic Animal Maltreatment Evaluations (FAME) & Animal Abuse Risk Assessment Tool" (4 April 2018), online (video): *YouTube* <www.youtube.com/watch?v=KtRiN8s-kpA> [perma.cc/55BL-UZNJ].

TEDx Talks, "Emotional laws are the answer for better relationships: Diana Wais at TEDxThessaloniki" (20 June 2014), online (video): *YouTube* <www.youtube.com/watch?v=gTZgfyOW-DA> [perma.cc/E33Q-PEMD] [TEDx Talks].

Other

"4-H Animal Programs" (last visited 10 November 2021), online: *Pennsylvania State College of Agricultural Sciences* <animalscience.psu.edu/outreach/youth> [perma.cc/6DY2-KRNG].

"About Us" (last visited 11 April 2021) online: *Colorado Link Project* <coloradolinkproject.com/about-us/> [perma.cc/W6HB-3NFC].

"Acute Stress Disorder vs. PTSD: What's the Difference?" (updated 31 August 2021), online: *Recovery Village* <www.therecoveryvillage.com/mental-health/acute-stress-disorder/acute-stress-disorder-vs-ptsd/#:~:text=Acute%20stress%20disorder%20refers%20to,lasted%20longer%20than%20a%20month> [perma.cc/KS48-HA79].

"Causes – Post-traumatic stress disorder" (last reviewed 27 September 2018), online: *National Health Services* <www.nhs.uk/mental-health/conditions/post-traumatic-stress-disorder-ptsd/causes/#:~:text=Post%2Dtraumatic%20stress%20disorder%20(PTSD)%20can%20develop%20after%20a,physical%20or%20sexual%20assault> [perma.cc/FT44-XXHT].

"Cognitive Processing Therapy" (last visited 1 February 2022), online: *Johns Hopkins Bloomberg School of Public Health* <www.jhsph.edu/research/centers-and-institutes/global-mental-health/talk-therapies/cognitive-processing-therapy/> [perma.cc/2KGV-Y3NJ].

"Community Action Model" (last visited 18 November 2021), online: *Conduent Healthy Communities Institute* <cdc.thehcn.net/promisepractice/index/view?pid=30159> [perma.cc/B52K-QDV4].

"Effects of child abuse and neglect for adult survivors" (January 2014), online: *Australian Institute of Family Studies* <aifs.gov.au/cfca/publications/effects-child-abuse-and-neglect-adult-survivors> [perma.cc/S638-J4U7].

"Exhibit 1.3-4 DSM-5 Diagnostic Criteria for PTSD, Trauma-Informed Care in Behavioural Health Services" (last visited 11 May 2022), online: *National Center for Biotechnology Information* <www.ncbi.nlm.nih.gov/books/NBK207191/box/part1_ch3.box16/> [perma.cc/H5TF-59NV].

"Getting Stuck In Your Trauma or PTSD" (last visited 27 January 2022), online: *Oxford Development Center* <www.oxforddevelopmentcentre.co.uk/getting-stuck-in-your-trauma-or-ptsd/> [perma.cc/5Z5T-5JJY].

"Home" (last visited 11 April 2021), online: *National Link Coalition* <nationallinkcoalition.org/> [perma.cc/6275-944V].

"Homepage" (last visited 11 April 2021), online: *Alcoholics Anonymous* <aa.org/> [perma.cc/6XJD-RCG4].

"How to Manage Trauma" (2013), online: *National Council for Behavioural Health* <www.thenationalcouncil.org/wp-content/uploads/2013/05/Trauma-infographic.pdf?daf=375ateTbd56> [perma.cc/GNP2-2257].

"MSU Center for Survivors" (last visited 2 November 2022), online: *Michigan State University* Center for Survivors <centerforsurvivors.msu.edu/> [perma.cc/9J5B-SKQX].

"Post-Traumatic Stress Disorder" (last revised May 2019), online: *National Institute of Mental Health* <www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd#:~:text=Anyone%20can%20develop%20PTSD%20at,some%20point%20in%20their%20lives> [perma.cc/MCN5-TQME].

"Post-Traumatic Stress Disorder" (revised 2020), online: *National Institute of Mental Health* <www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/index.shtml> [perma.cc/GJ82-LV5C].

"PTSD: National Center for PTSD" (last visited 11 April 2021), online: *United States Department of Veteran Affairs* <www.ptsd.va.gov/> [perma.cc/2X6Q-D6LZ].

"PTSD Triggers" (last visited 25 October 2021), online: *Trauma Practice* <traumapractice.co.uk/ptsd-triggers/> [perma.cc/YD4G-TTDV].

"Recognizing PTSD Triggers" (last visited 11 April 2021), online: *International Association of Fire Fighters* <www.iaffrecoverycenter.com/blog/recognizing-ptsd-triggers/> [perma.cc/7JMW-2X5J].

"Social Learning Theory and Family Violence" (last visited 11 April 2021), online: *Criminal Justice* <criminal-justice.iresearchnet.com/crime/domestic-violence/social-learning-theory-and-family-violence/> [perma.cc/J285-FRWC].

"The Four Stages of Cruelty" (last visited 10 May 2022), online: *William Hogarth* <www.williamhogarth.org/four-stages-of-cruelty/> [perma.cc/NTH8-GAUP].

"The Three Theories of Criminal Justice" (last visited 8 November 2021), online: *CriminalJustice.com* <www.criminaljustice.com/resources/three-theories-of-criminal-justice/> [perma.cc/GWN7-PSAA].

"Trauma and Violence" (2 August 2019), online: *Substance Abuse and Mental Health Services Administration* <www.samhsa.gov/trauma-violence> [perma.cc/H7CX-5NMU].

"Understanding the Power and Control Wheel" (last visited 24 January 2022), online: *Domestic Abuse Intervention Programs* <www.theduluthmodel.org/wheels/understanding-power-control-wheel/> [perma.cc/GE8Y-Y7AS].

"What is EMDR?" (last visited 11 April 2021), online: *EMDR Institute, Inc* <www.emdr.com/what-is-emdr/> [perma.cc/HH2D-9NKS].

"What is the Link?" (last visited 24 January 2022), online: *National Link Coalition* <nationallinkcoalition.org/what-is-the-link> [perma.cc/MM7P-JCNW].

"What is Trauma-Focused Therapy" (last visited 10 November 2021), online: *Center for Child Trauma Assessment, Services and Interventions* <cctasi.northwestern.edu/trauma-focused-therapy/> [perma.cc/5NUS-PLZM].

Goldstein, Dana, "Too Old to Commit Crime?" (Mar. 20, 2015), online: *The Marshall Project* <www.themarshallproject.org/2015/03/20/too-old-to-commit-crime> [perma.cc/63R2-PA22].

Meade, Erica & Linda Mellgren, "Overview and Inventory of HHS Efforts to Assist Incarcerated and Reentering Individuals and Their Families" (31 January 2011), online: *Office of the Assistant Secretary for Planning and Evaluation* <aspe.hhs.gov/reports/overview-inventory-hhs-efforts-assist-incarcerated-reentering-individuals-their-families-0> [perma.cc/ZQS7-5RGC].

Hayes, Kelly & Marianne Kaba, “A Jailbreak of the Imagination: Seeing Prisons for What They Are and Demanding Transformation” (8 January 2019), online: *Prison Legal News* <www.prisonlegalnews.org/news/2019/jan/8/jailbreak-imagination-seeing-prisons-what-they-are-and-demanding-transformation/> [perma.cc/Y855-SKYN].

Resick, Patricia et al, “Cognitive Processing Therapy (CPT)” (2016), online: *International Society for Traumatic Stress Studies* <istss.org/clinical-resources/treating-trauma/treatment-materials/cognitive-processing-therapy-(cpt)> [perma.cc/S65M-HN4M].

Robinson, Charlie & Victoria Clausen, “The Link Between Animal Cruelty and Human Violence” (20 August 2021), online: *Federal Bureau Investigation, Law Enforcement Bulletin* <leb.fbi.gov/articles/featured-articles/the-link-between-animal-cruelty-and-human-violence> [perma.cc/G9FT-VWWF].

Selva, Joaquín, “What is Evidence-Based Therapy: 3 EBT Interventions” (28 October 2017), online: *Positive Psychology* <positivepsychology.com/evidence-based-therapy> [perma.cc/KJK4-RFEQ].

Stephens, Ronnie K, “Trauma and Abuse of Incarcerated Juveniles in American Prisons” (28 May 2021), online: *Interrogating Justice* <interrogatingjustice.org/prisons/trauma-and-abuse-of-incarcerated-juveniles-in-american-prisons/> [perma.cc/G5Q3-EKXE].

Teicher, Martin H, “Wounds That Time Won’t Heal: The Neurobiology of Child Abuse” (1 October 2000), online: *Cerebrum Dana Foundation* <dana.org/article/wounds-that-time-wont-heal/> [perma.cc/W67F-MTN3].

Tull, Matthew, “The Connection Between PTSD and Domestic Violence” (updated 16 January 2020), online: *Very Well Mind* <www.verywellmind.com/ptsd-and-domestic-violence-2797405#:~:text=Childhood%20Abuse%20and%20Relationship%20Violence&text=People%20with%20PTSD%20also%20have,and%20women%20with%20the%20disorder> [perma.cc/Q9XV-UFM6].

Other

Email from Stephanie Stanley, Therapist, Michigan State University Center for Survivors, to author (11 January 2021, 10:35 PST) (on file with author).

Obstructed Gynecology: Inaccess to Reproductive Health Care for Incarcerated Women as a Violation of Section 7 of the *Charter*

MEGAN MACKINNON *

ABSTRACT

Substandard prison health care in Canada has long been the subject of research, debate, and policy analysis. For nearly forty years, Senator Kim Pate and her associates have uncovered myriad human rights abuses occurring inside Canadian prisons and have urged governments to take action. The extent to which this substandard health care specifically impacts the reproductive freedom of incarcerated women has yet to be the subject of meaningful academic consideration. It has been argued by many that the conditions of Canadian prisons engage the *Charter of Rights and Freedoms*. This paper, in its limited scope, conceives of reproductive freedom as encapsulated by the section 7 *Charter* right to life, liberty, and security of the person. It is a novel analysis of how each of these three constitutional rights might be engaged by the current state of reproductive health care in prison.

Keywords: Prison Law; Incarcerated Women; Reproductive Health Care; Reproductive Justice; *Charter of Rights and Freedoms*; Section 7; Life, Liberty, and Security of the Person.

* Megan MacKinnon is a recent J.D. graduate of the Schulich School of Law at Dalhousie University, with a Certificate in Criminal Justice. Prior to law school she completed her Honours degree in Criminal Justice and Public Policy at the University of Guelph. She is currently articling at Collett Read LLP, a criminal defence law firm in Hamilton, Ontario.

I. INTRODUCTION

Thirty-five years ago, the Supreme Court of Canada ("SCC") decided *R v Morgentaler*.[1] In this landmark decision, the *Criminal Code* provisions that prevented women from accessing safe and timely abortion were deemed to violate their section 7 *Charter* right to security of the person. This was generally lauded as a deeply progressive item of jurisprudence, indispensable to gender equality in Canada. Morgentaler himself said in the wake of the decision, "[f]inally, we have freedom of reproduction in this country."[2]

With great respect to the late Dr. Morgentaler, the path to true freedom of reproduction is unfortunately not so direct. Three and a half decades after the decision, a great many women still face significant impediments to reproductive freedom in Canada. For one thing, this freedom encompasses much more than the ability to terminate a pregnancy. It includes the right to maintain bodily autonomy; the right to choose whether and when to have children, and how many children to have; and the right to parent one's children in safe and sustainable communities.[3] These are not rights currently enjoyed by all Canadians.

Reproductive freedom is a privilege. It flows from access to education, community resources, and health care.[4] Where these are not available, the reproductive freedoms identified above are hindered. Reproductive injustice thus pervades low-income, racialized, and otherwise marginalized communities, and is compounded by the overcriminalization and overincarceration of individuals from these communities.[5] The specific focus of this paper is the impact of incarceration on the reproductive freedom of Canadian women.[6]

---

1 *R v Morgentaler*, [1988] 1 SCR 30, 37 CCC (3d) 449 [*Morgentaler*].

2 CBC News, "Abortion rights activist Dr. Henry Morgentaler dies at 90" (29 May 2013), online: *CBC News* <www.cbc.ca/news/canada/abortion-rights-activist-dr-henry-morgentaler-dies-at-90-1.1321542> [perma.cc/6YYZ-ECNP].

3 "Reproductive Justice" (2022) online: *Sister Song* <www.sistersong.net/reproductive-justice> [perma.cc/J2RY-E7BD].

4 *Ibid.*

5 Canada, Department of Justice, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (Ottawa: DOJ, last modified 9 April 2020) (Reports and Publications: Research and Statistics Division); Jean-Denis David & Megan Mitchell, "Contacts with the Police and the Over-Representation of Indigenous Peoples in The Canadian Criminal Justice System" (2021) 63:2 Can J Crim & Corr 23.

6 The author uses "women" and "female" throughout the paper to refer to individuals who have or could become pregnant, while acknowledging that not all these individuals may identify as female or as women.

As the SCC asserted in *Sauvé v Canada*, prisoners are not "temporary outcasts from our system of rights and democracy."[7] The *Charter of Rights and Freedoms* applies to the incarcerated as much as the non-incarcerated. Despite any attitudes to the contrary, imprisonment as a form of punishment is not meant to extend beyond separation from society to include human rights abuses.[8] While "reproductive freedom" has not yet been specifically identified as a constitutional right in Canada, the right to life, liberty, and security of the person under section 7 of the *Charter* is well-established.[9]

Life, liberty, and security of the person have generally been interpreted as three distinct rights, any one of which can ground a section 7 claim. This paper argues that the reproductive health care currently received by incarcerated women is demonstrably substandard and engages all three rights in section 7. The right to life is engaged where inaccess to health care in prison leads to an increased risk of death for incarcerated mothers and their children. The right to liberty is engaged where this inaccess eliminates women's freedom to make informed health care decisions and where there is limited access to timely abortion. Finally, the right to security of the person is engaged, having regard to both physical and psychological security. Inaccess to health care is associated with adverse physical health outcomes for Canadian prisoners in general, with specific impacts on the reproductive health of female prisoners. With regard to psychological security, the state conduct infringes on incarcerated women's psychological integrity in at least three ways: by delaying health care treatment, by failing to provide access to mental health resources and trauma therapy following pregnancy loss, and by removing children from their mothers following birth.

To be constitutionally permissible, section 7 deprivations must also be causally connected to state conduct and accord with principles of fundamental justice. If these are made out, the burden shifts to the government to justify the infringement pursuant to section 1 of the *Charter*.[10] The state conduct subject to section 7 analysis here is the failure of Correctional Services Canada ("CSC") to provide incarcerated women with proper reproductive health care.

---

7 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 40, 47.

8 Canada, Parliament, Senate, Standing Committee on Human Rights, *Report on the Human Rights of Federally Sentenced Persons*, 42nd Parl, 1st Sess (June 2021) (Chair: Salma Ataullahjan) at 56 [Senate Report].

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

10 *Ibid*, s 1.

Part II of this paper canvasses the current state of reproductive health care in Canada. Part III then assesses the potential section 7 infringements associated with this substandard health care, the extent to which they are causally connected to state conduct, the relevant principle(s) of fundamental justice, and the potential justifications by CSC under section 1.

II. REPRODUCTIVE HEALTH CARE IN CANADA'S PRISONS

Section 86 of the *Corrections and Conditional Release Act* stipulates that CSC shall provide every inmate with "essential health care" and "reasonable access to non-essential health care," both of which must "conform to professionally accepted standards."[11] Notwithstanding this, the overall health of incarcerated persons in Canada is much poorer than that of the general population.[12] This can be partially attributed to social determinants of poor health such as adverse life events, substance abuse, family disorganization, and socioeconomic status, all of which are associated with criminality and incarceration.[13] However, any propensity for poor health is likely to be aggravated by substandard health care in the prison environment. All incarcerated individuals receive health care far below the national standard both during incarceration and following release back into the community.[14] In 2020 and 2021, health care complaints represented the second most common category of complaints by offenders to the Office of the Correctional Investigator;[15] from 2014 to 2020 they were number one.[16]

---

11 *Corrections and Conditional Release Act*, SC 1992, c 20, s 86 [*CCRA*].

12 Fiona Kouyoumdjian et al, "Health Status of Prisoners in Canada: Narrative Review" (2016) 62:3 Can Fam Physician 215 [Prisoner Health Status]; Adam Miller, "Prison Health Care Inequality" (2013) 185:6 Can Med Assoc J 249 [Miller].

13 *Ibid.*

14 Prisoner Health Status, *supra* note 12; Miller, *supra* note 12; Jessica Liauw et al, "The Unmet Contraceptive Need of Incarcerated Women in Ontario" (2016) 38:9 J Obstet Gynaecol Can 820 [Unmet Contraceptive Need].

15 Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2021 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2023).

16 Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2015 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2016); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2016 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2017); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2017 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2018); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2018 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2019); Canada, Public Safety Canada Portfolio Corrections

Specific complaints include excessively long wait times or outright failure to receive treatment, complications following medical procedures, and poor bedside manner.[17]

Reproductive health care for incarcerated women is a severely under-researched area.[18] Martha Paynter and others' 2020 meta-analysis of sexual and reproductive health outcomes among incarcerated women uncovered only 15 studies from between 1994 and 2020.[19] From what research has been done, it is clear that incarcerated women in Canada receive substandard reproductive health care in virtually every way. Incarcerated women have poorer access to contraception than non-incarcerated women and thus have higher rates of unintended pregnancy both while incarcerated and while in the community.[20] Prenatal care for women who are pregnant while incarcerated is also lacking. Alison Carter Ramirez and others found that compared to general population pregnancies, women with prison pregnancies had a significantly lower chance of receiving any of the following: a first-trimester doctor's visit, eight or more total doctor's visits during pregnancy (the number recommended by the World Health Organization),[21] and ultrasonography in their first trimester.[22] Another 2020 study by Carter Ramirez and others found that women with prison pregnancies were at greater risk than women in the general population of adverse birth outcomes such as premature birth,[23] which is associated with

Statistics Committee, *2019 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2020); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2020 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2022).

17 Miller, *supra* note 12.

18 Fiona Kouyoumdjian et al, "Research on the Health of People Who Experience Detention or Incarceration in Canada: A Scoping Review" (2015) 15:1 BMC Public Health 419.

19 Martha Paynter et al, "Sexual and Reproductive Health Outcomes among Incarcerated Women in Canada: A Scoping Review" (2020) Can J Nurs Res 1.

20 Unmet Contraceptive Need, *supra* note 14.

21 "WHO Recommendations on Antenatal Care for a Positive Pregnancy Experience" (28 November 2016), online: *World Health Organization* <www.who.int/publications/i/item/9789241549912> [perma.cc/JL6A-Y8UT] [World Health Organization].

22 Alison Carter Ramirez et al, "Quality of Antenatal Care for Women Who Experience Imprisonment in Ontario, Canada" (2020) 3:8 JAMA.

23 Alison Carter Ramirez et al, "Infant and Maternal Outcomes for Women Who Experience Imprisonment in Ontario, Canada: A Retrospective Cohort Study" (2020) 42:4 J Obstet Gynecol Can 462 [Infant and Maternal Outcomes].

infant mortality,[24] birth defects,[25] and postpartum depression.[26] The rate of premature birth among women who became pregnant before or during incarceration was 2.7 and 2.1 times higher, respectively, than in the general population.[27] Women in prison also experience higher rates of HIV and other sexually transmitted infections,[28] and of abnormal and overdue Pap tests.[29]

Qualitative studies, news reports, and other sources further illustrate the nature and extent of the problem. In a qualitative study by Jessica Liauw and others, women in prison reported having to wait months to see a physician despite multiple requests, a sense that their requests were not taken seriously by the correctional officers through whom these requests were submitted, and limited access to essential services such as contraception, IUD follow-up appointments, pregnancy tests, and abortions.[30] These women often became pregnant without meaning to and remained so because they did not know they were pregnant or did not receive an appointment until it was too late to terminate the pregnancy.[31] Women who carried pregnancies to term and gave birth in prison were often separated from their children following birth, a process described by the women in Liauw et al.'s study as "horrific."[32] Women who experienced pregnancy loss in prison described an absence of medical and emotional support, including inaccess to sanitary pads while experiencing miscarriage and inaccess to therapy or counselling afterward.[33]

---

24 "Preterm birth" (19 February 2018), online: *World Health Organization* <www.who.int/news-room/fact-sheets/detail/preterm-birth> [perma.cc/WPY9-TXCE].

25 Hannah C Glass et al, "Outcomes for Extremely Premature Infants" (2015) 120:6 Anesth Analg 1337.

26 Juliana Arantes Figueiredo de Paula Eduardo et al, "Preterm Birth as a Risk Factor for Postpartum Depression: A Systematic Review and Meta-Analysis" (2019) 259:1 J Affect Disord 392.

27 Infant and Maternal Outcomes, *supra* note 23.

28 Jonathan D Besney et al, "Addressing Women's Unmet Health Care Needs in a Canadian Remand Center: Catalyst for Improved Health?" (2018) 24:3 J Correct Health Care 276.

29 Infant and Maternal Outcomes, *supra* note 23; "Pap" tests check for the presence of human papilloma virus (HPV), several strains of which are predeterminants of cervical cancer.

30 Jessica Liauw et al, "Reproductive Healthcare in Prison: A Qualitative Study of Women's Experiences and Perspectives in Ontario, Canada" (2021) 16:5 PLOS [Reproductive Healthcare].

31 *Ibid.*

32 *Ibid* at 10.

33 *Ibid* at 9.

Incarcerated women in the Liauw study described a general unsympathetic attitude of prison officials, leading to a belief "that correctional officers did not consider them as deserving of good health care as members of the general population."[34] Media reports of pregnant women's prison experiences reveal a similar sentiment of indifference. One woman in an Ottawa jail described being ignored by prison officials for ten to fifteen minutes while miscarrying in her cell.[35] Another gave birth in her cell without a doctor present as prison officials thought she was in "false labour"; her son was born breech and died before the age of two due to respiratory problems.[36] According to Liauw et al., this lack of reproductive safety and dignity in the prison environment tended, unsurprisingly, to negatively influence these women's attitudes toward pregnancy and motherhood.[37] Personal essay anthologies like Gordana Eljdupovic and Rebecca Jaremko Bromwich's *Incarcerated Mothers: Oppression and Resistance* capture the intimate individual experiences of women at the intersection of motherhood, incarceration, and social marginalization.[38] These women describe social stigmatization, "otherness," and a general sense that, to use the editors' words, the society in which they live has deemed them "unworthy of investment."[39] Of particular note are the experiences of Indigenous women, who represent Canada's fastest-growing prison population,[40] and for whom motherhood often wields deep cultural significance.[41]

---

34 *Ibid* at 6.

35 Joe Lofaro, "Prisoner's miscarriage in jail cell raises questions about health care, critics say" (3 February 2017), online: *Ottawa Citizen* <ottawacitizen.com/news/local-news/prisoners-miscarriage-in-jail-cell-raises-questions-about-health-care-critics-say> [perma.cc/E4XA-GUEX].

36 "Inmate's rights allegedly violated in jailhouse birth" (10 October 2012), online: *CBC News* <www.cbc.ca/news/canada/ottawa/inmate-s-rights-allegedly-violated-in-jailhouse-birth-1.1142465> [perma.cc/PCH8-96JP].

37 Reproductive Healthcare, *supra* note 30.

38 Gordana Eljdupovic & Rebecca Jaremko Bromwich, eds, *Incarcerated Mothers: Oppression and Resistance* (Bradford, ON: Demeter Press, 2013) [Eljdupovic & Bromwich].

39 *Ibid* at 6.

40 Canada, Department of Justice, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (Reports and Publications: Research and Statistics Division) (Ottawa: DOJ, 2020).

41 Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Sumac Press, 2016); Shirley Bear, "Equality Among Women" in William Herbert New, ed, *Canadian Literature* (Vancouver: University of British Columbia, 1990).

In 2022, the Canadian Minister of Health stated that "reproductive rights are fundamental rights,"[42] such that "[t]he Government of Canada firmly believes that everyone should have access to safe and consistent sexual and reproductive health services."[43] This statement has yet to be reflected in jurisprudence or in any attempt to improve reproductive health care services in prison.

Indeed, reproductive rights are fundamental rights. This paper specifically envisions CSC's failure to provide and oversee reproductive health care services which conform to the statutorily prescribed standard as engaging section 7 of the *Charter*. What follows is a discussion of how this failure and its resultant deprivations may constitute an affront to incarcerated women's established rights to life, liberty, and security of the person.

III. SECTION 7

A. Life

The constitutional right to life is engaged where state action imposes death or an increased risk of death on a person, either directly or indirectly.[44] The SCC was clear in *Chaoulli v Quebec*[45] and *Canada v PHS Community Services Society*[46] that the deprivation of lifesaving medical care engages the right to life under section 7. In *Chaoulli*, the legislative prohibition on private health insurance violated the right to life where it deprived individuals of timely health care, potentially resulting in death. The Court concluded that "prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life [...] as protected by s. 7."[47]

Following the reasoning from *Sauvé*, "ordinary Canadians" includes those serving terms of imprisonment. It is clear that the government is failing to deliver health care to these Canadians in a reasonable manner. In *Chaoulli*, it was the excessive wait times for treatment that were deemed

---

42 Health Canada, "Government of Canada Strengthens Access to Sexual and Reproductive Health Services for Youth" (24 August 2022), online: *Government of Canada* <www.canada.ca/en/health-canada/news/2022/08/government-of-canada-strengthens-access-to-sexual-and-reproductive-health-services-for-youth.html>.

43 *Ibid*.

44 *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62 [*Carter*].

45 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 153 [*Chaoulli*].

46 *Canada (Attorney General) v PHS Community Services Society*, 2005 SCC 35 at para 91.

47 *Chaoulli, supra* note 45 at para 124.

"unreasonable." Indeed, "excessive wait times" was among the most-cited prisoner health care complaints in the studies above, with some individuals waiting years for treatment.[48] Just as the claimants in *Chaoulli* were statutorily barred from accessing more timely health care than was available under the universal health care regime, incarcerated individuals are limited to the health care provided by CSC. As above, where this health care is inadequate, the risk of complications and death is increased.

Under the existing jurisprudence, the argument that the right to life is being infringed is perhaps strongest with regard to prison health care in general. However, women have unique health care needs that engage the right to life. The specific paucity of gynecological and reproductive health care in Canada's prisons thus creates distinct challenges that may not be sufficiently addressed by a "general" improvement of prison health care. According to the United Nations, of which Canada is a member state, "[w]omen's sexual and reproductive health is related to multiple human rights, including the right to life,"[49] and violations of these rights include "denial of access to services that only women require" and "poor quality services."[50]

Incarcerated women have indeed described such denial and poor quality of female-specific services. Specifically, they describe inordinately long wait times or outright failure to receive potentially lifesaving procedures such as Pap tests and HPV/HIV screenings.[51] Their children are more likely than the children of non-incarcerated women to die from improper natal care and/or premature birth.[52] These increased risks of death are the result of CSC's failure to provide reproductive health care in a reasonable (i.e., timely) manner and thus engage the same right to life violated in *Chaoulli*.

---

48 Miller, *supra* note 12.

49 "Sexual and reproductive health and rights: OHCHR and women's human rights and gender equality" (last modified 2023), online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights> [perma.cc/UP6V-UWB2]; see also Committee on Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNESC, UN Doc E/C.12/GC/22, and United Nations General Assembly, *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, 2006, UN Doc A/61/338.

50 *Ibid.*

51 Reproductive Healthcare, *supra* note 30.

52 Infant and Maternal Outcomes, *supra* note 23.

B. Liberty

The right to liberty under section 7 protects "the right to make fundamental personal choices free from state interference."[53] In *Morgentaler*, the SCC described such choices as those "intimately affecting [the individual's] private life,"[54] a sentiment echoed in *Carter* and *Rodriguez v British Columbia*.[55] In *Carter*, the section 7 liberty interest was infringed where the state action interfered with the individual's "ability to make decisions concerning their bodily integrity and medical care."[56] Autonomy in medical decision-making has long been recognized under Canadian law.[57]

A unifying thread of section 7 jurisprudence is that the liberty interest protects freedom of choice. In the health care context, the freedom to make choices concerning one's medical care can only be meaningfully realized where there is reliable access to proper medical care. In *Chaoulli* the Court went so far as to identify accessible health care as one of the "hallmarks of Canadian identity."[58] As discussed above, health care received by prisoners, when and if it is received, is not reliable, proper, or accessible. As a result, it is not conducive to freedom of choice. Incarcerated individuals are not freely choosing to wait years to receive medical treatment or to forego routine preventative measures such as Pap tests; they are being forced to do so because CSC provides no alternative. The state action—or, more appropriately, inaction—is interfering with prisoners' ability to make decisions concerning their bodily integrity and medical care, and the section 7 liberty interest is engaged.

The freedom of choice which underpins the section 7 liberty interest is even more robust in the context of incarcerated women's reproductive freedom. Incarcerated women describe a lack of access to contraception, pregnancy tests, and abortion.[59] This engages the same section 7 interest from *Morgentaler*, where the criminal prohibition on abortion care was found to impede the liberty of pregnant women.[60] Forcing women to carry unwanted pregnancies to term by criminalizing abortion represented a significant infringement on autonomy and bodily integrity and was deemed unconstitutional. So too, it follows, is forcing incarcerated women to carry

---

53 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 54 [*Blencoe*].

54 *Morgentaler, supra* note 1 at 37.

55 *Carter, supra* note 44; *Rodriguez v British Columbia*, [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez*].

56 *Carter, ibid* at para 66.

57 *Ibid*; *Rodriguez, supra* note 55; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at paras 39, 100; see also *R v Parker*, 188 DLR (4th) 385, 146 CCC (3d) 193.

58 *Chaoulli, supra* note 45 at para 16.

59 Reproductive Healthcare, *supra* note 30.

60 *Morgentaler, supra* note 1.

unwanted pregnancies to term by failing to ensure proper abortion access and care. Unwanted prison pregnancies that are not prevented, identified, and terminated pose a significant threat to incarcerated women's liberty interests.

While freedom of choice is ever-invoked in the abortion context, reproductive freedom is about more than the choice to terminate a pregnancy. As with health care in general, it requires the ability to make free and informed decisions regarding natal care and childrearing. In *B(R) v Children's Aid Society*, the Court stated that "[t]he right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent."[61] While the unborn have no independent legal rights under section 7 or elsewhere,[62] prenatal care is nevertheless fundamental to the unborn child's development.[63] As such, it is part of the pregnant woman's liberty interest to make informed medical decisions regarding her child's development while pregnant as much as following childbirth. The ability of incarcerated women to make important medical decisions about their pregnancies is substantially undermined by the substandard quality and efficacy of reproductive health care in prison. This inaccess to care undermines the freedom of choice protected by section 7, and the liberty interest is engaged.

C. Security of the person

Broadly, security of the person encompasses "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity."[64] It is engaged by many of the same phenomena which ground the liberty interest.

Incarcerated women experience significant obstructions to personal autonomy and dignity. Consider, for example, the lack of access to sanitary pads during miscarriage,[65] or the sub-human treatment by prison officials discussed above.[66] These would engage the right to security of the person and its underlying principles in a broad sense.

---

61 *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 317, 122 DLR (4th).

62 See *R v Drummond*, 112 CCC (3d) 481, 3CR(5th) 380; see also *Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753, 174 DLR (4th) 1.

63 World Health Organization, *supra* note 21; Therese Dowswell et al, "Alternative versus standard packages of antenatal care for low-risk pregnancy" (2015) Cochrane Database Syst Rev.

64 *Rodriguez, supra* note 55.

65 Reproductive Health Care, *supra* note 30.

66 *Ibid.*

More specifically, the section 7 right to security of the person protects both physical and psychological security.[67] Poor health care that results in physical suffering and ill health clearly engages the physical security interest.[68] This would include the pain of experiencing miscarriage and childbirth without proper medical attention. The delay in receiving abortion care also engages the physical aspect of security of the person, just as it did in *Morgentaler*.[69]

The right to psychological security is also engaged in several ways. In *Chaoulli*, the ban on private insurance engaged psychological security of the person insofar as being forced to wait for medical treatments caused psychological suffering in the form of anxiety and depression.[70] Delay in treatment, and lack of certainty as to whether or when one would receive treatment, engaged the psychological security interest as much as the physical one. With regard to abortion care specifically, the Court in *Morgentaler* found that "[n]ot only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress."[71] In the study by Liauw et al., one woman "was begging and begging, like she's done requests, she's seen a doctor, she's already planned to go for an abortion. They were putting it off and putting it off, until like, almost at the point that she couldn't get one."[72]

The psychological distress associated with pregnancy loss is also profound. Miscarriage is a physically and psychologically traumatic experience significantly associated with anxiety, depression, and PTSD.[73] Despite this, incarcerated women who experience pregnancy loss do not receive mental health support following miscarriage.[74] This is unsurprising, given what is known about the accessibility of mental health resources in the carceral context,[75] but that does not render it immune from scrutiny pursuant to the psychological security interest in section 7.

---

67 *Carter, supra* note 44; *Chaoulli, supra* note 45 at para 118.

68 See Adelina Iftene, "Employing Older Prisoner Empirical Data to Test a Novel s. 7 Charter Claim" (2017) 40:2 Dal LJ 497 [Iftene].

69 *Morgentaler, supra* note 1 at 59, 37.

70 *Chaoulli, supra* note 45 at paras 116-17.

71 *Morgentaler, supra* note 1 at 56.

72 Reproductive Healthcare, *supra* note 30 at 6-7.

73 Jessica Farren et al, "Posttraumatic stress, anxiety and depression following miscarriage and ectopic pregnancy: a multicenter, prospective, cohort study" (2019) 222:4 AJOG 367; Jessica Farren et al, "The psychological impact of early pregnancy loss" (2018) 24:6 Hum Reprod Update 731.

74 Reproductive Healthcare, *supra* note 30.

75 Miller, *supra* note 12; Iftene, *supra* note 68.

Finally, the psychological security interest of incarcerated women is engaged when the state removes children from parental custody following birth. As another woman in the Liauw study articulated, "[i]t's the first thing that runs through every woman's mind in jail is, they're gonna take my baby away from me."[76] In Eljdupovic and Bromwich's anthology, Patricia Block writes: "The day at the hospital when I had to kiss my baby goodbye was the most helpless, miserable, and empty experience of my life."[77]

For state-induced affronts to psychological integrity to engage section 7, they "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety."[78] As noted above, inaccess to necessary health care, such as abortion, is likely to cause significant psychological distress. The psychological outcomes associated with pregnancy loss may also rise to the level of psychiatric illness—namely, depression, anxiety, and post-traumatic stress disorder. Finally, being separated from one's child was the very example given by the SCC in *New Brunswick v G(J)* of an interference with psychological integrity sufficient to engage the section 7 psychological security interest.[79] In *Blencoe*, the SCC specifically stated that "the prospect of losing guardianship of one's children"[80] would engage psychological security insofar as it represents a fundamental personal choice that ought to be constitutionally shielded from state interference.

D. Causal connection

The *Charter* does not apply to all of society's misconduct but to "all matters within the authority of Parliament"[81] and to the common law.[82] It only protects individuals from affronts to life, liberty, and security of the person inflicted by the state. To this end, there must be a "sufficient causal connection" between the state conduct and the infringement or deprivation.[83] This "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the

---

76 Reproductive Healthcare, *supra* note 30.

77 Eljdupovic & Bromwich, *supra* note 38 at 1; see also "Babies born in jail belong with moms, B.C. court says," (6 December 2016), online: *CBC News* <www.cbc.ca/news/canada/british-columbia/babies-born-in-jail-belong-with-moms-b-c-court-says-1.2466516> [perma.cc/R8FX-5XEN].

78 *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124.

79 *Ibid.*

80 *Blencoe*, *supra* note 53 at para 83.

81 *Charter*, *supra* note 9, s 32(1).

82 *RWDSU, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

83 *Blencoe*, *supra* note 53; *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*].

claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities."[84]

The criminal law, of course, is squarely under the authority of Parliament.[85] Accordingly, the *Corrections and Conditional Release Act* is subject to *Charter* scrutiny, as are the actions and decisions of prison officials that flow from its authority. State action to which the *Charter* applies for the purposes of section 7 thus includes the negligent treatment by CSC of incarcerated women with regard to their reproductive health. As mentioned, the differences between the reproductive outcomes of incarcerated women and non-incarcerated women can only be partially accounted for by social factors that are also predeterminants of incarceration. Qualitative studies, news reports, and reports about prison health care generally suggest that institutional factors also play a role. It is thus, logically, more likely than not that the state conduct is at least one cause of the affronts to incarcerated women's life, liberty, and security of the person.

In *Bedford*, the Court considered whether the causal connection was negated by the claimants' personal choices and/or the activity of non-state third parties.[86] In *R v Malmo-Levine*, for example, while the state action was causally connected to the deprivation under section 7, the claimant's personal choice to consume and possess marijuana negated this connection.[87] In *Bedford*, Canada argued that it was not the laws prohibiting activity related to prostitution which were the cause of the section 7 deprivation, but rather the activity of pimps and "johns" who exploited and abused the claimants.[88]

The causal connection between the state action and the section 7 deprivations suffered by incarcerated women is not negated by these women's personal choices. It may be argued that the "choice" to break the criminal law is implicated here; however, as mentioned, incarceration as punishment is not intended to include deprivations beyond the deprivation of liberty associated with imprisonment, which is protected by section 1. It is not the imprisonment of women that is the subject of this paper; it is the deprivations associated with substandard reproductive health care in the carceral environment. There are also no third parties whose actions would negate the causal connection here. In *Bedford*, the Court held that "[t]he

---

84 *Bedford, ibid.*

85 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.

86 *Bedford, supra* note 83.

87 *R v Malmo-Levine; R v Caine*, 2003 SCC 74 [*Malmo-Levine*].

88 *Bedford, supra* note 83.

violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence."[89] In the same way, the social determinants of health that are associated with incarceration do not negate the role of CSC in making incarcerated women more vulnerable to poor health and other section 7 violations.

E. Principles of fundamental justice

The language of section 7 specifically denotes the right not to be deprived of life, liberty, and security of the person "except in accordance with the principles of fundamental justice."[90] As such, where the state-induced deprivation accords with the principles of fundamental justice, there is no section 7 violation. Because the *Charter* provides no guidance as to what constitutes a "principle of fundamental justice," the analysis is borne out by jurisprudence. The Court has articulated that principles of fundamental justice are "principles that underlie our notions of justice and fair process,"[91] "to be found in the basic tenets of our legal system."[92] They are not free-standing rights but tools for measuring whether a section 7 deprivation can be justified by the state.

Incarceration is a prima facie deprivation of the section 7 right to liberty but is (ostensibly) justified where it is done so in accordance with principles of fundamental justice. In *R v Hebert*, for example, the state could not deprive an individual of liberty in a manner that violated his right to remain silent, fundamental as this right is to justice and fair process in the legal system.[93] In *Bedford*, certain provisions which criminalized sex work were deemed unconstitutional where they deprived sex workers of their section 7 rights in a manner 1) unconnected to a legitimate state objective (i.e., arbitrarily), 2) capturing mischief outside said objective (i.e., overly broadly), or 3) extending beyond the means necessary to achieve the objective (i.e., grossly disproportionately).[94]

If it is accepted that incarcerated women are being deprived of their section 7 right to life, liberty, and security of the person and that this deprivation is causally connected to the negligence of CSC, the next inquiry is whether the deprivation is in accordance with principles of fundamental justice. Whether a principle of fundamental justice is engaged is a fact-

---

89 *Ibid* at para 89.

90 *Charter, supra* note 9, s 7, emphasis added.

91 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 19 [*Charkaoui*].

92 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 at paras 31, 64 [*Motor Vehicle Reference*]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 23.

93 *R v Hebert*, [1990] 2 SCR 151, 57 CCC (3d) 1.

94 *Bedford, supra* note 83.

specific inquiry. Here, because it is state conduct rather than a specific legislative provision that is the cause of the deprivation, it is difficult to identify a legitimate government objective in respect of which the deprivation is arbitrary, overbroad, or grossly disproportionate. It may be reasonable to conclude that section 7 deprivations resulting from prison conditions are implicitly associated with the government's objective to punish and deter criminal behaviour. In the author's view, the substandard reproductive health care received by incarcerated women is indeed an additional punishment. However, it is one which exceeds the government's legitimate authority to punish, thus engaging the principle of gross disproportionality. As in *Bedford*:

> The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. [...] The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.[95]

There is at least some societal consensus that imprisonment is a proportional punishment for serious criminal offences. The same is not true for inaccess to health care, reproductive and otherwise. As the SCC said as early as *Solosky v The Queen*, "a person confined to prison maintains all of his civil rights, other than those expressly or impliedly taken away from him by law."[96] There is no law that expressly or impliedly rescinds the rights of prisoners to life, liberty, and security of the person as they pertain to health care and reproductive justice. In fact, the law affirmatively states that prisoners are to receive health care that conforms to professionally accepted standards.[97]

The gross disproportionality analysis focuses on harm to the individual and whether this harm is disproportionate to the purpose of the impugned conduct.[98] The harms suffered by incarcerated women, described in Part I, are sufficiently serious to engage section 7 and are not in sync with the objective of incarceration as punishment. They amount to reproductive injustice as punishment, which falls outside the accepted definition of punishment in our free and democratic society.

---

95 *Ibid* at para 120.

96 *Solosky v The Queen*, [1980] 1 SCR 821 at 823, 105 DLR (3d) 745.

97 *CCRA*, *supra* note 11, s 86.

98 *Bedford, supra* note 83.

F. Section 1

A law that violates section 7 in a manner not in accordance with the principles of fundamental justice can still be saved under section 1 of the *Charter*, which disclaims that its rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[99] Limits on *Charter* rights will be so demonstrably justified where the government can show that the right has been limited pursuant to a pressing and substantial objective, that the state conduct causing the infringement is rationally connected to this objective, and that the infringement impairs the right in question as little as possible to achieve this objective.[100] In *R v Keegstra*, for example, the SCC found that the *Criminal Code* provisions against hate speech violated the section 2(b) *Charter* right to freedom of expression, but the violation was saved under section 1.[101] Limiting hate speech was deemed a sufficiently pressing social objective, having regard to evidence of historic and continuing racial tensions and hateful conduct in Canada. The Court noted that decisions under section 1 are ultimately determined by "the court's judgment, based on an understanding of the values our society is built on and the interests at stake in the particular case."[102]

As the Court noted in *Charkaoui*, the rights protected by section 7 "are not easily overridden by competing social interests."[103] The state must demonstrate that there is a significant public good being served that outweighs the severity of the section 7 violation.[104] In *Keegstra*, the Court was convinced that the social benefit of outlawing hate speech overrode the constitutional right to freedom of expression in that particular case.

Presumably, CSC does not purport that there is a substantial and overriding public benefit to limiting incarcerated women's access to reproductive health care. As Dalhousie law professor Adelina Iftene notes in her 2017 article, where the source of the deprivation is state conduct rather than specific legislation, "[i]t is difficult to predict what arguments CSC would advance to justify their policies, or how successful these arguments would be."[105] Perhaps CSC would argue that substandard health care is part and parcel of incarceration, and suggest that women not commit

---

99 *Charter, supra* note 9, s 1.
100 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
101 *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1.
102 *Ibid.*
103 *Charkaoui, supra* note 91 at para 66. See also *Carter, supra* note 44 at para 95 and *Motor Vehicle Reference, supra* note 92 at 518.
104 *Carter, supra* note 44 at para 95.
105 Iftene, *supra* note 68 at 539.

crime if they are unprepared to serve time. Of course, as discussed above and in the Senate report on the rights of prisoners, "[s]eparation from society is the penalty. Any action that further interferes or infringes liberty interests is either not allowed; or, is permitted, through legislation and policy."[106] In the author's view, short of explicit legislation which permits CSC to deprive women of reproductive health care pursuant to a legitimate objective—whether it be punishment or something else—there is no legal justification for CSC's negligence. If such an Atwoodesque policy did exist, it would certainly be the subject of significant public outcry and *Charter* challenges under both section 7 and section 15. Unlike in *Keegstra*, the only objective to which such legislation could be rationally connected would offend the most basic social attitudes about gender equality in Canada. It would also be unlikely to be minimally impairing, fundamental as reproductive justice is to bodily autonomy, personal dignity, and freedom of choice.

IV. CONCLUSION

While the idea that Parliament would ever royally assent a law that explicitly deprives women of their reproductive rights may seem absurdly dystopian, the fact is that CSC is presently depriving incarcerated women of their reproductive freedom pursuant to its own prerogatives, unclear as those are. These deprivations engage all three human rights protected by section 7 of the *Charter*, do not accord with principles of fundamental justice, and cannot be justified by the government under section 1.

This paper began with the assertion that "reproductive justice" has not been explicitly recognized by courts in Canada. Indeed, that is evidenced by my necessarily piecemeal approach to reproductive rights at law for incarcerated women. It is my hope that future jurisprudence will recognize the principles and arguments I have identified here and ultimately seek to enforce more effective mechanisms for ensuring the protection of women's reproductive freedom both inside and outside the prison walls.

---

[106] Senate Report, *supra* note 8 at 56.

Vitiating Consent for Sexual Assault Causing Bodily Harm: Should *Jobidon* Apply to Sexual Activities?

MONA ABDOLRAZAGHI*

ABSTRACT

The Court in *R v Jobidon* held that consent to participate in a fist fight between adults is vitiated once bodily harm follows as a result of the fist fight. *Jobidon*'s ruling fundamentally altered the defence of consent to assault. This paper critiques the extension of *Jobidon* to sexual assault in the context of BDSM in *R v Welch* on multiple grounds. First, the paper shows that there are complexities in applying *Welch*'s ruling, which have led to confusions in jurisprudence surrounding: (a) the mental state of the assailant causing bodily harm; (b) the addition of psychological harm as a bodily harm to the scope of the ruling in question; and (c) the characterization of the sexual activity in question as degrading or dehumanizing. Second, the paper challenges the Court's reasoning in *Welch* on three grounds. First, characterizing a sexual activity as degrading to show that it is not worthy of protection by the law is subjective. Instead, the courts should assess the interests of sexual minorities. Second, the Court's comparison of sex with sport was inappropriate in finding the former containing insufficient social utility as opposed to the latter. Third, irrespective of political philosophy, the Court's ratio was contrary to the letter of law pursuant to section 9 of the *Criminal Code* by effectively creating a new law. This paper advocates for legal reform in *Jobidon* and applying it to sexual assault. The paper positions that Parliament has already taken steps to criminalize high-risk sexual activities such as asphyxiation under section267(c) of the *Criminal Code.*

Keywords: Consent; sexual assault; *R v Jobidon*; *R v Welch*; BDSM.

---

* Mona Abdolrazaghi was a third-year student at the University of Alberta.

I. INTRODUCTION

In *Jobidon*, two adults engaged in a consensual fist fight which resulted in one party getting critically injured and dying. The Supreme Court of Canada ("SCC") held that the surviving party was guilty of manslaughter with the unlawful act of assault. The SCC further held that consent is vitiated whenever two parties engage in a fist fight with the intent to harm each other and bodily harm follows. The Court exempted applying this rule for certain activities deemed to have social utility such as sports or stunt work.[1] This ruling has impacted the defence of consent to an assault. As Justice Sopinka stated in the concurring opinion, instead of introducing a new ruling on the vitiation of consent, the Court could have arrived at the same disposition by holding that consent was vitiated once the deceased lost consciousness after the first punch and that assault occurred on the second punch.

In *R v Welch*,[2] the accused engaged in a sexual act with the complainant which caused her bodily injury. While the complainant denied consenting to the activity, the accused brought the defence of consent. Instead of evaluating the issue of existence of consent, the Ontario Court of Appeal applied *Jobidon*'s ruling and held that when bodily harm follows from consensual sexual acts, the consent is vitiated. In addition, the Court reasoned that this type of sexual conduct is dehumanizing, and thus not worth protection under criminal law. The majority in *Welch* recognized the defence of consent is valid in sports where physical contact is intended, and harm is inflicted.[3]

Pop culture[4] promotes the exploration of various sexual practices;[5] however, individuals engaging in consensual sexual activities such as BDSM,[6] which intend and inflict harm, may be criminally charged.[7] BDSM is defined as a sexual activity which involves using physical restraint, giving up control, and inflicting pain.[8] It is characterized as a

---

1 *R v Jobidon*, [1991] 2 SCR 714, 66 CCC (3d) 454 [*Jobidon*].

2 *R v Welch*, 25 OR (3d) 665 [*Welch*].

3 *Ibid.*

4 Lyrics from the pop song "WAP" by Cardi B feat Megan Thee Stallion, online: *Musixmatch* <www.musixmatch.com> [perma.cc/9R6Y-QNMV] [WAP].

5 "Hot for Kink, Bothered by the Law: BDSM and the Right to Autonomy" (08 August 2016), online: *The Canadian Bar Association* <cba.org> [perma.cc/RQE8-6FH7].

6 BDSM is a combination of the acronyms for Bondage/Discipline, Dominance/Submission and Sadism/Masochism

7 *R v JA*, 2011 SCC 28 [*JA*].

8 Merriam-Webster, Inc., *Meriam Webster dictionary* (Springfield, Mass: Merriam-Webster, 2011) sub verbo "BDSM".

sexual sub-culture of erotic activities between adults that may involve bodily harm.[9] As illustrated by the popular movie series *Fifty Shades of Grey*[10] and other cultural products,[11] there appears to be a rift between the increasing mainstream acceptance of BDSM[12] and criminal law's treatment of it.[13]

BDSM practices lie in a moral gray area, exhibiting a clear tension between a libertarian view such as individual liberty,[14] and a utilitarian view such as Bentham's social utility.[15] One can argue that individuals' right to their body and their choice include the right to sexual exploration (i.e., sexual autonomy). An opposing view, similar to the Court's holding in *Welch*, differentiates BDSM from contact sports and criminalizes the former by deeming it outside of social norms and lacking utility.

This paper aims to show that the extension of *Jobidon*'s ruling[16] to sexual acts such as BDSM activities between consenting adults in *Welch* is not reasonable. The paper critiques *Welch*'s decision[17] based on the confusion in its application and the Court's flawed reasoning. The paper first argues that *Welch* has brought about confusion in the application of jurisprudence that may lead to inconsistent outcomes. Additionally, the paper puts forward three grounds for challenging the Court's reasoning in *Welch* in extending *Jobidon*'s ruling[18] to the law of sexual assault. First, comparing sex with sports in the context of social utility is flawed. Second, the Court's metric of social value in terms of social norms and utility is incomplete. The paper argues that the value of safeguarding sexual minorities must be considered in assessing the criminality of this act. Third, irrespective of supporting opinions based on individual liberty and social utility arguments, the holding in *Welch*[19] is an excessive encroachment into the

---

9 David M Ortmann & Richard Sprott, *Sexual Outsiders: Understanding Sexualities and Communities*, (Plymouth: Rowman & Littlefield Publishers, 2012).

10 E L James, *Fifty Shades of Grey,* (New York: Vintage Books, 2012).

11 WAP, *supra* note4.

12 Theodore Bennett, "A fine Line Between Pleasure and Pain: Would Decriminalizing BDSM permit Non-consensual Abuse?" (2021) 42 Liverp Law Rev 161 [Bennett].

13 "Tied Up in K/Notes: The Criminalization of BDSM in Canada" (08 August 2016), online: *The Canadian Bar Association* <cba.org> [perma.cc/FK4U-Z38G].

14 Edward N Zalta, "Libertarianism" (28 January 2019), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/> [perma.cc/DTD9-GH83] [Libertarianism].

15 Edward N Zalta, "The History of Utilitarianism" (22 September 2014), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/> [perma.cc/ 2JNX-Y3N8] [Utilitarianism].

16 *Jobidon*, *supra* note 1.

17 *Welch*, *supra* note 2.

18 *Jobidon*, *supra* note 1.

19 *Welch*, *supra* note 2.

private life of citizens. The criminalization of intended and inflicted harm in the context of BDSM may result in situations where parties attempt to hide their injuries to avoid criminal prosecution, leading to unsafe BDSM practices. This paper reasons that Parliament has already taken steps to criminalize sexual activities that are highly risky to individuals by holding that consent is vitiated whenever one partner is unconscious or being asphyxiated, the latter a BDSM sexual activity named breath play.

II. THE LAW ON THE DEFENCE OF CONSENT IN SEXUAL ASSAULT

This section is divided into three parts. The first part explains the law of sexual assault, the availability of the defence of consent, and the situations in which consent is vitiated according to the *Criminal Code*. The second part discusses the reformation in the vitiation of consent following from the extension of *Jobidon*[20] to sexual assault in *Welch.*[21]The third part discusses post-*Welch*[22] jurisprudence resulting from this reformation. This section aims to show that *Welch* has brought about uncertainties in applying the law of vitiation of consent in sexual assault cases.

A. Sexual assault and the defence of consent

Sexual assault consists of touching in a sexual nature conducted without the consent of the complainant.[23] Sexual assault is a violation of the sexual integrity of the victim.[24] The basis for the law on sexual assault is to protect individuals' bodily integrity, sexual autonomy, and human dignity.[25] The *actus reus* of the offence is unwanted sexual touching.[26] The *actus reus* of sexual assault consists of three main elements, which are voluntary touching, sexual nature of the touching, and lack of consent.[27]

The *mens rea* with respect to touching is the intention to touch.[28] There is no *mens rea* with respect to the nature of touching as it is determined from the perspective of a reasonable person. The sexual nature of the circumstances is not limited to bodily touch, but also includes any words,

---

[20] *Jobidon*, *supra* note 1.

[21] *Welch*, *supra* note 2.

[22] *Ibid.*

[23] *Criminal Code*, RSC 1985, c. C-46, s 271 [*Criminal Code*]; *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193. [*Ewanchuk*].

[24] *R v Osolin*, [1993] 4 SCR 595, 86 CCC (3d) 481 at 533-534.

[25] *R v Barton*, 2019 SCC 33 [*Barton*].

[26] *R v Al-Rawi*, 2018 NSCA 10. See also *Ewanchuk*, *supra* note 23 at para 23.

[27] *Ibid.*

[28] *Ibid.*

gestures, or intentions and motives of the accused that, in the totality of circumstances, a reasonable person would find sexual in nature. For instance, in *R v V(KB)*, touching the victim's genitals as a form of punishment was considered a sexual assault, even though the accused did not have a clear sexual purpose.[29] Further, in *R v Mastronardi*, the Court held that a doctor performing a medical examination with the intention of sexual gratification was committing sexual assault.[30]

The *mens rea* of lack of consent is from the complainant's subjective belief in a lack of consent at the time of the activity.[31] The accused's subjective belief is either reckless,[32] wilfully blind,[33] or knowledgeable.[34] Section 273.1 of the *Criminal Code* defines consent as a voluntary agreement of the complainant to participate in a specific sexual activity.[35] The lack of consent is solely decided based on the state of mind of the complainant.[36] The court looks at the complainant's testimony and surrounding circumstances and decides on its credibility. For instance, the court examines whether there is contradiction or ambiguity in the evidence to assess the credibility of the complainant's statement. Even if it appears that consent existed, the court may proceed with further examination of the evidence to see whether fear,[37] fraud, or exercise of authority as enumerated in section 245(3) of the *Criminal Code*[38] vitiates this consent. Consent must be given freely by the complainant and not be tied to any physical or psychological coercion.

The accused's understanding of the complainant's mental state is only relevant when the accused raises the defence of honest but mistaken belief in the existence of consent to negate the *mens rea* of offence. This defence is successful subject to two conditions. First, the accused honestly believed consent existed from the complainant (i.e. was positively communicated),[39] and second, the accused took reasonable steps to make sure the complainant was consenting to the sexual act in question pursuant to section 273.2(b) of the *Criminal Code*.[40] For the first condition, the accused

---

29 *R v V (KB)*, [1996] 2 SCR 857, 82 CCC (3d) 382

30 *R v Mastronardi*, 2014 BCCA 302.

31 *Ewanchuk*, *supra* note 23 at para 23.

32 *Pappajohn v The Queen*, [1980[] 2 SCR 120, 111 DLR (3d) 1 481 at 493.

33 *R v Sansregret*, [1985] 1 SCR 570, 17 DLR (4th) 577 223 at 234-238.

34 *R v Park*, [1995] 2 SCR 836, 99 CCC (3d) 1.

35 *Criminal Code*, *supra* note 23, s 273.1.

36 *Ewanchuk*, *supra* note 23 at para 26.

37 *R v Lacombe*, 2019 ONCA 938.

38 *Criminal Code*, *supra* note 23, s 245(3).

39 *R v Robertson*, [1987] 1 SCR 918, 33 CCC (3d) 481.

40 *Criminal Code*, *supra* note 23, s 273.2(b). See also *Ewanchuk*, *supra* note 23 at para 98.

must demonstrate that there was an air of reality to raising a reasonable doubt that consent did not exist or was not communicated by pointing to some facts as evidence capable of supporting this belief.[41] In other words, the accused cannot raise mistaking the understanding of the law of consent in sexual assault. Pursuant to section 19 of the *Criminal Code*,[42] mistaking the law is not a valid legal defence. The courts have repeatedly rejected the defence of honest but mistaken belief in consent in the law of sexual assault.[43] Many of these mistaken beliefs originated from societal misassumptions and stereotyping,[44] such as a woman being silent or passive means that she is giving consent. According to the law, consent to sexual activity[45] cannot be implied, advanced, or broad with no defined scope.[46] In *Barton*, the Court rejected the accused's honest but mistaken belief defence that he assumed that there was an implied consent based on having engaged in a similar sexual activity with the sex worker the previous night.[47] Similarly, in *R v Seaboyer*,[48] the Court held that it was a mistake of law with no valid defence when the accused relied on the defence of existence of consent based on prior sexual activity.[49] The jurisprudence around the notion of consent states that consent must be given for the specific sexual activity in question.[50] The underlying reasoning in the legal definition of consent is to remove myths and incorrect assumptions regarding sexual assault and to protect the security of the person.[51]

For the second condition for the defence of consent, the Court in *Redcliffe* rejected the existence of a reverse burden of proof on the defendant to take reasonable steps to ascertain consent. Instead, there is an evidentiary burden on the defendant to show reasonable steps were taken to ascertain consent. Once the defendant points to evidence showing that he/she has taken reasonable steps known to him/her, then the onus is on the prosecution to prove beyond a reasonable doubt that these steps were not

---

41 *Barton, supra* note 25 at paras 100-108.

42 *Criminal Code*, *supra* note 23, s 19.

43 *Ewanchuk, supra note 23* at paras 32-35; *R v Forster*, [1992] 1 SCR 339, 88 DLR (4th) 169; *R v MacDonald*, 2014 SCC 3.

44 *Ewanchuk, supra note 23 at para 82*; *R v Cepic*, 2019 ONCA 541; *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1; *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193 [*Seaboyer*].

45 *Ewanchuk, supra note 23* at para 97; *R v Hutchinson*, 2014 SCC 19 [*Hutchinson*]; *Barton, supra* note 25.

46 *JA, supra* note8; *R v AE*, 2021 ABCA 172.

47 *Barton, supra* note 25.

48 *Seaboyer, supra* note 46.

49 *Ibid* at 604.

50 *JA, supra* note 8.

51 Manning, Mewett & Sankoff, *Criminal Law*, 5th ed, (Lexis Nexis Canada, 2015).

taken.[52] The constitutional challenge of section 273.2(b) of the *Criminal Code*[53] in violating the presumption of innocence was rejected by the Court in *R v Darrach*.[54] In *R v G(R)* the Court explained that these reasonable steps may be more or less onerous depending on the circumstances.[55] However, the law does not require the accused to have taken all the reasonable steps. The Court explained in *R v Malcolm*[56] and *R v Despins*[57] that taking reasonable steps is a modified objective standard. Specifically, this refers to a reasonable person who is in the position of the accused and is equipped with the same knowledge as the accused at the time of the alleged sexual assault.[58]

Consent can be vitiated under circumstances where the accused knowingly, recklessly, or wilfully blindly fails to understand or take reasonable steps to ascertain the existence of consent from the complainant in the circumstances known to the accused. The *Criminal Code* under sections 265(3), 271, 272, and 273[59] is very clear about the circumstances under which vitiation or absence of consent occur. The next section of this paper discusses how the Court's decision in *Welch* following the holding in *R v Jobidon*[60] leads to a situation where consent is vitiated by the underlying policy.

B. Reformation of the defence of consent in sexual assault

The defence of consent is raised in both physical assault and sexual assault cases. Section 265(1) of the *Criminal Code* defines assault as the intentional application of force directly or indirectly without the consent of another person.[61] In *R v Jobidon*,[62] the SCC explained that consent cannot be a defence to assault where bodily harm is intended and caused,[63] at least for activities lacking in social utility such as fistfights. The bodily harm is defined to be serious and non-trivial[64] or more than transient, although it

---

52 *R v Redcliffe*, [1995] OJ No 942, 26 WCB (2d) 590.
53 *Criminal Code*, *supra* note 23, s 273.2(b).
54 *R v Darrach*, (1998), 122 CCC (3d) 225 (Ont. C.A.), aff'd (2000), 148 CCC (3d) 97 (SCC).
55 *R v G(R)*, 38 CR (4th) 123, 26 WCB (2d) 23.
56 *R v Malcolm*, 2000 MBCA 77 at 43-44.
57 *R v Despins*, 2007 SKCA 119.
58 *R v Cornejo*, 181 CCC (3d) 206, 61 WCB (2d) 513.
59 *Criminal Code*, *supra* note 23, s 265(3), 271, 272, 273.
60 *Jobidon*, *supra* note 1.
61 *Criminal Code*, *supra* note 23, s 265(1).
62 *Jobidon*, *supra* note 1.
63 *Criminal Code*, *supra* note 23, s 267(b).
64 *Jobidon*, *supra* note 1.

does not have to be permanent.[65] The Court explained that activities with social utility where consent can be used as a defence include surgery, sports, or stunt acts. [66]

The Court's reasoning in *Jobidon*[67] centered around public utility and morality. From the public utility perspective, the Court reasoned that physical fights break social order and peace, and thus have no social utility. From the morality perspective, the Court reasoned that fist fights breach the sanctity of the human body.[68] The Court elaborated that consent is not vitiated in the context of "rough sporting activities," "medical or surgical treatments," and "dangerous exhibitions by qualified stuntmen" which have a "significant social value."[69] In later cases, courts elaborated that social customary norms permit physical contact in activities such as boxing, tattooing, ear piercing, and surgery.[70] In *Paice,*[71] a subsequent case involving a fist fight, the SCC reaffirmed *Jobidon*[72]'s holding with respect to vitiation of consent whenever there is an intentionally inflicted harm.[73]

The Court in *Jobidon*[74] did not address the issue of consent in sexual activities causing bodily harm. In the UK case of *R v Brown,*[75] the House of Lords refused to accept the defence of consent to sado-masochistic (S&M) activities. Sado-masochism is defined as "the derivation of sexual gratification from the infliction of physical pain or humiliation either on another person or on oneself."[76] Despite the absence of complaints from the participants, the police laid charges of assault causing bodily harm. The Court reasoned that consent is vitiated where the inflicted bodily harm is actual and non-incidental as a result of physical violence and cruelty. By relying on an earlier UK case of *Rex v Donovan,*[77] the Court in *Brown* held that the harm caused may not necessarily be permanent but cannot be merely transient and trifling.[78] In *Brown*,[79]the Court's 3-2 split illustrates its

---

65 *Welch, supra* note 2.
66 *Jobidon*, *supra* note 1.
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*
70 *Welch, supra* note 2; *R v Brown,* 83 CCC (3d) 394, 20 WCB (2d) 266. [*Brown*].
71 *R v Paice*, 2005 SCC 22 [*Paice*].
72 *Jobidon*, *supra* note 1.
73 *Paice, supra* note 73.
74 *Jobidon*, *supra* note 1.
75 *Brown, supra* note 73.
76 Merriam-Webster, Inc, *Meriam Webster dictionary* (Springfield, Mass: Merriam-Webster, 2011) sub verbo "sadomasochism."
77 *Rex v. Donovan* [1934] 2 K.B. 498.
78 *Brown, supra* note 73.
79 *Ibid.*

struggle in applying public policy arguments to determine the involvement of criminal law. On the one hand, the majority invoked public policy on the basis of immorality of the accused's conduct. For instance, Lord Templeman said:

> Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.[80]

On the other hand, the dissenting opinion by Lord Mustill criticized the involvement of criminal law in the matter of "private sexual relations"[81] irrespective of is vitiated once bodily harm to the complainant follows as a result of the sexual activities. The Court explained further that S&M has no social utility by characterizing it as "inherently degrading and dehumanizing conduct."[82]

Both *Jobidon* and *Welch* decisions have been criticized numerous times.[83] This paper intends to show that the analysis of the Court in extending *Jobidon*'s ruling to the law of sexual assault was flawed. Section C aims to show the flaw in the Court's assessment and the complexities in applying *Welch*'s ruling to the subsequent jurisprudence.

C. Practical complexities in applying Welch

Jobidon's ruling followed by *Welch*'s holding may have brought some confusions in jurisprudence in at least three aspects. First, whether the *mens rea* of assault causing bodily harm is subjective or objective foresight. Second, whether psychological harm constitutes bodily harm. Third, whether the sexual activity in question can be characterized as dehumanizing or degrading.

With respect to confusion around the *mens rea* of assault causing bodily harm, while the ruling in *R v Paice*[84] concerning a consensual fist fight confirmed *Jobidon*'s holding,[85] it did not provide a clear answer for whether consent is vitiated on the basis of subjective or objective foresight to the caused harm.[86]

---

80 *Ibid.*

81 *Ibid*

82 *Ibid.*

83 Yarmi Taddese, "Courts need to reconsider laws around kinky sex" (14 November 2014), online: *Canadian Lawyer* <www.canadianlawyermag.com> [perma.cc/7LQY-S9V6].

84 *Paice*, *supra* note 73.

85 *Jobidon*, *supra* note 1.

86 *Welch*, *supra* note 2 at para 90.

The Court in *Welch*[87] incorrectly relied on *R v DeSousa*[88] to hold that consent is vitiated in sexual assault causing bodily harm if the bodily harm was objectively foreseeable from the perspective of a reasonable person. Although *DeSousa*[89] correctly explains that the *mens rea* of the consequence element of an offence is objective foresight, *DeSousa*[90] does not apply to the question of consent.[91] In *DeSousa,*[92] the Court explained that the offence of manslaughter, which is an unlawful act causing bodily harm under section 269 of the *Criminal Code,*[93] requires the Crown to prove beyond reasonable doubt that the bodily harm caused by the accused's unlawful act was reasonably foreseeable. However, the Court's inquiry in *Welch*[94] was whether consent is a valid defence to sexual assault causing bodily harm. The Court in *Welch*[95] did not correctly apply *Jobidon,*[96] as it should have held that irrespective of whether or not the bodily harm was objectively foreseeable, the focus is around the vitiation of consent where bodily harm was intended (i.e., the accused's subjective knowledge).

In *R v Zhao,* [97] the accused caused harm to the complainant through anal intercourse. The Court reviewed earlier post-*Welch* jurisprudence[98] and noted the lack of precision in defining the required mental element to vitiate consent in sexual assault causing bodily harm (i.e., the intention to cause harm).[99] The Court also observed a shift from objective foresight to subjective foresight in determining whether consent is vitiated in sexual assault causing bodily harm.

In *R v Quashie*, the court held that intent to cause bodily harm must be subjective to vitiate the defence of consent to sexual assault causing bodily harm.[100] In *Quashie*, the accused was charged with one count of sexual assault and one count of sexual assault causing bodily harm for forcefully

---

87 *Welch*, *supra* note 2.
88 *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4th) 595 at 961 [*DeSousa*].
89 *Ibid.*
90 *Ibid.*
91 *Ibid.*
92 *Ibid.*
93 *Criminal Code*, *supra* note 23, s 269.
94 *Welch*, *supra* note 2.
95 *Ibid.*
96 *Jobidon*, *supra* note 1.
97 *R v Zhao*, 2013 ONCA 293 [*Zhao*].
98 *R v Robinson*, 53 OR (3d) 448 [*Robinson*]; *R v Amos*, 39 WCB (2d) 285 [*Amos*]; *Paice, supra note* 73; *R v Quashie*, 200 OAC 65, 198 CCC (3D) 337 [*Quashie*].
99 *Zhao*, *supra* note 106 at paras 85& 90.
100 *Quashie*, *supra* note 107.

penetrating the complainant and causing her psychological trauma and physical injuries.[101]

The Court in *Zhao*[102] relied on the decision in *Quashie.*[103] The Court held that in order to convict for sexual assault causing bodily harm, the Crown needs to prove beyond a reasonable doubt the elements of sexual assault and consequence of bodily harm. The *mens rea* for the bodily harm is objective foreseeability of non-trivial bodily harm. If the trier of fact is satisfied beyond a reasonable doubt that the accused subjectively intended to harm the complainant, then the defence of consent does not apply. If the trier of fact is not satisfied beyond a reasonable doubt that the accused intended to harm the complainant, then the focus of inquiry shifts towards whether consent existed to the sexual act in question.[104]

With respect to the second confusion regarding psychological harm, when the Ontario Court of Appeal in *R v Nelson*[105] affirmed the framework in *Zhao,*[106] it raised an additional complexity of including psychological harm in place of bodily harm to negate consent when it is intended and inflicted in the sexual assault offence. While the Court explicitly avoid addressing this issue, the Court referred to the previous jurisprudence that psychological harm can be described as a non-trivial bodily harm. [107] In *R v McCraw,*[108] the SCC interpreted the bodily harm in section 264.1(1)[109] as broadly including psychological harm. The Court in *McCraw* further explained that the only types of psychological harm considered as bodily harm are those that permanently and substantially interfere with the health and well-being of the complainant.[110] In *R v McDonnell,*[111] the Court confirmed the extension of bodily harm to psychological harm in section 272(1) of the *Criminal Code*[112] by holding that psychological harm is presumed in sexual assault.

With respect to the third confusion regarding characterizing a sexual activity as dehumanizing or degrading, multiple post- *Jobidon* and *Welch*

101 *Ibid.*

102 *Zhao*, *supra* note 106.

103 *Quashie*, *supra* note 106.

104 *Zhao*, *supra* note 106 at para 98.

105 *Ibid*, at paras 36-37.

106 *R v Nelson*, 2014 ONCA 853 at para 25.

107 *R v McDonnell*, [1997] 1 SCR 948 at para 34, 145 DLR (4th) 577 [*McDonnell*]; *R v McCraw*, [1991] 3 SCR 72, 66 CCC (3d) 517 [*McCraw*].

108 *McCraw*, *supra* note 116.

109 *Criminal Code*, *supra* note 23, s 264.1(1).

110 *McCraw*, *supra* note 116.

111 *McDonnell*, *supra* note 116 at para 35.

112 *Criminal Code*, *supra* note 23, s 272(1).

cases made attempts to characterize the sexual activity in question to assess whether *Welch*'s holding applies.

While the Court in *R v Amos*[113] referred to the lack of evidence showing the intent to harm by the accused, the Court did not apply *Welch*'s holding.[114] The Court referred to section 159(2) of the *Criminal Code*[115] which exempted anal sex between two consenting adults from being a sexual offence and concluded that anal intercourse is not considered inherently degrading and dehumanizing or socially unacceptable.[116] The reasoning in *Amos* suggests that courts may apply *Welch*'s holding if they find the underlying sexual activity in the case to be inherently degrading and dehumanizing. While the Court in *Amos* referred to the *Criminal Code* as a guide for this determination, this sort of subjective assessment can lead to uncertainty.

In *R v Robinson*,[117] by relying on *Welch* the Court confirmed the trial judge's instruction to the jury as to whether a cucumber used by the accused to penetrate and injure the complainant was a weapon that was intended to harm or threaten the complainant.[118] The Court reasoned that consent could not be a defence to certain forms of bodily harm.[119]

While *R v Zhao*[120] was not directly concerned with vitiation of consent in the context of BDSM activities, the Court reviewed the past decisions in *Welch*[121] and *Jobidon*[122] and the extension of vitiation of consent to the context of sexual assault causing bodily harm. The issue in *Zhao*[123] was about assessing the credibility of a complainant's testimony regarding lack of consent to sexual assault causing bodily harm. The Court stated that the social utility of intimate sexual relationships differs greatly from consensual fights.[124] It rejected applying the extension of *Jobidon*[125] and *Welch*'s ruling[126] to sexual assault causing bodily harm in general.[127] The Court isolated

---

113 *Amos*, *supra* note 107.
114 *Welch*, *supra* note 2.
115 *Criminal Code*, *supra* note 23, s 159 [Repealed,2019, c.25. s 54].
116 *Amos, supra* note 107.
117 *Robinson*, *supra* note 107; *Amos, supra* note 107.
118 *Robinson*, *supra* note 107 at paras 62-65.
119 *Robinson*, *supra* note 107 at para 62.
120 *Zhao*, *supra* note 106.
121 *Welch*, *supra* note 2.
122 *Jobidon*, *supra* note 1.
123 *Zhao*, *supra* note 106.
124 *Zhao*, *supra* note 106 at para 79.
125 *Zhao*, *supra* note 106 at para 75.
126 *Welch*, *supra* note 2.
127 *Welch*, *supra* note 2 at para 98.

Welch's ruling[128] to sexual assault in the context of BDSM acts but not to sexual assault in general.[129]

In *R v JA*, the complainant received injuries as a result of consensual BDSM activities involving asphyxiation.[130] The SCC expressly refused to address the issue of whether consent is vitiated when bodily harm is inflicted in the context of BDSM activities.[131] Instead the Court centered the issue on the existence of consent when the complainant was unconscious. The SCC assessed a lack of consent due to the absence of "capacity" and "operating mind" by the complainant. The Court rejected an advance consent to a sexual act where the complainant was unconscious by reasoning that an unconscious person cannot revoke their consent during sexual activity. The Court held that consent must be ongoing and actively given.

The post-*Welch*[132] jurisprudence has brought at least three complexities and confusions resulting in inconsistencies in the lower courts in determining the validity of the defence of consent. In *Zhao,*[133]the Court explained that in assessing the defence of consent where there is an inflicted bodily harm, there exists two paths to conviction. First, under the offence of sexual assault causing bodily harm, the inflicted bodily harm must be viewed from an objective standard. Second, when the accused raises the defence of consent, the inflicted bodily harm needs to be viewed from a subjective standard of intention of the accused. This view is consistent with the current laws regarding sexual assault. However, this shift in inquiry from the objective *mens rea* for consequences of caused bodily harm to a subjective intent to cause harm for the vitiation of a defence of consent can be confusing for the trier of fact. The trier of fact must be able to determine the mental state of the accused in isolation for each inquiry.

A second issue with applying *Welch*'s ruling[134] regarding vitiation of consent occurs when only psychological harm, as opposed to physical harm, is intended and caused pursuant to the Court's reasoning in *Nelson.* It may not be a trivial task for the trier of fact to determine whether psychological harm was intended or caused owing to its intangible nature. While expert opinion may be brought in for these cases, care must be taken not to prejudice the trier of facts with it.

---

128 *Ibid.*

129 *Zhao*, *supra* note 106 at para 79.

130 *JA*, *supra* note 8.

131 *JA*, *supra* note 8 at para 75.

132 *Welch*, *supra* note 2.

133 *Zhao*, *supra* note 106.

134 *Welch*, *supra* note 2.

In addition, courts may have difficulty in determining whether the *Welch*[135] framework applies when assessing whether a sexual conduct in question is degrading to address the issue of vitiation of consent in sexual assault causing bodily harm. For instance, in *Amos,*[136] the court relied on section 159 of the *Criminal Code*[137] to hold that anal sex between two consenting adults is not degrading. However, this can be problematic in other cases, where the trier of law decides on this criterion based on either prevailing social norms or their own views.

The above-listed factors demonstrate the complexities in applying *Welch*'s ruling[138] which may result in inconsistencies in its application. Since the stakes in criminal cases are higher than in civil ones (e.g., the length of imprisonment), criminal law must have sufficient precision to minimize possible errors in its application.

III. CONTESTED PREMISE IN THE UNDERLYING RULING

The Court's reasoning in *Welch* for extending *Jobidon* to sexual assault can be viewed as a tension between two main political philosophy theories: utilitarianism[139] and libertarianism.[140]

The majority in *Jobidon*[141] and *Welch*[142] reasoned using utility theory and appealing to public policy by considering an act desirable if it brings the greatest expected benefit to the largest number of people. The Court in *Jobidon* found no social utility in fist fighting by reasoning that fist fighting breaks social order through public policy considerations.[143] The Court in *Welch* found the sexual activity of BDSM to be "inherently degrading and dehumanizing"[144] and not carrying social utility. In arriving at this decision, the Court in *Welch* relied on a prior UK case, *Brown,*[145]where social utility of sport was compared with that of sex. The Court in *Brown* found a higher social utility in sport than in sex, and, as a result, the Court found the intended and inflicted harm in sport to be acceptable in contrast with sexual

135 *Ibid.*
136 *Amos, supra* note 106.
137 *Criminal Code*, *supra* note 23, s 159 [Repealed,2019, c.25. s 54].
138 *Ibid.*
139 Utilitarianism, *supra* note 16.
140 Libertarianism, *supra* note 15.
141 *Jobidon*, *supra* note 1.
142 *Welch*, *supra* note 2.
143 *Jobidon*, *supra* note 1.
144 *Welch, supra* note 2.
145 *Brown*, *supra note* 73.

activities involving S&M. Thus, the Court concluded that S&M sexual activity does not carry the social utility to be worthy of protection by law.

A libertarian might criticize *Welch*'s decision[146] as an unjustified encroachment of the state on individual liberty and sexual autonomy.[147] The underlying principle behind this argument is the respect for one's self-ownership. In this view, sexual assault is wrong because it is against the will of the owner of the body that has been touched but not because the sexual activity is inherently wrong.[148] Thus, characterizing a sexual act such as BDSM as inherently degrading contradicts the libertarian view.

Irrespective of the choice of political philosophy, this paper proposes three arguments criticizing the approach of the court in *Welch* in extending *Jobidon* to the law of sexual assault. First, the Court's view of characterizing sexual conducts such as BDSM as dehumanizing and degrading and without social value appears to be subjective. As shown by jurisprudence, social value must be identified through the lens of fundamental values in Canadian society. In addition, the Court did not balance the competing values of protecting individuals from bodily harm against safeguarding the rights of sexual minorities. Second, the Court's reasoning in comparing sex with sport in terms of social utility was inappropriate. Third, the Court's ruling violated the principle of fairness within criminal law.

A. Social value: social norms versus safeguarding the rights of sexual minorities

Social norms are expectations which mandate social interactions in a society.[149] Behaving outside of these social norms results in sanctions such as stigmatization. Legal norms are a type of social norms which regulate society through formal rules and rights. Legal norms typically arise from social values.[150] In moral theory, values can be defined as intrinsic or instrumental. Intrinsic values are those that are inherently good, while instrumental values are those that are good because they are connected to something good.

Under current laws, the sexual practice of BDSM is not a crime unless harm is intended and inflicted pursuant to *Welch*. The Court in *Welch*

---

146 *Welch*, *supra* note 2.

147 Ben Ramanauskas, "BDSM, body modification, transhumanism, and the limits of liberalism" (2020) 40 Econ Aff at 85.

148 Libertarianism, *supra* note 15.

149 Edward N Zalta, "Social Norms", online: *Stanford Encyclopedia of Philosophy*, <plato.stanford.edu/> [perma.cc/77C3-LR2E].

150 Yehezkel Dror, "Value and the Law" (1957) 17:4 Antioch Review Inc 440.

found BDSM to be obscene and degrading[151] and thus without social worth. The Court's reasoning relied on the belief that a conduct such as BDSM does not promote human dignity and self-worth and does not possess intrinsic value to merit protection by the law. Another value the Court may have intended to protect but did not mention is the right against physical violence. While protection of society members against violence is a valid societal value, another value involves protection of the rights of sexual minorities. People who engage in BDSM activities are a minority in society. Thus, the Court should have balanced these values when making the ruling.

The Court's attitude in *Welch*[152] towards this sexual minority has parallels with the criminalization[153] of homosexuality which was later decriminalized.[154] Homosexuality is also practiced by a minority of society and was originally a crime, a status which was gradually repealed and entirely removed from the *Criminal Code*.[155]

Social norms evolve as society and its cultural values change. For instance, legal rules criminalized dueling, formerly a social norm in England and the United States, because the activity involved injuring or maiming someone. The harm resulting from dueling outweighed the preservation of a tradition; society then grew to accept this over time.[156] Similarly, while homosexuality remains contrary to the personal beliefs of certain members of society, there is no specific harm attached to its practice.

There were two problems with the Court's perspective on social value in *Welch*: first, the Court's partial criminalization of BDSM as an indecent and dehumanizing act seems to have stemmed from the Court's subjective view. Second, the Court did not engage in any analysis with respect to balancing the right of protection from bodily harm against the protection of rights of sexual minorities.

Regarding the first problem, the Court stated that acts such as unsanctioned fist fighting (*Jobidon*)[157] or BDSM activities (*Welch*)[158] are not within the customary norms of civilized society, and thus consent is not a

---

151 *Brown*, *supra* note 73; *Welch*, *supra* note 2.
152 *Ibid*.
153 *Criminal Code*, *supra* note 23, s 157.
154 *Criminal Code*, *supra* note 23, ss 147 &149. *Criminal Law Amendment Act*, SC 1968-69, c 38, s 7 (Bill C-150, 1st Sess, 28th Parl), added the exception as s 149A. See also Benette, *supra* note 13; Cheryl Hanna, "Sex is not sport: Consent and Violence in Criminal Law" (2001) 42:2 BCL Rev 249 [Hanna]; Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, cls 53-56.
155 *Criminal Code*, RSC 1985, c C-46, s 159 as repealed, 2019, c 25, s 54.
156 Hanna, *supra* note 163.
157 *Jobidon*, *supra* note 1.
158 *Welch*, *supra* note 2.

valid defence to causing bodily harm in them.[159] Meanwhile, violence in sport activities is widely accepted by societal norms. The libertarian view criticizing *Welch*'s decision is validated by John Stuart Mill's "harm principle."[160] This principle states that the only purpose which justifies applying a state's legal power to a member of society against their will is to prevent harm to another.[161] This principle has already been used and advocated by the SCC in *Labaye.*[162]

In *R v Labaye*[163] the Court rejected the interpretation of an indecent conduct as contrary to social norms on the basis of a community standards test. The reasoning of the Court was that community standards can vary between communities or evolve over time. The Court in *Labaye* reasoned that the community standard of tolerance is subjective and refused to apply it to determine whether an act was indecent.[164] In *Labaye*, the accused was charged with the offence of indecency under section 210 of the *Criminal Code*[165] for operation of a bawdy house and arranging private sexual acts between its members.[166] The Court held that social values must be related to "the fundamental values reflected in" the Canadian Constitution or fundamental laws such as the Bill of Rights.[167] To criminalize an activity, an objective test is required to evaluate whether harm to society or individual follows from the act.[168]

The Court in *Labaye*[169] proposed a two-step test based on the harm principle to determine whether an act is criminally indecent. The first step involves identifying whether the conduct causes harm, and the second step involves determining the degree to which the harm would impact the proper functioning of society.[170] The harm created by the conduct can be one of the following three types: "(1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to

---

159 *Jobidon*, *supra* note 1.
160 John Stuart Mill, *On Liberty and Considerations on Representative Government* (New Jersey: Blackwell, 1946) at 8.
161 *Ibid.*
162 *R v Labaye*, 2005 SCC 80 [*Labaye*].
163 *Ibid.*
164 *Ibid.*
165 *Criminal Code*, *supra* note 23, s 210.
166 *Labaye, supra* note 174.
167 *Labaye, supra* note 174 at paras 32-33.
168 *Ibid.*
169 *Ibid.*
170 *Labaye, supra* note 174 at para 20.

individuals participating in the conduct."[171] In this judgement, harm was broadly interpreted to include both physical and psychological harm.

Applying *Labaye*[172] to the issue of extending *Jobidon*[173] to sexual assault, it can be argued that the sexual activity of BDSM performed in private between two consenting adults do not lead to any social harms. There are no studies demonstrating that individuals engaging in BDSM acts are anti-social. The other risk is the possibility of individual harm to participants engaging in BDSM acts. BDSM activities have a broad spectrum. Some practices such as breath play (asphyxiation) can be life threatening if done incorrectly, while others such as playful teasing carry a miniscule possibility of harm. With the exception of dangerous BDSM acts such as breath play, most of its activities do not objectively carry the risk of harm.

The second problem with *Welch* is balancing the right to protection against bodily harm with protection of sexual minorities' rights. If harm following from a BDSM act has a greater cost than the constitutionally protected right of freedom of expression of an individual, the criminalization of this act is reasonable. The sexual acts classified under BDSM vary in terms of likelihood of harm. Parliament has already criminalized sexual acts with life-threatening risks such as asphyxiation under section 267(c) of the *Criminal Code*.[174] Thus, it can be argued that exclusive of these dangerous acts, there is no objectively foreseeable harm which follows from safe, consensual BDSM sexual activities between adults behind closed doors.

B. Sport vs BDSM

"Not all consent is created equal and not all consent is viewed as equal"[175]

Some consensual activities are accepted under public policy, while others result in sanctions. *Jobidon* specifically exempts certain activities such as surgery, medical treatment, stunts performed by qualified professionals, or rough sporting activities[176] in which consent to participate is given freely. [177] On the contrary, the Court in Welch[178] refused to extend the defence of consent to assault from contact sports to BDSM sexual activities by

---

171 *Labaye*, *supra* note 174 at para 36.
172 *Ibid*.
173 *Jobidon*, *supra* note 1.
174 *Criminal Code*, *supra* note 23, s 267(c).
175 Jill D Weinberg, "Consensual Violence: Sex, Sports, ad the Politics of Injury" (2016) University of California [Weinberg].
176 *Jobidon*, *supra* note 1.
177 *Ibid*.
178 *Welch*, *supra* note 2.

reasoning that there is no "creation of a socially liable cultural product" involved in BDSM activities.[179] The previous literature compares sport with sex from different angles such as rules of consent[180] or the riskiness of the activity in terms of likelihood and degree of harm due to the degree of force encountered.[181] It appears the Court in Welch followed the reasoning in *Jobidon* and implied that BDSM activities as compared to sports have insufficient social utility to justify the state from interfering with an individual's consensual rights when injury follows.[182] This section discusses the intrinsic flaw in comparing sex with sport from a social utility perspective.

Under Bentham's welfarism framework, utility is an ordinal metric that rates the success, satisfaction, or happiness of individual members of society by ranking one preference over another.[183] Social utility is described as the aggregation of the utilities for individual members of a society. Within this framework, an act with a higher social utility is the one which brings maximum utility for the greatest number of people in a society.[184] This paper argues that it is inappropriate to compare sex with sport in the social utility context on two grounds. First, not every activity that carries less social utility is subject to criminal sanction. Second, even if social utility is the measure of criminalization, its estimation contains a substantial amount of uncertainty, and this was highlighted by Sopinka and Stevenson in a concurring opinion in *Jobidon*.

With respect to the first issue, the assumption is that a conduct with social value is one which has social utility. However, this is not necessarily true in all cases. For instance, since childbearing is a social value, one could argue that because same-sex marriage is less likely to lead to the birth of children, this type of marriage has less social utility than a traditional heterosexual marriage; yet same-sex marriage is now legally recognized and accepted by the majority of societies across the world. It can be argued that homosexuality was criminalized based on societal beliefs rather than actual harm, and that it was partially decriminalized and then legalized as a response to society's changing beliefs and increasing tolerance.

---

179 *Ibid.*

180 *Weinberg*, *supra* note 187.

181 Hanna, *supra* note 163.

182 Paul J Farrugia, "The Consent Defence: Sports Violence, Sadomasochism, and the Criminal law" (1997) 8:2 Auckland U L Rev 472.

183 Laurent Cambon, Aicha Djouari &Jean-Leon Beauvois, "Social Judgement Norms and Social Utility: When It is more valuable to be useful than desirable" (2006) 65:3 Swiss J Psychol 167.

184 Utilitarianism, *supra* note 16.

Regarding the second issue, assuming that utility is the measure of social value, then there exist two main challenges in using it: (a) standards for measuring the individual utility and (b) aggregating the utility. In terms of the first challenge, the utility arising from sport is not comparable to sex. The social utility of sporting activities can be demonstrated by their benefits to society as a whole. Some of these benefits apply to the participant including the joy of competing, building athletic skills and obtaining a healthy body; others such as promoting teamwork, cooperation and leadership, and building wealth apply more broadly to society. By comparison, the social utility of BDSM activities derives from the sexual pleasure of the participants only. An exception is commercial BDSM, where the exchange of money benefits the sex workers. The difficulty is that there is no standardized unit of utility which can be assigned to these two different types of activities. Similarly for the second challenge, the aggregation of the units of utility for these two activities is not practically possible.

C. Fairness

"The view we take is, there's no place for the state in the bedrooms of the nation. What's done in private between adults doesn't concern the Criminal Code."[185]

The above famous quote from then-Justice Minister Pierre Trudeau in 1967 emphasizes the notion that criminal law should not interfere in the private lives of citizens any more than necessary. Although Welch[186] did not create a new offence in contravention of section 9 of the Criminal Code,[187] in practice a new criminal burden was created by extending the vitiation of consent to intended and inflicted harm in sexual acts, thus placing BDSM activities under the purview of criminal law. This implication interferes with the notion of fair notice to citizens within criminal law. On the one hand, popular media has popularized the practice of BDSM, including emphasizing consent and safety precautions such as establishing a "safe word."[188] On the other hand, the Court's ruling in Welch has stigmatized this practice.[189]

---

[185] CBC Television News, "Trudeau: 'There's no place for the state in the bedrooms of the nation'" (21 December 1967) at 00h:00m:36s, online (**video**): *CBC* <cbc.ca> [perma.cc/5LGV-CSNU].

[186] *Welch*, *supra* note 2.

[187] *Criminal Code*, *supra* note 23, s 9.

[188] Morton Nielsen, "Safe, Sane, and Consensual – Consent and the Ethics of BDSM" (2010) 24:1 Int J Appl Philos.

[189] Colin Perkel, "CBC executive fired in wake of Ghomeshi scandal sues for 'political' firing" (31 May 2016), online: *The Global News* <globalnews.ca/news/2725883/cbc-executive-fired-in-wake-of-ghomeshi-scandal-sues-for-political-firing/> [perma.cc/Z8H4-

In addition, while the purpose of Welch*[190]* appears to be the protection of victims of violence through removal of the defence of consent, in practice the Welch decision[191] leads to a potential miscarriage of justice in both intimate relationships as well as commercial settings. The primary issue in these situations is reporting. In intimate relationships, to avoid stigmatization and criminal sanction of their partner, the injured party may choose not to seek medical attention. In a commercial setting, the buyer paying to act out a submissive role in a BDSM setting could sustain serious body injuries.[192] In this case the buyer may elect not to bring criminal charges against the seller who caused these injuries, even if these were caused by unsafe practices or negligence of the seller, since the buyer can potentially face prosecution as a result of purchasing sex in violation of Bill C-36.[193] Conversely if the seller is playing a submissive role in BDSM activities and sustains injury, they may also decide not to report. Because sex workers may be in a weak economic position or under control of another party (e.g., a criminal gang or a pimp), they may avoid reporting their injuries for fear of losing their income or due to being forbidden to do so by the parties controlling them. While in some cases sex workers do report injuries which occurred on their job,[194]it's possible that a significant portion of them go unreported.

In the context of contact sports, the legal system has taken steps towards regulating the level of violence in sports.*[195]* For instance, in R v Bertuzzi,*[196]* the Court attempted to place limits on violence in ice hockey through a criminal sanction and proposed the possibility of vitiation of consent whenever aggression is beyond reasonable limits for the game.

Similarly, Parliament has taken steps to protect the safety of participants in BDSM acts. BDSM practices form a wide spectrum, ranging from nearly zero risk activities such as hand spanking to potentially life-threatening ones such as asphyxiation. It appears that the government has taken steps towards

---

5PJ2]; Christie Blatchford, "Christie Blatchford: Manitoba judge's career stalls while possibly biased inquiry into nudge photos grinds on" (21 June 2013), online: *National Post* <nationalpost.com> [perma.cc/LJY6-AKD9].

190 *Welch*, *supra* note 2.

191 *Ibid*.

192 "Prostitute gets probation after client dies in BDSM mishap" (26 Sep2016), online: *Toronto Sun* <torontosun.com/>[perma.cc/QCF7-8VDA].

193 Bill C -36, *Protection of Communities and Exploited Persons Act*, SC 2014, c25, 2nd Sess, 41st Leg.

194 *R v Preuschoff*, 2011 BCPC 352.

195 *R v Maki*, 14 DLR (3d) 164, 1 CCC (2d) 333; *R v Green*, [1970], 16 DLR (3d) 137, 2 CCC (2d) 442; *R v Bertuzzi*, 26 CR (6th) 71 [*Bertuzzi*]; *R v Ashton*, 2017 ONSC 585.

196 *Bertuzzi*, *supra* note 206.

regulating some of these riskier acts by criminalizing choking, suffocation, and strangulation under section 267(c) of the Criminal Code.[197]

After the Supreme Court of Canada's decision in J.A.,[198] Parliament amended the Criminal Code to expressly state that consent does not exist whenever one party is unconscious.[199] Section 273.1(2) (a.1) of the Criminal Code[200] states there is no consent whenever one party is unconscious[201] or incapacitated.[202]Section 273.1(2) (b) states there is no consent whenever one party is incapable of consenting to the activity. This effectively criminalizes the unsafe BDSM practice of breath play, since the receiver of the act is incapable of consenting while the sexual activity is taking place.

IV. CONCLUSION

The extension of *Jobidon* to sexual assault causing bodily harm in the Court's decision in *Welch* is controversial. In *Jobidon*, the SCC held that consent is vitiated in the case of assault causing bodily harm where the bodily harm is intended and inflicted. The SCC's underlying reasoning in *Jobidon* was that certain activities such as fist fights do not carry social utility. As a result, any intended harm that follows from them does not justify protection from criminal law. The Court contrasted low social utility activities such as fist fights with high social utility activities such as sports to explain this decision. In *Welch*, the Ontario Court of Appeal extended *Jobidon*'s holding to sexual assault causing bodily harm. The Court held that certain sexual activities such as BDSM do not carry social utility. If harm is intended and caused in their performance, consent is automatically vitiated.

Welch's framework can be criticized on two fronts: the uncertainties in its application and its underlying policy.

Regarding the former criticism, the *Welch* decision created ambiguity for courts, leading to inconsistencies in its application. The first ambiguity stems from the court being able to distinguish the mental element required for vitiation of consent (subjective intention) and the objective *mens rea* of the consequence part of the offence. The second ambiguity for courts is how to determine whether *Welch*'s framework applies by evaluating whether an activity is inherent degrading in order to follow the underlying reasoning in *Welch*. The third ambiguity is evaluating the open question of whether

---

197 *Criminal Code*, *supra* note 23, s 267(c).
198 *JA*, *supra* note 8.
199 *Criminal Code*, *supra* note 23, s 273.1(2) (a.1).
200 *Ibid.*
201 *R v Tookanachiak*, 2005 NUCA 4.
202 *R v R(R)*, 2003 SCC 4.

intended and inflicted harm which is purely psychological vitiates consent within the framework of *Welch*.

For the latter criticism, there are multiple viewpoints for questioning the underlying policy in the *Welch* holding, including libertarian and utilitarian. The libertarian view criticizes the decision as an intrusion to individuals' sexual autonomy. The utilitarian view employed in *Welch* was based on maximizing social utility. This paper demonstrated that there is an inherent flaw in the utilitarian argument used in *Welch*. The comparison of BDSM with sport to determine social utility is inappropriate, since it relies on the flawed assumption that social utility of each is objectively quantifiable and can be aggregated. The proposition of social utility of the sexual act of BDSM being lower than acts such as contact sports is flawed, since utility cannot be accurately ranked between these two. Although a smaller number of individuals in society engage in BDSM activities than participate in contact sports, the frequency and seriousness of injuries in the latter seems to be higher.

This paper then argued that there is an inherent flaw in relying on social value in terms of social utility to justify criminal sanctions. The social value in terms of social utility argument centers around whether an act or a behaviour is widely acceptable among individuals in a society. In other words, the Court in *Welch*'s argument of BDSM activities being fundamentally degrading stems from the perspective of social norms. Formulating criminal law based on intrinsically subjective and continuously evolving social norms defeat the principle of fairness of the law.

This paper holds that the libertarian view proposed by John Stewart Mills is a valid approach to the analysis of this issue. The basis of Mills's theory is that the state should only be involved in regulating behaviour of individuals to the extent which keeps them from harm. This framework was employed by the SCC in *Labaye.* In *Labaye*, the Court refused to criminalize a behaviour on the basis of social norms, and it proposed a harm analysis approach instead. Applying the harm analysis approach given in *Labaye* to BDSM acts shows that there is no substantial harm which follows from them. The problem with relying on social norms for criminal sanctions is the norms' subjective nature and their lack of consideration for certain types of values, such as the protection of the rights of sexual minorities. The former criminal sanction of homosexuality is an example of how social norms were used to unfairly sanction a minority group within society.

This paper concluded that irrespective of the choice of libertarian or utilitarian view, the *Welch* ruling inappropriately encroaches into the private life of individuals. This paper also explained how criminalization must be the last resort after other methods such as regulations have been exhausted,

particularly for areas involving personal choices and preferences of society's members. Criminal law must not invade the private life of citizens any more than necessary. *Welch*'s decision adds a new burden for citizens to regulate their behaviour. It can be argued that it violates section 9 of the *Criminal Code* by bringing this additional burden through criminalizing intended and inflicted harm as a result of consensual sexual activity. In addition, it can be argued that *Welch*'s decision suffers from practical implementation problems regarding sexual BDSM acts in private relationships or commercial settings by making individuals hesitate to report injuries from these activities due to fear of prosecution of the other party.

This paper aimed to show that *Welch*'s underlying reasoning to extend *Jobidon*'s ruling to the law of sexual assault is flawed and incomplete. With the increasing recognition and tolerance for consensual BDSM in popular media and among the general public, an action to challenge the ruling in *Welch* may be gaining traction.

Property, Civil Forfeiture and the *Charter*

M A R K   S O O *

ABSTRACT

This paper seeks to address the issue of how evidence obtained in violation of a *Charter*-protected right is to be dealt with in civil forfeiture proceedings. In arriving at the answer, the governing jurisprudence in this area of the law will be canvased to provide a contextual background that informs the parameters of this discussion. However, it will ultimately become clear by the end of this paper that evidence obtained in violation of a *Charter*-protected right should be dealt with by way of section 24(2) of the *Constitution Act, 1982*, and the use of a modified *Grant* test.

Civil forfeiture is the process by which the state commences legal action to obtain property that was seized as an instrument or proceed of unlawful activity. Although property can be forfeited through a number of different mechanisms, the scope of this paper is limited to forfeiture proceedings commenced by way of civil action under provincial legislation with a focus on British Columbia.

The case law presented in this paper will focus primarily on appellate court decisions from across the country due to the scarce attention this area of the law has received. These cases will highlight the endeavours of litigants who sought to undermine civil forfeiture proceedings through the use of common law principles and the *Charter*. Finally, commentary will be provided on the direction future research in this area of the law should take.

---

* Mark Soo is a third-year law student at Robson Hall, University of Manitoba Faculty of Law. He has worked in various capacities with the Royal Canadian Mounted Police, Canada Revenue Agency and the Public Prosecution Service of Canada. Upon graduation, Mark will be articling in the area of criminal defence in British Columbia. The author expresses his gratitude to the anonymous peer reviewers, editors at the Manitoba Law Journal and John W. Burchill for all of their comments and feedback on earlier drafts of this article.

Keywords: Civil forfeiture; The *Charter*; section 24(2); *Grant*; Exclusion; Evidence; Offence-related property.

I. INTRODUCTION

On March 12, 2013, William Khan Munnue's civil forfeiture came to an end, and he was ordered by the British Columbia Supreme Court to surrender his home to the state. The Court found Mr. Munne's home constituted an instrument of unlawful activity after it was determined that the property was used in a marijuana grow operation. As such, he was ordered to forfeit the property to the Director of Civil Forfeiture.[1]

Civil forfeiture is the process by which the state commences civil proceedings *in rem* against property that was seized as an instrument or proceeds of unlawful activity. Although the definition of unlawful activity varies across jurisdictions, it is broadly defined as an act or omission that is an offence under an act of Canada or another Canadian province or territory.[2] However, due to the numerous civil forfeiture statutes across the country, this paper will generally focus on British Columbia's *Civil Forfeiture Act*.[3]

The civil forfeiture landscape in BC has recently undergone some major developments. First, the BC Legislature passed the *Civil Forfeiture Amendment Act, 2023* on May 11, 2023, in response to the Cullen Commission's final report.[4] The commission was established by the Lieutenant Governor of BC to inquire into and report on money laundering in the province.[5] One of the Cullen Commission's key recommendations was to introduce unexplained wealth orders to combat "the accumulation of illicit wealth by organized crime groups and others involved in serious criminal activity."[6] With the new amendments, the Director of Civil Forfeiture can now seek an unexplained wealth order in relation to properties that it suspects are the proceeds of unlawful activity.[7] The effect of the order is to compel the respondent or responsible officer of

---

1. *British Columbia (Director of Civil Forfeiture) v Kazan*, 2013 BCSC 388 at paras 119-121.
2. See Appendix A for a comparison of how the terms are defined differently across each jurisdiction.
3. *Civil Forfeiture Act*, SBC 2005, c 29 [*Civil Forfeiture Act*].
4. Bill 21, *Civil Forfeiture Amendment Act, 2023*, 4th Sess, 42nd Parl, British Columbia, 2023 (assented, May 11, 2023).
5. *Commission of Inquiry into Money Laundering in British Columbia – Final Report* (Vancouver: Cullen Commission, 2022) at 49.
6. *Ibid* at 1616, 1618.
7. *Civil Forfeiture Act, supra* note 3, s 11.09.

the impugned property to demonstrate the nature of their interest in the property, as well as how it was acquired, among other things. Failure to comply with the order results in a presumption that the impugned property is the proceeds of unlawful activity.[8] The property can then be forfeited in the usual course of civil proceedings by virtue of the amendments to the *Civil Forfeiture Act*, which now permit an adverse inference to be made against the property.[9]

The second drastic change involves the British Columbia Court of Appeal's decision to uphold the constitutional validity of the "future use" provisions in the *Civil Forfeiture Act*.[10] The "future use" provisions relate to instruments of unlawful activity defined under section 1(b) of the *Civil Forfeiture Act* as "property that is likely to be used to engage in unlawful activity that may (i) result in the acquisition of property or an interest in property, or (ii) cause serious bodily harm to a person."[11] The Director of Civil Forfeiture relied on these provisions to target the clubhouses of the Hells Angels Motorcycle Club.[12] The trial judge found these provisions exceeded their constitutional authority and were *ultra vires* the province.[13] Upon appeal, however, this finding was overturned.[14]

The final development in this area of the law involves a challenge to the "asset tracing" provisions of the *BC Civil Forfeiture Act* in *Director of Civil Forfeiture v McDermid et al*.[15] In that decision, the Applicants successfully argued sections 22.02 and 11.01 of the Act infringed their section 7 and 8 *Charter* rights.[16] However, the Court has not determined whether these provisions can be saved by section 1 yet. Further commentary of this case will be provided below in the course of discussing challenges to civil forfeiture proceedings.

While these recent developments are related to civil forfeiture, the first two developments go beyond the scope of what this paper seeks to achieve. This paper will instead address how the *Charter of Rights and Freedoms*

---

8 *Ibid*, s 19.07(2).

9 *Ibid*, s 19.09(2).

10 *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2023 BCCA 70 at para 93 [*Angel Acres Recreation*]. Leave to appeal SCC dismissed on October 12, 2023, 2023 CanLII 92310.

11 *Civil Forfeiture Act, supra* note 3, s 1(b).

12 *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2020 BCSC 880 at para 1295.

13 *Ibid* at para 1465.

14 *Angel Acres Recreation, supra* note 10.

15 *Director of Civil Forfeiture v McDermid et al*, 2023 BCSC 2287 [*McDermid*].

16 *Ibid* at paras 215, 217 and 231.

impacts civil forfeiture proceedings.[17] More specifically, the focus is on how evidence obtained in violation of a *Charter*-protected right should be dealt with in civil forfeiture proceedings. By the end of this paper, it will be clear that the section 24(2) framework outlined in *R v Grant* by the SCC, subject to some modification, should be used in resolving civil forfeiture proceedings when the evidence was unconstitutionally obtained.[18]

To arrive at this conclusion, some context will be necessary to inform the parameters of this discussion. First, the various existing forfeiture regimes will be surveyed to provide foundational knowledge, followed by a discussion of the lack of constitutional protection of property rights. An in-depth discussion of the strategies and tactics employed by defendants of civil forfeiture proceedings will then take place to inform the reader of some of the challenges that have been raised. This will involve canvassing cases from all jurisdictions in Canada due to the little attention this area of the law has received from appellate courts. These cases will set the stage for the main issue this paper is ultimately concerned with.

II. THE VARIOUS FORFEITURE REGIMES ACROSS CANADA

A. Provincial Legislation

Civil forfeiture proceedings are structured to operate almost identically across all jurisdictions in Canada. Each Province can initiate the process in one of two ways. First, forfeiture of the proceeds and instruments of unlawful activity can be sought through the commencement of formal civil proceedings in court. This involves launching a civil action *in rem* against the property in question. Consider, for example, section 3 of British Columbia's *Civil Forfeiture Act*, which provides an example of the property the Director may seek forfeiture of.

Application for forfeiture order

3 (1) The director may apply to the court for an order forfeiting to the government
  (a) the whole of an interest in property that is proceeds of unlawful activity, or
  (b) the portion of an interest in property that is proceeds of unlawful activity.
(2) The director may apply to the court for an order forfeiting to the government property that is an instrument of unlawful activity.[19]

Alternatively, the state may also seek forfeiture by way of administrative means. Like formal proceedings, each Province has legislative provisions

---

[17] *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 [the *Charter*].

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

[19] *Civil Forfeiture Act, supra* note 3, s. 3.

that permit the Director of Civil Forfeiture to administratively seek forfeiture of property. This can be done as long as it provides the public with sufficient notice. For example, section 14 of British Columbia's *Civil Forfeiture Act* states:

Part 3.1 — Administrative Forfeiture of Subject Property

. . .

Application of this Part

14.02 (1) This Part applies if

(a) the director has reason to believe that

(i) the whole or a portion of an interest in property, other than real property, is proceeds of unlawful activity, or

(ii) property, other than real property, is an instrument of unlawful activity,

(b) the director has reason to believe that the fair market value of the property referred to in paragraph (a) (i) or (ii) is $75 000 or less,

(c) the property referred to in paragraph (a) (i) or (ii) is in British Columbia and is in the possession of a public body, and

(d) the director has no reason to believe that there are any protected interest holders in relation to that property.[20]

. . .

Notice of forfeiture under this Part

14.04 (3) Notice under subsection (1) (c) must be

(a) published in a newspaper of general circulation in British Columbia and circulating in or near the area in which the subject property was seized, or

(b) published in the *Gazette*.[21]

B. Federal Legislation

While the focus of this paper is on BC's *Civil Forfeiture Act*, the forfeiture provisions of *The Controlled Drugs and Substances Act* ("*CDSA*") and the *Criminal Code* are noted here to inform the reader's perspective, as the following cases will draw on some provisions of the *CDSA* and the *Criminal Code*. As such, it is worth highlighting the language of the relevant sections to be discussed. Consider, for example, section 16 of *The Controlled Drugs and Substances Act*, which states:

Forfeiture of property

16 (1) Subject to sections 18 to 19.1, if a person is convicted, or discharged under section 730 of the *Criminal Code*, of a designated substance offence and, on application of the Attorney General, the court is satisfied, on a balance of

---

20 *Ibid*, s 14.02.

21 *Ibid*, s14.03.

probabilities, that non-chemical offence-related property is related to the commission of the offence, the court shall

(a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and

(b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purposes of this paragraph.[22]

Property related to other offences

16 (2) Subject to sections 18 to 19.1, if the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) is related to the commission of the designated substance offence of which a person is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is non-chemical offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.[23]

Similarly, it is also worth noting the language expressed in section 490 of the *Criminal Code*, which permits the Crown to seek forfeiture of offence-related property.

490.1 (1) Subject to sections 490.3 to 490.41, if a person is convicted, or discharged under section 730, of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court shall

(a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and

(b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.[24]

As the noted legislation above indicates, the state can seek forfeiture of the offence-related property in numerous ways, regardless of the legislative scheme the proceedings are commenced under. Unfortunately for

---

22 *Controlled Drugs and Substances Act*, SC 1996, c 19, s 16(1).

23 *Ibid*, s 16(2).

24 *Criminal Code*, RSC 1985, c C-46, s 490.1.

defendants, there is little protection in the way of property rights in Canada that can be used against the state to shield their property and assets. A discussion on the lack of constitutional protection of property rights and their history will now ensue to inform the reader on why litigants have generally relied on common law principles rather than the *Charter*.

III. SECTION 7 OF THE *CHARTER* & THE LACK PROPERTY RIGHTS IN CANADA

Property rights in Canada are notably absent from the *Charter*. While the exact reasons are largely a matter of debate, their deliberate exclusion is not. Before the constitution was repatriated in 1982, there was mutual interest between the Liberal Party of Canada and the Conservative Party of Canada to enshrine property rights under the *Charter*.[25] In fact, early drafts of the constitution included property rights. However, these provisions did not survive subsequent debate due to continued opposition from provincial governments.[26]

Some of these provincial governments were concerned with constitutionally entrenching property rights. They feared doing so would undermine their power and control over property and civil rights under section 92(13) of *The Constitution Act, 1867*.[27] For example, the Attorney General of Saskatchewan pressured the Liberal government of Canada to back down from its efforts to include property rights due to concerns it had about limiting foreign ownership of land. This political maneuver, among others, resulted in the sacrifice of property rights from the *Charter* in order to garner the support of these dissenting provinces.[28] Although Prime Minister Pierre Trudeau could have unilaterally patriated the constitution, he wanted to avoid the appearance of imposing the constitution upon the provinces.[29] As such, property rights never made their way back into the final draft of the *Charter*. Since then, subsequent attempts to introduce property rights into section 7 have failed. First, the British Columbia legislature tried in 1983, followed by the House of Commons in 1988.[30]

---

25 *Dwight G Newman and Lorelle Binnion, The Exclusion of Property Rights from the Charter: Correcting the Historical Record*, 2015 52-3 Alberta Law Review 543, 2015 CanLIIDocs 113, < canlii.ca/t/6wc>, retrieved on 2023-04-17 at 554-555.

26 *Ibid* at 552.

27 *Ibid* at 555.

28 *Ibid* at 556.

29 *Ibid* at 553.

30 *British Columbia, Legislative Assembly, Official Report of Debates (Hansard)*, 32nd Parl,

In the context of civil forfeiture proceedings, this has forced defendants to mount creative defences based on common law principles and the *Charter*. For example in *Ontario (Attorney General) v. 8477 Darlington Crescent*, the defendant sought to rely on section 7 of the *Charter* in arguing his liberty interest was violated when the court ordered forfeiture of property pursuant to Ontario's forfeiture act, the *Civil Remedies Act*.[31] The defendant claimed ordering forfeiture based on the civil burden of proof of "on a balance of probabilities" was inconsistent with the principles of fundamental justice enshrined under section 7 of the *Charter*.[32]

The Ontario Court of Appeal rejected this argument, finding no property rights within section 7 of the *Charter*.[33] Even when section 7 is engaged, the Court found no supporting common law authority that requires a change in the standard of proof from "on a balance of probabilities" to the more onerous "beyond a reasonable doubt."[34] The Supreme Court of Canada ("SCC") also limited the application of section 7 to human beings in *Irwin Toy* because corporations and other artificial entities are incapable of enjoying the protections described under section 7, namely, life, liberty and security of the person.[35] As a result, if defendants of civil forfeiture proceedings are to rely on section 7, it would have to involve a breach of their rights as a person. For example in *Director of Civil Forfeiture v McDermid et al*, the defendants successfully argued their sections 7 and 8 *Charter* rights were breached as a result of the investigative steps taken by the Director of Civil Forfeiture in obtaining their financial records.[36] That decision will be subsequently discussed in further detail under the constitutional challenges to forfeiture legislation.

A. The Canadian Bill of Rights

The *Canadian Bill of Rights* is one area that does offer some protection of property. Specifically, section 1(a) provides the following:

Recognition and declaration of rights and freedoms

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race,

---

4th Sess (21 September 1982) at 9299; *House of Commons Debates*, 33rd Parl, 2nd Sess, No 12 (29 April 1988) at 14989.

31 *Ontario (Attorney General) v 8477 Darlington Crescent*, 2011 ONCA 363 at para 53.

32 *Ibid*.

33 *Ibid* at para 54.

34 *Ibid* at paras 54-55.

35 *Irwin Toy Ltd V Quebec (Attorney General)*, [1989] 1 SCR 927 at 1003.

36 *McDermid*, supra note 15.

> national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;[37]

While the *Canadian Bill of Rights* does offer some protection over property, it is important to note its limitations. First, it only applies to federal legislation. Second, it cannot override or supersede other laws. Instead, its remedial authority involves rendering inoperative any federal legislation that conflicts with the *Canadian Bill of Rights.* The extent of this remedial power was clarified by the SCC in *The Queen v Drybones*, stating any impugned legislation can supersede the *Canadian Bill of Rights*, as long as Parliament expressly indicates so.[38] In *Drybones*, the court examined section 94(b) of the *Indian Act*, which created an offence for an Indian to be intoxicated off reserve, and section 2 of the *Canadian Bill of Rights*. The decision indicated the ease with which the *Canadian Bill of Rights* can be overridden so long as Parliament expresses an unambiguous intention for the impugned legislation to operate notwithstanding the *Canadian Bill of Rights*.[39] Finally, the *Canadian Bill of Rights* is not constitutionally entrenched like the *Charter*.

B. Provincial Statutes

Some provinces like Alberta and Quebec have enacted their own statutes to safeguard property rights, such as the *Alberta Bill of Rights* and the Quebec *Charter*.[40] However, such legislation is neither universal across Canada nor constitutionally entrenched like the *Charter*. As a result, defendants have tried turning to common law principles in an attempt to undermine civil forfeiture proceedings.

IV. Legal Challenges

Litigants have attempted to thwart civil forfeiture proceedings in a number of ways by resorting to the *Charter*, as well as tangential legal concepts at common law that impact a defendant's *Charter* rights at trial.

---

[37] *Canadian Bill of Rights*, SC 1960, c 44, s 1.

[38] See generally *The Queen v Drybones*, [1970] SCR 282.

[39] *Ibid*.

[40] *Alberta Bill of Rights*, RSA 2000, c A- 14; *Charter of Human Rights and Freedoms*, CQLR, c C-12.

A. Issue Estoppel

Issue estoppel is a common law doctrine that prevents a legal issue from being re-litigated. The rationale behind this concept was outlined by the SCC in *R v Mahalingan*.[41] In that decision, the Court held that out of fairness to the accused, they should not be called upon to answer questions already decided in their favour. By compelling the accused to do so, the Court stated this could lead to inconsistent findings that would undermine the integrity and coherence of the criminal law.[42] The Court also emphasized how "the institutional values of judicial finality and economy" are essential to maintaining the confidence of the justice system.[43] Once an issue has been litigated, it should be final and only subject to review upon appeal.[44]

In the forfeiture context, a defendant who faces simultaneous civil and criminal proceedings may seek to rely on issue estoppel to prevent the same legal issue from being heard twice. This is precisely what Mr. Vellone tried to do in the following case.

In *R v Vellone*, the accused sought to rely on this legal concept during a hearing in which the state was seeking forfeiture of his home as offence-related property.[45] Mr. Vellone was charged with a series of drug-related offences under the *CDSA*. The Crown claimed Mr. Vellone's home facilitated drug sales by operating as a "stash house," where narcotics and money were stored in between transactions.[46] At trial, Mr. Vellone was successful in bringing a motion to exclude evidence obtained in violation of his section 8 *Charter* rights.[47] The result of this was the exclusion of the impugned evidence pursuant to section 24(2) of the *Charter*. An acquittal was subsequently found on all but one of the charges, which he resolved by way of a guilty plea.[48]

Mr. Vellone then sought to prevent admission of the evidence during his forfeiture hearing by asserting issue estoppel. However, to succeed with issue estoppel in criminal law, the accused must demonstrate the following requirements outlined by the SCC in *Mahalingan*:

---

41 *R v Mahalingan*, 2008 SCC 63 at para 16 [*Mahalingan*].
42 *Ibid* at para 45.
43 *Ibid* at para 46.
44 *Ibid*.
45 See generally *R v Vellone*, 2020 QCCA 665, leave to appeal to SCC refused, 2021 CanLII 15594 [*Vellone*].
46 *Ibid* at paras 7, 22.
47 *Ibid* at para 7.
48 *Ibid*.

(1) the issue must have been resolved in the accused's favour in the previous criminal proceedings;
(2) the issue decided must be final; and
(3) the parties must be the same in both proceedings.[49]

During the forfeiture hearing, the trial judge re-engaged in a section 24(2) analysis to determine the admissibility of evidence despite her earlier ruling that favoured Mr. Vellone. The Quebec Court of Appeal upheld the trial judge's decision to conduct a section 24(2) analysis afresh, agreeing with her reasoning that the criminal trial and forfeiture proceedings serve distinct purposes.[50] The trial judge found Mr. Vellone's prosecution was concerned with determining guilt and the loss of liberty.[51] By contrast, the forfeiture hearing did not share the same punitive emphasis. Instead, the forfeiture proceeding was concerned with taking offence-related property out of circulation.[52] As a result, the trial judge found issue estoppel did not apply and proceeded to perform a section 24(2) analysis *de novo*.[53]

The onus then shifted to Mr. Vellone to demonstrate "that having regard to all of the circumstances, admission of the evidence would bring the administration into disrepute" pursuant to the three-part *Grant* analysis under section 24(2).[54] At trial, the judge found the first two factors of the *Grant* test favoured exclusion while the final factor favoured the admission of the evidence.[55] During the forfeiture hearing, she dispensed with an analysis of the first two factors because they still militated against inclusion.[56] On the final factor, however, she found the administration of justice would be brought into disrepute if the offence-related property were permitted to continue circulating.[57] As a result, she placed more weight on the final factor and admitted the evidence, despite the first two factors that favoured exclusion.

Although Mr. Vellone's matter arose out of provisions under the *CDSA* rather than a provincial forfeiture act, this case is nonetheless helpful as an appellate level authority in illuminating how the *Grant* test can be re-applied in a civil setting in determining the admissibility of improperly obtained evidence.

---

49 *Mahalingan*, *supra* note 41 at paras 52-56.
50 *Vellone*, *supra* note 45 at paras 55-56.
51 *Ibid* at para 55.
52 *Ibid*.
53 *Ibid* at para 49.
54 *Grant*, *supra* note 18 at para 45.
55 *Vellone*, *supra* note 45 at paras 57-60.
56 *Ibid* at para 61.
57 *Ibid* at para 62.

B. Section 24(2)

A separate section of this article is dedicated to *Charter* challenges, however, Mr. Vellone's case is being discussed here due to the nature of his challenge. Instead of arguing that a specific *Charter* right was breached, Mr. Vellone challenged the admissibility of the evidence by relying on the finality of the section 24(2) finding at trial. He claimed that the exclusion of evidence ruling under section 24(2) at trial prevented the Crown from relying upon the same evidence during the forfeiture proceedings.[58] While the Court acknowledged that orders made under section 24(2) within the same proceeding are generally final, they also held exceptions do exist.

The Court referred to *R v Calder,* where the SCC held reconsideration of section 24(2) may be justified when a material change in the circumstances has occurred.[59] However, the Quebec Court of Appeal held that the exceptions outlined in *Calder* only apply to applications for review of orders made within the same proceeding.[60] Unfortunately for Mr. Vellone, the Court of Appeal determined his criminal trial was separate from his forfeiture hearing, as the latter took place under a provision of the *CDSA*.[61] The Court accordingly ruled against him on this argument.

C. Stay of Proceedings

The Director of Criminal Property and Forfeiture v Gurniak et al is another forfeiture case that demonstrates the ingenuity of defendants to raise legal arguments premised on common law doctrines and the *Charter*.[62] In *Gurniak 1*, the defendant was facing parallel proceedings in criminal and civil court. He brought a motion for a stay of proceedings against the civil matter on the basis that his right to silence would be jeopardized during his criminal trial. In particular, he feared the parallel proceedings would affect his *Charter*-protected rights under sections 7 and 11.[63]

The motion's judge granted the stay of proceedings, finding that while rare and exceptional circumstances are normally required to grant a stay of proceedings, the threshold should be lowered where parallel proceedings are underway.[64] The motion's judge based her decision on several grounds.

---

58 *Ibid* at paras 23, 25.

59 See generally *R v Calder*, [1996] 1 SCR 660.

60 *Vellone, supra* note 45 at para 32.

61 *Ibid*.

62 See generally *The Director of Criminal Property and Forfeiture v Gurniak et al*, 2020 MBCA 96 [*Gurniak 2*].

63 *The Director of Criminal Property and Forfeiture v Gurniak et al*, 2019 MBQB 80 at para 33 [*Gurniak 1*].

64 *Ibid* at para 32.

First, she found that the Director of Civil Forfeiture is distinct from other litigants in that it would not suffer prejudice from a delay in obtaining a remedy.[65] Second, she believed the relationship between the Director and the police would result in a coordinated effort to undermine the fairness of the accused's criminal prosecution.[66] Her concern was that the police would share information with the Crown that it gained through the civil proceeding.[67] Finally, she concluded the *Charter* and *Manitoba Evidence Act* were inadequate in protecting the defendant from the risk of derivative evidence.[68]

The Manitoba Court of Appeal disagreed with the motion judge's ruling, finding she erred in applying the proper legal test.[69] Ordinarily, the test from *RJR-MacDonald* is used to determine whether a stay of proceedings should be granted.[70] However, the three-part test from that case is not used when criminal and civil proceedings are being heard concurrently.[71] Instead, the Court examines "whether there are exceptional or extraordinary circumstances which show that the right of the applicant on the criminal charge cannot adequately be addressed by the rules governing the civil proceeding or a remedy available to an accused in their criminal process."[72] The Court also found no presumption in favour of a stay of proceedings simply due to the existence of parallel proceedings.[73] In fact, the presumption is the opposite: that the proceedings can be dealt with fairly and that the applicant bears the burden of demonstrating otherwise.[74]

Mr. Gurniak then tried arguing derivative evidence could be obtained from the civil proceedings that would incriminate him during prosecution.[75] He claimed affidavits or compelled testimony would end up in the hands of the Crown.[76] Additionally, he was worried that such evidence may reveal defence strategy or further crimes that have not come to the attention of law enforcement yet.[77] Ultimately, he argued this would

---

65 *Ibid* at paras 27, 28,40.
66 *Ibid* at para 28.
67 *Ibid.*
68 *Ibid* at paras 34-36.
69 *Gurniak 2, supra* note 62 at paras 39-42.
70 *Ibid* at para 38.
71 *Ibid* at para 39.
72 *Ibid* at para 40.
73 *Ibid.*
74 *Ibid.*
75 *Ibid* at para 47.
76 *Ibid.*
77 *Ibid* at para 48.

undermine trial fairness, and a stay of proceedings should be entered as a result.[78]

The Court of Appeal acknowledged Mr. Gurniak's concerns in *Gurniak 2* but held sufficient protections exist to prevent the defendant's criminal trial from being prejudiced by the concurrent proceedings. First, the Court held there is a distinction between use immunity and derivative use immunity.[79] Use immunity prevents the direct admission of evidence obtained through compelled testimony.[80] For example, the Court referenced, and the defendant conceded, that the *Charter* and the *Canada Evidence Act* prevent self-incrimination. Specifically, section 13 of the *Charter* provides:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.[81]

Additional safeguards were identified by the Court in the *Canada Evidence Act* and *The Manitoba Evidence Act* that prevent self-incrimination in subsequent proceedings. These provisions serve to restrict the use of answers provided during litigation to the proceedings at hand.[82] They are reproduced here for ease of reference:

Canada Evidence Act

Incriminating questions

> 5(1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.[83]

Answer not admissible against witness

> 5(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution

---

78 *Ibid* at para 49.

79 *Ibid* at para 50.

80 *Ibid.*

81 *The Charter, supra* note 17, s 13.

82 *Gurniak 2, supra* note 62 at para 51.

83 *Canada Evidence Act*, RSC 1985, c C-5, s 5(1).

> for perjury in the giving of that evidence or for the giving of contradictory evidence.[84] [Emphasis added]

The Manitoba Evidence Act

Incriminating questions

> 6(1) No witness shall be excused from answering any question, or producing any document, upon the ground that the answer thereto or the production thereof may tend to criminate him, or may tend to establish his liability to a legal proceeding at the instance of the Crown or of any person.[85]

Evidence not to be used

> 6(2) If, with respect to any question or the production of any document, a witness objects to answer or to produce upon any of the grounds mentioned in subsection (1), and if but for this section or any Act of the Parliament of Canada, the witness would have been excused from answering that question or from producing that document, then although the witness is, by reason of this section or any Act of the Parliament of Canada, compelled to answer or to produce, the answer so given or the document so produced shall not be used or receivable in evidence in any legal proceeding against him thereafter taking place.[86] [Emphasis added]

Similar to use immunity, derivative use immunity exists to prevent the evidence or testimony of witnesses from being used against them indirectly.[87] In *Thompson Newspapers Ltd. v Canada (Director of Investigation and Research)*, Justice L'Heureux-Dubé defined derivative evidence as "all facts, events or objects whose existence is discovered as a result of a statement made to the authorities."[88] Moreover, in the same decision, Justice Wilson held, "[t]here is a direct causal relationship between the compelled testimony and the derivative evidence. ... [C]ausality is the *sine qua non* of derivative evidence."[89] The concern with derivative use immunity is the gathering of evidence from statements and testimony given by litigants in their effort to defend the civil suit against them.[90] In *Thompson Newspapers Ltd.*, the Court refers to the text of Justice Sopinka with regard to onus and proof, where the text states:

> The Supreme Court of Canada, in the cases of *R. v. S. (R.J.) and British Columbia (Securities Commission) v. Branch*, [1995] 2 SCR 3, considered the question of the use to which evidence discovered as a result of a witness' testimony can be put. If

---

[84] *Ibid*, s 5(2).

[85] *The Manitoba Evidence Act*, CCSM c E150, s 6(1).

[86] *Ibid*, s 6(2).

[87] *Gurniak 2*, *supra* note 62 at para 52.

[88] *Thompson Newspapers Ltd V Canada (Director of Investigation and Research)*, [1990] 1 SCR 425 at 574 [*Thompson Newspapers*].

[89] *Ibid* at 484.

[90] *Gurniak 2*, *supra* note 62 at para 52.

> the evidence would not have been discovered but for the compelled testimony of the witness, such derivative evidence will be excluded from the trial.[91]

The Manitoba Court of Appeal also held section 7 of the *Charter* has been interpreted to prevent the use of any incriminating evidence in subsequent trials, referring once again to the text of Justice Sopinka.[92]

In light of the existing statutory and common law protections, the Manitoba Court of Appeal dismissed Mr. Gurniak's appeal.[93] The Court also stated derivative use immunity only applies where such evidence actually exists.[94] This extends to include potential disclosure through civil proceedings, such as a forfeiture hearing.[95] In Mr. Gurniak's case, speculation and hypothetical concerns of compelled testimony from the civil action spilling over to the criminal trial do not meet the threshold for a stay of proceedings.[96]

Finally, before the Court allowed the Director's appeal, it held that other protections, such as the implied undertaking rule exist. In *Juman v Doucette*, the SCC elaborated on the implied undertaking rule. The issue in *Juman* was whether *bona fide* disclosures of transcripts of civil proceedings could be disclosed to the police.[97] In that case, the Vancouver Police Department ("VPD") and the Attorney General of British Columbia ("AGBC") sought to obtain the trial transcripts of a daycare worker who faced a claim of negligence.[98] The SCC ultimately held that *bona fide* disclosures of the kind that the VPD and AGBC were requesting violated the implied undertaking rule.[99]

The implied undertaking rule prevents pre-trial discovery from being used for purposes extraneous to the civil process in which the statements or evidence arise.[100] The consequences of breaching the undertaking can result in serious remedies, such as a stay or dismissal of the proceeding, striking a defence, or even contempt.[101] There are only exceptional circumstances where the implied undertaking rule can be overridden.[102]

---

91 *Thompson Newspapers, supra* note 88 at 573-574.
92 *Gurniak 2, supra* note 62 at para 56.
93 *Ibid* at para 69.
94 *Ibid* at para 59.
95 *Ibid* at para 58.
96 *Ibid* at para 73.
97 *Juman v Doucette*, 2008 SCC 8 at para 1.
98 *Ibid*.
99 *Ibid* at para 58.
100 *Ibid* at para 4.
101 *Ibid* at para 29.
102 *Ibid* at para 30.

For example, when the applicant seeking to use the information outside of the civil proceedings demonstrates on a balance of probabilities that a public interest exists that is of greater weight than the values the implied undertaking rule seeks to protects.[103] Such values include ensuring the parties are forthcoming and complete with their responses during discovery.[104] Protecting the privacy of the parties to the litigation from exposure to embarrassing, defamatory, or salacious gossip likewise qualify.[105]

Alternatively, one possible situation where disclosure could be made with little prejudice to the examined party is when the same parties are involved.[106] In these circumstances, the SCC reasoned that prejudice to the examinee in such circumstances would be non-existent. Another possible exception involves impeaching the witness for prior inconsistent statements, as does public safety.[107] Finally, the police may seek a warrant to obtain the material; however, doing so would require the police to satisfy the necessary judicial requirements.[108]

To summarize, Mr. Gurniak's case represents another creative attempt to undermine civil forfeiture proceedings through the use of common law doctrines. Although it provides contextual information surrounding previous attempts by litigants to thwart civil forfeiture proceedings, it does not address the larger issue of how a court should procedurally or substantively navigate a *Charter* breach.

D. *Charter* Challenges to Legislation

The *Charter* has been used by many defendants in their defence against civil forfeiture claims, alleging their sections 7, 8, 9 and 10(b) *Charter* rights were violated. For example, in *Director of Civil Forfeiture v McDermid et al*, the defendants ("the McDermids") challenged sections 22.02 and 11.01 of the *BC Civil Forfeiture Act*, also known as the asset tracing provisions.[109] The litigation arose out of an order sought by the Director of Civil Forfeiture ("the Director") for the McDermids' banking records.[110]

In this case, the Director sought the McDermid's financial records after the Vancouver Police Department made a referral to the Director alleging cannabis oil extraction laboratories were being operated on properties

---

[103] *Ibid* at para 32.
[104] *Ibid* at para 26.
[105] *Ibid* at para 24.
[106] *Ibid* at para 35.
[107] *Ibid* at paras 40-41.
[108] *Ibid* at para 6.
[109] *McDermid*, supra note 15 at paras 2, 18.
[110] *Ibid* at para 8.

owned by the McDermids. [111] As a result, the Director commenced civil proceedings against the McDermids shortly thereafter, alleging the properties in question were proceeds and instruments of unlawful activity.[112]

Sections 22.02 and 11.01 permit the Director to obtain third-party information by court order, such as financial records.[113] The McDermids challenged the constitutional validity of these provisions, alleging they deprive individuals of the right to life, liberty, and security of the person as well as constitute unreasonable search and seizure, as protected under sections 7 and 8 of the Charter, respectively.[114] With respect to section 7, the McDermids claimed the "'quasi-criminal' nature of CFA proceedings, the overbroad nature of the provisions, and the lack of procedural safeguards deprive them of the right to life, liberty and security of the person and are contrary to the principles of fundamental justice as guaranteed by s. 7."[115]

As for the section 8 challenge, the McDermids claimed they had a reasonable expectation of privacy in the information that their financial institutions were ordered to produce pursuant to orders made under sections 22.02 and 11.01.[116] They also claimed the financial records went to the biographical core of an individual, and as such amounted to a search and seizure within the meaning section 8 of the *Charter*. [117]

In dealing with the alleged breaches, the Court concluded that all of the constitutional challenges will be dealt with under section 8 of the *Charter*, including those under section 7.[118]

With respect to section 22.02, the Court found that the information disclosed under this section only relates to what was described as "tombstone" information. Such information is limited to the individual's name, date of birth and whether that individual maintains an active account with the financial institution in question.[119] As a result, the Court found such basic information does not go to the biographical core of an individual.[120] In reaching its decision, the Court stated privacy expectations

---

[111] *Ibid* at para 7.
[112] *Ibid* at para 10.
[113] *Ibid* at para 20.
[114] *Ibid* at para 4 and 35.
[115] *Ibid* at para 35.
[116] *Ibid* at para 36.
[117] *Ibid*.
[118] *Ibid* at para 57.
[119] *Ibid* at para 127.
[120] *Ibid*.

are reduced under civil law matters as opposed to criminal proceedings.[121] Upon finding no reasonable expectation of privacy, the Court concluded section 8 is therefore not engaged.[122]

As for section 11.01, the *Charter* challenge involved the reasonableness of the law authorizing the search and seizure.[123] In determining the reasonableness of the law, the Court adopted the flexible approach outlined by the Supreme Court of Canada in *Goodwin v British Columbia (Superintendent of Motor Vehicles)* and examined the following factors:

> (a) the nature of the legislative scheme; (b) the purpose of the legislative scheme; (c) the mechanisms employed, having regard for the degree of its potential intrusiveness, and (d) The availability of judicial supervision or other procedural safeguards."[124]

1. The nature of the legislative scheme

The Court held that the nature of the proceedings should be seen on a sliding scale, given that they are commenced under civil law, but also include some stigma relating to criminal conduct.[125] In particular, the Court held that the standard of reasonableness is skewed towards quasi-criminal due to its inherent connection to criminal conduct and "the spectre of criminality" from the allegations.[126] As such, the Court found this factor weighs against the reasonableness of the authorizing statute.[127]

2. The purpose of the legislative scheme

The Court agreed with the Attorney General of BC's argument that sections 22.02 and 11.01 assist in achieving the following identified goals of the legislation:

> (1) to take the profit out of unlawful activity;
> (2) to prevent the use of property to unlawfully acquire wealth or cause bodily injury; and
> (3) to compensate victims of crime and fund crime prevention and remediation.[128]

Having been satisfied that sections 22.02 and 11.01 assist in accomplishing the listed goals by allowing the Director to identify the

---

[121] *Ibid* at para 129.
[122] *Ibid* at para 130.
[123] *Ibid* at para 134.
[124] *Ibid* at para 137.
[125] *Ibid* at paras 153, 162.
[126] *Ibid* at paras 159, 162.
[127] *Ibid* at para 163.
[128] *Ibid* at paras 139, 142-143.

parties and assets involved, it found this factor weighed in favour of reasonableness.[129]

3. The mechanisms employed, having regard for the degree of its potential intrusiveness

Under this branch of the analysis, the Court held that the search does not involve any surveillance, physical intrusions that could violate the bodily integrity of the McDermids, or concerns of entry into a private residence.[130] Instead, the mechanism is through the judicial system by obtaining prior judicial authorization in the form of a warrant.[131] However, the Court found the nature of the information that can be compelled under section 11.01 goes to the biographical core of personal information, a point which the Director and Attorney General conceded.[132]

The Court ultimately found the broad range of information available to the Director under this section to constitute a significant interference with an individual's privacy rights. Accordingly, this factor militated against its reasonableness.[133] Specifically, the type of records that be compelled include "written or oral responses from colleagues or friends about a variety of matters including an individual's day-to-day activities, their associates, and habits."[134] The Court's concern was also rooted in the section's broad language which empowers the Director to obtain information even in the absence of a forfeiture claim.[135] While the Court acknowledged that not every case will necessarily involve compelling the broad scope of information that the provision authorizes, the potential for its abuse remained a concern.[136]

4. The availability of judicial supervision or other procedural safeguards

The Court acknowledged the inherent safeguard in requiring prior judicial authorization and was satisfied that the "reasonably required" mandate provides courts with some discernable parameters to ensure an individual's privacy is respected.[137] However, the Court was troubled by the lack of required notice to the affected parties under this section when their

---

[129] *Ibid* at paras 143, 145.
[130] *Ibid* at para 166.
[131] *Ibid*.
[132] *Ibid* at para 169.
[133] *Ibid* at paras 175, 186.
[134] *Ibid* at para 173.
[135] *Ibid* at paras 180, 186.
[136] *Ibid* at para 186.
[137] *Ibid* at paras 189, 195.

information is accessed.[138] As such, the Court found the absence of statutory notice obligations sufficient to justify its concerns about the constitutional validity of this provision.[139] In particular, the Court expressed concern with the possibility that an individual may never discover that their personal information was accessed unless formal proceedings ensue.[140] Accordingly, the Court found this jeopardizes the constitutional validity of the section.[141]

E. Overall Assessment of the Goodwin Factors

Having regard to all of the factors considered, the Court found the legislative purpose and prior judicial authorization requirement to weigh in favour of finding the provision reasonable.[142] By contrast, the intrusive nature of the search, its limitless capacity to compel information, as well as the broad definition of the powers, functions and duties that the information must be tied to, all weighed against finding the provision reasonable.[143]

Further, the broad and overbreadth nature of the provision allows the Director to obtain information that "tends to reveal intimate details of the lifestyle and personal choices of the individual" that the individual has an expectation of privacy in.[144] The broad scope of this language militated against the judicial oversight involved in obtaining a production order due to the ease with which the Director could link the request to their powers, functions and duties.[145] As the Court described it, the Director may receive information about individuals that is not required, or possibly even relevant to the specific matter at hand."[146] This potential abuse was compounded by the lack of mandatory notice required until formal proceedings are launched. The Court accordingly concluded that section 11.011 does not achieve a reasonable balance between the state's goals and ensuring individual privacy rights in accordance with section 8 of the *Charter*.[147]

In short, the Court held that section 22.02 withstands constitutional scrutiny, while section 11.01 was held to constitute an unreasonable search

---

138 *Ibid* at para 204.
139 *Ibid* at para 206.
140 *Ibid* at paras 204, 207.
141 *Ibid* at para 207.
142 *Ibid* at para 211.
143 *Ibid* at para 212.
144 *Ibid* at para 213.
145 *Ibid* at para 214.
146 *Ibid*.
147 *Ibid* at paras 215, 217.

and seizure, contrary to section 8 of the *Charter*.[148] As of the time of writing, the Court has not ruled on whether the provisions can be upheld under section 1 of the *Charter* as a reasonable limit.[149]

F. *Charter* Challenges to State Misconduct

Beyond constitutional challenges to legislation, defendants have also raised *Charter* issues over the collection of improperly obtained evidence. For instance, in *Alberta (Minister of Justice and Attorney General) v Squire*, a civil forfeiture case commenced under Alberta forfeiture legislation, the defendant asserted a series of *Charter* breaches.[150] The case involved a claim against the $27,020 cash that was located in the vehicle driven by Mr. Squire.

Mr. Squire came to the attention of the police while driving past two officers on the highway.[151] During this brief encounter, the police noticed Mr. Squire's vehicle was missing a mud flap and queried his license plate in their database. The results indicated the vehicle was recently queried by the Vancouver Police Department and the Dryden Police.[152] A vehicle stop was then initiated by the officers.

During the traffic stop, the officers engaged Mr. Squire in a conversation, in which they observed a suitcase stowed behind the centre console and two cell phones on the front passenger seat.[153] The police then retreated back to their vehicle to decide how to handle the situation.[154] Based on their experience, they eventually decided to request the assistance of a canine unit.[155]

When the dog handler arrived, Mr. Squire was asked to exit the vehicle and accompany the officers to the rear of their cruiser. The officers then cautioned Mr. Squire and provided him with his right to counsel.[156] An interrogation then began, in which Mr. Squire disclosed where he was traveling to, whether there were any illegal substances in the vehicle and the $27,020 currency that was in the vehicle.[157] While the interrogation occurred, the dog handler conducted a "sniffer dog" search of the vehicle

---

[148] *Ibid* at para 6.
[149] *Ibid* at para 231.
[150] *Alberta (Minister of Justice and Attorney General) v Squire,* 2012 ABQB 194 at para 2 [*Squire*].
[151] *Ibid* at para 6.
[152] *Ibid* at paras 6, 7.
[153] *Ibid* at para 10.
[154] *Ibid* at para 12.
[155] *Ibid* at para 13.
[156] *Ibid* at para 14.
[157] *Ibid* at para 15.

with the canine and the dog made a positive indication of a controlled substance odour.[158]

Following this indication, the officers reassessed their observations in light of the large sum of cash Mr. Squire disclosed to possessing.[159] The officers then placed Mr. Squire under arrest and read him the reasons for his arrest. At this point, Mr. Squire indicated he wished to speak with counsel, however his request was never fulfilled.[160] Instead, Mr. Squire was confronted with two options. The first option was to sign a statement of relinquishment indicating he was not the rightful owner of the money and forfeit it.[161] On the other hand, the second option was to claim ownership of the funds and be charged with possession of proceeds of crime.[162]

Mr. Squire ultimately chose the former option out of fear that the latter option would result in the seizure of the vehicle, which belonged to his brother.[163] This ended his interaction with the police.[164]

When the matter went to trial, Mr. Squire alleged a breach of his sections 8, 9 and 10(b) *Charter* rights, citing an illegal detention due to the lack of reasonable suspicion and denial of right to counsel.[165] He argued that the subsequent interrogation and search of his vehicle constituted a further infringement of his section 8 rights. Finally, Mr. Squire claimed his section 10(b) right was breached when the police failed to facilitate access to counsel.[166] The Court agreed with Mr. Squire, finding his section 8 *Charter* rights were breached as a result of the lack of reasonable suspicion required to detain him.[167] The judge also found the evidence from the interrogation and search to constitute fruits of an illegal search and seizure.[168]

With respect to section 10(b) of the *Charter*, the judge rejected the Minister's argument that Mr. Squire's right to counsel could not be facilitated due to the lack of privacy on the side of the road.[169] Similarly, the judge also dismissed the Attorney General's argument that Mr. Squire

---

158 *Ibid* at para 16.
159 *Ibid* at para 17.
160 *Ibid*.
161 *Ibid* at para 19.
162 *Ibid* at para 20.
163 *Ibid* at paras 20-21.
164 *Ibid* at para 22.
165 *Ibid*.
166 *Ibid*.
167 *Ibid* at para 40.
168 *Ibid* at para 49.
169 *Ibid* at para 55.

waived his right to counsel by signing the statement of relinquishment.[170] Such an argument was found to be illogical, as the purpose of section 10(b) is to assist the individual in need of legal advice in a time of jeopardy by clarifying the implications of his decision.[171] Accordingly, the Court held it would render section 10(b) meaningless if the police were permitted to rely on Mr. Squire's uninformed choice in signing the statement as the basis to absolve the police of their obligations under section 10(b).[172] As such, the Court found Mr. Squire's 10(b) right to be violated.[173]

Upon finding that Mr. Squire's *Charter* rights were breached, the Court turned to section 24(2) to determine admissibility of the evidence. The Minister argued the *Grant* factors under section 24(2) should not be afforded the same weight in a forfeiture hearing, due to the absence of any risk to his liberty.[174] In support of this argument, the Minister relied on *R v Daley*, a pre-*Grant* case from the Alberta Court of Appeal, where the Court dealt with a forfeiture claim made under a provision of the *Criminal Code.* The Court held *Daley* was distinguishable on the basis it was decided under the *Collins/Stillman* approach to section 24(2), which was overhauled by the SCC in *Grant*.[175]

Under the *Grant* approach to section 24(2), the Court found the state infringing conduct is not mitigated by a change in the nature of the proceedings.[176] Regardless of whether the proceedings are commenced under criminal or civil law, the Court found the egregious behaviour of the state remains constant.[177] As a result, the Court proceeded to apply the *Grant* test.

Under the first factor, the seriousness of the breach, the Court did not find the police conduct to be particularly heinous, but it did state that reasonable suspicion and investigative detention are well established concepts that the police ought to get right.[178] With respect to the second factor, the impact of the breach on the *Charter* protected right, the Court found the breach undermined Mr. Squire's liberty to be free from state interference, privacy interests and right to silence.[179] Under the final branch of analysis, society's interest in adjudicating the matter on its merits, the

---

170 *Ibid* at paras 56, 57.
171 *Ibid* at para 57.
172 *Ibid*.
173 *Ibid* at para 58.
174 *Ibid* at para 59.
175 *Ibid* at para 60.
176 *Ibid* at para 63.
177 *Ibid* at paras 63, 64.
178 *Ibid* at para 66.
179 *Ibid* at para 67.

Court found the physical evidence seized favoured admission because of its reliability.[180] By contrast, the signed statement of relinquishment was held to be highly unreliable, with the judge questioning whether Mr. Squire was coerced into providing his signature.[181] This favoured exclusion of the evidence. As such, all of the impugned evidence was excluded pursuant to section 24(2).[182]

Since *Squire*, further challenges have been raised under the *Charter*. For example, in *Director (Under the Seizure of Criminal Property Act, 2009) v Negash*, the Court found the defendant's section 10(b) *Charter* right was infringed, but admitted the evidence after conducting a brief analysis under section 24(2) of the *Charter*.[183] Similarly, in AG *Ontario and $164,300 in Currency* and AGO *v $68,870 Cdn Currency & $3,700 US currency (In Rem)*, the defendants both claimed their section 8 *Charter* rights were violated, but the Court in both decisions disagreed, finding no *Charter* infringement.[184]

V. *CHARTER* BREACHES AND REMEDIES

As seen in *Squire* and *Negash*, section 24(2) of the *Charter* has been applied to resolve issues of admissibility regarding evidence obtained in violation of a *Charter* protected right. However, it is also worth noting that provincial forfeiture statutes offer another form of relief to defendants. Section 6 of British Columbia's *Civil Forfeiture Act*, which provides a possible avenue of resolution by authorizing a court to grant the following relief to the defendant.

> **Relief from forfeiture**
>
> 6 (1) If a court determines that the forfeiture of property or the whole or a portion of an interest in property under this Act is clearly not in the interests of justice, the court may do any of the following:
>
> (a) refuse to issue a forfeiture order;
> (b) limit the application of the forfeiture order;
> (c) put conditions on the forfeiture order.[185]

---

[180] *Ibid* at para 69.
[181] *Ibid*.
[182] *Ibid* at para 70.
[183] See generally *Director (Under the Seizure of Criminal Property Act, 2009) v Negash*, 2021 SKQB 240 [*Negash*].
[184] See generally AG *Ontario and $164,300 in Currency*, 2019 ONSC 2024 and AGO *v $68,870 Cdn Currency & $3,700 US currency (In Rem)*, 2019 ONSC 6546
[185] *Civil Forfeiture Act*, *supra* note 3, s 6.

Section 6 of BC's *Civil Forfeiture Act* is just one example of several other relief provisions that exist in civil forfeiture legislation across the country. However, the issue with section 6 and other relief provisions under provincial statutes is that they merely authorize the court to refuse ordering forfeiture of the impugned property. The remedial provision does not address the underlying *Charter* breach by excluding impugned evidence. As such, section 24(2) of the *Charter* is the appropriate remedial provision to resolve issues of improperly obtained evidence in civil proceedings, as it is in criminal law matters. This was the approach taken by Justice Sullivan in *Alberta (Justice and Attorney General) v Petros*, a civil forfeiture case in which the defendant alleged sections 8 and 9 *Charter* violations.[186]

In that decision, Justice Sullivan held the Alberta Minister of Justice cannot rely on improperly obtained evidence in a civil forfeiture matter. He reasoned that the *Charter* is an instrument that holds the state accountable for his misconduct, citing the Justice LaForest's decision in *McKinney v University of Guelph.*[187] In the context of civil forfeiture, Justice Sullivan held the *Charter* applies as a means of ensuring fairness in the proceedings.[188]

Since *Petros*, Alberta forfeiture cases and a small number of others from neighbouring jurisdictions have continued to follow Justice Sullivan's ruling by applying section 24(2) and the *Grant* test to subsequent forfeiture proceedings. [189]Although these cases continue to apply the *Charter* in civil settings, there is an insufficient number of cases to reveal a clear and consistent approach to section 24(2). To date, no appellate court has addressed the issue of improperly obtained evidence strictly in the context of civil proceedings and examined whether the test should continue apply as set out by the SCC.

A. Issues in Applying Grant to Forfeiture Proceedings

In *Grant*, the SCC introduced a new approach to the exclusion of evidence analysis under section 24(2) of the *Charter.*[190] The new test required courts to balance the following three avenues of inquiry in determining whether "admission of the evidence would bring the administration of justice into disrepute."

---

[186] See generally *Alberta (Justice and Attorney General) v Petros*, 2011 ABQB 541 at paras 36-37 [*Petros*].

[187] *Ibid* at para 37.

[188] *Ibid*.

Alberta (Justice) v Wong, 2012 ABQB 498 (See also *Mackie v Alberta (Minister of Justice and Attorney General)*, 2014 ABQB 173; *Feuerhelm v Alberta (Justice and Attorney General)*, 2017 ABQB 709; *Director (Under the Seizure of Criminal Property Act, 2009) v Negash*, 2021 SKQB 240).

[190] *Grant*, *supra* note 18.

(1) the seriousness of the state's offending conduct;
(2) the impact of the breach on the accused's *Charter*-protected interests; and
(3) society's interest in the adjudication of the case on the merits.[191]

The difficulty with applying the *Grant* framework to civil forfeiture proceedings is that the test arose out of a criminal matter, in which the SCC specifically referred to the truth-seeking function of the criminal trial process in that decision.[192] Specifically, under the third inquiry, the question posed is whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the impugned evidence.[193] However, forfeiture proceedings are not concerned with determining guilt. Rather, the purpose and nature of the proceedings differ significantly, calling into question the appropriateness of a straight forward application of the *Grant* test, as seen in *Squire* and *Negash*.

There are a number of distinctions that those courts did not consider in assessing the weight to be afforded to each branch of the analysis. First, the subject of forfeiture hearings is real property, not an accused. This is a salient distinction that was highlighted by the Court in *Vellone,* in which it found makes the hearing akin to a civil process.[194]

Second, civil proceedings serve a different purpose than criminal trials. The purpose of forfeiture hearings was identified by the Court in *Vellone* as reducing the continued circulation of offence-related property, another distinction that the Court of Appeal agreed with when it upheld the trial judge's decision to conduct her 24(2) analysis *de novo*.[195] By contrast, prosecutions are concerned with the truth-seeking function of the criminal process stated in *Grant*.[196]

While it is true civil forfeiture proceedings are undeniably connected to unlawful activity, they are not concerned with punishing the defendant. In fact, the BC *Civil Forfeiture Act* authorizes the Director to proceed in the absence of a prosecution. Section 18(a) of the Act permits the finding of unlawful activity even if no person is charged with an offence that falls under the provided definition.[197] Further, section 18(b) allows a finding of unlawful activity even where a person is acquitted of all charges.[198] This

---

[191] *Ibid* 8 at para 50.
[192] *Ibid* at para 79.
[193] *Ibid*.
[194] *Vellone*, *supra* note 45 para 41.
[195] *Ibid* at paras 54-55.
[196] *Grant, supra* note 18 at para 59.
[197] *Civil Forfeiture Act, supra* note 3, s 18(a).
[198] *Ibid*, s 18(b).

lends further support to the idea that the forfeiture hearing is solely concerned with removing the offence-related property from continued circulation in the criminal underworld. Again, this is a separate and distinct purpose from what the Court in *Grant* was referring to when it articulated the new approach to 24(2). Further, the Minister of Public Safety and Solicitor General of British Columbia made the following comments about the Act's purpose during its second reading:

> With this new legislation we will be taking the profit out of illegal activity. It will be another tool to deter and prevent fraud, theft and a host of other illegal activities, and it will enable the recovery of ill-gotten gains and will assist in providing compensation to eligible victims.
> The moneys recovered through forfeiture will compensate eligible victims and will be used to support further crime prevention initiatives. The moral and legal underpinnings of civil forfeiture are very clear. Civil forfeiture is similar to the civil remedy against unjust enrichment. It takes back assets derived from illegal conduct. No one should be allowed to get rich as a result of breaking the law. No one, I hope, can or will seriously argue that point.[199]

The British Columbia Court of Appeal also found the policy rationale for the Act was to:

> (1) to take the profit out of unlawful activity;
> (2) to prevent the use of property to unlawfully acquire wealth or cause bodily injury; and
> (3) to compensate victims of crime and fund crime prevention and remediation.[200]

Similarly, under section 2 of Manitoba's civil forfeiture act, *The Criminal Property Forfeiture Act*, the stated purpose is to provide civil remedies that will prevent:

> (a) people who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities; and
> (b) property from being used to engage in certain unlawful activities.[201]

The distinct purpose of forfeiture hearings and the absence of any risk to an individual's jeopardy support a modified approach to the *Grant* test in the context of civil forfeiture hearings.

---

199 *British Columbia, Legislative Assembly, Hansard,* 38th Parl, 1st Sess, Vol 2, No 9 (19 Oct 2005) at 948 <www.leg.bc.ca/documents-data/debate-transcripts/38th-parliament/1st-session/20051019pm-Hansard-v2n9#bill13-2R>.

200 *British Columbia (Director of Civil Forfeiture) v Onn*, 2009 BCCA 402 at para 14.

201 *The Criminal Property Forfeiture Act,* CCSM, c C306, ss 2(a) and (b).

B. A Modified Approach to *Grant*

When the SCC articulated the new approach to 24(2) in *Grant*, it also held that there are no overarching rules that dictate the balancing act required of judges during their analysis.[202] The SCC also went on to acknowledge that mathematical precision is "obviously not possible" when weighing the different factors. [203] As a result, the question becomes how the *Grant* test should be applied in the civil process.

In a recent decision by the BC Court of Appeal regarding bifurcation of civil forfeiture issues, the court mentioned the possibility that the test could be modified to reflect the policy objectives of forfeiture legislation.[204] Modifying the application of the *Grant* test would not constitute a serious unprecedented shift in the law.

Historically, courts have adopted and applied tests of a different legal nature on several occasions, sometimes reducing down the requirements in the process. In *Doré*, the SCC held that a modified version of the *Oakes* test was to be applied in administrative law proceedings where discretionary administrative decisions were made. Such an approach was considered more flexible to meet the needs of administrative law rather than a full section 1 analysis.[205] Similarly, the SCC has drawn on legal tests from various areas of the law that did not necessarily coincide with the case it was attempting to resolve. Consider *Dagenais v. Canadian Broadcasting Corp*, where the SCC dealt with the issue of a publication ban concerning one of the Canadian Broadcasting Corporation's television shows.[206]

In that case, Mr. Dagenais and his co-accused were members of the Catholic order who were on trial for the physical and sexual abuse of young Catholic schoolboys.[207] The Canadian Broadcasting Corporation wanted to air its television series *The Boys of St. Vincent*, a fictional television program that depicted the alleged offences that Mr. Daganais and his co-accused were charged with.[208] The SCC created a two-part test to determine when a publication ban should be ordered.[209] That same test was subsequently

---

[202] *Grant*, *supra* note 18 at para 86.

[203] *Ibid.*

[204] *British Columbia (Director of Civil Forfeiture) v Conrad*, 2024 BCCA 10 at para 115. The BC Court of Appeal approved of *Squire*, *supra* note 150, at paras 112-114 of the decision, but also noted that "the jurisprudence on the exclusion of evidence in civil forfeiture proceedings pursuant to s. 24(2) of the Charter is not, as of yet, well developed."

[205] *Doré v Barreau du Québec*, 2012 SCC 12 at paras 33-43.

[206] See generally *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835.

[207] *Ibid* at 836-837.

[208] *Ibid* at 851-852.

[209] *Ibid* at 878.

adopted in *R v Mentuck*, a criminal case in which the Crown sought to prohibit the publication of certain facts it intended to introduce as evidence during the trial.[210] In particular, the Crown brought a motion to ban the publication of:

> (a) the names and identities of the undercover police officers [involved] in the investigation of the accused, including any likeness of the officers, appearance of their attire and physical descriptions;
> (b) the conversations of the undercover operators in the investigation of the accused to the extent that they disclose the matters in paragraphs (a) and (c);
> (c) the specific undercover operation scenarios used in investigation. . . . [211]

Other courts have taken similar approaches in borrowing legal tests from areas of law outside the case they were trying to decide. The legal test of injunctions from *RJR-MacDonald* is another leading example of when courts have adapted and applied a test to a different legal setting. In *RJR-MacDonald*, an injunction was sought by the tobacco company to temporarily abstain from complying with the packaging and warning requirements mandated under the *Tobacco Products Control Act* while the substantive legal matter was being litigated.[212]

Yet, in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, the Manitoba Court of Queen's Bench applied the same interlocutory injunction test in the labour sphere.[213] The Manitoba Federation of Labour sought an injunction against the Government of Manitoba in relation to an employment dispute, and, as such, the *RJR-MacDonald* test was appropriately used to resolve the Federation's application.

In adapting a legal test, courts can exercise their discretion to vary the amount of weight and emphasis given to each aspect of the test in their analysis. This was the approach taken by the trial judge in *Vellone*.[214] Recall that during Mr. Vellone's criminal trial, the judge found the first two factors of the *Grant* test favoured exclusion and declined to admit the evidence.[215] Yet, when the analysis was conducted again during the forfeiture hearing, she admitted the evidence because she placed greater emphasis on society's interest in the adjudication of the matter on its merits.[216] She was persuaded by an abundance of case law on how the integrity of the justice

---

[210] See generally *R v Mentuck*, 2001 SCC 76.
[211] *Ibid* at para 6.
[212] See generally *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.
[213] See generally *Manitoba Federation of Labour et al v The Government of Manitoba*, 2018 MBQB 125.
[214] *Vellone, supra* note 45.
[215] *Ibid* at paras 61-62.
[216] *Ibid*.

system would be brought into disrepute by returning offence-related property. [217]

Similarly, the case of *R v Breton* offers further support for the re-interpretation of the *Grant* test during a forfeiture hearing.[218] In that case, the Court excluded all of the evidence under section 24(2) and acquitted Mr. Breton at trial after it found his section 8 *Charter* rights were violated.[219] However, the impugned evidence was subsequently admitted when the Crown brought an application to seek forfeiture of the 1.2 million dollars of cash that was seized during the illegal search.[220] In reaching its decision, the Court was persuaded by the Crown's argument that section 24(2) can be revisited during a forfeiture hearing. The Court reasoned that a forfeiture hearing constitutes a change in the jeopardy for the accused that allows for a new section 24(2) analysis to be conducted, citing *Vellone* as persuasive.[221]

As with *Vellone*, the Court in *Breton* found a distinction between the interests of an accused and their property when the determination of guilt and deprivation of liberty are no longer in question.[222] Similar to *Vellone*, the focus was on removing potential offence-related property out of circulation.[223] Specifically, the inquiry was about the operation of sections 463.43 and 490(9) of the *Code*.[224] Those sections of the *Criminal Code* direct the Court to consider whether the impugned property was unlawfully possessed when it was seized.[225] In *Breton*, the Court held that society has a right to consider whether the property was unlawfully held and, if so, whether to allow the unlawful possession to continue.[226]

In re-conducting its *Grant* analysis, the Court held that the weight attributed to each branch of the test at trial was influenced by the context of the trial. However, the Court re-evaluated the test based on the circumstances of the forfeiture hearing, where the accused's liberty is no longer at risk.[227] Although the first two branches of the test still militated in favour of exclusion, the third and final branch of the test involving the repute of the administration of justice led to a different outcome. Rather

---

217 *Ibid*.
218 See generally *R v Breton*, 2023 ONSC 2035.
219 *Ibid* at paras 3-4.
220 *Ibid* at paras 4, 5, 34.
221 *Ibid* at paras 14, 16, 17.
222 *Ibid* at para 9.
223 *Ibid* at para 10.
224 *Ibid* at para 22.
225 *Ibid* at para 23.
226 *Ibid* at para 23.
227 *Ibid* at para 26.

than exclude the evidence again, the Court found that doing so would bring the administration of justice into disrepute.[228] The Court held that the 1.2 million dollars that was seized could be used in ways that would endanger the public and harm society.[229] Accordingly, the Court found society had a vested interest in the adjudication of whether Mr. Breton lawfully possessed the cash and admitted the evidence.[230]

VI. CONCLUSION

In summary, there have been numerous attempts to undermine civil forfeiture proceedings that involved the use of the *Charter* and common law principles. Some of these efforts have been more successful than others in establishing a *Charter* breach where the court had to turn to the remedial provisions of the *Charter*. In *Squire*, the Court excluded the improperly obtained evidence under section 24(2), finding the defendant's section 8, 9 and 10(b) *Charter* rights were violated. By contrast, in *Vellone*, the evidence was initially excluded at the prosecution of his criminal charges, but was subsequently admitted during the forfeiture hearing despite upholding the *Charter* violation. This has led to the question of whether the *Grant* test can be horizontally adopted across criminal and civil proceedings, or if a remedy is more appropriately found under forfeiture legislation.

Civil forfeiture acts contain their own relief provisions that permit a judge to oppose granting the forfeiture sought. However, it must be remembered that section 24(2) is the remedial provision in the *Charter* and the extent of a *Charter* breach is not simply reduced as a result of a change in the procedural formality by which the state opts to commence the proceedings.[231] Whether the matter is tried civilly or criminally, the state misconduct that led to the improperly obtained evidence remains equally as egregious.[232] The question then becomes how the *Grant* test should be applied in determining the admissibility of such evidence. Within the civil forfeiture context, the court should take a modified approach by exercising its discretion to emphasize the importance of some factors over others. Some courts have adopted to take this approach, while others simply applied *Grant* without taking into account the differences that exist between civil and criminal proceedings.

---

228 *Ibid* at para 30.
229 *Ibid*.
230 *Ibid* at paras 30, 34.
231 *Squire*, *supra* note 150 at paras 63-64.
232 *Ibid*.

Clarifying instructions from the SCC on the correct approach to take would assist lower level courts in navigating this situation. However, such guidance is far from imminent. In March 2021, the SCC refused to grant Mr. Vellone leave to appeal his matter.[233] If, however, the matter was granted leave, the SCC could very well have resolved the matter in both criminal and civil forfeiture proceedings simultaneously. In *R v Hills*, the SCC endorsed the use of hypotheticals in a sentencing hearing, permitting the sentencing judge to rule based on hypothetical facts.[234] The SCC could likewise clarify this area of the law if presented with an opportunity to do so by using a hypothetical scenario and inviting counsel and other interested parties to make submissions on the matter.

Until the SCC provides a definitive ruling on how to traverse this area of the law, future research endeavours should consider examining the impact of the exclusion of evidence under section 24(2) in civil forfeiture proceedings. In particular, once this area of the common law develops, future research might consider how the Director could succeed despite an unfavourable section 24(2) ruling. Stated differently, researchers could examine whether a civil claim ends once the evidentiary basis collapses due to the exclusion of evidence under section 24(2).

Although the answer may appear intuitive, the data could suggest the exclusion of evidence under section 24(2) is a moot point in most cases. Recall that civil forfeiture proceedings are commenced *in rem* against the property itself and are assessed on the civil standard of proof of on a balance of probabilities. As such, the Director may have sufficient evidence that survives the section 24(2) ruling to prove its claim. Whether the common law developments in this fashion remains to be seen, in the meantime, it is clear that section 24(2) and a modified *Grant* test should be used to resolve issues of improperly obtained evidence in civil forfeiture proceedings.

---

233 *Roberto Vellone v Her Majesty the Queen*, 2021 CanLII 15594.

234 See generally *R v Hills*, 2023 SCC 2.

Appendix A
Comparison of Civil Forfeiture Regimes across Canadian Provinces*

	BC	AB	SK	MB
ACT	*Civil Forfeiture Act*, SBC 2005, C. 29	*Civil Forfeiture Act*, SA 2001, c C-15.2	*The Seizure of Criminal Property Act*, 2009, SS 2009, c S-46.002	*The Criminal Property Forfeiture Act*, C.C. S.M. c. C306
CIVIL FORFEITURE PROVISIONS	3 (1) The director may apply to the court for an order forfeiting to the government (a) the whole of an interest in property that is proceeds of unlawful activity, or (b) the portion of an interest in property that is proceeds of unlawful activity. (2) The director may apply to the court for	19.2(1) Subject to subsection (2), the Minister may, with respect to property that is alleged to be an instrument of illegal activity, commence an action under this Part by an application for any one or more of the following purposes: (b) to remove financial incentives to commit illegal acts, including disgorging financial gains from illegal acts;	3(1) The director may apply to the court for a forfeiture order if the director is satisfied that property is proceeds of unlawful activity or an instrument of unlawful activity.	3(1) If the director is satisfied that property is proceeds of unlawful activity or an instrument of unlawful activity, he or she may commence proceedings in court seeking an order forfeiting the property to the government.

	BC	**AB**	**SK**	**MB**
	an order forfeiting to the government property that is an instrument of unlawful activity.	(c) to prevent property that has been used or is likely to be used in carrying out an illegal act from being used to carry out future illegal acts;		
ADMIN. PROVISIONS	**Part 3.1 — Administrative Forfeiture of Subject Property** 14.02 (1) This Part applies if (a) the director has reason to believe that (i) the whole or a portion of an interest in property, other than real property, is proceeds of unlawful activity, or	**Administrative disposition proceeding** 1.3(1) In this section, “bona fide interest holder” means, in relation to property described in subsection (2)(a), a person who has an interest in the whole or a portion of the property in respect of which the person has registered a financing statement in the Personal Property	**PART II.1 Administrative Forfeiture Proceedings** 10.2(1) The director may commence administrative forfeiture proceedings against property if: (a) the director is satisfied that the property is proceeds of unlawful activity or an instrument of	**Property eligible for administrative forfeiture** 17.2(1) Property may be the subject of administrative forfeiture proceedings under this Part if (a) it is cash or other personal property; (b) it has been seized by a law enforcement

	BC	AB	SK	MB
	(ii) property, other than real property, is an instrument of unlawful activity, (b) the director has reason to believe that the fair market value of the property referred to in paragraph (a)(i) or (ii) is $75 000 or less, (c) the property referred to in paragraph (a)(i) or (ii) is in British Columbia and is in the possession of a public body, and (d) the director has no reason to believe that	Registry, and who (a) did not directly or indirectly engage in the carrying out of the illegal act that is the basis for disposal under this Act, or (b) where the property had been acquired subsequent to the acquisition of the property by illegal means, did not know and would not reasonably be expected to know that the property had been acquired by illegal means. (2) The Minister may commence an administrative disposition proceeding under this Part with respect to personal property without	unlawful activity; (b) the property is personal property; (c) the property has been seized by a law enforcement agency and is being held by or on behalf of that agency; (d) the director has reason to believe that the fair market value of the property is less than the prescribed amount; (e) subject to subsection (1.1), no other person has a prior registered interest	agency and is being held by or on behalf of that agency; (c) the director has reason to believe that the fair market value of the property does not exceed (i) the prescribed amount, or (ii) if no amount is prescribed, $75,000; (d) all persons who have a prior registered interest in the property consent in writing to proceedings under this Part; and

	BC	AB	SK	MB
	there are any protected interest holders in relation to that property. (2) This Part does not apply to property described in subsection (1) of this section if	having to commence a legal action under Part 1.01 or Part 1.1 if (a) the Minister has reason to believe that the property is property acquired by illegal means or is an instrument of illegal activity, (b) the Minister has no reason to believe that there are any bona fide interest holders with respect to the property, and (c) the property is located in Alberta and is in the possession of a public body.	in the property; and (f) the property is not the subject of an application for a forfeiture order pursuant to Part II. **Notice to interested persons** 10.3(1) The director must give written notice of administrative forfeiture proceedings against the subject property to: (a) the person from whom the subject property was seized; (b) the law enforcement agency that	(e) the property is not the subject of proceedings seeking a forfeiture order under Part 2.

	BC	AB	SK	MB
			seized the subject property; and (c) any other person who the director believes may have an interest in the subject property. (2) A notice pursuant to this section must include the following: (a) a description of the subject property; (b) the date the subject property was seized and the place of seizure; (c) the basis on which the director seeks forfeiture	

	BC	AB	SK	MB
			of the subject property; (d) a statement that the subject property may be forfeited to the Crown; (e) a statement that a person who intends to oppose forfeiture of the subject proper ty must submit a written notice of dispute to the director at an address set out in the notice by a deadline date specified in the notice;	
UNLAWFUL ACTIVITY	Part 1 Interpretation "unla wful activity" means an act or omission described in	A reference in this Act to an illegal act is a reference to any of the following: (a) anything done	PART I Interpr etation 2 In this Act: (u) “unlawful	"unla wful activity" means an act or omission that is an offence under

	BC	AB	SK	MB
	one of the following paragraphs: (a) if an act or omission occurs in British Columbia, the act or omission, at the time of occurrence, is an offence under an Act of Canada or British Columbia; (b) if an act or omission occurs in another province of Canada, the act or omission, at the time of occurrence, (i) is an offence under an Act of Canada or the other province, as	or carried out in contravention of, or that constitutes an offence under, an enactment of Canada; (b) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of Alberta; (c) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of another province or territory of Canada; (d) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of	activity" means an act or omission that is an offence pursuant to: (i) an Act, an Act of any province or territory of Canada or an Act of the Parlia ment of Canada; or (ii) an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence pursuant to an Act or an Act of the Parliament of Canad a if it were committed in Saskatchewan;	(a) an Act of Canada, Manitoba or another Canadian province or territory; or (b) an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Manitoba if it were committed in Manitoba; whet her the act or omission occurred before or after the coming into force of this Act.

	BC	AB	SK	MB
	applicable, and (ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia; (c) if an act or omission occurs in a jurisdiction outside of Canada, the act or omission, at the time of occurrence, (i) is an offence under an Act of the jurisdiction, and (ii) would be an offence in British Columbia, if the act or	a foreign jurisdiction if the thing would have constituted an offence under an enactment of Canada or Alberta had it occurred in Alberta.		

	BC	AB	SK	MB
	omission had occurred in British Columbia, but does not include an act or omission that is an offence (d) under a regulation of a corporation, or (e) under an enactment of any jurisdiction if the enactment or the jurisdiction is prescribed under this Act. (2) For the purpose of the definition of "proceeds of unlawful activity", "equivalent in			

	BC	**AB**	**SK**	**MB**
	value" means equivalent in value as determined or established by the regulations.			

	ON	QB	NS	NB
ACT	*Civil Remedies Act,* 2001, S.O. 2001, c. 28	C-52.2 - *Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity*	*Civil Forfeiture Act* S.N.S. 2007, c. 27	*Civi l Forfeiture Act*, SNB 2010, c C-4.5
CIVIL FORFEITURE PROVISIONS	**Forfeit ure order** 8 (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is an instrument of unlawful activity.	**Civil Forfeiture of Proceeds and Instruments of Unlawful Activity** 4. The Attorney General may apply to a court of civil jurisdiction for forfeiture to the State of any property that is in whole or in part directly or indirectly derived from or used to engage in unlawful activity. The Attorney General may also file an incidental application	**Applic ation for forfeiture order** 5 (1) The Manager may apply to the court for an order forfeiting to Her Majesty in right of the Province (a) the whole of an interest in property that is proceeds of unlawful activity; or (b) the portion of an interest in property that is proceeds of	**Atto rney General may commence proceedings** 5(1) The Attorney General may commence a proceeding in court for an order forfeiting to the Crown in right of the Province property that is alleged to be proceeds of unlawful activity or an instrument of unlawful activity, or both.

	ON	QB	NS	NB
		requesting the court to declare rights in the property unenforceable because they are of a fictitious or simulated nature or because they were acquired out of the proceeds of unlawful activity	unlawful activity. (2) The Manager may apply to the court for an order forfeiting to Her Majesty in right of the Province property that is an instrument of unlawful activity.	

	ON	QB	NS	NB
ADMIN. PROVISIONS	Grounds to seek administrative forfeiture (2) The Attorney General may commence an administrative forfeiture proceeding against property if he or she has reason to believe that the property is proceeds of unlawful activity or an instrument of unlawful activity. 2020, c. 11, Sched. 3, s. 1 (1). Section Amendments with date in force (d/m/y) Commencing administrative forfeiture proceeding 1.3 (1) In order to	N/A	N/A	N/A

	ON	QB	NS	NB
	commence an administrative forfeiture proceeding, the Attorney General must, (a) file notice of the administrative forfeiture proceeding against the property in the registration system established under the Personal Property Security Act; and (b) give written notice of the administrative forfeiture proceeding to, (i) the person from whom the property was seized, (ii) the public body that is holding			

	ON	QB	NS	NB
	the property or on whose behalf the property is being held, and (iii) any other person whom the Attorney General has reason to believe may have an interest in the property. 2020, c. 11, Sched. 3, s. 1 (1).			
UNLAWFUL ACTIVITY	An act or omission that, (a) is an offence under an Act of Canada,	An act or omission that is an offence under the Criminal Code (R.S.C. 1985, c. C-46), the Controlled	3 (1) In this Act, (m) "unlawful activity" means an act or omission	The following definitions apply in this Act. "unlawful

	ON	QB	NS	NB
	Ontario or another province or territory of Canada, or (b) is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario, whether the act or omission occurred before or after this Part came into force.	Drugs and Substances Act (S.C. 1996, c. 19) or the Cannabis Act (S.C. 2018, c. 16) is unlawful activity for the purposes of this Act. A penal offence under an Act listed in Schedule 1 is also unlawful activity for the purposes of this Act. This Act applies to property that is in Québec. It is applicable to unlawful activity committed in Québec and to unlawful activity engaged in outside Québec that would also be unlawful activity if engaged in in Québec.	described in one of the following subclauses: (i) where an act or omission occurs in the Province, the act or omission, at the time of occurrence, is an offence under an Act of the Parliament of Canada or of the Province, (ii) where an act or omission occurs in another province of Canada, the act or omission, at the time of occurrence, (A) is an offence under an Act of the Parliament of Canada or of	activity" means an act or omission (activité illicite) (a) that occurs in the Province if, at the time of occurrence, the act or omission is an offence under an Act of the Legislature or an Act of the Parliament of Canada; (b) that occurs in another province of Canada if, at the time of occurrence, the act or omission (i) is an offence under an Act of the Parliament of Canada

	ON	QB	NS	NB
			the other province, as applicable, and (B) would be an offence in the Province if the act or omission had occurred in the Province, (iii) where an act or omission occurs in a jurisdiction outside of Canada, the act or omission, at the time of occurrence, (A) is an offence under an Act of that jurisdiction, and (B) would be an offence in the Province if the act or omission had	or under an Act of the other province, and (ii) would be an offence in the Province if the act or omission had occurred in the Province; (c) that occurs in a jurisdiction outside Canada if, at the time of occurrence, the act or omission (i) is an offence under an Act of the jurisdiction, and (ii) would be an offence in the Province

	ON	**QB**	**NS**	**NB**
			occurred in the Province, but does not include an act or omission that is an offence under an enactment of any jurisdiction if the enactment or the jurisdiction is prescribed under this Act.	if the act or omission had occurred in the Province; but does not include an act or omission prescribed by regulation.

*Prince Edward Island and Newfoundland do not have civil forfeiture legislation at the time of writing.

Ushering in a New Era: Assessing the Reasonable Expectation of Privacy vis-à-vis Cryptocurrency and Blockchain Data

NOAH LESIUK*

ABSTRACT

In recent years, the technology of cryptocurrency has become increasingly mainstream and has been documented as playing a role in the commission of contemporary criminal activity. The law must be responsive to these new techniques for committing crimes and adapt accordingly. Currently, there is a dearth of both jurisprudence and literature as it relates to section 8 of the *Canadian Charter of Rights and Freedoms* and the search and seizure of cryptocurrency by law enforcement. For the protections of section 8 to apply, there must be a reasonable expectation of privacy in the matter searched or seized by authorities. This paper analyzes the reasonable expectation of privacy as it relates to cryptocurrency in three different ways: first, in cryptocurrency transaction data on the blockchain, which is a public ledger that records cryptocurrency transactions; second, in various types of cryptocurrency storage mediums; and third, in user information on cryptocurrency exchanges. Previous section 8 *Charter* jurisprudence, U.S. case law, secondary sources, and blockchain data were all utilized to guide these analyses. Applying the reasonable expectation of privacy test to these inquiries yielded three distinct findings. It was determined that there is no reasonable expectation of privacy in cryptocurrency transaction data on the blockchain, that there is a reasonable expectation of privacy in various types of cryptocurrency storage mediums, and that there is a reasonable but

* Noah Lesiuk is a third-year law student at Robson Hall. He obtained his Bachelor of Arts degree in Criminal Justice from the University of Winnipeg in 2021 and wishes to pursue a carrer focused on the practice of Criminal Law. He would like to thank Professor John Burchill, the editors and peer reviewers of the Manitoba Law Journal, and his mother, Katina Andranistakis, for their support and guidance in the creation of this paper.

diminished expectation of privacy in user information on cryptocurrency exchanges.

***Keywords*:** Cryptocurrency; Crypto; Blockchain; Search; Reasonable Expectation of Privacy; Privacy Interest.

I. INTRODUCTION

Fifteen years ago, on the heels of the 2008 financial collapse, an alias known as Satoshi Nakamoto developed Bitcoin, the first decentralized cryptocurrency, and authored a white paper explaining Bitcoin's revolutionary applications.[1] While the concept of cryptocurrency may have been esoteric and futuristic in 2008, one cannot deny that cryptocurrency has quickly penetrated the mainstream. Indeed, recent media coverage of crypto-related events has been plentiful.[2] While abundant, such news has been relatively negative, painting a less-than-satisfactory picture of cryptocurrency for potential investors.[3] Notably, in November 2022, the multi-billion-dollar crypto exchange, FTX, went insolvent, millions in customer assets were lost, and the CEO at the time now faces U.S. Securities and Exchange Commission ("SEC") charges for defrauding investors.[4] In a similar vein, notable celebrities such as Kim Kardashian have been charged by the SEC for unlawfully touting cryptocurrency to investors.[5] Contemporary companies have also been receptive to crypto;

---

1 Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System" (2008), online (pdf): *Bitcoin* <bitcoin.org/en/> [perma.cc/C6ZJ-9QDP] [Nakamoto].

2 See e.g., Don Pittis, "Crypto markets tumble and investors get their fingers burned" (13 May 2022), online: *CBC* <www.cbc.ca/news/business/crpto-tumble-column-don-pittis-1.6450411> [perma.cc/P8RP-7KUY]; Allison Morrow, "Crypto is joining the grown-up table, and no one is happy about it" (14 February 2023), online: *CNN* <www.cnn.com/2023/02/14/business/nightcap-crypto-regulation/index.html> [perma.cc/A3UA-YSM3].

3 See e.g., Jon Sarlin, "Stablecoins were supposed to be 'stable.' Then the crash came" (17 May 2022), online: *CNN* <www.cnn.com/2022/05/17/investing/luna-terra-losses-crypto-traders/index.html> [perma.cc/X38Q-UQBU]; Pete Evans, "Crypto market crashes anew as trading platform Celsius freezes up" (13 June 2022), online: *CBC* <www.cbc.ca/news/business/markets-crypto-monday-1.6486635> [perma.cc/33XC-38KP].

4 See *Securities and Exchange Commission v Samuel Bankman-Fried*, No 1:22-cv-10501 (SDNY 2022). See also Pete Evans, "Crypto trading platform FTX collapses into bankruptcy, dragging bitcoin price down with it" (11 November 2022), online: *CBC* < www.cbc.ca/news/business/ftx-bankrupt-friday-1.6648872> [perma.cc/X7RE-H6G5].

5 See "SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security" (3 October 2022), online: *US Securities and Exchange Commission*

large companies such as Microsoft and payment processors such as PayPal have begun to accept cryptocurrency as a method of payment.[6] What can be discerned from the news surrounding cryptocurrency and its adoption by major corporations is simple: crypto's popularity is on the rise amongst the masses.

As a matter of pure logic, the more prevalent new technologies become, the more likely they are to be used in the commission of modern crime. The relationship between cryptocurrency and crime has been documented as "on the rise because cryptocurrencies are increasingly accepted as payments for online transactions of illegal commodities."[7] Indeed, crypto has created the opportunity for drug trafficking,[8] Ponzi schemes,[9] and money laundering.[10] The reason crypto proves useful for such illicit activities is due to the anonymity of its use. For instance, when making a crypto transaction, it is only documented as between crypto wallet addresses which are comprised of a string of random numbers and letters separated from the wallet user's identity.[11] With such a capacity for supporting criminal enterprise, it is self-evident that modern-day law enforcement must be responsive to the technologically advanced nature of cryptocurrency. As recognized by Justice Karakatsanis in *R v Fearon*, "as technology changes, our law must also evolve."[12] However, the law as it relates to the search and seizure of cryptocurrency by law enforcement has remained unaddressed. Such an untapped opportunity allows for the consideration of a novel issue vis-à-vis digital privacy and s. 8 of the *Canadian Charter of Rights and Freedoms*.[13] This paper seeks to address where the jurisprudence is lacking by assessing how the reasonable expectation of privacy applies to cryptocurrency transaction data on the blockchain, different methods for

---

<www.sec.gov/news/press-release/2022-183> [perma.cc/Q2SJ-KWZY].

6 See Sesha Kethineni & Ying Cao, "The Rise in Popularity of Crypto currency and Associated Criminal Activity" (2020) 30:3 Intl Crim Justice Rev 325 at 325 [Kethineni].

7 *Ibid* at 329.

8 See generally Marie Claire Van Hout & Tim Bingham, "'Silk Road,' the virtual drug marketplace: A single case study of user experiences" (2013) 24:5 Intl J Drug Policy 385. The Silk Road was an online drug marketplace where buyers utilized bitcoin to purchase narcotics online.

9 See *Securities and Exchange Commission v Trendon T Shavers and Bitcoin Savings and Trust*, 4:13-CV-416 (RC) (ALM) 1031 (ED Tex 2014).

10 See Kethineni, *supra* note 6 at 326-327.

11 An example is 34xp4vRoCGJym3xR7yCVPFHoCNxv4Twseo. This is Binance's (the largest cryptocurrency exchange) wallet address on the Bitcoin blockchain, meaning only Bitcoin can be sent and received from this address.

12 *R v Fearon*, 2014 SCC 77 at para 102 [*Fearon*].

13 See *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.

storing cryptocurrency, and user information on cryptocurrency exchanges. Principally, it shall be contended that there is no reasonable expectation of privacy in cryptocurrency transaction data on the blockchain, that there is a reasonable expectation of privacy in various types of cryptocurrency storage mediums, and that there is a diminished reasonable expectation of privacy in user information on cryptocurrency exchanges.

To advance these arguments, the following five-part structure shall be implemented. First, a brief explanation of cryptocurrency and the blockchain will be provided to bestow the reader with sufficient knowledge so they may better understand these concepts. Second, the s. 8 *Charter* jurisprudence as it relates to the reasonable expectation of privacy will be summarized with a specific focus on informational privacy. Third, the reasonable expectation of privacy in cryptocurrency transaction data itself will be assessed. The decentralized nature of such data, which is available for all to see on the public blockchain, will be deemed a factor seriously impeding any reasonable expectation of privacy. Fourth, the reasonable expectation of privacy in various mediums for storing cryptocurrency will be assessed. This analysis will concentrate on three types of storage, in particular, those being mobile, desktop, and hardware wallets. It will be contended that all three forms of storage likely attract a reasonable expectation of privacy. While it should be noted that there are other forms of storage, assessing every medium of doing so is beyond the cursory scope of this paper. As such, those deemed most relevant and contentious about s. 8 were chosen for analysis. Lastly, the reasonable expectation of privacy in an individual's user information on cryptocurrency exchanges will be examined. The purview such information can provide into the intimate details of one's financial preferences and choices, paired with considerations of control and third-party confidentiality, will be evaluated in determining why a diminished reasonable expectation of privacy attaches to this information.

II. Cryptocurrency and the Blockchain: A Basic Overview

To better understand the forthcoming aspects of this paper, it is first necessary to provide a simple explanation of cryptocurrency and the blockchain. Irrespective of the mainstream nature of crypto, its basic premises and functions still require a degree of elucidation to enhance general comprehension as it pertains to the topic.

The inception of cryptocurrency is often attributed to the Bitcoin whitepaper authored by an alias known as Satoshi Nakamoto in 2008.[14] Released following the 2008 Global Financial Crisis, which caused a significant amount of the public to lose trust in modern financial institutions,[15] cryptocurrency was envisioned as a digital-based transaction system which removed the centralized authority of financial institutions from transactions.[16] Although Nakamoto's whitepaper was based solely on Bitcoin, its contents equally explain cryptocurrency as a concept. In its most simple form, Bitcoin, and thus cryptocurrency in general, was explained by Nakamoto as a "purely peer-to-peer version of electronic cash [that] would allow online payments to be sent directly from one party to another without going through a financial institution."[17] Premised on the issues of trust-based systems which require a third-party financial institution to serve as a medium to effect financial transactions, crypto was seen as a solution to attenuate the risks in a trust-based process. By removing the third-party intermediary, cryptocurrency is not controlled by any financial institution or government and is secured by the underlying technology of cryptography, which essentially makes it impossible to counterfeit.[18] On a basic level, cryptography is a secured communications technique associated with mathematical algorithms that ensure communication between parties is authentic, unaltered, and private.[19] Further, in normal financial transactions, every party and institution involved must keep their records of the transaction. This presents risks of possible *post hoc* modification of records as nothing prevents the parties from doing so.[20] However, cryptocurrency mitigates this risk by operating on a blockchain, which is essentially a ledger that contains a public record of all cryptocurrency

---

14 See Francisco Javier Garcia Corral et al, "A Bibliometric Review of Cryptocurrencies: How Have they Grown?" (2022) 8:2 Financial Innovation 1 at 2 [Garcia Corral]. See also Nakamoto, *supra* note 1.

15 See generally Felix Roth, "The Effect of the Financial Crisis on Systemic Trust" (2009) 44:4 Intereconomics 203; Timothy Earle, "Trust, Confidence, and the 2008 Global Financial Crisis" (2009) 29:6 Risk Analysis 785. The Global Financial Crisis of 2008 resulted from a culmination of factors such as extreme risk taking by global financial institutions, predatory lending, and the bursting of the U.S. housing market bubble.

16 See Nakamoto, *supra* note 1 at 1.

17 *Ibid.*

18 See Mary C Lacity, "Crypto and Blockchain Fundamentals" (2020) 73:2 Ark L Rev 363 at 367 [Lacity].

19 See Greg S Sergienko, "Self Incrimination and Cryptographic Keys" (Updated version 16 March 2023), online: *Gary Kessler Associates* <www.garykessler.net/library/crypto.html> [perma.cc/2GZU-VLJP].

20 See Lacity, *supra* note 18 at 365-366.

transactions made on that blockchain.[21] For example, Bitcoin operates on the Bitcoin blockchain. Any and every transaction involving Bitcoin is recorded on that blockchain as a public record that anyone with access to the internet can see.[22] The blockchain addresses the possible risk of altered records in traditional financial transactions as it is immutable, transaction records cannot be changed or deleted, and records become permanently documented.[23] While users transacting on a blockchain can enhance the security of their transactions by utilizing a Virtual Personal Network (VPN) to encrypt their data, disguise their IP address, and hide their location,[24] the transaction data itself is still fully recorded on the blockchain and remains unaltered. Although a VPN generally enhances the security and anonymity of an internet user, it cannot manipulate the data recorded on the blockchain. Ultimately, a blockchain is an unalterable public ledger of cryptocurrency transactions and serves as a "universal record of truth."[25]

The records kept on a blockchain show the transactions between cryptocurrency wallet addresses but do not reveal the personal information of the individuals or institutions making those transactions.[26] For instance, if party A utilized Bitcoin to buy an item from party B, then the blockchain transaction data would show the Bitcoin wallet address of party A sending the Bitcoin to the Bitcoin wallet address of party B. The following example illustrates a recorded transaction on the Bitcoin blockchain which was simply located by accessing the public website Blockchain.com.[27]

---

[21] See David Challenger et al, "Blockchain Basics and Suitability: A Primer for Program Managers" (2019) 30:3 J of Information Technology Management 33 at 37 [Challenger].

[22] See Lacity, *supra* note 18 at 370.

[23] See Challenger, *supra* note 21 at 37.

[24] Chamandeep Kaur & Yogesh Kumar Sharma, "The Vital Role of Virtual Private Network (VPN) in Making Secure Connection Over Internet World" (2020) 8:6 International Journal of Recent Technology and Engineering 2336 at 2336-2337.

[25] See Lacity, *supra* note 18 at 369.

[26] *Ibid* at 370.

[27] Blockchain.com, (Transaction created 20 February 2022), online: *Blockchain.com* <www.blockchain.com/explorer/transactions/btc/e1346a7eb498a875842d25f3f28f83bf4894e2a9d181545bd1db293f97e3e333> [perma.cc/6G8T-LZYW]. It should be noted that the provided example was a random transaction selected by the author and the author is in no way affiliated with any of the four Bitcoin wallet addresses contained in the photograph.

Figure 1: Public Bitcoin Blockchain Transaction Data

Summary

This transaction was first broadcasted on the Bitcoin network on February 20, 2023 at 02:02 AM GMT-6. The transaction currently has 10 confirmations on the network. The current value of this transaction is now $26,529.49.

Advanced Details

Hash	e134-e333	Block ID	777,538
Position	54	Time	20 Feb 2023 02:42:31
Age	1h 31m 50s	Inputs	1
Input Value	1.07098161 BTC	Outputs	3
	$26,534.69	Output Value	1.07077153 BTC
Fee	0.00021008 BTC		$26,529.49
	$5.20	Fee/B	82.063 sat/B
Fee/VB	-	Size	256 Bytes
Weight	1,024	Weight Unit	20.516 sat/WU
Coinbase	No	Witness	No
RBF	No	Locktime	0
Version	2	BTC Price	$24,776.05

Overview JSON

From		To	
1	1Ez9V31dQ83aHf78EJFCB3wV5HCtqQV5RQ 1.07098161 BTC • $26,534.69	1	1LZM79FdcpGAQKbFZbrLyRewCJ4pnVcR1b 0.01000000 BTC • $247.76
		2	bc1qpuqln98nvw59d2lxmf2flel7t5kwtty3f9xe63 0.01536075 BTC • $380.58
		3	1EcEe5FFV5cTeJo92H7YYSD617eN2LhLx5 1.04541078 BTC • $25,901.15

As can be seen, the blockchain transaction data shows that the Bitcoin wallet address on the left sent $26,534.69 USD worth of Bitcoin to three different Bitcoin wallet addresses. This not only shows how much USD and Bitcoin were sent but also the exact time and date of the transaction along with all the wallet addresses involved. Evidently, the blockchain records crypto transactions in a rather comprehensive and easy-to-understand manner for the public to view.

When the cryptocurrency changes and is on a different blockchain, such as the coin Ethereum which operates on the Ethereum blockchain, the wallet address will be different than the wallet address for Bitcoin. In effect, this means that an actual cryptocurrency wallet utilized to store crypto, such as a physical ledger or an app on one's computer or cellular device, has distinct sub-addresses for each of the different blockchains that cryptocurrencies operate on.[28] The different ways of storing cryptocurrency will be explored later in this paper, but generally, there are two ways of

---

[28] See Bitpay, "Crypto Wallet Addresses: What They Are and How to Create One" (2 February 2023), online: *Bitpay* <bitpay.com/blog/crypto-wallet-addresses/> [perma.cc/S839-C7TJ]; *United States of America v Ellingson*, 2023 BCSC 124 at para 17 [*Ellingson*].

doing so: either on a "cold" wallet, which is an offline wallet such as a hardware ledger, or on a "hot" wallet, which is an online wallet such as an app on one's desktop or mobile phone.[29] It is important to note that cryptocurrency exchanges also offer users a wallet to utilize both inside and outside the confines of that exchange.[30]

Overall, cryptocurrency is a form of decentralized currency. As aforementioned, cryptocurrency transactions do not require a central authority to act as an intermediary and all transactions are publicly recorded on the blockchain for anyone to browse. Thus far, crypto has remained relatively unregulated although it has become increasingly incorporated into the mainstream as a method of payment processing, data recording, and transacting.[31] This lack of regulation, paired with what has been called cryptocurrency's "simplicity of use," has been deemed to contribute to why it is utilized in criminal activities.[32] With this in mind, how law enforcement in Canada will go about conducting searches and seizures of cryptocurrency is a serious consideration. An even more salient question is if, and when, such searches would attract the protection of s.8 of the *Charter,* which guarantees the right to be free from unreasonable search and seizure.[33] Now that a basic explanation of cryptocurrency and the blockchain has been provided, it is apt to shift focus and scrutinize these concepts in light of s.8 of the *Charter* and its surrounding jurisprudence. However, it will first prove useful to review the operation of s. 8 of the *Charter* and its development over time.

III. Section 8 and The Reasonable Expectation of Privacy: A Review

In 1984, the Supreme Court of Canada's ("SCC") seminal case on s. 8 of the *Charter*, *Hunter v Southam,* required the SCC to interpret s.8 of the *Charter* and its breadth for the first time.[34] Writing for a unanimous court, Justice Dickson found that s. 8 of the *Charter* "protects people, not places"

29 Judith N'Gumah, "Evaluating Security in Cryptocurrency Wallets" (2021) 115 Culminating Projects in Information Assurance 1 at 9 [N'Gumah].

30 See *Ellingson*, *supra* note 28 at paras 25-28.

31 See Tina van der Linden & Tina Shirazi, "Markets in crypto-assets regulation: Does it provide legal certainty and increase adoption of crypto-assets?" (2023) 9:22 Financial Innovation 1 at 2.

32 Garcia Corral, *supra* note 14 at 5.

33 See *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.

34 See *Hunter et al v Southam inc*, [1984] 2 SCR 145 [*Hunter*].

and guarantees the right to be free from unreasonable search and seizure.[35] This guarantee was deemed to trigger only if an individual had a reasonable expectation of privacy in the subject matter searched. Thus, the threshold question for whether s.8 of the *Charter* applies is whether the individual had a reasonable expectation of privacy in the subject matter that was searched or seized. [36] Elaborating on how such a determination is to be made, Justice Dickson held that an assessment would be required. Namely, balancing the public's interest in being left alone from government intervention with the government's interest in infringing on an individual's privacy in the name of crime control.[37] Only once this threshold test is met will a court then proceed to determine whether the impugned search or seizure was conducted in a reasonable manner compliant with s.8 of the *Charter*.[38] Seeing as this paper only seeks to explore the reasonable expectation of privacy vis-à-vis cryptocurrency, this threshold portion of the s. 8 test will form the crux of its analyses moving forward.

Eventually, the SCC would go on to add further clarity to the reasonable expectation of privacy threshold in *R v Edwards*.[39] In *Edwards,* the SCC held that a reasonable expectation of privacy is to be determined based on the "totality of the circumstances" and laid out a non-exhaustive list of factors to be considered in this evaluation.[40] The SCC would eventually move on to streamline this assessment in *R v Tessling* and adjust the threshold test into four separate prongs.[41] This would be refined to some degree years later in *R v Patrick* and the following test, confirmed numerous times throughout the jurisprudence, remains the present-day totality of the circumstances test for whether there is a reasonable expectation of privacy:

> (1) What was the subject matter of the alleged search?
> (2) Did the claimant have a direct interest in the subject matter?
> (3) Did the claimant have a subjective expectation of privacy in the subject matter?
> (4) If so, is this subjective expectation of privacy objectively reasonable,

---

35 *Ibid* at para 159.

36 See Richard Jochelson & David Ireland, *Privacy in Peril: Hunter v Southam and the Drift from Reasonable Search Protection* (Vancouver: UBC Press, 2019) at 24.

37 See *Hunter*, *supra* note 34 at paras 159-160.

38 See *R v Edwards*, [1996] 1 SCR 128 at para 45 [*Edwards*]; *R v Cole,* 2012 SCC 52 at para 36 [*Cole*]; *R v Reeves,* 2018 SCC 56 at para 14; *R v Wise,* [1992] 1 SCR 527 at 533.

39 See *Edwards*, *supra* note 38.

40 *Ibid* at para 45.

41 See *R v Tessling*, 2004 SCC 67 at para 32 [*Tessling*].

having regard to the totality of the circumstances?[42]

If the answer to the fourth part of the inquiry is yes, this being that the claimant's subjective expectation of privacy was objectively reasonable, then the claimant will have the required standing to advance a section 8 claim as their reasonable expectation of privacy is made out.[43]

In assessing the first part of the test, the subject matter being searched must not be construed too narrowly. It must be determined by considering the nature of the privacy interests which are potentially infringed upon by the state action and what information may be revealed by such state action.[44] The three different types of privacy interests are personal privacy, territorial privacy, and informational privacy. While the subject matter of a search generally falls within one of these three categories, it is important to note that they may overlap.[45] For this paper, informational privacy forms the most salient of these categories and will be the root of focus from here on out. Informational privacy has been held to represent "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[46] Essentially, informational privacy is underpinned by the values of dignity, integrity, and autonomy, and involves information that an individual would want to shield from the state as it may reveal intimate details of their lifestyle and personal choices.[47] When characterizing the subject matter of an informational privacy-based search, the information that data can reveal, and the direct and immediate inferences that can be drawn from it, must be taken into account.[48] Ultimately, the ethos of informational privacy is the protection of a biographical core of personal information that an individual would wish to control and not have peered into by the state.[49]

---

42 *Ibid*; *R v Patrick*, 2009 SCC 17 at para 27 [*Patrick*]; *Cole, supra* note 38 at para 40; *R v Spencer,* 2014 SCC 43 at para 12 [*Spencer*]; *R v Jones*, 2017 SCC 60 at para 13 [*Jones*]; *R v Marakah*, 2017 SCC 59 at para 11 [*Marakah*]. See also David Ireland & Richard Jochelson "The Reasonable Expectation of Privacy: Digital Interests in the Supreme Court of Canada in Section 8 Jurisprudence (2010-2020)" in Christopher DL Hunt & Robert Diab, eds, *The Last Frontier: Digital Privacy and the Charter* (Toronto: Thompson Reuters, 2021) at 7.

43 See *Tessling*, *supra* note 41 at para 33.

44 See *Spencer*, *supra* note 42 at paras 26, 31.

45 See *Tessling, supra* note 41 at para 20. See also *R v Gomboc*, 2010 SCC 55 at para 19 [*Gomboc*].

46 *Ibid* at para 23 quoting, Alan F Westin, *Privacy and Freedom* (New York: Atheneum, 1970).

47 See *R v Plant*, [1993] 3 SCR 281 at 293 [*Plant*].

48 See *Spencer, supra* note 42 at para 31; *Marakah*, *supra* note 42 at paras 14, 16.

49 *Ibid* at para 27.

In *R v Spencer*, the SCC held that informational privacy is composed of three conceptually different understandings of privacy: privacy as anonymity, privacy as secrecy, and privacy as control.[50] Privacy as secrecy relates to the concept that there is a reasonable expectation information that is disclosed in confidence will be held accordingly in trust and confidence by the entity or person to whom that information is disclosed.[51] Privacy as control signifies the idea that individuals have control over their information such that they can determine what information about them is to be communicated with others.[52] Lastly, privacy as anonymity allows "individuals to act in public places but to preserve freedom from identification and surveillance."[53] These concepts will go on to play a minor role in the forthcoming analyses as they relate to informational privacy and cryptocurrency.

Concerning the second portion of the totality of the circumstances test, it is not particularly difficult to satisfy. For an individual to have a direct privacy interest in the subject matter searched, an individual must simply show that they had some degree of personal privacy interest in that subject matter.[54] The third portion of the totality of the circumstances test, which is whether the claimant had a subjective expectation of privacy in the subject matter searched, is also not a difficult standard to meet. As the court noted in *Patrick*, this stage of the test simply questions whether a claimant had, or can be presumed to have had, an expectation of privacy in the subject matter searched.[55] It is "not a high hurdle" to satisfy and is not focused on the reasonableness of such a belief.[56] Rather, reasonableness is assessed at the fourth stage of the test as the claimant's subjective expectation of privacy must be shown to be objectively reasonable.

Determining the objective reasonableness of a claimant's subjective expectation of privacy involves a contextual analysis which takes into consideration a variety of different factors. Over the years, the SCC has provided a variety of non-exhaustive considerations to be assessed in this inquiry. These include, but are not limited to:

> (a) The place where the search occurred;
> (b) whether the subject matter searched was in public view;
> (c) whether the subject matter searched was abandoned;

---

50 *Ibid* at para 38.
51 *Ibid* at para 39.
52 *Ibid* at para 40; *R v Dyment*, [1988] 2 SCR 417 at 429.
53 *Ibid* at para 43.
54 See *Marakah, supra* note 42 at para 21; *Cole*, *supra* note 38 at para 43.
55 See *Patrick*, *supra* note 42 at para 36.
56 *Ibid*. See also *Jones, supra* note 42 at para 20.

(d) whether the subject matter searched was already in the hands of third parties, and if so, whether it was subject to an obligation of confidentiality;
(e) whether the police technique utilized was intrusive in relation to the privacy interest implicated;
(f) whether the use of this police technique was itself objectively unreasonable;
(g) whether the subject matter searched exposed any intimate details of the appellant's lifestyle, or information of a biographic nature;[57] and
(h) other considerations such as control over the subject matter of the search and the context surrounding the search.[58]

These many factors, where relevant, are to be considered in the overall quantum of objective assessment. Although the analysis is inherently factual, the standard is normative rather than descriptive and is made from the "perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy."[59] The objective reasonableness portion of the reasonable expectation of privacy test is, as recognized by the SCC, often the battleground upon which the s 8 jurisprudence meets the most resistance.[60] The upcoming assessment of crypto-related searches and the reasonable expectation of privacy will necessarily face most of its tribulations in this metaphorical warzone.

With the legal aspects of s. 8 and the reasonable expectation of privacy now detailed, it is apt to apply this law to the various aspects of cryptocurrency that this paper seeks to explore. While the concept of cryptocurrency and the law is relatively recent and completely novel concerning s. 8 of the *Charter,* the arguments advanced will nevertheless be grounded in the s 8 jurisprudence.

IV. PROBLEMATICALLY PUBLIC: THE REASONABLE EXPECTATION OF PRIVACY IN CRYPTOCURRENCY TRANSACTION DATA ON THE BLOCKCHAIN

Beginning the delve into cryptocurrency and the reasonable expectation of privacy, it is pragmatic to begin with transaction data contained on the blockchain as doing so sets the stage for the assessments that follow. As a brief refresher, blockchain transaction data refers to the

57 *Patrick, supra* note 42 at para 26.
58 *Marakah, supra* note 42 at para 38; *Cole, supra* note 38 at para 52.
59 *Patrick, supra* note 42 at para 14; *Spencer, supra* note 42 at para 18.
60 See *Tessling, supra* note 41 at para 43.

records kept on a blockchain that show the transactions between cryptocurrency wallet addresses. This information does not, however, reveal the personal details of the individuals or institutions making those transactions. Only their wallet addresses, the exact time the transaction was made, and the amount of cryptocurrency involved in the exchange are displayed.[61] For instance, in *R v Shaporov,* investigators utilized the blockchain to confirm the exact time the accused, who was already identified as the owner of a specific Bitcoin wallet address, conveyed Bitcoin to a website to access child pornography.[62]

At the forefront of establishing a reasonable expectation of privacy in cryptocurrency transaction data on the blockchain, it is first necessary to discern the subject matter of such a search. While the reasons why law enforcement may choose to look at this data may vary, the actual subject matter of the search, construed broadly with attention to possible inferences that can be drawn, leads to one general conclusion. This is because the subject matter of such a search is the electronic transaction data between two or more cryptocurrency wallet addresses. Whether law enforcement wishes to see what time a transaction was made, how much money was involved, which wallet addresses were implicated, and what cryptocurrencies were exchanged, this subject matter definition encapsulates all these possibilities. In this sense, the subject matter of the search is informational as it relates purely to data contained on the blockchain. This hypothesized subject matter description can be further supported by analogy. In *R v Marakah*, the majority held that the subject matter of the search of text message records was "the electronic conversation between two or more people."[63] Essentially, a search of crypto transaction data on the blockchain is similar, not in form, but in substance. Such a search involves looking at the records of an electronic transaction between two or more crypto wallet addresses. By adopting the shell of the *Marakah* majority's articulation, the subject matter proffered vis-à-vis cryptocurrency transaction data on the blockchain is both consonant with, and guided by, prior s. 8 jurisprudence. As such, this paper advances that the electronic transaction data between two or more cryptocurrency wallet addresses forms the subject matter of a search of cryptocurrency transaction data on the blockchain.

With the subject matter now defined, the other aspects of the reasonable expectation of privacy test must be explored. First, it is arguable that an individual has a direct interest in their electronic transaction data

---

61 See Lacity, *supra* note 18 at 370-371.

62 *R v Shaporov*, 2022 ONCJ 111 at para 78 [*Shaporov*].

63 *Marakah*, *supra* note 42 at para 19. See also *Jones, supra* note 42 at para 14.

on the blockchain as they utilized their crypto wallet to create such a transaction and, as a consequence, its data on the blockchain. That individual was a participant in, and an author of, that transaction.[64] This data can show when exactly that transaction was made, how much it was worth, and what other crypto wallet addresses were involved. It does not seem contentious to claim that an individual would have a direct interest in such information. For instance, if that individual engaged in a transaction with a crypto exchange, they may wish to go back and check that transaction to fill out their taxes.[65]

Turning to whether an individual would have a subjective expectation of privacy in their electronic transaction data on the blockchain, the answer is likely in the affirmative. As explained in *Patrick,* this is not a high hurdle to meet.[66] An individual could simply argue that they believed that their transaction data on the blockchain was private and would remain so. This is an especially prudent contention considering crypto is often touted as "generally anonymous."[67] Seeing as the subjective expectation of privacy is not particularly difficult to satisfy, it is more appropriate to assess whether this subjective expectation of privacy is objectively reasonable.

Assessing whether an expectation of privacy is objectively reasonable involves a variety of different considerations.[68] Beginning with the most basic, the place where the search would occur is on the blockchain as it stores the electronic transaction data between cryptocurrency wallet addresses. In *Tessling,* the SCC held that "a person can have no reasonable expectation of privacy in what he or she knowingly exposed to the public, or to a section of the public."[69] As previously mentioned, the blockchain acts as an unalterable <u>public</u> ledger that records crypto transactions made on that blockchain in a comprehensive and easy-to-understand manner. The blockchain's very purpose is to ensure transactions are permanently recorded and available for viewing by the public.[70] Anyone with access to the internet can search through these records and easily examine them through websites such as Blockchain.com.[71] This proves problematic for the

---

64 See *Marakah*, *supra* note 42 at para 21.

65 Cryptocurrencies are taxable in Canada. See Government of Canada, "Guide for cryptocurrency users and tax professionals" (26 June 2021), online: *Canada Revenue Agency* <www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html>.

66 See *Patrick*, *supra* note 42 at para 37.

67 Garcia Corral, *supra* note 14 at 4.

68 See *Patrick*, *supra* note 42 at para 26.

69 *Tessling, supra* note 42 at para 40; *R v Stillmann*, [1997] 1 SCR 607 at para 62.

70 See Challenger, *supra* note 21 at 37.

71 See generally www.blockchain.com/explorer.

assertion that there is an objectively reasonable expectation of privacy in the electronic transaction data between crypto wallets. By utilizing cryptocurrency, the reasonable person knows, or ought to know, that the transactions they make are publicly recorded and available on the blockchain. Stated simply, it is unreasonable for there to be an expectation of privacy in inherently public information that anyone can access. While a counterargument may be mounted that it cannot be assumed that a reasonable person would be aware that their cryptocurrency transactions are publicly recorded, this contention falls short and attempts to utilize ignorance as a bastion. Irrespective of whether an individual is aware of the blockchain or not, this does not change the fact that the inherently public nature of the blockchain allows anyone with internet access to browse the records of cryptocurrency transactions. Further, how could it be objectively reasonable for a cryptocurrency user to be ignorant of the blockchain when it is quite literally the fundamental ethos of crypto?

It is also worth noting, as the Supreme Court of British Columbia in *United States of America v Ellingson* did, that the blockchain "only reflects the movement of funds between anonymous wallets and, therefore, cannot by itself be used to determine the identities of the persons involved in the transactions."[72] This is particularly important as it illustrates that blockchain transaction data itself maintains the anonymity of those implicated in the transaction. Consequently, such data alone cannot illustrate intimate details about one's life or biographical core of personal information as they remain anonymous under the guise of their crypto wallet address. Paired with the intrinsically public nature of the blockchain, this militates in favour of a finding that there is no objectively reasonable expectation of privacy.

United States jurisprudence has taken a similar approach. In *United States v Gratkowski*, at issue was whether Mr. Gratkowski had a reasonable expectation of privacy in his transaction information on the Bitcoin blockchain.[73] Finding that Mr. Gratkowski did not have such a privacy interest, the court held that "Bitcoin users are unlikely to expect that the information published on the Bitcoin blockchain will be private" and that "it is well known that each Bitcoin transaction is recorded in a publicly available blockchain."[74] The public nature of the blockchain was deemed to eviscerate any conception that there was a reasonable expectation of

---

72 *Ellingson*, *supra* note 28 at para 16.

73 *United States v Gratkowski*, 964 F.3d 3017 (5th Cir, 2020) at 1-2 [*Gratkowski*].

74 *Ibid* at 7.

privacy in transaction information on the blockchain.[75] This approach seems cogent and, as argued above, is the angle this paper has adopted.

As an added policy perspective, it would be impractical to consider looking at cryptocurrency transaction data on the blockchain as a search. If authorities had to obtain a warrant every time they wished to look at a crypto transaction on the blockchain, which is something any ordinary person could do without issue, this would unnecessarily constrain the crime-controlling capabilities of law enforcement. This notion is especially apt considering that a wallet address could be involved in thousands of transactions. If law enforcement was investigating a specific wallet address and it was involved in thousands of transactions with hundreds of other wallet addresses, it would seem unfeasible to require a warrant in each instance. The balance recognized in *Hunter v Southam* between the public's interest in privacy and the state intruding on this privacy in the name of effective crime control lends further credence to these contentions.[76] While the privacy interests of the public are minimal as blockchain transaction data itself reveals no details about the actual individuals involved, the crime-controlling capabilities of the state would be seriously hindered if they had to procure a warrant every time they wished to search this publicly available information. The impracticality of such a requirement, balanced against the minimal privacy interest in blockchain transaction data, militates in favour of ensuring the state is not unduly obstructed in combatting crime. Accordingly, it would be prudent to recognize that the browsing of such data does not amount to a search for the purposes of s. 8.

The inherently public nature of the blockchain and its maintenance of a crypto wallet user's anonymity without further information seriously hinders any notion that there is an objectively reasonable expectation of privacy in cryptocurrency transaction data on the blockchain. Anyone with access to the internet can browse through these records as they are open for public viewing and do not reveal who is making a transaction. On this basis, paired with similar thoughts echoed by United States jurisprudence, it is highly unlikely that there is a reasonable expectation of privacy in cryptocurrency transaction data on the blockchain. Consequently, such data likely does not attract the protections of s.8, nor does its inspection by authorities constitute a search under that section.

---

[75] *Ibid* at 6-7.

[76] *Hunter*, *supra* note 34 at paras 159-160.

V. MEDIUMS OF CRYPTOCURRENCY STORAGE AND THE REASONABLE EXPECTATION OF PRIVACY: DESKTOP, MOBILE, AND HARDWARE WALLETS

As aforementioned, cryptocurrency is stored in wallets. Unlike a traditional leather wallet, these wallets are mediums that allow a user to keep a balance of various cryptocurrencies and send or receive them accordingly.[77] There are two general ways of storing crypto: either in an online "hot" wallet or in an offline "cold" wallet.[78] Hot wallets are connected to the internet while cold wallets are akin to a safety deposit box holding one's crypto assets in a manner unconnected to the online world.[79] In particular, two types of hot wallets—desktop and mobile wallets–and one type of cold wallet—hardware wallets—will be discussed. Mobile wallets can be utilized via an app on one's cellular device and desktop wallets are an app or program on an individual's personal computer.[80] As can be discerned, these types of wallets are inherently found on, and connected to, an individual's personal devices such as a computer or mobile phone. On the other hand, hardware wallets are electronic devices, often USBs, that have programmed software to store crypto within them and act as a form of offline storage.[81] These wallets are seen as more secure than hot wallets as they are not connected to the internet and someone would need physical access to the hardware storage device to access the crypto on it.[82] With an explanation now provided concerning the basic functions of the types of crypto wallets that will be examined, it is apt to scrutinize them in light of s. 8 and the reasonable expectation of privacy.

Beginning with mobile and desktop wallets, it is pragmatic to assess them together. As recognized by Justice Cromwell in *R v Fearon,* cellular devices, especially smartphones, "are the functional equivalent of computers."[83] Approximately 84.4% of Canadians own a smartphone for personal use and, as such, any search of a crypto wallet on a mobile device is more than likely going to occur on a smartphone.[84] Turning to the

---

77 N'Gumah, *supra* note 29 at 7.
78 *Ibid* at 9.
79 Stevo Jokić et al, "Comparative Analysis of Cryptocurrency Wallets Vs Traditional Wallets" (2019) 65:3 ekonomika 65 at 67 [Jokić].
80 *Ibid* at 68.
81 *Ibid* at 69.
82 *Ibid.*
83 *Fearon*, *supra* note 12 at para 54.
84 Statistics Canada, "Smartphone personal use and selected smartphone habits by gender and age group" (6 June 2021), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2210011501> [perma.cc/3NYD-

reasonable expectation of privacy analysis, the subject matter of a prospective search of these types of wallets must be determined. As explained by the majority in *R v Marakah,* the subject matter of a search must be described holistically and precisely without being confined to physical acts or spaces.[85] Although a search of mobile and desktop crypto wallets would necessarily take place on a personal computer or cellular device, it is not these devices nor their general contents that police would be after. Rather, the subject of the search would more than likely be the informational content on these cryptocurrency storage mediums. A similar articulation was offered by the SCC in *R v Cole* when a search of the data on an accused's laptop was being assessed.[86] The majority held that the subject matter of the search was the "data, or informational content of the laptop."[87] Analogously, a search of a cryptocurrency storage medium is to access its data, and thus, its informational content. While one may contend that such a construction of subject matter is confined to a physical space, that being a cryptocurrency storage medium, this fails to recognize that what authorities would be after is not the medium of storage itself, but the informational content it is storing. In this sense, the search is informational in scope and implicates privacy of control interests as it deprives the individual of the capacity to control whether or not the information searched is divulged to the state.[88] The informational content searched could include but is not limited to, the cryptocurrency assets held in the wallet, transaction data, and the wallet addresses for various blockchains.[89] Considering this, the subject matter for a search of a mobile and desktop crypto wallet can be characterized as the informational content contained on a cryptocurrency storage medium. This encapsulates the various forms of data contained in a cryptocurrency wallet while also ensuring that the subject matter is precisely defined. For clarity moving forward, it will be assumed that a searched mobile or desktop wallet is on an individual's personal device and their identity is known by authorities.

Turning to direct interest and subjective expectation of privacy in the subject matter, it is not difficult for a hypothetical claimant to establish both. It can easily be inferred that an individual has both a direct interest and subjective expectation of privacy in the informational content contained on their cryptocurrency storage medium. As previously

---

7VLH].

85 See *Marakah, supra* note 42 at paras 16-17.

86 See *Cole, supra* note 38 at para 41.

87 *Ibid.*

88 See *Spencer, supra* note 42 at para 40.

89 See Jokić, *supra* note 79 at 67-69.

mentioned, these cryptocurrency storage mediums store one's cryptocurrency assets, which are essentially personal financial assets. [90] Further, desktop and mobile wallets are themselves situated on personal electronic devices such as cell phones or computers. The SCC in both *Cole* and *R v Morelli* found that details of an individual's financial situation militate in favour of elevated privacy interests.[91] While this was done in the context of personal computers, it is equally applicable to cryptocurrency wallets as they illustrate an individual's financial details by revealing what crypto assets they hold, how much they hold, and how much those assets are worth. Such a purview into one's financial decisions and details surely attracts a direct interest and subjective expectation of privacy in the subject matter at hand.

As is often the case, determining whether this subjective expectation of privacy is objectively reasonable often proves to be the decisive factor. The SCC has recognized that characterizing the place of a search is difficult when it comes to electronic sources.[92] It is also worth considering whether the search for the informational content of a cryptocurrency storage medium is the search for a place itself or simply a thing. In *Marakah*, the SCC had to determine how electronic conversation data on a cellular device fit into the concept of a searched place and came up with two different possibilities.[93] The first possibility was that the electronic conversation did not occupy a specific physical area but the place of the search was an electronic "private chat room" existing in an electronic space.[94] The other possibility was that the place of the search was the device through which the messages were accessed or stored.[95] While not definitively determining the place, the court found that either possibility favoured a reasonable expectation of privacy. Seeing as the SCC only considered the electronic conversation data in terms of a place being searched and not a thing, this paper will do the same as it relates to the informational content of a cryptocurrency storage medium as it is also a form of electronic data.

Utilizing the two-pronged approach from *Marakah*, a similar construction of the place of the search can be crafted in terms of the informational content of a cryptocurrency storage medium. As the SCC in *Marakah* did when composing the first possibility, it is apt to analyze the

---

90 *Ibid* at 67-68.
91 See *Cole, supra* note 38 at para 47; *R v Morelli*, 2010 SCC 8 at para 103 [*Morelli*].
92 See *Marakah*, *supra* note 42 at para 51.
93 *Ibid* at paras 27-30.
94 *Ibid* at para 28.
95 *Ibid* at para 29.

informational content of a cryptocurrency storage medium in terms of electronic space. In the case of mobile and desktop crypto wallets, this informational content would be contained in an app or program. These mediums of storage essentially become a way to store, send, and receive crypto electronically, acting as one's vault of financial assets in a manner analogous to a bank account.[96] In this sense, these mediums of storage are effectively an electronic bank account for cryptocurrency ripe with information about transactions, blockchain wallet addresses, and held crypto assets. With this in mind, the place of a search for the informational content of a cryptocurrency storage medium can be construed as a bank account for cryptocurrency storage and transactions existing in an electronic space.[97] Accordingly, a reasonable person would presume that their bank account and its financial contents would remain highly private to that individual.

Another way in which to construe the place of the search is to adopt the second possibility offered in *Marakah*. As aforementioned, the SCC in *Marakah* found it a viable option to state that the place of the search of a text message conversation was the device through which the messages were accessed or stored.[98] Considering personal cellular devices and computers are the place through which law enforcement would access mobile and desktop crypto wallets, the logic from *Marakah* surely applies. Consequently, the place of the search for the informational content of a cryptocurrency storage medium can also be advanced as an individual's mobile phone or computer. On numerous occasions, the SCC has recognized a high privacy interest in these types of devices.[99] As such, it is certain that a reasonable person would have an expectation of privacy in their cellular device or computer.

In whichever manner the place of the search is articulated, similar to *Marakah*, both possibilities militate in favour of a reasonable expectation of privacy in the informational content of cryptocurrency storage mediums. Whether the place of the search is a bank account for cryptocurrency storage and transactions existing in an electronic space, or simply a cellular device or computer, both places denote areas in which an individual would undoubtedly have significant privacy interests.

An argument can be mounted against an objectively reasonable expectation of privacy on the basis that much of the informational content

---

96 See Jokić, *supra* note 79 at 67.

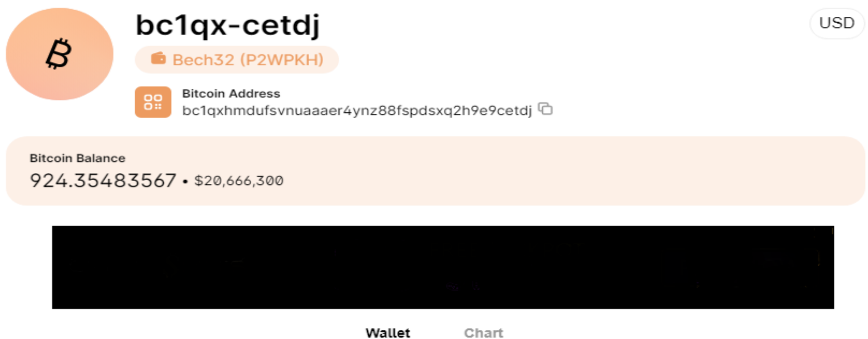
97 See *Marakah*, *supra* note 42 at para 28.

98 *Ibid* at para 29.

99 See *R v Vu*, 2013 SCC 60 at paras 24, 40-41; *Fearon*, *supra* note 12 at paras 51, 126; *Morelli*, *supra* note 91 at para 105; *Cole*, *supra* note 38 at para 3.

in a crypto wallet is publicly available. It was earlier illustrated how the public blockchain can show a crypto wallet address' transactions. Interestingly, other potentially sensitive information available for public viewing can also flow from a crypto wallet address if it is looked up on the blockchain. This includes the amount of cryptocurrency a wallet address contains on a certain cryptocurrency's blockchain, along with the amount of crypto that the wallet address has sent and received. For example, simply navigating blockchain.com and looking at a Bitcoin wallet address yields the information shown in the example below.[100]

Figure 2: Example Wallet Information on Blockchain



Although this data is sensitive, the individual behind the wallet address is still shrouded by the cloak of anonymity without further identifying information. However, if authorities search the informational content of a person's cryptocurrency storage medium, they can ascertain the crypto wallet addresses on it and attribute them to that individual. While the public availability argument is persuasive, it loses force when it is realized that without further information, this data, along with blockchain transaction data, still maintains the anonymity of the individual behind the guise of their wallet address. In juxtaposition, if authorities search the

[100] Blockchain.com, (accessed 2 March 2022), online: *Blockchain.com* <www.blockchain.com/explorer/addresses/btc/bc1qxhmdufsvnuaaaer4ynz88fspdsxq2h9e9cetdj> [perma.cc/PP3C-HM7S].

informational content of a person's cryptocurrency storage medium on that person's personal device, they will almost always know who that individual is. Thus, the transaction data and crypto assets held are no longer anonymously hidden behind a wallet address but become attributed to that individual. This creates a conceptual difference. On one hand, the data by itself is publicly available but completely anonymous without further information. On the other, a search of one's crypto wallet on their personal device will connect that individual to that public data, rendering it no longer anonymous. Therefore, such a search implicates privacy interests, as it necessarily puts a name and identity to a crypto wallet address and thus the held crypto assets and transaction data flowing from it. In this sense, the data does not become publicly attached to an individual until police search their cryptocurrency storage device. This provides the information needed for law enforcement to create the link between an individual, their crypto assets, and their wallet transaction data, something the data on the blockchain cannot do in isolation. Ultimately, the public information contention must fail. While available publicly, it is only after authorities engage in an external search of the informational content of a cryptocurrency storage medium that the mask of anonymity is cast off this public data and linked to the individual. As the SCC in *R v Spencer* cogently stated when discussing anonymity and internet privacy, in "'public acts we do not expect to be personally identified and subject to extensive surveillance but seek to merge into the 'situational landscape.'"[101] In transacting on the public blockchain, an individual seeks to merge into that landscape. Searching the informational content of a crypto storage medium, allows the individual to be personally identified in this landscape, undermining their privacy in anonymity interests as a consequence.

Shifting to other considerations, the element of control is worth discussing. Control has been deemed a relevant factor in determining whether an expectation of privacy is objectively reasonable.[102] While important, the presence of control or the lack of, is not determinative of the reasonable expectation of privacy but factors into the overall assessment.[103] Undoubtedly, individuals exercise meaningful control over the informational content of their cryptocurrency storage mediums. Not only is such data contained on a personal device that an individual

---

[101] *Spencer*, *supra* note 42 at para 44, quoting M Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988) 39 *Syracuse L Rev* 647 at 706.

[102] See *Edwards, supra* note 38 at para 45; *Cole, supra* note 38 at para 51; *Marakah, supra* note 42 at para 38.

[103] See *R v Buhay*, 2003 SCC 30 at para 22.

possesses, thus exerting literal control over the contents of that device, but an individual can choose when, how, and to whom they disclose that this information is linked to them.[104] On this basis, the element of control seems to favour a reasonable expectation of privacy.

Finally, whether the informational content of cryptocurrency storage mediums tends to reveal "a biographical core of personal information" must be assessed.[105] As recognized by the SCC, this includes information which exposes the intimate details of one's lifestyle and personal choices.[106] A search of the informational content on a cryptocurrency storage medium allows authorities to have a glimpse into the details of one's financial holdings in terms of cryptocurrency. This reveals how much money an individual holds in crypto, what assets they personally hold and have previously held, and when and for how much they have made transactions with those assets. Such a search divulges to the state the personal choices and lifestyle of an individual by illustrating how they choose to spend their money along with when and how much of it they spend. Essentially, this provides a purview into the financial situation and preferences of an individual. As previously mentioned, the SCC has viewed an individual's financial situation as attracting a privacy interest.[107] The capacity of a search of the informational content of cryptocurrency storage mediums to expose an individual's financial preferences, holdings, and when and how they choose to spend their money, quite obviously uncovers the intimate details of one's personal choices and lifestyle. This being the case, the private information revealed by this type of search militates in favour of a reasonable expectation of privacy.

Taking into consideration the place of the search, control over the content searched, and the private and intimate details revealed by the search of the informational content on one's cryptocurrency storage medium, the expectation of privacy with such content can be deemed objectively reasonable. Accordingly, it can be claimed that there is a reasonable expectation of privacy in mobile and desktop crypto wallets.

In terms of hardware wallets, much of the same analysis can be adopted from the assessment of desktop and mobile wallets. The subject matter of a hardware wallet search is still the informational content contained in that cryptocurrency storage medium. Additionally, a search of a hardware wallet still provides a view into one's financial decisions and details, similarly attracting a direct interest and subjective expectation of privacy in the

---

104 See *Marakah*, *supra* note 42 at para 39.

105 *Plant*, *supra* note 47 at 293.

106 *Ibid.*

107 See *Cole, supra* note 38 at para 47; *Morelli, supra* note 91 at para 103.

subject matter. Whether this subjective expectation of privacy is objectively reasonable generally hinges on the same contentions. The place of the search is the medium of crypto storage, this being the hardware wallet, which also acts as an electronic bank account for cryptocurrency storage and transactions. One difference is that the place of the search can also be construed as the individual's personal hardware device itself, which is essentially a USB.[108] Either way, the search of someone's financial assets or personal USB device arguably favours a reasonable expectation of privacy. The argument pertaining to the public nature of the informational contents on the crypto storage device fails for the same reason it did for mobile and desktop wallets. It is only once police search an individual's hardware wallet that the public data on it becomes attached to that individual. Regarding control, an individual also exerts literal control over and possession of, the contents of the hardware wallet and can choose when, how, and to whom they disclose that the information on it relates to them. Lastly, a search of the informational content on a hardware wallet also divulges information about an individual's personal financial choices and lifestyle to the state. Namely, how much money an individual holds in crypto, what assets they personally hold and have previously held, and when and for how much they have made transactions with those assets. Based on all these factors, it can be concluded that there is also a reasonable expectation of privacy in hardware wallets.

The contentions advanced have strongly supported the claim that there is a reasonable expectation of privacy in mobile, desktop, and hardware crypto wallets. These devices are contained on or are personal devices themselves, and their informational content exposes intimate details relating to the owner's financial proclivities. If the state could peer into one's financial data with complete impunity, irrespective of how they do so, George Orwell's dystopian novel of mass surveillance, *1984*, does not seem so farfetched.[109]

VI. Creating a Connection between the Individual and the Wallet: User Information on

[108] See Jokić, *supra* note 79 at 69.

[109] See George Orwell, *Nineteen Eighty-Four* (London: Penguin Classics, 2021).

CRYPTOCURRENCY EXCHANGES AND THE REASONABLE EXPECTATION OF PRIVACY

Cryptocurrency exchanges are the main platforms that facilitate the trading of cryptocurrencies.[110] Exchanges often have a KYC or 'know your customer' policy to access their services. This policy requires a user to verify their identity with the exchange through means such as their government-issued ID.[111] It is also true that exchanges often give users crypto wallet addresses so they may send, receive, and transact crypto both on and outside that exchange.[112] This means that cryptocurrency exchanges have the personal information necessary to attach an identity to the wallet addresses that they provide to their users. These wallets can be used on the exchange platform but are not their own form of wallet. This is because they are still accessed via mobile devices or personal computers, essentially making them a type of hot wallet such as a mobile or desktop wallet. Moving forward, these will simply be called exchange wallet addresses for clarity.

In *Shaporov*, a Bitcoin wallet address from the exchange Coinbase was used on a website to buy child pornography.[113] The court noted that American authorities subpoenaed Coinbase and examined their records to determine the owner of that wallet address.[114] Through doing so, they were able to procure the information of the accused and connect him to that wallet address.[115] After passing this evidence off to Canadian authorities, it factored heavily into the accused's conviction for child pornography.[116] As can be seen, user information on a cryptocurrency exchange can prove useful for authorities, specifically when a wallet address they are investigating has been given to the user by a cryptocurrency exchange. Interestingly, this poses an issue similar to the one raised in *Spencer*, that being whether there was a reasonable expectation of privacy in subscriber information held by an internet service provider. In these circumstances,

---

110 See Pengcheng Xia et al, "Characterizing cryptocurrency exchange scams" (2020) 98 Computers & Security 1 at 1.

111 See Binance, "Important Changes About Binance Identity Verification" (20 August 2021), online: *Binance* <www.binance.com/en/support/announcement/important-changes-about-binance-identity-verification-51bf294e26324211a4731ca998e110ca> [perma.cc/92S3-3KSD]; Binance, "How to Complete Identity Verification" (22 April 2019), online: *Binance* <www.binance.com/en/support/faq/how-to-complete-identity-verification-360027287111> [perma.cc/C6UX-9CLK].

112 See *Ellingson*, *supra* note 28 at paras 25-28.

113 See *Shaporov*, *supra* note 62 at paras 1-5.

114 *Ibid* at para 6.

115 *Ibid* at paras 6-7, 299-303.

116 *Ibid* at paras 6-7.

the question is whether there is a reasonable expectation of privacy in user information held by a cryptocurrency exchange.

Beginning with the subject matter of the search, authorities would likely be seeking an exchange user's information so they may link the identity revealed by this information with an exchange wallet address. In *Spencer*, where police accessed an individual's subscriber information from an ISP, the court rejected the notion that the subject matter of the search was simply the name and address of the accused. Rather, they held that what the police were really after was the connection between this identifying information and what it tends to reveal about the accused's activity on the internet.[117] This seems to be analogous in the case of a search of user information on a crypto exchange as authorities will be looking to connect an individual's identity with a specific exchange wallet address. In this sense, it is logical to characterize the subject matter of a search for user information on a cryptocurrency exchange as the identity of a cryptocurrency exchange user in connection to a specific crypto wallet address. A search of this nature would be informational in scope as it seeks to reveal the identity behind an exchange crypto wallet address so the state may connect this individual with that wallet's underlying information, thereby implicating privacy of anonymity concerns.

Regarding direct interest and subjective expectation of privacy in the subject matter, a claimant could easily satisfy these requirements. Surely, a hypothetical claimant would have such an interest and expectation of privacy in information that can personally link them to a crypto wallet and the transaction data or assets of that wallet. An individual could simply argue that they believed their personal information would remain confidential and would not be shared by the cryptocurrency exchange. As was the case for blockchain data and cryptocurrency storage mediums, it is whether the reasonable expectation of privacy is objectively reasonable that proves most controversial.

To begin, it cannot be said that the subject matter of a search for user information on a cryptocurrency exchange is already in public view or abandoned. This identifying data is kept by an exchange, often under a privacy policy, and is not available for the public to simply browse.[118] Unless the exchange chooses to share such information, it will generally remain anonymous.

---

117 See *Spencer*, *supra* note 42 at paras 31-33.

118 See Binance, "Privacy Notice – Binance" (29 September 2022), online: *Binance* < www.binance.com/en/privacy> [perma.cc/48EK-U2UX].

A more salient consideration is whether the subject matter searched was already in the hands of third parties, and if so, whether it was subject to an obligation of confidentiality.[119] While United States jurisprudence was previously drawn upon to support the contention that there is no reasonable expectation of privacy in transaction data on the blockchain, no such harmony likely exists between Canada and the U.S. in terms of user information on cryptocurrency exchanges. Unlike the United States' third-party doctrine, which holds that a person generally has no legitimate expectation of privacy in information they voluntarily turn over to third parties, the SCC has rejected such a categorical approach for a more holistic methodology.[120] In the Canadian context, the lack of control over information and the existence of a contractual and statutory relationship with a third party does not in and of itself defeat a reasonable expectation of privacy.[121] Rather, the terms governing the relationship between a commercial entity and its users are to be weighed in the totality of the circumstances underpinning the expectation of privacy analysis.[122] As can be discerned, there is a significant difference between U.S. and Canadian search and seizure law in terms of information held by third parties. This likely separates the legal conclusions that may be reached by the U.S. and Canada in terms of a reasonable expectation of privacy in user information on a cryptocurrency exchange. While US law would deny such an expectation based on the third-party doctrine, this paper contends that Canadian law would recognize such an expectation, albeit in a diminished capacity.

In *Gomboc*, the ability of a commercial entity to disclose users' information was deemed to factor heavily against a finding of a reasonable expectation of privacy.[123] Ignorance of such terms by a claimant is no defence; as recognized in *Spencer*, a reasonable user would be aware of the terms and conditions underpinning a service they are utilizing.[124] In regards to crypto exchanges, the terms and conditions of the largest and most used exchange, Binance, will be utilized as an example for this analysis.[125] Under

---

[119] See *Tessling*, *supra* note 41 at para 32.

[120] See *United States v Miller*, 425 US 435 (5th Cir, 1976). See also *Gratkowski*, *supra* note 73 at 4-6.

[121] See *Gomboc*, *supra* note 45 at para 28; *Cole*, *supra* note 38 at paras 54, 58; *Marakah*, *supra* note 42 at para 38; *Jones*, *supra* note 42 at paras 40-45; *Spencer*, *supra* note 42 at paras 46, 54.

[122] See *Gomboc*, *supra* note 45 at para 31.

[123] *Ibid* at para 33.

[124] See *Spencer*, *supra* note 42 at para 57.

[125] See Coinmarketcap, "Top Cryptocurrency Spot Exchanges" (accessed 18 March 2022), online: *CoinMarketCap* <coinmarketcap.com/rankings/exchanges/> [perma.cc/V24B-J4F7]. It should be noted that after the writing of this paper, Binance has announced

Binance's terms of use, their privacy policy is a supplemental contractual term to those terms of use and a user must agree to them to use the platform.[126] Binance's privacy policy states "we may share your personal data with third parties" including "to legal authorities to the extent we are obliged to do so according to the law. We may also need to share your information to enforce or apply our legal rights or to prevent fraud."[127] The terms of use also indicate that Binance has the right to unilaterally investigate and determine whether you have breached their terms and, without consent or prior notice, report an incident to authorities.[128] This indicates that Binance will disclose a user's personal information to authorities if compelled to do so legally, or voluntarily if they suspect a user is engaged in activities which breach their conditions. In this sense, it cannot be said that there is an obligation of confidentiality attached to a user's information on Binance. A reasonable user of Binance's platform would be aware of these underlying terms and the power they give to Binance to divulge their information. Similar to *Gomboc*, the fact that Binance is free to disclose information to authorities if compelled or if they so choose, militates against finding a reasonable expectation of privacy in user information on crypto exchanges.[129] However, the court in *Gomboc* held that this is not dispositive of the objective reasonableness inquiry, instead stating that the question is "whether the information is the sort that society accepts should remain out of the state's hands because of what it reveals about the person involved."[130] With this in mind, it is prudent to turn to the privacy interests implicated by a search for user information on a cryptocurrency exchange.

Shifting the focus to the privacy interests engaged by state conduct, it must be determined whether the information sought tends to reveal a biographical core of personal information. The court in *Spencer* held that "subscriber information, by tending to link particular kinds of information

---

that it is withdrawing its services from the Canadian marketplace in late 2023 due to tightening regulations. See Craig Lord, "Binance, the world's biggest cryptocurrency exchange, is leaving Canada" (12 May 2023), online: *Global News* <globalnews.ca/news/9694837/binance-leaving-canada-crypto/> [perma.cc/PXR3-9MZ9].

126 See Binance, "Binance Terms of Use" (8 February 2023), online: *Binance* <www.binance.com/en/terms> [perma.cc/76G2-PEQL].

127 Binance, "Privacy Notice – Binance" (29 September 2022), online: *Binance* <www.binance.com/en/privacy> [perma.cc/X29K-3P62].

128 See Binance, "Binance Terms of Use" (8 February 2023) online: *Binance* <www.binance.com/en/terms> [perma.cc/BP34-E4D7].

129 See *Gomboc, supra* note 45 at para 33.

130 *Ibid* at para 34.

to identifiable individuals, may implicate privacy interests relating not simply to the person's name or address but to his or her identity as the source, possessor or user of that information."[131] This is analogous to a situation where authorities seek user information from a cryptocurrency exchange. The privacy interests implicated are beyond the name, address, email or phone number of the user. Instead, authorities wish to utilize this information to link an identifiable individual to a specific exchange wallet address. In this sense, the privacy interests engaged relate to the information that can be elicited from the connection of that person to the wallet. United States jurisprudence has taken a narrower view of a search of cryptocurrency exchange records, finding that "it provides only information about a person's virtual currency transactions."[132] However, by utilizing the blockchain to look at that wallet address, authorities can discern a quantum of information far beyond mere transaction data. As illustrated above in examples 1 and 2, the information revealed includes what transactions an individual has made, when they made them, how much money was implicated in those transactions, and what cryptocurrencies that individual has on that wallet address. Similar to the search of cryptocurrency storage mediums, the subject matter of the search for user information on a crypto exchange can reveal an individual's financial holdings and preferences. This uncovers the intimate details and personal lifestyle choices of an individual in numerous ways. It allows the state to know what cryptocurrencies an individual chooses to hold in their exchange wallet, the exact time that the individual transacts, and the overall amount of the transaction. Knowing the exact time that an individual transacts also reveals to the state exactly when that individual was connected to the internet. Considering the purview such a search can provide into one's personal financial preferences, choices, and dealings, the privacy interests engaged arguably militate in favour of a reasonable expectation of privacy.

Balancing the circumstances, it is true that there is a lack of control over user information on cryptocurrency exchanges and that contractual terms, at least concerning the largest cryptocurrency exchange, do not have an obligation of confidentiality vis-à-vis that information. While this militates against a reasonable expectation of privacy, and a lack of third-party confidentiality factored heavily into the decision rendered in *Gomboc*, the court instructed that the central issue in that case still fell upon whether the information at issue disclosed intimate details of an individual's lifestyle

---

131 *Spencer*, *supra* note 42 at para 47.

132 *Gratkowski*, *supra* note 73 at 8.

and personal choices.[133] The information at issue in *Gomboc*, that being the pattern use of electricity in a home as disclosed by a digital recording ammeter, was held not to divulge any intimate details beyond an individual's consumption of electricity.[134] In contrast, a search of user information on a cryptocurrency exchange can reveal personal financial preferences, choices, and dealings. These privacy interests are far more revealing of one's lifestyle and choices compared to the mere consumption of electricity and allow the state to peer into how one conducts themselves financially. This includes knowing when they transact, for how much, and what cryptocurrencies they choose to hold in their exchange wallet. It is contended that this distinction tips the scale in favour of finding that the expectation of privacy is objectively reasonable as it concerns a search of user information on a cryptocurrency exchange. Similar to *Gomboc,* the lack of control and third-party obligations of confidentiality hinder this expectation. But unlike *Gomboc,* there are privacy interests at stake with the capacity to reveal intimate financial details about an individual. Such a conclusion is consonant with the decision rendered in *Gomboc* and follows the SCC's instruction. Namely, that the central question in informational privacy cases concerns the ability of the impugned search to reveal intimate details about one's lifestyle and choices.[135] It is, however, conceded that the lack of control and confidentiality as it concerns this information likely diminishes a reasonable expectation of privacy. Accordingly, there is a reasonable, albeit diminished, expectation of privacy in user information on a cryptocurrency exchange.

VII. CONCLUSION

This paper set out to address the void in Canadian jurisprudence as it relates to section 8 of the *Charter* and cryptocurrency. How the reasonable expectation of privacy applies to cryptocurrency transaction data on the blockchain, different methods of storing cryptocurrency, and user information on cryptocurrency exchanges was explored. Three contentions were sought to be made concerning this investigation: that there is no reasonable expectation of privacy in cryptocurrency transaction data on the blockchain; that there is a reasonable expectation of privacy in various types of cryptocurrency storage mediums; and that there is a diminished reasonable expectation of privacy in user information on cryptocurrency

---

[133] See *Gomboc*, *supra* note 45 at para 34.
[134] See *Gomboc*, *supra* note 45 at paras 1, 14, 39.
[135] See *Gomboc*, *supra* note 45 at para 34.

exchanges. Following an explanation of cryptocurrency, the blockchain, and the jurisprudence relating to s. 8 of the *Charter*, these arguments were meticulously examined and substantiated by thorough analysis.

The inherently public nature of the blockchain, paired with the fact that a search of the blockchain does not itself reveal the identity of an individual behind a crypto wallet address, was deemed to thwart any conception that there is a reasonable expectation of privacy in cryptocurrency transaction data on the blockchain. Anyone with access to the internet can browse a blockchain's records as its very purpose is to display this information in the wide open for public view. In further support of this proposition, United States jurisprudence that echoed similar thoughts was cited.[136] On the premise of these considerations, it was determined that there is no reasonable expectation of privacy as it relates to cryptocurrency transaction data on the blockchain.

In terms of mediums of cryptocurrency storage, three types were explored. These were desktop, mobile, and hardware wallets. It was discovered that the search of these types of wallets necessarily occurs on an individual's personal device, which essentially connects that individual to the searched crypto wallet as authorities will almost always know who owns the device being searched. This allows the state to personally identify an individual with the informational content on the searched cryptocurrency storage medium. Such information reveals intimate details about an individual's lifestyle and choices as it exposes to the state how much money an individual holds in crypto, what crypto assets they hold and have previously held, and when and for how much they have made transactions with those assets. By exposing an individual's financial preferences, holdings, and when and how they choose to spend their money, the search of a cryptocurrency storage medium was held to implicate significant informational privacy interests relating to one's lifestyle and personal choices. An individual's control over the informational content of their cryptocurrency storage mediums was also explored. It was determined that individuals undoubtedly exercise meaningful control over these cryptocurrency storage mediums as they are contained on, or are themselves, personal devices in the individual's possession. Considering all these elements, they were found to militate in favour of the notion that there is a reasonable expectation of privacy in desktop, mobile, and hardware cryptocurrency storage wallets.

The reasonable expectation of privacy in user information on cryptocurrency exchanges was analyzed last. However, it was also established that a search of user information on a cryptocurrency exchange

[136] See *Gratkowski*, *supra* note 73 at 6-7.

can reveal details about an individual's lifestyle and personal choices. The privacy interests implicated in such a search were held to go beyond merely the name, address, email, or phone number of the user. Rather, authorities would utilize this user information to link an identifiable individual to a specific exchange crypto wallet address. Consequently, this allows law enforcement to attach that individual to a specific exchange crypto wallet address and browse its data on the blockchain. This exposes to the state information relating to the exact time that individual transacts, how much they transact for, and what cryptocurrencies an individual chooses to hold in their exchange wallet. Based on the tendency of such information to reveal one's personal financial preferences, choices, and dealings, the privacy interest engaged by a search of user information on a cryptocurrency exchange was held to weigh in favour of a reasonable expectation of privacy. Balancing the privacy interests at stake with the lack of control and confidentiality, and utilizing the SCC's instructions and language from *Gomboc*, it was concluded that there is a reasonable but diminished expectation of privacy in user information on a cryptocurrency exchange.

Ultimately, the perpetual evolution of technology inevitably carries with it the reality that it can, and will, be utilized in some form of criminal enterprise. The law must adjust quickly and pragmatically to ensure law enforcement has a degree of guidance in their attempts to combat contemporary techniques of engaging in criminal activity. In this quest for adaptation, the law must tread carefully and appropriately balance the public's privacy interests with the state's pursuit of crime control. After all, it would be tragic to witness privacy become a sacrificial lamb as the state attempts to adjust to contemporary technologies.

Perhaps a solution to the tension between crypto's use in criminal enterprise and the maintenance of public privacy lies in the regulatory clarity provided by parliament. While the substantive nature of such regulation is beyond the breadth of this paper, regular disclosure of crypto assets by crypto exchanges and financial institutions, paired with reporting to tax authorities on large-scale crypto transactions, could help to combat the risks posed by crypto. Doing so could alleviate the possibility of another exchange like FTX defrauding customers of millions of dollars. This could also potentially prevent other crimes such as money laundering by requiring the reporting of large-scale crypto transactions to tax agencies like the CRA. Considering the 2023 federal budget explicitly dedicates resources to protecting Canadians from the risks of crypto, it is safe to say that these speculated changes may indeed be on the horizon.[137]

---

137 See Canada, Department of Finance, *Budget 2023*, (Ottawa: Government of Canada, 2023) at 175-176.