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INTRODUCTION

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It is my pleasure to write this foreword for the first volume of the *Digital Companion*. The new *Digital Companion*, the online counterpart of the *Windsor Review of Legal and Social Issues*, is reserved exclusively for student writing. It features the very best of the papers presented by law students at the 7th Annual Canadian Law Student Conference. At this conference, law students from across the country gather at Windsor Law School to meet one another and to present, and receive feedback on, their work. The conference offers an excellent opportunity for law students to share their research with peers and others. The best of these student papers are published in the *Digital Companion*, and the digital format makes the papers available to a wide audience.

Windsor Law School is proud of this initiative and the opportunities it offers to Canadian Law students. The skills of solid, creative research and clear and persuasive writing are among the essential skills of a lawyer, no matter the field in which that lawyer works. The excellent student papers in Volume I of the *Digital Companion* feature a diverse range of topics, from immigration and multiculturalism, to childcare accommodation, to the search powers of police and section 8 of the *Canadian Charter of Rights and Freedoms*. The breadth of topics explored in these papers is a testament to the quality of the research and writing being done by Canadian law students. By providing a publication forum for these papers, the *Digital Companion* is enhancing and advancing the research, writing and presentation skills of future lawyers.

Congratulations to the students whose papers appear in this volume, and to the editors of the *Windsor Review of Legal and Social Issues* for launching this initiative.

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OPERATIONALIZING *GOLDEN*: MEASURING THE EFFICACY OF JUDICIAL OVERSIGHT

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On September 10, 2012, Obene Darteh, a native of Ghana and a resident of Toronto, was riding his bike through an intersection when he was stopped by the Toronto Police Service for an alleged traffic violation. What followed was a litany of police misconduct, including a humiliating strip search in broad daylight; the officers required Darteh to lift his shirt and pull down his shorts and underwear.[1] This was properly characterized by the trial judge as an illegal strip search and an egregious violation of the accused's section 8 rights.[2] As a result, the cocaine discovered during Darteh's search was excluded.[3]

Over a decade ago, in *R v Golden*, the Supreme Court of Canada set out clear guidelines on when a strip search complies with section 8 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[4] Since that time, high profile cases have captured the public's attention, signaling that police services continue to struggle with implementing the *Golden* principles. Cases such as *R v Bonds*—where Stacy Bonds was aggressively and illegally strip searched, including having her bra and shirt cut off by members of the Ottawa Police Service—remind us of this reality.[5] Should Bonds and Darteh, both of whom are racialized, be considered isolated incidents of police misconduct, or do they reflect systemic disregard or indifference to the standards established by the Supreme Court of Canada in *Golden*? Ultimately, their experiences signal persistent systemic issues explored by the court.

This paper examines the efficacy of judicial oversight in three parts. Part I analyzes the divergent approaches taken by the Supreme Court of Canada in contemplating police compliance with section 8 of the *Charter*. Part II explores the extent police departments have operationalized the *Golden* principles in the following Canadian cities: Calgary, Montreal, Ottawa, Peel Region, Toronto, Vancouver, Windsor and Winnipeg. Current case law and academic literature on the topic suggest that omissions in policies, and a lack of understanding of how policies are operationalized, impact the way strip searches are conducted. Part III analyzes the question posed at the beginning of this paper: do the systemic issues articulated by the Supreme Court of Canada in *Golden* remain? This question is analyzed with the information provided in the previous sections, to gauge whether systemic issues persist.

The extent of illegal and unreasonable strip searches in Canada's major cities is difficult to quantify. However, case law and current police policies suggest that the principles developed in *Golden* are neglected by police services in major Canadian cities. While the judiciary can facilitate police accountability, it must be coupled with other strategies to be effective. This

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* Brady graduated from the University of Windsor, Faculty of Law in June 2014. This paper was prepared as part of her fellowship with the Law Enforcement and Accountability Project, as supervised by Professor David Tanovich. She is especially grateful to Professor Tanovich for his continued support and encouragement. Brady presented this research at the 7th Annual Canadian Law Student Conference, held in Windsor, Ontario in March 2014. She is currently a Student-at-Law.

[1] *R v Darteh*, 2013 ONSC 233 at paras 1-3, 62, 276 CRR (2d) 37 [*Darteh*].
[2] *Ibid* at para 58.
[3] *Ibid* at para 62.
[4] 2001 SCC 83, [2001] 3 SCR 679 [*Golden*].
[5] 2010 ONCJ 561 at para 20, 79 CR (6th) 119 [*Bonds*].

paper puts forth a list of best practices that police services can use to increase accountability, arguing that police services themselves have an important role to play in proactively promoting compliance with the *Golden* principles.

PART I: DIVERGENT APPROACHES TO SECTION 8 OF THE *CHARTER*

The *Charter* has had an obvious and significant impact on the judiciary, marked by a movement away from a Crime Control Model and towards a Due Process Model.[6] In practice, this means that the "'administration of justice' include[s] not only the trial process but the investigatory process."[7] Specifically, the *Charter* has increased judicial intervention on the principle of due process. In the last ten years, Parliament has resisted judicial intervention. As a result, a strongly worded Supreme Court of Canada decision is ineffective if it is not coupled with action by Parliament.[8] This analysis is helpful in understanding the impact of the *Golden* decision. If, for example, Parliament took action in the form of a warrant requirement, *Golden* would likely have a greater influence on the way police departments operate.

The *Charter* opened the door for the judiciary to scrutinize police conduct in a way that was not available at common law. The Supreme Court of Canada has taken at least two approaches to bring police practices in line with the *Charter*. In *R v Feeney*[9], *R v Duarte*[10], and *R v Wise*[11], the Supreme Court of Canada placed the onus on Parliament to impose a warrant requirement to regulate the police. On the other hand, in *Golden*, the Supreme Court of Canada regulated strip searches directly by establishing minimum standards for the police.[12]

In *Feeney*, Justice Sopinka, writing for the majority, held that the accused had a reasonable expectation of privacy in his own home. By failing to obtain a warrant, the police gained access to the accused's home in an unlawful manner.[13] Parliament responded to the decision by enacting section 529 of the *Criminal Code*.[14] Elena Bakopanos, the Liberal Member of Parliament who introduced the bill, described its necessity as follows:

> The bill essentially creates a warrant scheme by which peace officers may obtain judicial authorization before entering a dwelling to arrest someone. The bill also sets out certain circumstances under which such warrants or authorizations are not required. Members of the public and law enforcement officials could argue that the bill does not go far enough by not giving police officers the same powers of entry and arrest they had before. I repeat before the Feeney decision. However, given that Feeney was decided on constitutional grounds, it would not be possible to restore the common law power to enter a dwelling to arrest. To put it plainly, the court has ruled that privacy interest must be balanced against the interest of the state to arrest in a dwelling house and that balancing of interest must be done by judges.[15]

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[6] F L Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms" (1987) 20:1 Can J Pol Sc 31 at 37. See also Herbert L Packer, "Two Models of the Criminal Process" (1964) 113:1 U Pa L Rev 1.
[7] *R v Cohen*, 148 DLR (3d) 78 at para 93, 33 CR 3(d) 151 (BCCA).
[8] Kent Roach, "Twenty Years of the Charter and Criminal Justice: A Dialogue between a Charter Optimist, a Charter Realist and a Charter Skeptic" (2003) 19:2 SCLR 39 at 42.
[9] [1997] 2 SCR 13, 146 DLR (4th) 609 [*Feeney*, cited to SCR].
[10] [1990] 1 SCR 30, 65 DLR (4th) 240.
[11] [1992] 1 SCR 527, 11 CR (4th) 253.
[12] *Golden*, *supra* note 4 at paras 100-01
[13] *Supra* note 9 at 37.
[14] RSC 1985, c C-46, s 529.
[15] *House of Commons Debates*, 36th Parl, 1st Sess, No 25 (31 October 1997) at 1000-05.

Like *Feeney*, the *Golden* decision was concerned with unjustified searches by the state. On January 18, 1997, members of the Toronto Police Service executed a take-down operation in a sandwich shop.[16] As a result of observations made by the police prior to the take-down, the appellant, a black male, was arrested for trafficking cocaine.[17] Following the arrest, one of the officers conducted a pat-down search of the appellant and a visual inspection of his underwear and buttocks.[18] It was at this time that the officer noticed a clear plastic bag protruding from the accused's buttocks. The officers unsuccessfully tried to retrieve the bag, at which point they required the appellant to bend over a table. The appellant's pants were lowered to his knees and his underwear pulled down.[19] The officers were eventually able to retrieve the bag and its contents: 10.1 grams of crack cocaine.[20] At trial, the appellant sought to have the evidence excluded under sections 8 and 24 of the *Charter*.[21]

In rendering its decision, the Supreme Court of Canada reiterated that if the search is authorized by law, the law is reasonable, and the search is conducted in a reasonable manner, there is no violation of section 8 of the *Charter*.[22] The court defined a strip search as "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), undergarments."[23] The court acknowledged that strip searches are a "significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subjected to them."[24] As a result, strip searches "cannot be carried out simply as a matter of routine police policy."[25] The court was explicit in warning that a frisk or a pat-down search will suffice for the purpose of determining if the accused has concealed weapons on his or her person. To that end, the court held that "the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search."[26]

The issue of a warrant requirement was raised by the Canadian Civil Liberties Association ("CCLA") but was not imposed by the court.[27] This paper demonstrates that compliance with the *Golden* principles remains an issue, and a warrant requirement for strip searches is worth revisiting. In determining the best approach for conducting a strip search, the court in *Golden* adopted guidelines from the United Kingdom's *Police and Criminal Evidence Act 1984*.[28] The guidelines, as cited by the court, pose eleven questions, including:

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[16] *Golden*, *supra* note 4 at paras 27-29.
[17] *Ibid* at paras 27-28.
[18] *Ibid* at para 30.
[19] *Ibid* at paras 30-32.
[20] *Ibid* at para 33.
[21] *Ibid* at para 35.
[22] *Ibid* at paras 44-45.
[23] *Ibid* at para 47.
[24] *Ibid* at para 83.
[25] *Ibid* at para 90.
[26] *Ibid* at para 94.
[27] *R v Golden*, 2001 SCC 83 (Factum of the Canadian Civil Liberties Association at para 11); *ibid*.
[28] *Police and Criminal Evidence Act 1984* (UK), 1984, c 60 [*PACE*]; *Golden*, *supra* note 4 at para 101.

> 1. Can the strip search be conducted at the police station and, if not, why not?...
> 3. Will the strip search be authorized by a police officer acting in a supervisory capacity?...
> 7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
> 8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?...
> 11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?[29]

The court concluded that the "decision to strip search was premised largely on a single officer's hunch".[30] This, coupled with the absence of exigency, made the decision to strip search unreasonable.[31] The Supreme Court of Canada was also careful to note the disproportionate impact strip searches have on racialized communities.[32]

By adopting the *PACE* regulations in its decision, the Supreme Court of Canada legislated a regime for section 8 compliance. While the court recommended further legislative guidance on the issue, Parliament has yet to respond.[33] Part II of this paper seeks to understand the extent police departments have adopted this regime.

PART II: IMPLEMENTING *GOLDEN*—EXPERIENCES OF EIGHT CANADIAN CITIES

To conceptualize the extent *Golden* is operationalized, Freedom of Information requests were sent to eight Canadian cities: Calgary, Montreal, Ottawa, Peel Region, Toronto, Vancouver, Windsor and Winnipeg. The request asked for three things. First, the most recent policies and procedures relating to strip searches. Second, any data on when and under what circumstances searches are carried out. Third, whether the police department in question collected data on race, or if they had a policy to that effect.

The policies are analyzed using the following questions:

> (1) Does the policy include the Supreme Court of Canada's assertion that strip searches are humiliating and degrading, and how is strip search defined?
> (2) Does the policy include the eleven *Golden* principles?
> (3) Does the policy provide guidance as to when and under what circumstance a strip search can be conducted?
> (4) Does the policy respond to case law, post-*Golden*? For example, does the policy include special provisions for individuals who identify as transgender?
> (5) How is the strip search recorded?[34]

This analysis is summarized in Figure 1 below. Figure 2 visually demonstrates compliance with the *Golden* principles.

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[29] *Ibid*.
[30] *Ibid* at para 110.
[31] *Ibid*.
[32] *Ibid* at para 83.
[33] *Ibid* at para 103.
[34] *Forrester v Peel (Regional Municipality) Police Services Board*, 2006 HRTO 13, 56 CHRR 215 [*Forrester*].

Figure 1: Review of Police Procedures

	Strip search defined	**Incorporates 11 *Golden* Principles**	**Guidance on when and how may be conducted***	**Transgender provisions**	**Record of a strip search**
Calgary					
Montreal					
Ottawa					
Peel					
Toronto					
Vancouver					
Windsor					
Winnipeg					

Black = Complete Compliance (full compliance with the *Golden* decision)
Grey = Partial Compliance (for example, some but not all of the *Golden* principles are incorporated in the policy)
White = No Compliance (the measure is not included in the policy)
* This measure is hard to quantify in a chart and fails to capture the full spectrum of guidance in this area of the law

Figure 2: *Golden* Principles

***Golden* Principle**	**Calgary**	**Montreal**	**Ottawa**	**Peel**	**Toronto**	**Vancouver**	**Windsor**	**Winnipeg**
At the police station and if not, why not?								
Ensures the health and safety of all involved?								
Authorized by an officer in charge?								
Officers same gender as person being searched?								
Minimum force necessary?								
Conducted in a private area?								
Conducted as quickly as possible?								
Detainee given the option of removing object discovered?								
Involve only a visual inspection of the arrestee's genital areas?								
Proper record of the reason and the manner?								

Black = Complete Compliance
Grey = Partial Compliance
White = No Compliance

A. Calgary

The Calgary Police Service provided one policy. The policy was updated in 2013 and adopts many of the *Golden* principles.[35] The policy highlights that the mere possibility a person may be concealing evidence or weapons is insufficient to justify a strip search.[36] Part 3 of the policy is a verbatim adoption of the *Golden* principles, yet they appear under the heading "Determining the Reasonableness of Conducting a Strip Search".[37] The policy also provides insight into how to conduct a strip search with individuals who identify as transgender.[38] The *Golden* requirement that a strip search be recorded is not dealt with by the policy, but the policy indicates that officers are required to record a strip search in their notebooks.[39]

The policy reflects a holistic application of the *Golden* principles. However, Part 7(1) of the policy states that prior to being lodged in cells, a prisoner may be strip searched where a frisk search would not reasonably ensure safety. This instruction is confusing—earlier parts of the policy indicate that a frisk search is sufficient for ensuring safety. Following *Golden*, strip searches conducted just because a prisoner may come in contact with the prison population have been found to be a violation of section 8.[40] Judges have emphasized the need for a case-by-case analysis of all strip searches. Part 7(1) does not preclude a case-by-case analysis so much as it justifies a strip search where it may not be necessary.

The Calgary Police Service does not collect data on when and under what circumstances a strip search is conducted. While the Calgary Police Service does collect data on race as a description of subjects, no official policy on the collection of data on race was produced.[41]

B. Montreal

The Service de Police de la Ville de Montréal ("SPVM") provided one policy on strip searches. The directive was last updated in 2005, and it includes factors to be considered when deciding the type of search and the amount of force to be used. These factors include: the gravity of the offence, the danger to the police officer, the time and location of the search, and other circumstances. A strip search is defined as the visual inspection of a person's intimate body parts and underneath their clothes, by removal or displacement in part or completely.[42] The policy warns that a strip search should never be conducted as a matter of routine. As a result, a police officer must have reasonable grounds to conduct the search, and the search must be conducted in a reasonable manner.[43] For a search to be conducted in a reasonable manner, it must comply with the *Golden* principles.[44] Officers are required to record strip searches in their notebooks. The SPVM does not collect data in relation to strip searches or race.

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[35] Calgary Police Services, *Search of Person Policy* (2013) [unpublished].
[36] *Ibid*, part 1(2).
[37] *Ibid*, part 6(3)(a).
[38] *Ibid*, part 4(7)(a).
[39] Letter from Anita Nixon, Disclosure Analyst, to Brady Donahue, LEAP Fellow (30 January 2013) [Nixon Letter].
[40] See e.g. *R v Carrion-Munoz*, 2012 ONCJ 539, 2012 39 MVR 144 [*Carrion-Munoz*]; *R v Mesh*, 2009 OJ No 6194 (CJ) [*Mesh*] (charges stayed); *R v Samuels*, 2008 ONCJ 85, 168 CRR (2d) 98 (charges stayed); *R v F (RL)*, 2005 ABPC 28, 69 WCB (2d) 547.
[41] Nixon Letter, *supra* note 39.
[42] Service de police de la ville de Montréal, *Pouvoirs de Fouille*, (2005) [unpublished].
[43] *Ibid*, part 2.2(a).
[44] *Ibid*, part 2.2(b).

The SPVM policy is problematic in three ways. First, given that it was last updated in 2005, it has not adequately responded to changes in case law, including the need for special provisions for individuals who identify as transgender. Second, by indicating that searches should be conducted based on the "gravity of the offence", the policy implicitly undermines the *Golden* principles. The decision to strip search should be reliant on reasonable grounds, primarily driven by officer safety and the discovery of contraband. Finally, the SPVM policy does not address what constitutes reasonable grounds.[45]

C. Ottawa

The Ottawa Police Service provided one policy regarding the search of a person.[46] The policy was first approved in 2002 and last updated in 2010, likely as a result of the media attention generated by the *Bonds* case. The policy is attentive to the assertion in *Golden* that a strip search is inherently humiliating, but it does not define what constitutes a strip search or include guidance on how to conduct a strip search.[47] It falls short of adhering to all of the *Golden* principles because it does not include guidance on how to conduct a strip search. Specifically, the policy excludes the *Golden* principles that a person should never be left fully naked, and that a strip search should be conducted as quickly as possible. What constitutes reasonable grounds is not explored in the policy—officers are directed to conduct a strip search if they have reasonable grounds to do so. On a positive note, officers are given special instructions on how to conduct a strip search for individuals who identify as transgender.

Case law suggests however, that the Ottawa Police Service continues to neglect the *Golden* principles**.** In January 2013, a young man was arrested outside a downtown area bar for possession of a firearm. He was strip searched, and the trial judge found that although the search was reasonable, it was conducted in an unreasonable manner. The officers charged with the search failed to conduct the strip search in private, and one of the officers used excessive and gratuitous violence in carrying out the search.[48]

The Ottawa Police Service records when a strip search occurs and the race of an individual who comes in contact with the police. It does not provide any data in relation to when and under what circumstances strip searches are conducted, nor does it have a policy on collection of race data.[49] The Ottawa Police Service is currently engaged in a two-year project where officers will be required by their own observation to record the race of a driver at all traffic infraction stops. The data collection process to date does not extend to any other stop.[50]

D. Peel Region

The Peel Regional Police provided three directives: general procedure for search of persons, strip search of transsexual and intersexual persons, and general procedure concerning young persons. The general procedure relating to search of persons was re-evaluated in September 2013 and adopts many of the *Golden* principles articulated by the Supreme Court of

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[45] Letter from Alan Cardinal, SPVM Lawyer, to Brady Donahue, LEAP Fellow (7 February 2013).
[46] Ottawa Police Service, *Search of Persons Policy* (2010) [unpublished].
[47] *Ibid* at 1.
[48] *R v McGuffie*, 2013 ONSC 2097 at paras 22, 45, 107 WCB (2d) 290.
[49] Letter from Carol Brunet, Freedom of Information Analyst, to Brady Donohue, LEAP Fellow (13 March 2013).
[50] *Traffic Stop Race Data Collection Project*, online: Ottawa Police Services <www.ottawapolice.ca/en/news-and-community/Traffic-Stop-Race-Data-Collection-ProjectTSRDCP.asp>.

Canada.[51] It does not address what constitutes permissible force in conducting a strip search. The policy is progressive in that it includes special provisions for searching Sikhs and Muslims.

The policy does not define a strip search, but instructs officers to always conduct a frisk search before a strip search. Officers are required to consult with the Officer in Charge to determine if a strip search is reasonable, keeping in mind that a strip search may not be conducted as a matter of routine policy.[52] Officers are required to record the search in their notebooks. The search is also recorded using Peel Regional Police Form #166 and by the Officer in Charge.[53] Peel does not aggregate when and under what circumstances a strip search is conducted, nor does it have a policy on data collection related to race.[54]

E. Toronto

The Toronto Police Service policy and procedures on strip searches was accessed through the Police Accountability Coalition; the policy was posted online in November 2011. The policy begins with an acknowledgment of the *Golden* decision and adopts its principles. The policy provides guidance on risk factors for officers contemplating a Level 3, which is a strip search. In considering the reasonableness of a search, officers consider: the history of the person, any items already located on the person during a Level 1 or Level 2 search, the demeanour or mental state of the individual, the risk to the individual, the police, or others associated with not performing a Level 3 search, and the potential that the person will come into contact with other detainees and hand off contraband, weapons, and the like to another prisoner. The policy also provides that strip searches should not be conducted in the field, and if they are, the onus is on the officer to show why a search in the field was necessary. The preservation of evidence is not sufficient to warrant a strip search according to the policy.[55]

The Toronto Police Service has procedurally adopted the *Golden* principles, but the policy is deficient as it fails to highlight that a frisk search will be sufficient for ensuring officer safety. Strip searches are recorded in the officer's notebook.

F. Vancouver

The search policy of the Vancouver Police Department exists within a policy on prisoners and jail operations. The policy was last updated in 2010 and defines a strip search as "[a] thorough search and examination of a person's clothing and body. This will include the removal of some or all of the clothing of a person so as to permit a visual inspection of all areas of a person's body."[56] The Vancouver Police Department procedurally accepts many of the *Golden* principles. However, it does not give a prisoner the opportunity to remove any contraband themselves. It does not provide guidance in relation to the reasonableness of conducting a search; it only states that the search should be reasonable. Officers of the Vancouver Police Department

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[51] Peel Regional Police, *Strip Search Policy* (2013), parts H(a)-(m).
[52] *Ibid*, parts H(1)(a)-(b).
[53] *Ibid*, parts H(2)-(3).
[54] Letter from Cst D Carrier, Coordinator of Information and Privacy, to Brady Donohue, LEAP Fellow (13 February 2013).
[55] "Toronto Police Accountability Bulletin No. 64, on Strip Searches" (21 November 2011), online: Toronto Police Accountability Coalition <www.tpac.ca/show_bulletin.cfm?id=153>.
[56] *Regulations and Procedures Manual* (2010), c 1.12.1(v), online: Vancouver Police Department <vancouver.ca/police/assets/pdf/manuals/vpd-manual-regulations-procedures.pdf>.

are not given guidance on how a strip search should be recorded. The policy makes special provisions for individuals who identify as transgender. The Vancouver Police Department does not collect or aggregate data on strip searches or race.[57]

The placement of the Vancouver Police Department policy within a policy on jail procedures implies that strip searches will only be conducted against prisoners. The policy also states that strip searches can be conducted in the field to preserve evidence or for officer safety. The *Golden* principles hold that strip searches in the field are presumptively unreasonable.[58] The policy stipulates that officers "must be able to clearly articulate why a strip search was required in each particular instance."[59] It is not sufficient to say that strip searches can be conducted to preserve evidence and find weapons; it should be clear to officers and outside readers that strip searches in the field should be a last resort. Further, the definition of a strip search should be amended to include the displacement of clothing, and not simply the removal of clothing.

G. Windsor

The Windsor Police Service provided two policies: *Detention Centre Operational Policies and Procedures*, and *Search of Persons*. Both policies were last reviewed on July 9, 2012. The *Search of Persons* policy begins with the rationale that searches must be conducted lawfully, conducted in an appropriate manner, and justified in all circumstances.[60] The policy requires that officers consider two questions before proceeding with a search. Does the accused have a reasonable expectation of privacy? And, if so, will the search by the police be conducted reasonably?[61]

The *Search of Persons* policy defines a strip search as the removal of clothing. This is inconsistent with the *Golden* principle that includes the removal or displacement of clothing in the definition of strip search.[62] The policy satisfies the requirement that a strip search be conducted reasonably, but offers officers no further insight as to when a frisk search will suffice. The policy does not reflect current changes in case law regarding those who identify as transgender. Further, the *Golden* decision was decisive in prohibiting strip searches as a matter of routine; the Windsor Police Service policy fails to articulate this point. It is surprising that the policy remains deficient, given that in 2011, Mayor Eddie Francis promised a review of the strip search policy after four strip searches were held in violation of *Golden* by Justice Renee Pomerance of the Superior Court.[63]

In *R v Muller*, the case prompting Mayor Francis' remarks, the facts support the assertion that the Windsor Police Service continues to struggle with operationalizing the principles espoused in *Golden*. In September 2009, the Windsor Police Service executed a drug warrant, and found four people, upon entering the apartment.[64] A fifth person, the suspect, was arrested outside the building.[65] All five were arrested, detained, and strip searched.[66] Justice Pomerance

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[57] Letter from Civilian Analyst Information and Privacy Unit, to Brady Donohue, LEAP Fellow (6 March 2013).
[58] *Golden*, *supra* note 4 at para 105.
[59] *Supra* note 56 at c 1.12.1(v).
[60] Windsor Police Service, *Search of Persons* (9 July 2012) at Directive p I [unpublished].
[61] *Ibid* at Directive p II(c).
[62] *Golden*, *supra* note 4 at para 47.
[63] Craig Pearson, "Francis Promises Strip Search Review", *The Windsor Star* (18 August 2011), online: Canada.com < www2.canada.com/windsorstar/news/story.html?id=d5b55e30-d8c5-4664-a69c-398bfb4719fc>.
[64] *R v Muller*, 2011 ONSC 4892 at paras 2-3, 276 CCC (3d) 3971.
[65] *Ibid* at paras 13-17.

held the strip searches of the four individuals found in the apartment building unlawful; in doing so, the court expressed concern that the *Charter* violations "represent systemic practices that are unlawful and unconstitutional."[67] However, because the strip search of the accused, carried out on different grounds and by a different officer, was deemed constitutional, the application to exclude evidence under section 24(2) of the *Charter* was dismissed.[68]

Finally, the Windsor Police Service does not gather statistics on strip searches or race. The race of an individual is recorded when a report is generated, but statistics on race are not compiled. Windsor also lacks a policy or procedure on the collection of data on race.[69]

H. Winnipeg

The Winnipeg Police Services policy was reviewed in January 2013 and adopts all the *Golden* principles. Yet, the Winnipeg Police Services policy is deficient in relation to the first *Golden* principle: the policy does not acknowledge the humiliating nature of a strip search, nor does it define a strip search to include the displacement of clothing.[70] The policy includes many of the *Golden* provisions, but does not include a discussion of the amount of force to be used.[71] Further, the policy does not define reasonable grounds, nor does it warn that strip searches cannot be conducted as a matter of routine. The policy does not include special provisions on how to strip search individuals who identify as transgender,[72] and officers are only required to record a "narrative" that outlines the reason for and result of the search.[73]

On November 11, 2012, Devon Clunnis, the Chief of Police, sent out a routine order entitled "Main Street Project" where he reminded officers of the *Golden* principles, specifically that police require reasonable and probable grounds to carry out a strip search. The impetus of the memorandum appeared to be related to strip searching intoxicated persons. The Chief reminded officers to be familiar with the *Golden* decision, and the difference between arrest and detention.[74] A possible systemic problem can be inferred from this memorandum: impaired drivers held in custody because they are too intoxicated are disproportionately strip searched.

I. General Observations

The first standard applied to the policies questioned the sufficiency of the definition of a strip search. Ottawa, Peel Region, Vancouver, Windsor, and Winnipeg either lacked or had incomplete definitions of strip searches. This is important because it begs the question: are officers given the opportunity to properly understand what constitutes a strip search? The following series of cases involving women, who were required to remove their bras in the presence of male officers, demonstrates a lack of understanding or deliberate ignorance of the nature of a strip search.

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[66] *Ibid* at para 3.
[67] *Ibid* at para 6.
[68] *Ibid*.
[69] Letter from Shelley Gray, Information and Privacy Unit, to Brady Donohue, LEAP Fellow (21 February 2013).
[70] Winnipeg Police Services, *Search Policy* (2013), part 2(d) [unpublished].
[71] *Ibid*, part 7(a).
[72] *Ibid*, parts 2(f)-(g)
[73] *Ibid*, part 7(7).
[74] Memorandum from Devon Clunnis, Chief of Police WPS (11 November 2012).

R v Lee, a case heard by the Ontario Superior Court, involved the arrest and detention of Sang Eua Lee for impaired driving. At the police station, she was required to remove her bra in the presence of a male officer. At trial, the officer testified that he had been an officer for twenty-eight years, and that asking women to remove their bra was standard operating procedure in York Region. The judge ordered a new trial, and added that the systemic nature of the problem should be given consideration in any section 24(1) *Charter* analysis.[75]

Issues like this also exist in jurisdictions not examined in this paper. In *R v PFG*, a female Aboriginal youth was charged with public intoxication. The arresting officer asked her to remove her bra. At trial, the officer testified that this was the standard operating procedure of the Royal Canadian Mounted Police for anyone lodged in a cell. The trial judge, interpreting the search as a strip search, held the search violated the *Golden* principles, even though the officers were not searching for weapons or evidence.[76]

More recently, in *R v Deschambault*, a woman who was arrested for impaired driving was forced to remove her bra at the police detachment. When she refused, her bra was forcefully removed. As articulated in Justice Tompkins' decision:

> Constable Crocker testified that, while not policy, surrender of bras is standard operating procedure. Every woman placed in cells is required to remove her bra. The officers gave three reasons for this standard procedure:
>
> 1. The Detainee's safety: A woman might use the bra itself to commit suicide or otherwise harm herself or, if the bra is underwired, she might remove the wires and use them to harm herself. This requirement parallels, one officer testified, the requirement that people held in cells surrender their belts and shoelaces.
> 2. Weapons: The wire in an underwired bra might be used as a weapon against others or the woman might have weapons concealed in her bra.
> 3. Contraband: Contraband might be concealed in the bra.[77]

Justice Tompkins classified the search as a strip search and encouraged the police to take a fresh look at their policy, as it failed to meet the requirements opined in *Golden*.[78]

The second standard applied to the policies asked if police departments have incorporated the *Golden* principles into their policies. Ottawa, Peel, Vancouver, and Winnipeg were missing one or more of the *Golden* principles. This is an unfortunate omission, because the *Golden* principles ensure that a search is conducted in a reasonable manner. Policies should, at a minimum, reflect these principles.[79] Many of the policies adopt the Supreme Court of Canada's ruling in *Golden* verbatim. The problem is that the *Golden* principles are rhetorical questions, not answers. To include the question without the answer is counterintuitive. For example, *Golden* asks what the minimum force necessary to conduct a strip search is. Most policies include this verbatim, but it leaves the reader wondering what the minimum force to be used in conducting a strip search actually is. Is it less or more than another type of search? When is it appropriate? When is it unreasonable? To be effective, *Golden* principles must be more than procedural observations.

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[75] *R v Lee*, 2013 ONSC 1000 at para 47, 286 CRR (2d) 160. See also *R v Bouchard*, 2011 ONCJ 610, 250 CRR (2d) 359 (the accused was asked to remove her bra and the arresting officer testified that this is standard operating procedure. The trial judge excluded the evidence).
[76] *R v PFG*, 2005 BCPC 187 at paras 31–32, [2005] BCWLD 4814.
[77] *R v Deschambault*, 2013 SKPC 112 at para 58, 288 WCB (2d) 138.
[78] *Ibid* at para 76.
[79] *Golden*, *supra* note 4.

The third standard applied to the policies inquired if guidance is provided as to when and under what circumstance a strip search can be conducted. It is inadequate to simply state that strip searches can be conducted incident to lawful arrest, if the police officer has reasonable grounds. An important proviso in the *Golden* decision is that strip searches cannot be conducted as a matter of routine. These instructions should be included in all policies. Windsor lacks them entirely. Without providing a checklist of risk factors—which only the Toronto Police Service policy does—policies can lack transparency.

Yet, even checklists can be deficient and result in unreasonable searches, if not fully compliant with the *Golden* principles. As highlighted by Justice Cole in *R v SM*, the Toronto Police Service's checklist and policy fails to articulate that a detainee must not be completely naked when conducting a search.[80] In *R v SM*, a youth was strip searched naked. Justice Cole held that the search constituted egregious conduct and ordered a stay of proceedings. Thus, if the checklist does not comply with the *Golden* principles in their entirety, following a checklist can still render a search unreasonable.[81]

In addition, the court in *Golden* was explicit that a frisk search would often be sufficient to find weapons or contraband, yet this is rarely acknowledged. Combined with a lack of understanding of reasonable grounds for strip searching, this could facilitate a number of unlawful searches.

Special Constable Melanie Morris, one of the officers involved in *Bonds*, explained the impact that a lack of guidance has on police services.[82] Morris testified that officers are often left to their own devices and that the policies do not adequately address what to do when a woman needs to be searched, but no female officer is available to do so.[83] The policies also do not capture what to do in the circumstance of an uncooperative or belligerent person.[84] Her testimony is indicative of a greater problem: officers are still unsure of when and under what circumstances a strip search is appropriate. By omission or deliberate action, they are left to their own devices.[85] Evidence in other jurisdictions, including the United Kingdom, supports the notion that problems continue in the interpretation of reasonable grounds by police officers.[86]

The fourth standard analyzed the extent the policies are in tune with judicial reasoning, beyond the *Golden* decision. Notably, many of the policies have addressed how to conduct a strip search for individuals who identify as transgender.[87] However, the way standards established by the courts are operationalized continue to violate *Golden*. The following impaired driving cases elucidate this point.

In *R v McKay*, a sixty-one-year-old retired teacher was arrested for impaired driving, among other things.[88] She was brought back to the police detachment where it was decided that she would be held for a show cause hearing. As a result, she was strip searched.[89] Not satisfied

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[80] 2013 ONCJ 219 at para 32, 281 CRR (2d) 240.
[81] *Ibid* at para 49.
[82] Megan Gillis, "Ottawa Strip Search Policy Does Not Cover Violent Prisoners: Officer", *Sun News* (2 October 2012), online: Sun News Network <www.sunnewsnetwork.ca/sunnews/canada/archives/2012/10/20121002-150425.html>.
[83] *Ibid.*
[84] *Ibid*.
[85] *Ibid*.
[86] Ben Bowling & Coretta Phillips, "Disproportionate and Discriminatory: Reviewing the Evidence of Police Strip and Search" (2007) 70:6 Mod L Rev 936 at 938.
[87] *Forrester*, *supra* note 34 at para 4.
[88] 2013 ONCJ 298, 107 WCB (2d) 17.
[89] *Ibid* at para 33.

that the police had reason to hold Ms. McKay in the first place, Justice Greene went on to find that the strip search was conducted as a matter of routine policy, stating that "[t]he police were required to consider the personal circumstances [of the accused]".[90] In failing to do this, the police acted as a matter of routine policy. Justice Greene held that a stay of proceedings was the appropriate remedy.[91] He articulated frustration that more than ten years after the *Golden* decision, police departments are still conducting strip searches as a matter of routine:

> Given the obvious emotionally damaging impact of strip searches, it is an affront to the administration of justice when the members of the system hold such cavalier attitudes about strip searches thereby exposing detainees to unnecessary intrusions on their privacy. As noted in *Golden* it is important to prevent such invasive searches before they even occur (at paragraph 89). In my view, the police conduct in the case at bar does call into question the integrity of the justice system and a remedy of some weight is necessary.[92]

Similar sentiments have reverberated in other decisions. In *R v Auger*, the accused was arrested for impaired driving and brought back to the police station, where the officers conducted a strip search.[93] Similar facts in the Ontario case *R v Manuel* resulted in a stay of proceedings, after the accused was arrested for impaired driving and strip searched because he was staying in jail overnight.[94] Justice LeRoy found that the accused was arbitrarily detained and illegally strip searched.[95] While these cases were adjudicated in Edmonton and London respectively, cases decided in the applicable jurisdictions of this paper emphasize this point.

In *Carrion-Munoz*, the accused was charged with impaired driving.[96] She was strip searched at the police station on the basis that she would be held in a cell adjacent to other prisoners. Staff Sergeant Ruth, the Officer in Charge, was cross-examined on when a strip search could be conducted. She testified that the policy was not overly helpful and that the courts did not provide clear direction on the issue.[97] The trial judge held that the strip search was unreasonable, and that the *Charter* violation should be a mitigating factor at sentencing.

In *R v McGee*, Justice Grossman ordered a stay of proceedings.[98] The accused was arrested for impaired driving and strip searched. When Crown counsel asked the arresting officer why he conducted a strip search, he replied, "in my experience as not only a police officer, but also a correctional officer at one point, whenever a person is entering a facility and going to be housed with—by themselves or with other people in a cell scenario they're to be completely searched."[99] The trial judge held the arresting officer did not have reasonable and probable grounds to conduct the strip search, and this violated the accused's section 8 rights.[100] A stay of proceedings was also ordered in *R v Mok*. The accused was arrested for impaired driving and her bathroom activities were monitored. The trial judge relied on *Golden* and ordered a stay of proceedings.[101]

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[90] *Ibid* at para 74.
[91] *Ibid* at paras 74, 86.
[92] *Ibid* at para 85.
[93] 2012 ABPC 100 at paras 3, 5, 104 WCB (2d) 934.
[94] 2012 ONCJ 392, 102 WCB (2d) 378.
[95] *Ibid* at para 18.
[96] *Supra* note 40.
[97] *Ibid* at para 37.
[98] 2012 ONCJ 63, 252 CRR (2d) 355 [*McGee*].
[99] *Ibid* at para 71.
[100] *Ibid* at para 100.
[101] *R v Mok*, 2012 ONCJ 291, 258 CRR (2d) 232.

In *R v Melo*, the accused was arrested for impaired driving and strip searched.[102] The officer who carried out the search admitted she was aware of the Toronto Police Service policy, which requires reasonable grounds for a search. Despite the requirement, she was concerned that prisoners could be brought in from other divisions at any time, since 32 Division is a central lock up. As she stated, "[i]t's my personal policy. It's an unwritten policy. For me personally I search anybody to be lodged."[103] Justice Pringle held that: "[i]t's obvious to me that the strip search in this case had nothing to do with any grounds or concerns related to Mr. Melo. Rather the strip search was simply a matter of routine procedure for the officers."[104] As a result, the trial judge sentenced the accused to a fine of one dollar.

In *R v Nguyen*, Justice Green was critical of the arresting officer who arrested Mr. Nguyen for impaired driving.[105] Justice Green stated that the officer's reasons were:

> [I]nimical to the letter and spirit of *Golden* which, at minimum, commands a careful assessment of all the relevant factors in light of the intrusive invasions of privacy and personal dignity inevitably engaged by a strip search…the decision to strip search [was a] mechanical decision: the possibility of hidden drugs, he reasoned, requires a strip search. This decision—or, perhaps more importantly, the facile manner in which it was reached—complied with neither TPS policy nor constitutional imperatives. It reflected a myopic focus on a single factor that for Male appears to have been dispositive. This is not the case-by-case, particular-circumstances-of-the-case analysis directed by the Supreme Court. Nor is it properly responsive to the Court's caution, as earlier quoted, that, "the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search.[106]

An egregious section 8 violation occurred in *R v A(Z)*.[107] The accused, a youth, was arrested for failing to provide a breath sample. More than an hour after arriving at the station, the youth was stripped naked.[108] In the course of his interaction with police, AZ was charged with assaulting a police officer. When asked about how the experience made him feel, AZ stated: "I'm strip searched like that's—do you know how ashamed I was—like I never showed any of my private parts to a girl and I have to show it to an officer."[109] Justice Cohen stayed the charges. He found that the police did not have reasonable grounds to conduct a strip search, and the search was not carried out in a reasonable manner. In his reasons, Justice Cohen expressed the view that the strip search was carried out as a matter of routine policy.[110]

The case law suggests that systemic disregard or ignorance of the *Golden* principles persists. In all of these cases, judges were troubled by the apparent routine nature of a strip search. Given the number of stayed proceedings in one year, a revision of the policy by every Canadian police department may be necessary to remedy the confusion surrounding how to manage intoxicated persons. The court has overwhelmingly rejected strip searches on the basis that a person may come in contact with other prisoners. Courts are, instead, in favour of a case-by-case analysis of the situation. So far, this is rarely reflected in the policies.

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[102] 2012 ONCJ 765, 104 WCB (2d) 726.
[103] *Ibid* at para 25.
[104] *Ibid* at para 57.
[105] 2012 ONCJ 624, [2012] OJ No 4784.
[106] *Ibid* at para 38.
[107] 2012 ONCJ 541, 266 CRR (2d) 152 [*A(Z)*].
[108] *Ibid* at para 30.
[109] *Ibid*.
[110] *Ibid* at para 71.

A(Z) also elucidates the issues found in the fifth, and final, point of analysis conducted in reviewing the policies of eight Canadian police services: how strip searches are recorded. In light of the *Golden* decision, this process should be transparent. For a number of reasons, including inadequate note taking, the process for conducting a strip search remains unclear. In *A(Z)* the trial judge made specific mention of the officer's failure to take adequate notes.[111] Adequate records serve a dual purpose: to refresh an officer's memory if he or she ever has to testify, and to increase accountability. Many of the policies do not require officers keep a record of the search beyond their notebooks.

Insufficient records resulted in a number of successful *Charter* applications. In *R v Smith*, the trial judge stayed the charges on the basis that the police did not have reasonable grounds for a strip search, and the search was not conducted in a reasonable manner.[112] The trial judge was shocked by the lack of adequate records, and considered this to be a factor in her decision to stay the charges.[113] In the same year, Justice Rutherford stayed the impaired driving charges against an accused. While the Officer in Charge testified that he had authorized the search, he and his colleagues did not have any record of the event. The trial judge reasoned that a lack of note taking was indicative of a lackadaisical approach towards strip search practices. Justice Rutherford was particularly troubled by the glaring evidence that the search was authorized and carried out in a routine manner.[114]

This section explored the extent police departments have operationalized the *Golden* principles in Calgary, Montreal, Ottawa, Peel Region, Toronto, Vancouver, Windsor, and Winnipeg. The police policies in these jurisdictions were analyzed from five perspectives: how strip searches are defined, inclusion of the eleven *Golden* principles, guidance on how and when strip searches can be conducted, responsiveness to post-*Golden* jurisprudence, and methods of recording strip searches. The police policies and recent case law demonstrate a continued lack of understanding, or deliberate ignorance, of the *Golden* principles.

PART III: ISOLATED INCIDENT OR SYSTEMIC ISSUE?

The lack of data about when and under what circumstances a strip search should be conducted is a barrier to quantifying a strip search analysis post-*Golden*. Existing policies, in conjunction with academic writing and case law on the topic, indicate that systemic issues persist. As late as 2011, more than sixty percent of arrests in Toronto led to a strip search.[115] Other figures show that in 2010, eighty-five people were strip searched a day, an increase from 2009. Of those, only a third resulted in the discovery of evidence.[116] Professor Kent Roach, a leading scholar in criminal law, argues that police need clearer guidelines as to when and under what circumstances a strip search can be conducted.[117]

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[111] *Ibid* at para 43.
[112] 2010 ONCJ 137 at para 22, 37, 87 WCB (2d) 489.
[113] *Ibid* at para 29.
[114] *Mesh*, *supra* note 40 at para 30.
[115] Prithi Yelaja, "85 Police Strip Searches a Day 'Too High'", *CBC News* (19 August 2011), online: CBC/Radio Canada <www.cbc.ca/news/canada/85-police-strip-searches-a-day-too-high-1.1001576>.
[116] *Ibid.*
[117] *Ibid.*

The quantitative research is clear: the *Golden* principles are inconsistently applied.[118] Without a benchmark, it is hard to measure the systemic nature of a strip search, but without an accurate record of the number of strip searches that are conducted, a benchmark is nearly impossible.

A. Detained with Others: The New Routine

A number of cases post-*Golden* reflect concern that strip searches are still conducted as a matter of routine. In *R v Wilson*, the accused was arrested for impaired driving.[119] The accused could have been released on a promise to appear in court, but because no one could pick him up, he was detained at the station for a few hours. At trial, the arresting officer testified that it was standard procedure to strip search anyone lodged in a cell.[120] In response, the trial judge excluded breathalyser evidence, but did not stop there. Troubled by the fact that without the officer's spontaneous admission at trial, the court would not have been aware of the complete disregard of the *Golden* principles, Justice Baldwin recommended that the Halton Crown Attorney's Office screen police briefs related to strip searches, and that a copy of his reasons be sent to the Chief of Police.[121]

The public hearings related to the Toronto G20 Summit further demonstrate this point. In their report on the topic, the CCLA asserts that the scale and systemic nature of the seemingly illegal searches suggest a lack of constitutional protection in downtown Toronto.[122] According to the report, this contributed to the confrontational atmosphere between police and demonstrators.[123]

The impetus of the problem is hard to discern: is it deliberate disregard of the policies or a lack of clarity in the policies themselves?[124] It may be that *Golden* is still beholden to police discretion.[125] The issue could also be that the judiciary is an ineffective venue for establishing police accountability, and that it is Parliament, not the courts, who are better placed to ensure effective regulation of police powers.[126]

At the same time, the Supreme Court of Canada's involvement in outlining the source, scope, and limits of police authority increases the potential for dialogue between Parliament and

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[118] David M Tanovich, "*Bonds:* Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power" (2011) 79 Criminal Reports (6th) 132 at 139 [Tanovich, "*Bonds*"].
[119] 2006 ONCJ 434, 148 CRR (2d) 33.
[120] *Ibid* at para 22.
[121] *Ibid* at paras 56-59. See also *R v Drury*, 2004 BCPC 188 at para 72, [2004] BCJ No 1317 (stay ordered); *R v Padda*, 6 Admin LR (4th) 38, 64 WCB (2d) 550 (ONCJ); *McGee*, *supra* note 98 (stay); *R v Crocker*, 2011 BCSC 1361, 97 WCB (2d) 166; *R v Sarachandran* 98 WCB (2d) 505 at para 23, [2011] OJ No 6144; *R v Chowdhury*, 2009 ONCJ 478 at para 7, 85 WCB (2d) 16.
[122] National Union of Public and General Employees & Canadian Civil Liberties Association, *Breach of the Peace: G20 Summit: Accountability in Policing and Governance* (Ottawa: NUPGE & CCLA, 2011) at 30.
[123] *Ibid*.
[124] Craig B Futterman, Mellissa Mather & Melanie Miles, "The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department a Broken System" (2008) 1 DePaul J Social Justice 251.
[125] Debra Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing" (1997) 97 Colum L Rev 551 at 592.
[126] James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's LJ 1.

the Bench. This ensures that the larger purpose of the *Charter*—to safeguard individuals from abuses of state power—is actualized.[127]

The judiciary continues to act as an accountability mechanism through section 24 of the *Charter*. For example, the Supreme Court of Canada decision in *Ward v Vancouver* (*City)* has opened the door for civil litigation of *Charter* violations.[128] The extent that this promotes police accountability remains to be seen. Ultimately, a warrant requirement, as proposed by the CCLA in *Golden*, would address the concerns outlined above. First, it would place an appropriate limit on police discretion, by making a strip search *prima facie* unreasonable if conducted without a warrant. Second, Parliament's inclusion in the process would increase accountability.

B. Remedying Policies Themselves: Increasing Accountability

Other steps include remedying the shortcomings in the policies themselves, while also enhancing accountability using the short list of best practices proposed by Professor Samuel Walker, a police accountability expert.[129] These include:

> (1) A comprehensive use of force reporting system;
> (2) An open and accessible citizen complaint system;
> (3) An early intervention or warning system to identify potential problem officers; and,
> (4) Data collection.[130]

The most crucial first step towards accountability in Canadian police services is an emphasis on data collection, as this paper has found data collection to be an overwhelming deficiency in the policies. Courts across Canada have agreed that the lack of note taking on this issue is particularly troubling.[131]

Data collection is necessary because it will help identify the extent racialized communities in Canada are disproportionately strip searched.[132] *Golden* was not simply a case about strip searches, but one of the few cases to address the disproportionate impact of police misconduct on marginalized segments of society.[133] Reports, academic articles,[134] and *Bonds*[135] collectively indicate this is a persistent problem. Thus, improving data collection is not simply about upholding section 8 *Charter* rights, but ensuring equal treatment before the law.

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[127] *Ibid* at 6.
[128] 2010 SCC 27, [2010] 2 SCR 28.
[129] Samuel Walker, *The New World of Police Accountability* (California: Sage Publications, 2005) at 6-7.
[130] *Ibid* at 5.
[131] See e.g. *A(Z) supra* note 107.
[132] Tanovich, "*Bonds*", *supra* note 118.
[133] David Tanovich, "Ignoring the *Golden* Principle of Charter Interpretation" (2008) 42 SCLR (2d) 441.
[134] April J Walker, "Racial Profiling –Separate and Unequal Keeping the Minorities In Line- The Role of Law Enforcement in America" (September 2009), online: Selected Works <www.works.bepress.com/april_walker> ("current legal doctrine seems to condone police brutality and makes individual acts appear isolated, aberration, and acceptable rather than part of a systemic pattern of official violence" at 8); Louise Westmarland, "Blowing the Whistle On Police Violence" (2001) 41 Brit J Crim 523; Quebec, Commission des Droits de la Personne et des Droits de la Jeunesse, *Racial Profiling and Systemic Discrimination of Racialized Youth* (Quebec: CDPDJ, 2011) ("I grew up in Montreal. I don't shout racism all the time. But it happens. I tell my children to be careful, and to be polite to the police" at 3); Peter Kraska & Victoria E Kappeler, "To Serve and Pursue: Exploring Police Sexual Violence Against Women" (1995) 12 Justice Q 85.
[135] Tanovich, *"Bonds*", *supra* note 118.

One of the few quantitative studies dealing with police misconduct and race was conducted by the University of Chicago Law School. According to the study, Chicago Police Department data suggests that officers focus on particular victims within low-income African-American and Latino communities.[136] The study exposed deliberate indifference on the part of the Chicago Police Department to police misconduct. Improved data collection by Canadian police services will increase transparency, and protect against unreasonable and illegal strip searches.

A lack of effective data prevents organizations from identifying problems. When problems are ascertained, police services across Canada will be able to directly address these issues. As police services become more accountable for strip searches, the result will be improved compliance with the *Golden* principles. While the judiciary has played—and continues to play—an important role in ensuring *Charter* compliance of strip searches, police services must also recognize their role.

CONCLUSION

The *Golden* decision has not been realized. *Bonds* and *Darteh* raise two concerns: current strip search polices are ineffective at operationalizing *Golden*, and strip searches continue to disproportionally impact women and racialized communities.[137] For systemic issues to be remedied, it is imperative that illegal strip searches be viewed not simply as the conduct of "rotten apples" but as a symptom of a "rotten barrel".[138]

The landmark decision in *Golden* provided clear guidelines and limitations on the common law doctrine of search incident to arrest.[139] Judicial oversight succeeded in encouraging a more professional and accountable police force, as evidenced by policies that attempt to codify the decision. The judiciary remains active in a number of ways, but effective accountability requires a holistic approach, including organizational change by police services across Canada. Illegal strip searches undermine the integrity of our judicial system. Effective police accountability is not simply a legal issue, but an integral measure of a healthy democracy.

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[136] Futterman, Mather & Miles, *supra* note 124 at 283.
[137] Tanovich, *"Bonds*", *supra* note 118.
[138] Walker, *supra* note 129 at 3-4.
[139] Eric V Gottardi, "The *Golden* Rules: Raising the Bar Regarding Strip Searches Incident to Arrest" (2002) 47 Criminal Reports (5th) 48.

TAKING (JUDICIAL) NOTICE OF WORKPLACE PRECARITY: SINGLE MOTHERS AND THE RIGHT TO CHILDCARE ACCOMMODATION

Craig Mazerolle*

Familial relationships have been a growing topic of interest for human rights jurisprudence in the employment context. While lone-parent families are far from unique, courts and tribunals have yet to comprehensively address the interaction of family status discrimination and the childcare needs of lone-parent families. Using a feminist and historical framework, this paper analyzes the growing field of law concerning childcare accommodation and working parents. I argue that, by crafting jurisprudence within the context of two-parent households, courts and tribunals risk inadvertently silencing the unique childcare issues of lone-parent families, especially those families led by single mothers. To better address these issues, lawyers must encourage courts to issue judicial notice of the interaction between lone-parent families, gender, and precarious work.

A PERSONAL PERSPECTIVE

Maria Menendez[1] worked for many years cleaning one of Toronto's glass-covered condominium buildings. Beginning at 8:30 am and ending just before dinnertime, Maria would clean several floors and lobbies of this busy downtown building before heading off to her son's suburban daycare centre. The schedule was tight, but her employer, Clean Lines Janitorial Services, never had any issues with the quality of her work.

Maria was left in a state of shock when her supervisor took her aside one Monday morning to discuss a letter that had been sent from head office. The letter, sent by the company president, informed her of scheduling changes. For Maria, this meant that she would be taken off the day shift and moved to the night shift. There was no explanation for the scheduling change, and her supervisor could not explain why she was taken off a shift she had successfully worked for so many years. There would be no change in pay or total hours, but the new start time meant an end to her carefully crafted childcare schedule.

After receiving the letter, Maria excused herself to the staff washroom, and immediately had a panic attack. The panic attack became so intense that a fellow co-worker had to rush her to a nearby hospital. The doctors decided to keep her overnight to ensure that her condition did not worsen. She would later describe this overnight stay as one of the loneliest moments of her life.

Maria went into work the following day and informed her supervisor that she could not continue to work with Clean Lines if the president insisted she be on the night shift. The company refused to change the schedule, and Maria was subsequently fired.

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[1] Biographical details have been altered to protect the identity of the actual client. This paper is dedicated to her.

When Maria first came in to see me at Parkdale Community Legal Services, we attempted to resolve the issue by filing a claim under the Ontario *Human Rights Code*[2], using the protected ground known as "family status". Family status is defined in the *Code* as "the status of being in a parent and child relationship".[3] Familial relationships have been a growing topic of interest for human rights jurisprudence in the employment context. However, as my case law research soon revealed, relevant jurisprudence to Maria's circumstances was unexpectedly absent from a growing collection of court and tribunal decisions.

Dramatic scheduling changes can be detrimental to any working parent. But, as a "lone-parent family",[4] Maria and her son get by with little help from an absent father; Maria's inability to negotiate alternative childcare arrangements with a spouse adds another layer of stress to an already precarious work-life balance. While the Menendez family arrangement is far from unique, courts and tribunals have yet to comprehensively address the interaction of family status discrimination and the childcare needs of lone-parent families.

The seemingly common facts of Maria's story highlight a jurisprudential silence. If judges and adjudicators are not sensitive to the needs of lone-parent families, especially those led by single mothers, workplace accommodations will be out of reach for an already marginalized group. The practice of divorce required explicit judicial intervention to give voice to the feminization of poverty and the traditional family structure. A similar pronouncement is needed to ensure that employment law's regulation of domestic affairs does not perpetuate patterns of female poverty and precarity. I argue that lawyers must push for judicial notice of the interaction between lone-parent families, gender, and precarious work arrangements.

THE *ONTARIO HUMAN RIGHTS CODE* AND CHILDCARE ACCOMMODATIONS

Considering the threshold that must be met to access childcare accommodations under the *Code*, the absence of case law relating to the childcare needs of lone-parent families is glaring. The current test requires the applicant demonstrate that they made reasonable efforts to self-accommodate a substantial childcare need, before asking the employer for help. If both self-accommodation and substantial need is proven, the applicant is able to claim workplace accommodation up to the point of undue hardship. While the test may seem comparatively innocuous, by allowing this jurisprudence to develop through the lens of two-parent families, the threshold of reasonable efforts may be too high for single parents. This standard is particularly concerning for women, who head up a disproportionate number of Canada's lone-parent households.[5]

Women, Precarity, and Lone-Parent Families

Of the twenty employment law files that I managed during my time at Parkdale Community Legal Services, twelve of the clients were women.[6] Though often spoken about in passing, these workers would occasionally reflect on their role as women in the workplace. Some

[2] RSO 1990, c H.19 [*Code*].
[3] *Ibid*, s 10(1).
[4] Statistics Canada, *Fifty years of families in Canada: 1961 to 2011*, Catalogue No 98-312-X2011003 (Ottawa: Minister of Industry, 2012) at 2 (lone-parent families now make up 16.3% of all family units, a near doubling in size since the early 1960s).
[5] *Ibid*.
[6] The other student caseworkers in the clinic's Workers' Rights Division had similar percentages of female clients.

would speak about the stress of raising children while unemployed. Others would discuss the explicit gendering of workplace tasks. There were also stories of husbands and boyfriends whose heavy workloads required the uncompensated labour of my female clients. Their experiences as women in the workplace were as diverse and complex as the clients themselves, but the one common theme was intense and pervasive precarity in the workplace. All of my clients worked in low wage, temporary positions that provided little to no benefits or job security. Whether it was cleaning high-rise buildings, taking care of children, or working contract to contract for a fly-by night company, these jobs provided little in the way of financial or social stability.

As a student caseworker managing files in a poverty law clinic, it is perhaps unsurprising that my files gave witness to the conflux of gender and precarious work. Yet, the women I worked with are by no means aberrations in Canadian society. In 2008, forty percent of all female workers in Canada were employed under the so-called "non-standard work arrangements" that typify precarious work.[7] Only thirty percent of working men filled similar positions.[8] This ratio is higher in Ontario, where women perform seventy-two percent of all permanent, part-time jobs.[9] The disparity is even higher for racialized women.[10]

Precarious work may manifest itself in any number of ways. The Law Commission of Ontario has developed a useful definition for precarious work:

> Precarious work is characterized by lack of continuity, low wages, lack of benefits and possibly greater risk of injury and ill health. It is often compared to "standard" employment which is long-term with one employer in a single location with good benefits during and after the working period, increasingly subject not only to minimum statutory protections but also to greater protections through collective bargaining or individual negotiation.[11]

Beyond comparatively lower levels of wages and benefits, precarious work tends to involve lower skilled sectors of the economy, such as, food service, accommodation, and personal care.[12] Such low-skill positions offer limited opportunity for job training and advancement, an arrangement that means "workers frequently become trapped in less secure, low paying positions."[13]

Women's traditional role as the family's primary caregiver has worked to reinforce the over-representation of women in low-skill, precarious work. While a breadwinning father is likely encouraged to develop valuable skills in the labour market, a mother's domestic skills are

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[7] Monica Townson, *Women's Poverty and the Recession* (Ottawa: Canadian Centre for Policy Alternatives, 2009) at 17 (the report also classifies multiple jobs as a "non-standard work arrangement").

[8] *Ibid*.

[9] Law Commission of Ontario, *Vulnerable Workers and Precarious Work*: *Final Report* (Toronto: December 2012) at 19 [LCO Final Report].

[10] Sheila Block & Grace-Edward Galabuzi, *Canada's Colour Coded Labour Market: The Gap for Racialized Workers* (Ottawa: Canadian Centre for Policy Alternatives & The Wellesley Institute, 2011) at 15; Cheryl Teelucksingh & Grace-Edward Galabuzi, *Working Precariously: The Impact of Race and Immigrants Status on Employment Opportunities and Outcomes in Canada* (Canadian Race Relations Foundation, 2005) at 4.

[11] Law Commission of Ontario, *Vulnerable Workers and Precarious Work: Background Paper* (Toronto: December 2010) at vi.

[12] *Supra* note 9 at 18.

[13] *Ibid* at 114. See also Block & Galabuzi, *supra* note 10 at 17 (This ability to make workers feel both professionally trapped and yet uncertain of what tomorrow will bring has been linked to high levels of depression and exhaustion); Wayne Lewchuk et al, "From Job Strain to Employment Strain: Health Effects of Precarious Employment" (2003) 3 Just Labour 23 at 24.

likely to fill similar domestic positions when she is required to find paid employment.[14] As Professor Joan Sangster highlighted in her work on pregnant flight attendants and organized labour, gendered notions of women's work, based on traditional conceptions of mothers, have regulated women's employment.[15]

The negative effects of "occupation segregation"[16] and workplace precarity are only further exacerbated when one considers women in lone-parent families. Of Canada's over 1.5 million lone-parent families, women lead almost eight in ten households.[17] Even after decades of improving poverty rates, lone-parent, female-led families still rank among the poorest groups in the country.[18] In fact, these households are five times more likely to fall into poverty than families with two-parents.[19] In their report on the effects of the Great Recession on women's economic well-being, the Centre for Canadian Policy Alternatives connected high rates of single mother poverty with the high rate of precarious work. The report discusses how:

> Differences in low-income rates between female and male lone parents may be partly attributable to differences in the incidence of non-standard work arrangements and thus in earnings…Data from the 2001 Census indicate that 71.1% of lone mothers were employed, and, of these, 60.8% were working mostly full-time, while 17.1% were working mostly part-time. In contrast, 82.0% of lone-parent fathers were employed in 2001, of whom 83.6% worked mostly full-time while 5.7% worked mostly part-time.[20]

FAMILY STATUS JURISPRUDENCE AND CHILDCARE ACCOMMODATION

A lack of affordable and available childcare options is a symptom and cause of poverty in lone-parent families.[21] This tension between childcare needs and precarious work schedules has led some parents and lawyers to view the issue through the lens of employment accommodation and human rights law. Recent news articles have identified that the protected ground of family status under the *Code* is being used to argue for scheduling accommodations that consider family obligations.[22] While family status discrimination was generally used to address hiring practices

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[14] *Supra* note 7 at 20; *supra* note 9 at 20. See also Jack L Knetsch, "Some Economic Implications of Matrimonial Property Rules" (1984) 34:3 UTLJ 263.

[15] Joan Sangster, "Debating Maternity Rights: Pacific Western Airlines and Flight Attendants' Struggle to "Fly Pregnant" in the 1970s" in Judy Fudge & Eric Tucker, eds, *Work on Trial: Canadian Labour Law Struggles* (Toronto: Irwin Law, 2010) 283 at 285-86.

[16] Townson, *supra* note 7 at 20.

[17] Statistics Canada, *Portrait of Families and Living Arrangements in Canada*, Catalogue No 98-312-X2011001 (Ottawa: Minister of Industry, 2012) at 3, 6.

[18] *Supra* note 7 at 7. Rates of poverty for lone-parent families have been improving over the past two decades, but almost 20% of all lone-parent families still live in poverty, as opposed to 5.1% of two-parent families, Citizens for Public Justice, *Poverty Trends Scorecard: Canada 2012* (Citizens for Public Justice, 2012) at 13, online: <www.cpj.ca/files/docs/poverty-trends-scorecard.pdf>.

[19] *Supra* note 7 at 6-7 (the average household income of a female-led, lone-parent family is about $7,500.00 less than Statistics Canada's Low Income Cut-Off).

[20] *Ibid* at 20.

[21] *Ibid*; Grace Park, *Gender, Poverty, and Access to Justice: An Ethnographic Approach to Defining Legal Aid Needs* (LLM Thesis, York University, Faculty of Graduate Studies, 2010) at 67 [unpublished].

[22] See e.g. Laurie Monsebraaten, "Canada Border Services Agency Discriminated Against Employee When it Refused to Accommodate Employee's Child-Care Request, Court Rules", *The Toronto Star* (4 February 2013), online: <www.thestar.com/news/canada/2013/02/04/canadian_border_services_agency_discriminated_against_employee_when_it_refused_to_accommodate_employees_childcare_request_court_rules.html>; Chris Rootham, "Treating

that penalize workers with children, this new line of jurisprudence looks at the way scheduling policies have become a subtle and systemic barrier for workers with children.

A. Initial Split in the Jurisprudence

Recent academic interest in family status jurisprudence and childcare accommodation stems from the divergence between two of the early and foundational cases on the matter: *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*[23] and *Johnstone v Canada (Attorney General*)[24].

Campbell River is the first appellate level decision to address the issue of family status discrimination and childcare accommodation.[25] The case involved a work schedule that made it impossible for the applicant to care for her children's unique needs. The British Columbia Court of Appeal found the schedule to be a discriminatory barrier to workplace participation.[26] On behalf of the applicant, the union asked the court to follow the holdings in *Brown v Department of National Revenue (Customs and Excise)*[27] and *Woiden v Lynn*[28], two earlier human rights cases that found family status discrimination on what appeared to be similar facts.

While the applicant was successful in her appeal, the court opted for a more restricted view of family status discrimination than that proposed by the union. Writing for a unanimous Court, Justice Low found the previous rulings underdeveloped and grounded in a definition of family status that was overly broad and vague.[29] The court held a *prima facie* finding of family status discrimination could only be found when "a change in a term or condition of employment *imposed by an employer* results in a serious interference with a substantial parental or other family duty".[30] This test for family status discrimination meant that a parent would have to demonstrate a serious infringement of a unique childcare need, and show that the harm was caused by a change brought on by the employer.

Johnstone, 2007 would eventually question the need for such a restrictive framework. *Johnstone*, 2007 involved a mother who was unable to balance the needs of her children and the scheduling requirements of her employer. Here, the disruption was caused by a change within the applicant's family, instead of by an employer.[31] Rather than require the applicant show a detrimental change prompted by the employer, the Federal Court agreed with the application's argument. The court held,

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Parents Right: Flexibility is Key in Accommodating Family Status", *Ottawa Life* (5 December 2013), online: <www.ottawalife.com/2013/12/treating-parents-right-flexibility-is-key-in-accommodating-family-status>; Emond Harden LLP, "Family Status Issues in the Workplace", *Ottawa Life* (6 December 2013), online: <www.ottawalife.com/2013/12/family-status-issues-in-the-workplace>; "Employers Told They Must Accommodate Staff's Child-Care Requests", *Canadian Press* (5 February 2013), online: CBC News <www.cbc.ca/news/canada/employers-told-they-must-accommodate-staff-s-child-care-requests-1.1315953>.

[23] 2004 BCCA 260, 240 DLR (4th) 479 [*Campbell River*].

[24] 2007 FC 36; 306 FTR 271 [*Johnstone*, 2007].

[25] Recent treatments of the case seem to disregard the case's jurisdictional stature, see e.g. *Seely v Canadian National Railway*, 2013 FC 117 at paras 79-81, 426 FTR 258 [*Seely*].

[26] *Supra* note 23 at para 40 (these needs included caring for a child with Tourette's Syndrome and Attention Deficit Hyperactivity Disorder: treatment that required adherence to a very tight and stable schedule).

[27] (1993), 19 CHRR D/39, 93 CLLC para 17,013.

[28] 43 CHRR D/296, 2003 CLLC 230-005.

[29] *Supra* note 23 at para 35.

[30] *Ibid* at para 39 [emphasis added].

[31] *Supra* note 24 at para 3.

> [T]o limit family status protection to situations where the employer has changed a term or condition of employment is unduly restrictive because the operative change typically arises within the family and not in the workplace (eg. the birth of a child, a family illness, etc.). The suggestion by the Court in *Campbell River*, above, that *prima facie* discrimination will only arise where the employer changes the conditions of employment seems to me to be unworkable and, with respect, wrong in law.[32]

In addition to finding error in the employer-focused model of discrimination, the court also took issue with the "serious interference" standard endorsed in *Campbell River*:

> There is no discretion, and no degree or level of discrimination which must be suffered by a complainant to obtain the protection of the *CHRA*. Thus, the fact that the Applicant was adversely affected by the Respondent's policy is sufficient to establish a prima facie case of discrimination, and, by applying a higher standard to the ground of family status in its decision, the Commission erred in law.[33]

The difference between the standards in *Campbell River* and *Johnstone*, 2007 is stark. The narrow treatment in *Campbell River* requires a high level of interference with childcare obligations. On the other hand, *Johnstone*, 2007 suggests that any non-trivial interference between one's family life and career will amount to *prima facie* discrimination. The different standard of interference is significant when demonstrating harm to the applicant. A lower level of interference also creates a correspondingly lower threshold to meet when showing self-accommodation.

B. Testing and Finessing the Divide

The first major case to examine this jurisprudential divide was *Re Power Stream Inc and International Brotherhood of Electrical Workers (Bender et al)*.[34] The case involved a group of employees who were denied childcare accommodations after an employer-driven change in scheduling. In addressing the issue of family status, Arbitrator Jesin found that *Campbell River* was too restrictive and that *Johnstone*, 2007 did not provide a workable alternative.[35]

Arbitrator Jesin instead proposed a more contextual analysis. The analysis would determine if an applicant had made reasonable attempts at limiting adverse childcare effects from a workplace *or* family change. For instance, after disposing with the respondent's claim that one of the applicants should have relocated before claiming discrimination, Arbitrator Jesin stated that the employer would have been justified in requiring the employee demonstrate investigations into alternative childcare arrangements.[36]

This imposes a non-trivial duty to self-accommodate, a level of reasonable efforts that is closer to *Campbell River* than *Johnstone*, 2007. While the Federal Court in *Johnstone*, 2007 seemed hesitant to use the language of "choice" when determining the appropriateness of a parent's desired childcare arrangement, Arbitrator Jesin had no such qualms:

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[32] *Ibid* at para 29.
[33] *R v Johnstone*, 2007 FC 36 (Memorandum of Johnstone at para 38) [emphasis added].
[34] (2009), 186 LAC (4th) 180, 99 CLAS 93 [*Power Stream* cited to LAC].
[35] *Ibid* at 197-98.
[36] *Ibid* at 202.

> Nor should employees expect their employer to accommodate every such characteristic [of family status]. Employees can and do make accommodations to meet the needs of their employer so that they can work for themselves and their families. Those accommodations include their choice of accommodation, choice and degree of child care, and choice of what kind of jobs to accept.[37]

Power Stream involves one of the few applicants in the case law whose status as a lone-parent is identified and explored. To contrast with lone-parent families, like Maria Menendez's, who do not have the aid of a former spouse, this applicant was successful in negotiating a custody-sharing agreement. While Arbitrator Jesin did not thoroughly explore issues present in separated families, he did recognize the need to protect custody agreements. Arbitrator Jesin held that, "a change in a workplace rule which forces parents to alter a carefully constructed custody agreement to their detriment in order to accommodate that workplace rule may be found to be discriminatory."[38]

C. Tipping the Scales towards the Employee

The most recent and expansive interpretation of family status accommodation occurred when the same family from *Johnstone*, 2007 made their way back to the Federal Court in *Johnstone v Canada (Border Services)*.[39] In upholding the Canadian Human Rights Tribunal's finding of discrimination and inadequate accommodation, Justice Mandamin also agreed with the tribunal's use of a lower standard for childcare interference:

> The Tribunal acknowledged that 'not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence'. In my view the childcare obligations arising in discrimination claimed based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations. However, this requirement does not constitute creating a higher threshold test of serious interference [as used in *Campbell River*].[40]

By questioning the efficacy of the *Campbell River* model, Mandamin J proposed that family status discrimination would be made out when an "employment rule interferes with an employee's ability to fulfill her *substantial parental obligations in any realistic way*".[41]

This new articulation differs from both *Campbell River* and *Johnstone*, 2007. First, Mandamin J replaced *Campbell River*'s "serious interference" test with the threshold of "interferes…in any realistic way". This new standard reduces the employee's burden of demonstrating harm, and lowers the threshold of demonstrated efforts to self-accommodate. Second, while *Johnstone*, 2007 shied away from the question of what constitutes a "substantial parental duty or obligation", *Johnstone*, 2013 provides a definition, equating substantial parental duty with the threshold used for religious discrimination in *Syndicat Northcrest v Amselem*.[42]

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[37] *Ibid* at 201 [emphasis added].
[38] *Ibid* at 204.
[39] 2013 FC 113, 357 DLR (4th) 706 [*Johnstone*, 2013].
[40] *Ibid* at para 120.
[41] *Ibid* at para 129 [emphasis added].
[42] *Ibid* ("In Amselem the Supreme Court of Canada ruled that a person's freedom of religion is interfered with where the person demonstrates that he or she has a sincere religious belief and a third party interfered, in a manner that is non-trivial or not insubstantial, with that person's ability to act in accordance with the belief. The phrase 'a

Considering the Supreme Court of Canada in *Amselem* held that religious discrimination can be established without intense judicial investigations into religious authenticity,[43] this comparison appears to instruct future courts and tribunals to avoid deep questioning of "authentic" parental needs.

While *Johnstone*, 2013 shifts from the expansive—albeit, vague—treatment of family status discrimination in *Johnstone*, 2007, the judgment is still sympathetic to the needs of working parents. The divide between the restrictive test in *Campbell River* and the very accommodating standard in *Johnstone*, 2007, has been replaced with a tighter, somewhat employee-friendly divide. The debate is now between a model of equal employer-employee responsibilities in *Power Stream* and Mandamin J's model that tips the scales in favour of employees.

The test for establishing *prima facie* family status discrimination was recently examined at the Federal Court of Appeal.[44] Though maintaining much of the lower court's decision,[45] in *Johnstone v Canada*, the Federal Court of Appeal clarified some persistent issues in the case law.[46] Of interest is the court's conception of family status discrimination as a mirror of the other protected grounds.

One of the Federal Court of Appeal's most important clarifications involved the concept of parental obligation.[47] Focusing on the immutable nature of other protected grounds in the *Canada Human Rights Act*[48], the court held the legal responsibilities set out in the *Criminal Code*[49] and provincial child welfare statutes are the immutable aspect of the parent-child relationship. Since other protected grounds are understood as the inability or high personal cost of removing a protected characteristic, a parent's legal obligation to supply childcare is similarly immutable. While the case provides necessary guidance, it seems likely provincial appellate courts will continue to debate the extent that family status discrimination can be compared to other protected grounds.

D. Growing Space for a Contextual Analysis

Mandamin J's recent family status case law shows how a contextual analysis of family status discrimination, giving voice to lone-parent struggles, can be achieved. In *Seely*, a decision released days after *Johnstone*, 2013, Mandamin J concluded that judges and other adjudicators should ask the following questions when deciding issues of family status discrimination:

a) does the employee have a substantial obligation to provide childcare for the child or children; in this regard, *is the parent the sole or primary care giver*, is the obligation substantial and one that goes beyond personal choice;

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substantial parental duty or obligation' equates with and establishes the same threshold as a sincere religious belief" at paras 126-27); 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

[43] *Ibid* at para 51.

[44] *Canada (Attorney General) v Johnstone*, 2014 FCA 110, 372 DLR (4th) 730.

[45] The Court of Appeal did overturn several remedial findings from the lower court. These changes are immaterial to the present discussion.

[46] *Johnstone*, 2013, *supra* note 39.

[47] *Supra* note 44 at paras 68-74.

[48] RSC 1985, c H-6.

[49] RSC 1985, c C-46, s 215(1).

b) are there realistic alternatives available for the employee to provide for childcare: has the employee had the opportunity to explore and has explored available options; and is there a workplace arrangement, process, or collective agreement available to the employee that may accommodate an employee's childcare obligations and workplace obligations;
c) does the employer conduct, practice or rule put the employee in the difficult position of choosing between her (or his) childcare duties or the workplace obligations?[50]

The first question requires the decision-maker consider if the employee's childcare obligations are "substantial". This decision is made in consideration of the parent's role as either "sole or primary care giver", as well as through the notion of personal choice.[51]

To support this, Mandamin J cites *Power Stream* and the individualized investigations used therein to determine whether discrimination had been made out.[52] Individualized assessments appear to run counter to the hands-off investigation of childcare obligations proposed in *Johnstone*, 2013. However, given Mandamin J's desire to craft employee-friendly jurisprudence, one can surmise that "substantial childcare obligation" refers to the needs of the child, and the potential for alternative, self-accommodating childcare choices. While it may be simpler for parents to rely on the hands-off approach of discretion when showing the needs of a child, an individualized assessment may be more helpful to demonstrate the reasonable options of self-accommodation.

THE LAW OF DOMESTIC AFFAIRS AND JUDICIAL DISCRETION

By creating case law that is responsive to the needs of all parents, Mandamin J's recent judgments present an opening for lone-parent families to be heard. However, without an explicit investigation and articulation of lone-parent concerns, this important family-focused jurisprudence will be left to the whim of individual judges and adjudicators.

The pitfalls of wide discretion in the legal regulation of domestic affairs have been a topic of study and concern throughout the twentieth century.[53] The present abundance of discretion in domestic affairs is part of an intentional, historical shift away from the rigidity of nineteenth century legal doctrines. This shift is now viewed by some as going too far.[54]

Former justice of the Supreme Court of Canada, Justice Estey, expressed similar concerns in his dissent in the family law case, *Leatherdale v Leatherdale*:

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[50] *Supra* note 25 at para 78 [emphasis added].
[51] See *Falardeau v Ferguson Moving and Others*, 2009 BCHRT 272, [2009] BCWLD 8124 (this case involved a lone-parent father that was attempting to balance childcare needs with his job as a mover. Even though his status as a single father was briefly discussed when the Tribunal was laying out the facts of the case, they did not explicitly factor his marital status into their ultimate decision to deny family status discrimination).
[52] *Seely*, *supra* note 25 at para 81.
[53] Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5 Can J Fam L 15 (Professor Bala cites the emergence of the pejorative term "palm tree justice" from 1950s British family law cases as evidence of this long-standing consternation). See also *Pettkus v Beecker*, [1980] 2 SCR 834, 19 RFL (2d) 165 (the term was also used in Cairns LJ's dissent in the famous Canadian family property case); Edward W Cooey, "The Exercise of Judicial Discretion in the Award of Alimony" (1939) 6 Law & Contemp Probs 213 (For an early 20th-Century example of this discretion scholarship); Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003) at 282.
[54] Bala, *supra* note 53 at 34.

> One of the hallmarks of family law is the broad discretion vested in trial judges to resolve individual disputes in accordance with very general principles. Inevitably when judges are guided only by the vague standards embodied in these principles, they will be greatly influenced by their personal values, experiences and assumptions…Although judicial discretion can never be eliminated, especially in family law, it must be structured so as to make the outcome of litigation more predictable.[55]

In recognizing the needs of lone-parent families to have their voices heard, as well as the tendency of personal experiences and assumptions to influence the discretion of the judiciary, it is important for lawyers and their clients to present a strong and explicit story of these struggles. Judges and adjudicators must understand how Canada's 1.5 million lone-parent families live, struggle, and thrive in this country. While family law and family status jurisprudence may carry unique assumptions and histories, the overlapping regulation of domestic affairs allows comparisons to be made and lessons to be learned. In the next section, I investigate the perils of discretion and domestic affairs by analyzing the history and reform of the *Divorce Act.*

A. A Brief History of the *Divorce Act* in Canada

Legal divorce did not begin in Canada with the introduction of a comprehensive, federal *Divorce Act*.[56] Judges in most common law provinces possessed the power to terminate marriages on account of adultery, with Nova Scotia also allowing judges to terminate marriages on the basis of cruelty.[57] The legislation's main reform involved the expansion of this judicial power by allowing "marital breakdown" to form a ground of divorce, or legal separation by way of general relationship breakdown. Other grounds for divorce were introduced alongside adultery and marital discord.[58] The *Divorce Act* made the practice of legal separation mainstream, through an expanded and nationally uniform framework for separation.

The *Divorce Act* dramatically changed the nation's perception and practice of divorce, but it was not without flaws. Problems with the legislation included: the adversarial nature of marital offences, a lack of judicial knowledge and efficiency in the realm of family law, and the treatment of children in the system.[59] The Law Reform Commission of Canada's landmark report, *Report on Family Law*, proposed a series of reforms to these issues, namely the elimination of the marital offenses system,[60] and the creation of courts that would have exclusive jurisdiction over family law matters.[61] This latter reform would only come to pass in a few Canadian cities.[62] But the replacement of the marital offence model would eventually form the backbone of Parliament's 1985 reforms to the *Divorce Act*.[63] Currently, divorces are granted

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[55] [1982] 2 SCR 743 at 772, 142 DLR (3d) 193.
[56] SC 1967-68, c 24.
[57] *Report of the Special Joint Committee of the Senate and House of Commons on Divorce* (June 1967) at 102 (Joint Chairmen: AW Roebuck & AJP Cameron) (wealthy and well-connected families could also appeal to the Canadian Parliament for a legal divorce. An act of Parliament was the only way that couples in Quebec and Newfoundland were able to obtain a legal separation before the passage of the *Divorce Act*).
[58] These additional grounds included: abandonment, homosexuality, the national expansion of cruelty, etc.
[59] Law Reform Commission of Canada, *Report on Family Law* (Ottawa: LRCC, 1976) at 7-8 [*Report on Family Law*].
[60] *Ibid* at 7, 13.
[61] *Ibid* at 7.
[62] Parliamentary Information and Research Service, *Divorce Law in Canada* by Kristen Douglas (Library of Parliament, 2008), online: <www.publications.gc.ca/collections/collection_2009/bdp-lop/cir/963-2e.pdf>.
[63] *Divorce Act*, RSC, 1985, c 3, 2nd Supp.

when a spouse can demonstrate marital breakdown has taken place.[64] By eliminating the need to prove an offence, the system also allows couples to file joint applications that encourage pre-emptive negotiations over children and shared financial responsibilities.[65]

In addition to the procedural fairness and efficiency of divorces, the *Report on Family Law* addressed the substantive issue of economic disparity between spouses. Best typified by the unfortunate case of *Murdoch v Murdoch*,[66] the Law Reform Commission of Canada saw a clear divide between the legal conception of divorce and the lived experience of former spouses:

> The present legal framework for dealing with questions of property and the maintenance of a needy spouse simply does not accord with social reality today. Traditionally…the law has not considered the work of the homemaker as a contribution to, or as having anything to do with the acquisition of property in marriage; equally it did not foresee that women could be independent and responsible for their own lives… The law therefore cannot be fixed but must have room to evolve creatively, allowing men and women to define their own roles within marriage, supporting rather than confining individual choices.[67]

Provincial property-sharing legislation would later remedy some of these economic inequalities. At the federal level, the gendered nature of poverty after divorce remained a pressing issue until 1985. With a belief that enumerated objectives would guide judicial discretion towards economic equality, Parliament amended the *Divorce Act* to include four basic objectives for determining spousal support orders.[68] While the federal political parties agreed on the need for some kind of enumerated guidelines, there were serious questions about the content and vagueness of the objectives being proposed.[69]

Yet, none of the guidelines evoked as much debate as the inclusion of "economic self-sufficiency" in the *Divorce Act*. This controversy is best evidenced by the Attorney General's need to explicitly assuage fears in the House of Commons:

> The legislation will not impose hardship on those that cannot attain economic self-sufficiency. If…we were to discover that, contrary to our intention, this does occur, then I will certainly consider changes. That is, once it is proven, if it ever is proven.[70]

The Attorney General also assured Parliament that all four objectives would be given equal weight, so that judges would not be tempted to latch onto the language of "economic self-sufficiency".[71]

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[64] *Ibid*, s 8.
[65] Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 4th ed (Toronto: Irwin Law, 2011) at 192.
[66] [1975] 1 SCR 423, 41 DLR (3d) 367 (former wife denied share of family home, due to perceived lack of value in household labour).
[67] *Report on Family Law*, *supra* note 59 at 3.
[68] *Divorce Act*, *supra* note 63 ("(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time", s 6).
[69] *House of Commons Debates*, 33nd Parl, 1st Sess, vol 7 (22 January 1986) at 10051 (Lynn McDonald) (NDP proposed amendments to provide more specificity to the support objectives. The inclusion of spousal age was one of these proposed amendments).
[70] *Ibid*, (23 January 1986) at 10107 (Hon John Crosbie).
[71] *Ibid*.

There is no reason to believe that Attorney General John Crosbie misled Parliament, but a study on post-1986 divorces indicates these statements were perhaps too confident:

> [I]t appears that the dominant emphasis in the grouping of cases involving middle-aged women leaving mid-length marriages is on the value of promoting spousal self-sufficiency. The philosophy of spousal support that is continually articulated in these cases is a philosophy of spousal self-sufficiency after divorce…Some courts explicitly acknowledge that a clean break philosophy is inherent in the new *Divorce Act*.[72]

This study showed that although extenuating factors, such as length of marriage and dependent children, helped lessen a judge's reliance on self-sufficiency, the *Divorce Act*'s vague objectives continued to create case law based on the viewpoints of a given judge.

B. Judicial Notice and the Law of Domestic Affairs

The inconsistent jurisprudence on divorce and separation provided the backdrop for Justice L'Heureux-Dubé's seminal spousal support ruling in *Moge v Moge*.[73] Drawing on a lower court's decision to nullify a husband's spousal support order on the grounds that his wife had taken too long to achieve economic self-sufficiency, the Supreme Court of Canada considered the ability of judges to use discretion when amending spousal support orders. L'Heureux-Dubé J explicitly highlighted the issues surrounding women's poverty after divorce. Citing extensive social science research on the feminization of poverty, L'Heureux-Dubé J clearly articulated the poverty created within the traditional family unit,

> Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non- monetary and came in the form of work at home, such as taking care of the household, raising children, and so on…These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities.[74]

In her judgment, L'Heureux-Dubé J elevated the experience of women and poverty after divorce to the position of judicial notice:

> Based upon the studies…the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice…While quantification will remain difficult and fact related in each particular case, judicial notice should be taken of such studies, subject to other expert evidence which may bear on them, as background information at the very least.[75]

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[72] Carol J Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part I)" (1991) 7 Can Fam LQ 155 at 204.
[73] [1992] 3 SCR 813, 99 DLR (4th) 456 [*Moge,* cited to SCR].
[74] *Ibid* at 861.
[75] *Ibid* at 873-74.

Moge has been heralded as both a "watershed judgment" and "a victory for women".[76] Contemporary news reports recognized the profound importance of the case, reporting that the Supreme Court of Canada had effectively "[warned] lower court judges not to force women to sink or swim in the job market".[77] While there have been questions over the ability of *Moge* to change the material circumstances of divorced women, Carol Rogerson, Canada's leading scholar in spousal support, has demonstrated that *Moge* had significant effects on the way spousal support orders were determined.[78] Further, numerous judges and lawyers have cited the case to show the interaction between women's poverty and the law.[79]

The ruling changed the way judges adjudicate questions of spousal support, and greatly expanded the use of judicial notice within the regulation of domestic affairs.[80] By allowing divergent stories of family life to become easily accessible to both judges and litigants, *Moge* helped remove a significant evidentiary burden from marginalized women.[81]

CONCLUSION

Judicial notice can act as a catalyst for developing legal remedies to the issues faced by lone-parent families. In the historical development of the *Divorce Act* and Canadian family law jurisprudence, judicial notice has played an important role in shedding light on the interaction of women's poverty and traditional marriage. There is room in the recent case law to craft a place for lone-parent families. However, if the legal community leaves these stories unexplored, courts and tribunals risk reinforcing historical patterns of poverty and precarity. Families like Maria Menendez's cannot be left to the individual discretion of judges and adjudicators. Lawyers must implement a legal strategy that places these stories at the fore. An explicit and concerted effort is the only way that judicial notice can be realistically achieved.

Lawyers must work to actively create links with lone-parent families, childcare experts, and social reformers in the areas of feminism and poverty. By working as equal partners, lawyers, clients, and activists can find ways to present substantial records of expert and personal testimony that will comprehensively explore the needs of lone-parent families. Creative legal arguments could also be crafted through this partnership—for example, framing refusal to consider the unique needs of lone-parent families as an implicit form of marital status discrimination. By pairing this legal strategy with the current state of family status jurisprudence, lawyers can convince a court that the struggles facing single mothers in the workplace merits judicial notice. At the very least, it will alert adjudicators to the importance of considering these factors when deciding cases of childcare accommodation.

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[76] Robert Leckey, "What is Left of *Pelech*?" (2008) 51 Sup Ct L Rev 103 at 107-08. Professor Leckley is quick to note, though, that *Moge* has been criticized by feminist scholars for not going far enough, see Colleen Sheppard, "Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*" (1994-95) 12 Can J Fam L 283.
[77] CBC Television, "Divorce: Alimony Agony" (17 December 1992), online: CBC <www.cbc.ca/player/Digital+Archives/Society/Family/ID/1769147048>.
[78] Carol Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001-02) 19 Can Fam LQ 185 at 192.
[79] At the time of writing, Westlaw Canada states that *Moge* has been judicially considered 2596 times.
[80] Susan G Drummond, "Judicial Notice: The Very Texture of Legal Reasoning" (2000) 15 Can JL & Society 1 at 5.
[81] Claire L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L Rev 551 at 568-69.

CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND THE TRAGEDY OF MISSING AND MURDERED ABORIGINAL WOMEN

Julie Mouris*

The tragedy of missing and murdered Aboriginal women in Canada has been the subject of national and international scrutiny throughout the last decade.[1] Numerous reports by national and international bodies have identified this ongoing and pressing problem, and have urged Canada to fulfill its obligations on this issue.[2] Canada's obligations toward Aboriginal women flow not only from domestic laws, but also from Canada's many international commitments.

This paper examines how Canada is in breach of a number of its international human rights obligations towards missing and murdered Aboriginal women. Part I examines the issue of missing and murdered Aboriginal women, outlining key statistics compiled by the Native Women's Association of Canada ("NWAC"). This section also scrutinizes the contributory role of police. Part II discusses international legal instruments relevant to the topic of missing and murdered Aboriginal women, as well as commentary and case law from international human rights bodies. Part III provides a timeline of reports and recommendations made by national and international bodies, including a critical assessment of Canadian responses. Finally, Part IV discusses paths forward and recommendations on urgent measures to be adopted by the Canadian government.

As more cases of missing and murdered Aboriginal women continue to emerge, and Canada remains in breach of its international human rights obligations to Aboriginal women, I argue a national inquiry is needed immediately. A national inquiry, coupled with expanded domestic remedies—such as improvements to criminal investigations and compensation—will enable Canada to demonstrate its commitment to this matter, and fulfill its international obligations.

PART I: MISSING AND MURDERED ABORIGINAL WOMEN

A. The *Sisters in Spirit* Initiative: Diagnosing the Problem

Beginning in the 1980s, Aboriginal communities across Canada began voicing their concerns about missing and murdered Aboriginal women.[3] In 2004, NWAC launched the *Sisters in Spirit* campaign to address this ongoing violence.[4] As part of the campaign, NWAC sought help from a range of federal government departments to address the issue. In 2005, the Ministry

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[1] In this paper, I use the term "women" as reference to women and girls. I also use the term "Aboriginal". This term is meant to be inclusive, encompassing First Nation, Métis and Inuit peoples.

[2] See Part III: Reports, Recommendations, and Responses, *below*.

[3] Anita Olsen Harper, "Is Canada Peaceful and Safe for Aboriginal Women?" (2006) 25:1-2 Can Women Studies 33 at 36.

[4] Native Women's Association of Canada, *What Their Stories Tell Us: Research Findings from the Sisters in Spirit Initiative* (2010) at 1, online: NWAC <www.nwac.ca/sites/default/files/reports/2010_NWAC_SIS_Report_EN.pdf>.

of Status of Women Canada agreed to fund the *Sisters in Spirit* initiative for five years. With this funding, NWAC created a database of missing and murdered Aboriginal women across Canada. The final report was released in 2010.[5]

The findings of the report are striking. As of March 31, 2010, the initiative had documented 582 cases of missing and murdered Aboriginal women across Canada, with the caveat that "it is believed the scope of this violence is far greater than what has been documented".[6] Of the 582 cases, 393 involved death as a result of homicide or negligence, 115 involved missing women and girls, twenty-one involved suspicious deaths, and fifty-three were cases of an unknown nature—it was unclear whether the women had died, were missing, or were murdered.[7] Almost half of the murder cases remained unsolved, a statistic that is "dramatically different from the average clearance rate for homicides in Canada, which was reported by Statistics Canada at 84% in 2005".[8]

Of the 393 cases involving death as a result of homicide or negligence, in 234 instances, the location of the victim was known. Of these 234 cases, fifty-nine percent of Aboriginal women were found in their residential dwelling, suggesting a link with family violence.[9] In fifteen percent of cases, the violence happened in an open area, like a field. In fourteen percent of cases, the violence took place on a street, road, or highway.[10]

NWAC reports 261 cases where information is known and charges were laid. Of the 261 cases, twenty-three percent of the accused offenders were the victim's current or ex-partner, seventeen percent were acquaintances, and 16.5 percent were strangers with no connection to the woman. Based on this research, NWAC found that Aboriginal women in Canada were almost three times more likely to be killed by a stranger than non-Aboriginal women.[11] As for cases of missing Aboriginal women, in over seventy percent of cases, women went missing from an urban area, twenty percent from a rural area, and seven percent from a reserve.[12]

NWAC also looked into the link between prostitution and disappearance or death, given the high levels of vulnerability to violence women in the sex trade face. Information was only known about the women's involvement in prostitution for 149 cases. In about half of the 149 cases, the women were not involved in the sex trade, in contrast to fifty-one cases where they were.[13] In a further twenty-four cases, there was insufficient evidence to substantiate claims of involvement in the sex trade. Regardless, NWAC emphasized that prostitution itself "is not a cause of disappearances or murders; rather, many women arrive at that point in the context of limited options and after experiencing multiple forms of trauma or victimization."[14]

These "multiple forms of trauma or victimization" are common to many missing and murdered Aboriginal women—not just sex trade workers—and speak to the many underlying causes of violence against these women.[15] While there are many underlying causes of violence

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[5] *Ibid*.
[6] *Ibid* at 17-18. See Part III: Reports, Recommendations, and Responses, *below* (the number of missing and murdered Aboriginal women has increased since 2010).
[7] *Supra* note 4 at 18.
[8] *Ibid* at 27.
[9] *Ibid* at 29.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid* at 26-27.
[13] *Ibid* at 31.
[14] *Ibid*.
[15] *Ibid*.

against Aboriginal women, "colonization remains the constant thread connecting the different forms of violence against Aboriginal women in Canada".[16] Aboriginal peoples have identified historic colonialist policies, such as the residential school system, as a root cause of violence in their communities.[17] Amnesty International also identifies a number of current factors that contribute to the heightened risk of violence against Aboriginal women: the marginalization of Aboriginal women, police failure to provide adequate protection, and racist motivations, or the expectation of impunity.[18] Although intensive analysis of the underlying causes of violence is beyond the scope of this paper, the police's responsibility for missing and murdered Aboriginal women is considered in the next section.

B. The Role of Police and Problematic Investigations

There are a number of problems with police investigations of missing and murdered Aboriginal women in Canada. First, nearly half of the murder cases involving Aboriginal women remain unsolved. Second, police data do not consistently identify whether victims of violence have Aboriginal status, and if they are First Nations, Métis or Inuit.[19] For example, Statistics Canada's annual Homicide Survey asks police to record the number of Aboriginal victims and persons charged. NWAC found that:

> [S]ome police agencies…refused to collect or report the data, arguing that collection of such information contravenes internal policy, that the information is not needed for the agency's own purposes, or that police officers find it impractical, uncomfortable or insensitive to ask individuals about their cultural background.[20]

While these may be legitimate concerns, they preclude collecting comprehensive statistics that could help determine the scope of the problem. Further, NWAC consulted ten Aboriginal communities across Canada to see if they would be amenable to the Committee collecting information about Aboriginal identity. The consulted communities agreed, provided the questions are framed in a culturally sensitive manner.[21]

Another problem is that many police forces do not have protocols for when Aboriginal women are reported missing. There are stories of police failing to take basic steps, such as interviewing family and friends in a timely manner after the report of a missing person.[22] Further, "overlapping and unclear jurisdictional areas of the RCMP, First Nations, municipal and provincial police forces has impeded effective resolution of some cases".[23] Families who report missing persons have sometimes been sent back and forth between police forces.[24]

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[16] *Ibid* at 2.
[17] House of Commons, Standing Committee on the Status of Women, *Ending Violence Against Aboriginal Women and Girls: Empowerment – A New Beginning* (December 2011) at 32 (Chair: Irene Mathyssen) [Standing Committee].
[18] Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada* (October 2004) at 2, online: YWCA Canada <ywcacanada.ca/data/research_docs/00000024.pdf> [Amnesty International, *Stolen Sisters*].
[19] *Supra* note 17 at 14.
[20] Native Women's Association of Canada, *supra* note 4 at 16.
[21] *Supra* note 17 at 14-15.
[22] *Supra* note 18 at 32.
[23] *Supra* note 4 at 38.
[24] *Ibid*.

Finally, police mistrust is a persistent problem. Reports of abusive policing of Aboriginal peoples,[25] and research indicating "police often stereotype missing Aboriginal girls and act based on those stereotypes",[26] add to Aboriginal peoples' lack of confidence in police services. This mistrust is especially troubling for women in the sex trade, as they may be hesitant to report violent attacks to police, due to the threat of arrest for engaging in prostitution.[27]

These issues indicate systemic problems within police practices, and arguably contribute to the issue of missing and murdered Aboriginal women. In the next section, I turn to international human rights law, outlining Canada's obligations to protect Aboriginal women from violence.

PART II: APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

This section examines international human rights law triggered by missing and murdered Aboriginal women in Canada. From the outset, I focus on two treaties, to which Canada is a party: the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Discrimination against Women*.[28] I discuss Commentary by the Human Rights Committee and the *Convention* Committee (the "Committee"), as well as relevant jurisprudence, to provide insight into Canada's obligations arising under the *ICCPR* and the *Convention*. Finally, I examine the importance of the United Nations' (the "UN") *Declaration on the Rights of Indigenous Peoples*.[29]

A. The *International Covenant on Civil and Political Rights*

In 1976, the *ICCPR* came into force, and was acceded to by Canada. Pursuant to article 9 of this multilateral treaty, disappearances violate the right to liberty and security of the person. Pursuant to article 6(1), the inherent right to life is contravened in cases of murder, and where disappearance leads to death.[30] The Human Rights Committee, the oversight body to the *ICCPR*, clarified the scope of a state's obligation to protect the right to life with respect to disappearances in *General Comment No 6*:

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[25] Human Rights Watch, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada* (13 February 2013), online: Human Rights Watch <www.hrw.org/reports/2013/02/13/those-who-take-us-away-0> [HRW Report].

[26] Native Women's Association of Canada, *supra* note 4 at 32-33.

[27] Amnesty International, *Stolen Sisters*, *supra* note 18 at 27.

[28] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976/47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13, Can TS 1982/31 (entered into force 3 September 1981, ratification by Canada 10 December 1981) [*Convention*]. Other treaties to which Canada is a party could also be examined. Seventeen percent of the victims are girls 18 years of age and under, Native Women's Association of Canada, *supra* note 4 at 23. One could invoke the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 at 3, Can TS 1992/3 (entered into force 2 September 1990, ratification by Canada 13 December 1991). The racial dimension of the problem could also warrant an examination of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 at 212, Can TS 1970/28 (entered into force 4 January 1969, accession by Canada 14 October 1970).

[29] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/295 Vol III (23 December 2006 – 17 September 2007) [*Declaration*].

[30] *ICCPR*, *supra* note 28, arts 6, 9.

> States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.[31]

The Human Rights Committee urges signatories to thoroughly investigate existing cases of missing persons, and pre-emptively enact protocols that prevent disappearances. While the Human Rights Committee's *General Comment No 6* is non-binding, it provides useful guidance in interpreting the right to life provisions that relate to disappearances.

Article 2 of the *ICCPR* is also relevant. It provides that each state party will "respect and ensure" *ICCPR* rights to individuals within its territory and jurisdiction, without distinction. Enumerated rights include race, colour, and sex. Each state party must provide effective remedies for rights violations.[32] The Human Rights Committee refers to article 2 as encompassing a "due diligence" obligation. The due diligence obligations involves preventing, punishing, investigating, or redressing the harm committed by private persons or entities who have violated *ICCPR* rights.[33] The Human Rights Committee reminds signatories "of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2[(3)]".[34]

Finally, article 26 of the *ICCPR* provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[35] In the case of missing and murdered Aboriginal women, entitlement to equal protection of the law without discrimination is relevant. The police play a crucial role in protection, prevention, and investigation; yet, issues relating to unequal treatment of Aboriginal women by Canadian police forces remain.

B. The *Convention on the Elimination of All Forms of Discrimination against Women*

Another Canadian obligation under international law is the *Convention*. Canada ratified the *Convention* in 1981, the same year the treaty came into force.[36] The *Convention* focuses on discrimination against women, and does not have express provisions on violence. However, in *General Recommendation No 19*, the Committee extended the article 1 definition of "discrimination against women" to include gender-based violence.[37] In this broader definition, the right to life, liberty and security of the person is protected.[38] *General Recommendation No 19* is not binding, and thus neither is the expanded definition of discrimination. Regardless, the

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[31] *General Comment No 6: The Right to Life (Article 6)*, UNHRC, 16th Sess (1982), reproduced in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.7 128 at para 4 [emphasis added].
[32] *ICCPR*, *supra* note 28, arts 2(1), 2(3)(a).
[33] *General Comment No 31 [80]*: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UNHRC, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add 13 (2004) at para 8 [*General Comment No 31*].
[34] *Ibid*.
[35] *ICCPR*, *supra* note 28, art 26.
[36] *Convention*, *supra* note 28.
[37] *General Recommendation No 19*: *Violence against women*, UNCEDAW, 11th Sess, A/47/38 (1992), reproduced in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) 243 at para 7 [*General Recommendation No 19*].
[38] *Ibid* at paras 7(a), 7(d).

Committee's justification that gender-based violence "seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men",[39] is compelling. *General Recommendation No 19* is also the most frequently cited of the Committee's recommendations, nationally and internationally.[40]

The *Convention* contains a two-pronged obligation in relation to discrimination. Article 2 mandates that states condemn discrimination against women. Article also compels states,

> (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
> (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise[41]

In the case of missing and murdered Aboriginal women, police forces must refrain from discriminating against women, and take measures to eliminate discrimination by private persons—the due diligence obligation. The Committee confirmed this two-pronged obligation in *General Recommendation No 19*:

> It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5)…Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.[42]

The mention of compensation is important, given that the *Convention* itself does not discuss remedies. In *General Recommendation No 19*, the Committee recommends in cases of gender-based violence that "[e]ffective complaints procedures and remedies, including compensation, should be provided".[43] In the following subsections, I examine Committee cases concerning remedies. I discuss the relevance of these remedies to the Canadian context in Part IV.

C. *Convention* Jurisprudence: The Remedy of Systemic Measures

In 2007, two Committee cases dealt with remedies for state failure to protect women against violence, *Goekce v Austria*, and *Yildirim v Austria*. The two cases involved similar facts: both women were killed by their husband after a pattern of physical abuse, and both women sought assistance several times from law-enforcement agencies and courts.[44] Two non-governmental organizations ("NGOs") brought these cases to the Committee on behalf of family

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[39] *Ibid* at para 1.
[40] Andrew Byrnes & Eleanor Bath, "Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women – Recent Developments" (2008) 8:3 Human Rights L Rev 517 at 519.
[41] *Convention*, *supra* note 28, arts 2(d)-(e) [emphasis added].
[42] *General Recommendation No 19*, *supra* note 37 at para 9.
[43] *Ibid* at para 24(i).
[44] *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,* UNCEDAW, 39th Sess, UN Doc C/39/D/5/2005 (2007) [*Goekce v Austria*]; *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,* UNCEDAW, 39th Sess, UN Doc C/39/d/6/2005 (2007) [*Yildirim v Austria*]. See also Byrnes & Bath, *supra* note 40 at 520.

members of the women.[45]

In *Goekce v Austria*, Şahide Goekce was in contact with police over a three-year period about her physically abusive husband. She obtained a three-month injunction prohibiting him from entering the family apartment.[46] This injunction, and a weapons prohibition, was in effect at the time of her death. Despite the orders, her husband acquired a handgun, and a few weeks later, shot Ms. Goekce in her apartment. A few hours before she was killed, Ms. Goekce telephoned the emergency call service, but no patrol car was sent.[47] The Committee concluded that "the police knew or should have known that Şahide Goekce was in serious danger; they should have treated the last call from her as an emergency", and that "the police are accountable [for] failing to exercise due diligence to protect [her]".[48]

In *Yildirim v Austria*, Fatma Yildirim took numerous measures to increase her safety from her physically abusive husband. These measures included: moving out of their apartment, establishing ongoing communication with police, seeking an injunction, and authorizing the prosecution of her husband.[49] Despite Ms. Yildrim taking these protective steps, the public prosecutor denied police requests to arrest Ms. Yildrim's husband. The Committee determined that authorities knew, or should have known, that Ms. Yildirim was in extreme danger. By failing to detain Mr. Yildirim the state breached its due diligence obligation to protect Ms. Yildirim.[50]

In both cases, the Committee noted the state party had "established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counseling for victims of violence and work perpetrators."[51] However, the Committee stressed that the realization of these women's rights required the political will of state actors to satisfy their due diligence obligations. The Committee recommended numerous measures that would address the systemic problems within Austria's "comprehensive model".[52] Recommendations included faster prosecutions of perpetrators of domestic violence, better coordination amongst law enforcement officials and NGOs working with victims of gender-based violence, and strengthening training programs on domestic violence for those officials.[53]

D. *Convention* Jurisprudence: The Remedy of Compensation

The remedy of compensation arose in *VPP v Bulgaria*, a case decided by the Committee in 2012.[54] This case involved a seven-year-old girl who was sexually assaulted by a man in her neighbourhood. The perpetrator was given a suspended sentence through a plea-bargain agreement, but the agreement "did not award compensation for the pain and suffering suffered

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[45] *Ibid*.
[46] *Goekce v Austria*, *supra* note 44 at para 12.1.3.
[47] *Ibid*.
[48] *Ibid* at para 12.1.4.
[49] *Yildirim v Austria*, *supra* note 44 at para 12.1.3.
[50] *Ibid* at paras 12.1.5-12.1.6.
[51] *Ibid* at para 12.1.2; *Goekce v Austria*, *supra* note 44 at para 12.1.2.
[52] Byrnes & Bath, *supra* note 40 at 525.
[53] *Goekce v Austria*, *supra* note 44 at paras 12.3 (b)-(d); *Yildirim v Austria*, *supra* note 44 at paras 12.3 (b)-(d).
[54] *Views of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UNCEDAW, 53rd Sess, UN Doc C/53/D/31/2011 (2012) [*VPP v Bulgaria*].

by the victim".[55] The Committee recalled the obligation to provide compensation in *General Recommendation No 19*, and found the victim had not received adequate monetary compensation. They also found the state party's legal mechanisms inadequate to ensure that she would receive compensation.[56] The Committee recommended the state party provide reparation to the victim.[57] The Committee also held,

> [A]rticle 15 of the Convention embodies the principle of equality before the law, and that under this article, the Convention seeks to protect women's status before the law, be it as a claimant, a witness or a victim, and that the above includes the right to adequate compensation in cases of violence including sexual violence.[58]

The inclusion of "witness" is relevant to families of missing and murdered Aboriginal women who may seek compensation in Canada on the victim's behalf.

In arriving at their conclusion, the Committee considered state obligations with respect to gender-based violence. The Committee emphasized that "[s]tate parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act."[59] The Committee also referred to the due diligence obligation in article 2(e) of the *Convention*, whereby state parties can be found responsible for private acts of violence, if they fail to prevent, investigate, and punish those acts.[60]

E. The UN *Declaration on the Rights of Indigenous Peoples*

The *Declaration* was adopted by the UN General Assembly on September 13, 2007.[61] The draft process involved UN agencies, as well as Aboriginal peoples.[62] The *Declaration* was adopted with 144 states voting in favour, and four states—including Canada—voting against. However, on November 12, 2010, Canada endorsed the *Declaration*. While the *Declaration* is non-binding, "there is an expectation that Canada, and all other States, will work to ensure that our laws and policies uphold the rights set out in the UN Declaration".[63] Further, Canadian courts may look to such declarations when interpreting human rights.[64]

Article 22(2) of the *Declaration* provides that, "[s]tates shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."[65] It follows that states should work in concert with Aboriginal peoples, rather than unilaterally, to ensure full

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[55] *Ibid* at para 9.2.
[56] *Ibid* at para 9.9.
[57] *Ibid* at para 10(1).
[58] *Ibid* at para 9.11.
[59] *Ibid* at para 9.3.
[60] *Ibid*.
[61] *Declaration*, *supra* note 29.
[62] Indigenous Bar Association & University of Manitoba, Faulty of Law, *Understanding and Implementing the* UN Declaration of Rights of Indigenous Peoples*: An Introductory Handbook* by Brenda Gun (Indigenous Bar Association & University of Manitoba, Faculty of Law, 2011) at 6, online: IBA <www.indigenousbar.ca/pdf/undrip_handbook.pdf>.
[63] *Ibid* at 7.
[64] Paul Joffe, "Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*, eds (Saskatoon: Purich Publishing, 2010) 70 at 86.
[65] *Supra* note 61, art 22(2).

protection against violence and discrimination. This provision also draws a nexus between violence and discrimination, expanding the purview of the *Declaration*. Amnesty International considers this connection crucial to understanding the issue of missing and murdered Aboriginal women.[66]

This section has explored the various international commitments, such as the *ICCPR*, the *Convention*, and the *Declaration* that are invoked in the protection of Aboriginal women from violence. These are commitments that Canada has attached its name to, and that Canada is currently failing to uphold. States can be held accountable for failure to fulfill these obligations, as the cases of *Goekce v Austria*, *Yildirim v Austria*, and *VPP v Bulgaria* demonstrate. In the next section, I discuss reports documenting Canada's neglect of the issue of missing and murdered Aboriginal women, and further develop the extent of Canada's failure to fulfill its international obligations.

PART III: REPORTS, RECOMMENDATIONS, AND RESPONSES

This section provides a timeline of reports and recommendations made by various organizations, committees, and international human rights bodies, on the topic of missing and murdered Canadian Aboriginal women. This includes an examination of the Canadian government's response, and the positive steps the government has taken. However, a number of recent reports and recommendations show that the government's reforms are inadequate. Greater concerted measures, such as a national inquiry, are required.

The release in 2004 of Amnesty International's report and the launch of NWAC's five-year research initiative, *Sisters in Spirit*, placed an international spotlight on missing and murdered Aboriginal women in Canada. In October 2005, the Human Rights Committee adopted its *Concluding Observations* in the fifth periodic report on Canada's commitment to the *ICCPR*. The Human Rights Committee recommended:

> The State party should gather accurate statistical data throughout the country on violence against Aboriginal women, fully address the root causes of this phenomenon, including the economic and social marginalization of Aboriginal women, and ensure their effective access to the justice system. The State party should also ensure that prompt and adequate response is provided by the police in such cases, through training and regulations.[67]

Similar recommendations were echoed by others. In November, 2008, the Committee recommended that Canada "examine the reasons for the failure to investigate the cases of missing or murdered aboriginal women and take steps to remedy the deficiencies in the system."[68] The Committee called on Canada to urgently and thoroughly investigate pending cases.[69] In September, 2009, Amnesty International released a follow-up to their 2004 report, criticizing the government's failure to develop a national action plan. A national action plan is a

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[66] Amnesty International, *Stolen Sisters*, *supra* note 18 at 2.
[67] *Concluding Observations of the Human Rights Committee, Canada*, UNHRCOR, 85th Sess, UN Doc CCPR/C/CAN/CO/5 (2006) at para 23.
[68] *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, UNCEDAWOR, 42nd Sess, UN Doc CEDAW/C/CAM/CO/7 (2008) at para 32.
[69] *Ibid*.

measure that Aboriginal women, and a number of human rights bodies, have recommended.[70]

The Canadian government has taken some measures to address the matter. In 2010, when the *Sisters in Spirit* initiative ended, so did the funding for the database. But the Ministry of Status of Women Canada funded two new NWAC initiatives, which allowed the organization to shift its focus from research to action.[71] In the first project, a six-month initiative called *Evidence to Action I*, Status of Women Canada provided $500,000 to "strengthen the ability of Aboriginal women and girls across Canada to recognize and respond to issues of gender-based violence within their families and communities".[72] The second project, *Evidence to Action II*, involved $1,890,844 over a three-year period, from February 2011 to April 2014.[73] This initiative aimed to "strengthen the ability of communities, governments, educators (including the Canadian Police College, post-secondary institutions as well as elementary and high schools) and service providers to address the root causes of violence against Aboriginal women and girls."[74] It is not yet clear if this initiative has been successful.

Aside from the Ministry of Status of Women Canada funding, the federal government's 2010 budget allocated $10 million to the Department of Justice Canada, over a two-year period. Rona Ambrose, Minister of Public Works and Government Services and Minister for Status of Women, announced that funding would be used "to address the disturbingly high number of missing and murdered Aboriginal women and to make our communities safer."[75] The plan involved seven steps, including $4 million for a National Police Support Centre for Missing Persons and related initiatives; $2.15 million for the Department of Justice's Victims Fund to help Western provinces develop victims services for Aboriginal peoples; and $500,000 for the development of a national compendium of law enforcement practices to help Aboriginal communities improve the safety of women.[76]

These resource commitments are important first steps. In January 2013, the RCMP launched the National Public Website for Missing Persons and Unidentified Remains, which identifies data such as the victim's race.[77] In addition to the website, a new RCMP database is expected to launch in 2014, and "will allow officers to upload more detailed cultural information about victims".[78] The compendium of practices was posted on the Department of Justice

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[70] Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada* (September 2009) at 4, 26, online: YWCA Canada <ywcacanada.ca/data/research_docs/00000021.pdf>.

[71] Standing Committee, *supra* note 17 at 11.

[72] *Ibid* at 11-12.

[73] *Ibid* at 12.

[74] "Government of Canada Invests in Community Project to Help End Violence Against Aboriginal Women and Girls", *CNW* (25 February 2011), online: CNW <www.newswire.ca/en/story/764479/government-of-canada-invests-in-community-project-to-help-end-violence-against-aboriginal-women-and-girls>.

[75] Canada, Department of Justice, News Release, "Government of Canada Takes Concrete Action Regarding Missing and Murdered Aboriginal Women" (29 October 2010), online: Government of Canada <www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32560.html>.

[76] Canada, Department of Justice, News Release, "Backgrounder A: Concrete Steps to Address the Issue of Missing and Murdered Aboriginal Women" (October 2010), online: Government of Canada <www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32564.html>. See also Standing Committee, *supra* note 16 at 13.

[77] Canada, Royal Canadian Mounted Police, "RCMP Launches National Public Website for Missing Persons and Unidentified Remains" (31 January 2013), online: RCMP <www.rcmp-grc.gc.ca/news-nouvelles/2013/01-31-ncmpur-cnpdrni-eng.htm>.

[78] Susana Mas, "Aboriginal women inquiry backed by Conservative Yukon MP", *CBC News* (11 October 2013) online: CBC <www.cbc.ca/news/politics/aboriginal-women-inquiry-backed-by-conservative-yukon-mp-1.1991064>.

website.[79] The practices fall under categories such as "social conditions" and "economic circumstances"; these practices are crucial in addressing root causes of violence against Aboriginal women. However, the compendium provides scant attention to specific steps police and law enforcement officials should take, and agencies are under no obligation to implement these practices.

The Canadian government also funded a Parliamentary Standing Committee on the Status of Women (the "Standing Committee") to study violence against Aboriginal women and girls. The Standing Committee's report, released in 2011, contains a detailed overview of the causes of missing and murdered Aboriginal women, reflecting the wide range of witnesses that were heard throughout the study. However, as the report explains, the Standing Committee opted to "shift its focus from the aftermath of the violence to empowering young Aboriginal girls and women."[80] While focusing on empowerment is important, this only represents a part of the solution and obscures state obligations.

Consequently, the Standing Committee's recommendations regarding missing and murdered Aboriginal women were weak. The Standing Committee's recommendations included: increased collaboration between the federal government and NWAC to share information with the RCMP Support Centre for Missing Persons; improving support services for families of victims; and, continued collaboration between the federal government and provincial and territorial partners, to improve existing service models, and better address the needs of Aboriginal victims of violence.[81]

No mention was made of the need for better investigations, racial data collection, or consistent police protocols on missing or murdered Aboriginal women. The New Democratic Party ("NDP") and the Liberal Party of Canada expressed dissatisfaction with the Standing Committee's recommendations. The NDP called for a coordinated approach to address the underlying causes of violence against Aboriginal women, and the Liberal Party of Canada called for "a full public investigation into the circumstances surrounding the murdered and missing Aboriginal women and girls."[82]

A committee of federal, provincial, and territorial Deputy Ministers responsible for justice (the "FPT Committee") released their own report on the incidence of missing and murdered women in 2012. The report included, but was not limited to, Aboriginal women. The FPT Committee convened in June 2006 "to consider the effective identification, investigation, and prosecution of cases involving serial killers who target persons living a high-risk lifestyle, including but not limited to the sex trade."[83]

The recommendations of the FPT Committee were more concrete and actionable than those of the Standing Committee. For example, the FPT Committee report acknowledged that police policies and procedures for cases of missing persons varied widely, and a consistent approach was required.[84] The FPT Committee report also recommended the Canadian

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[79] Canada, Department of Justice, *Compendium of Promising Practices To Reduce Violence and Increase Safety of Aboriginal Women in Canada* (2013), online: Government of Canada <www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/comp-recu/p6.html>.
[80] Standing Committee, *supra* note 17 at 1.
[81] *Ibid* at 43-44.
[82] *Ibid* at 60, 67.
[83] Coordinating Committee of Senior Officials Missing Women Working Group, *Report: Issues Related to the High Number of Murdered and Missing Women in Canada* (Ottawa: Canadian Intergovernmental Conference Secretariat: September 2010) at 2, online: CICS <www.scics.gc.ca/CMFiles/830992005_e1MAJ-2112011-6827.pdf>.
[84] *Ibid* at 11.

Association of Chiefs of Police "consider a national strategy to ensure consistency in reporting mechanisms for reporting missing persons. This could be developed in conjunction with implementation of a national database."[85] The FPT Committee further proposed measures to increase reporting of disappearances of marginalized women, including better communication between police and families of missing persons.[86]

In her 2012 report, Rashdio Manjoo, the UN Special Rapporteur on Violence against Women, highlighted the ongoing concern of missing and murdered Aboriginal women. In her report, Manjoo explicitly mentions "the failure of police to protect aboriginal women and girls from violence and to investigate promptly and thoroughly when they are missing or murdered".[87]

In November 2012, another Canadian report emerged: *Forsaken: The Report of the Missing Women Commission of Inquiry*. In this report, Commissioner Wally Oppal concluded that "police investigations into missing and murdered women were blatant failures" due in part to "recurring patterns of error that went unchecked and uncorrected for several years".[88] The report made sixty-three recommendations, including measures to improve missing person policies and practices, enhance police investigations, and strengthen multi-jurisdictional policing.[89] While the report was criticized for not including input from the Aboriginal community, and failed to specifically mention Aboriginal women, the findings remain applicable to the issue of missing and murdered Aboriginal women.[90]

Starting in December 2012, Aboriginal peoples across Canada made their voices heard during the *Idle No More* grassroots movement. On January 11, 2013, Aboriginal leaders met with Prime Minister Stephen Harper. During this meeting, Shawn A-in-Chut Atleo, National Chief of the Assembly of First Nations, requested seven specific actions from the federal government. One request was a national inquiry on violence against Aboriginal women, with a special focus on missing and murdered Aboriginal women.[91]

In February 2013, Human Rights Watch released a report on abusive policing and failures to protect Aboriginal women in Northern British Columbia.[92] Not only did Human Rights Watch examine police failures to protect Aboriginal women from disappearance and murder, the HRW Report also highlighted incidents where police had physically or sexually abused Aboriginal women.[93] The HRW Report made several recommendations, including: establish a national commission of inquiry before the end of 2013; develop a national action plan with leadership from Aboriginal communities; and, ratify the *American Convention on Human Rights* and the *Convention of Belém do Pará*.[94] The HRW Report also recommended the RCMP "[c]ollect and

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[85] *Ibid* at 9-10.
[86] *Ibid*.
[87] Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UNHRCOR, 20th Sess, UN Doc A/HRC/20/16 (2012) at paras 61-62, online: United Nations Human Rights <www.ohchr.org/Documents/Issues/Women/A.HRC.20.16_En.pdf>.
[88] British Columbia, Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry*, Executive Summary (British Columbia: 2012) at 160 (Commissioner: Hon Wally T Oppal), online: MWCI <www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Forsaken-ES-web-RGB.pdf>.
[89] *Ibid* at 165-68.
[90] Native Women's Association of Canada & Canadian Feminist Alliance for International Action, *Murders and Disappearances of Aboriginal Women and Girls in Canada: Information Update for the United Nations Committee on the Elimination of Discrimination Against Women* (2013) at 26 [Report to CEDAW].
[91] *Ibid* at 25.
[92] HRW Report, *supra* note 25.
[93] *Ibid* at 59-65.
[94] *Ibid* at 15.

make publicly available (as ethically appropriate) accurate and comprehensive, disaggregated data that includes an ethnicity variable on violence against indigenous women and girls".[95]

Shortly after the HRW Report was released, opposition members in Parliament demanded Prime Minister Harper establish a national inquiry. Prime Minister Harper responded stating, "[i]f Human Rights Watch, the Liberal party, or anyone else is aware of serious allegations involving criminal activity, they should give that information to the appropriate police so they can investigate it. Just get on and do it."[96] This response shows a lack of comprehension, or an unwillingness to acknowledge that inept investigations into the death or disappearance of Aboriginal women are the crux of the issue.

Pressure on the Canadian government to deal with this matter is only increasing. In June 2013, NWAC and the Canadian Feminist Alliance for International Action ("FAFIA") presented a report to the Committee as an update on the situation. The organizations indicated the incidence of murder and disappearance of Aboriginal women had risen to 668.[97] The report also highlights the encouraging fact that Canada had agreed to visits by the Committee, the Inter-American Commission on Human Rights, and the UN Special Rapporteur for Indigenous Peoples.

The report further emphasizes Canada's need for external, expert help. The report explains:

> Canada needs the expert, external assistance of the CEDAW [*Convention*] Committee, the Inter-American Commission on Human Rights, and the Special Rapporteur because it has not yet put in place the programs, protocols, standards, and practices that will meet the nation's obligation to exercise due diligence to prevent, protect, investigate and remedy violence against Aboriginal women and girls, nor has Canada addressed the root causes of the violence.[98]

This marks a striking shift from previous reports that made recommendations to Canada directly.

Former UN Special Rapporteur on Indigenous Peoples, James Anaya, made an official visit to Canada in October, 2013, to examine the human rights situation of Aboriginal peoples. Anaya made a statement upon the conclusion of his visit, outlining his major findings. He recognized the measures taken by the federal and provincial governments to address the issue of murdered and missing Aboriginal women. However, Anaya remarked,

> [I]n all of the places I have visited, I have heard from aboriginal peoples a widespread lack of confidence in the effectiveness of those measures. I have heard a consistent call for a national level inquiry…I concur that a comprehensive and nation-wide inquiry into the issue could help ensure a coordinated response.[99]

Overall, the reports and recommendations outlined above echo Anaya's statement. Canada has taken some measures to address the matter of missing and murdered Aboriginal women in Canada, but these measures are insufficient, and do not target the most important areas

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[95] *Ibid* at 16.
[96] *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 210 (13 February 2013) at 14080 (Hon Andrew Scheer)
[97] Report to CEDAW, *supra* note 90 at 7.
[98] *Ibid*.
[99] James Anaya, "Statement upon conclusion of the visit to Canada", *James Anaya: Former United Nations Special Rapporteur on the Rights of Indigenous Peoples* (15 October 2013), online: United Nations <unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>.

that need reform. Today, NWAC is still pushing for urgent action. On February 13, 2014, NWAC presented a petition to the federal government, with over 23,000 signatures, calling for a national inquiry.[100] It remains to be seen how the Canadian government responds, as international and domestic pressure continues to mount.

PART IV: RIGHTS VIOLATIONS AND DOMESTIC REMEDIES

Considering international human rights law, and the many reports detailing Canada's failure to remedy the problem of missing and murdered Aboriginal women, it is clear that Canada is in breach of a number of its international human rights obligations.

Canada is not meeting its obligations pursuant to the *ICCPR*. Canada is not ensuring and respecting the recognition of Aboriginal women's right to life, liberty, and security of the person,[101] without distinction as to race or sex.[102] Canada is not exercising due diligence, which may be considered a component of article 2 of the *ICCPR*;[103] the country has not enacted specific measure to prevent disappearances, despite the Human Rights Committee's urging. Canada is insufficiently preventing, punishing, investigating, and redressing the harm committed by private persons against Aboriginal women.[104] Canada's poor investigation record of incidents of death or disappearance also suggests the country has not provided effective remedies to the victims.[105]

Pursuant to the *Convention*, Canada is in breach of its two-pronged discrimination obligation.[106] According to the Committee, discrimination includes gender-based violence.[107] This two-pronged obligation involves: first, ensuring that public authorities and institutions condemn discrimination, and second, eliminating discrimination by private persons. This second prong is considered the due diligence obligation.[108] Further, Canada has not provided effective remedies or compensation to victims or their families.[109]

Finally, Canada's policies do not uphold article 22(2) of the *Declaration*, which provides that Canada will work in conjunction with Aboriginal peoples to protect Aboriginal women against violence and discrimination.[110] Families of victims have encountered difficulty working with police due conflicts in jurisdiction, police stereotyping, and incompetent investigation practices.[111]

Canada needs effective criminal investigations of disappearances and deaths of Aboriginal women. A set of systemic measures, such as those recommended in *Goekce v Austria* and *Yildirim v Austria*, would be helpful in Canada. Canada, like Austria, already has a comprehensive model in place to deal with violent crimes. However, failures lie in the function

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[100] Native Women's Association of Canada, Press Release, "Thousands of Canadians Call for National Public Inquiry into Missing and Murdered Aboriginal Women" (13 February 2014), online: NWAC < http://www.nwac.ca/press-release-immediate-release-2014-02-13-en>.
[101] *ICCPR*, *supra* note 28, arts 6, 9.
[102] *Ibid*, art 2.
[103] *General Comment No 31*, *supra* note 33.
[104] *Ibid.*
[105] *ICCPR*, *supra* note 28, art 2(3).
[106] *Convention*, *supra* note 28, arts 2(d)-(e).
[107] *General Recommendation No 19*, *supra* note 37.
[108] *Convention*, *supra* note 28, arts 2(d)-(e).
[109] *General Recommendation No 19*, *supra* note 37. See also "Convention Jurisprudence: The Remedy of Compensation", *above*.
[110] *Supra* note 61, art 22(2).
[111] Amnesty International, *Stolen Sisters*, *supra* note 18 at 18.

of our police services. Functional improvements to police services may include the following four recommendations. First, create a nation-wide uniform protocol for police forces that includes the collection of racial data of victims. Second, increase collaboration between police and NGOs to identify and solve cases of violence against Aboriginal women. Third, resolve jurisdictional conflicts between police forces. Fourth, improve training of police officers to enhance understanding of the causes of violence against Aboriginal women. In tackling systemic problems at a functional level, police services will be better able to deal with current cases and prevent future incidents.

Canada must also improve compensation for victim's families. According to recent statistics, 440 children have been left without mothers.[112] Government-backed reforms may include establishing a compensation fund for the children of victims, as recommended in the Missing Women Commission of Inquiry report.[113]

Crafting solutions to these issues on a national scale is a complex task. Therefore, a well-funded national inquiry is needed to carefully research the matter. Aboriginal peoples and organizations, the UN Special Rapporteur on Indigenous Peoples, international human rights bodies, and NGOs have voiced approval for such a measure.[114] The inquiry must include participation of Aboriginal organizations and peoples. The inquiry must have a reactive and a preventative focus—to deal with current cases, and to prevent future ones. The inquiry must address the root causes of violence and discrimination against Aboriginal women. To the extent that Canada is in need of international, expert assistance, a number of international bodies are prepared to offer their guidance.[115] Canada should make use of this guidance, as the time has come for strong and decisive action.

Implementing systemic measures, providing compensation, and conducting a national inquiry has significant resource implications. However, spending resources to prevent and investigate missing and murdered Aboriginal women should not be an either-or proposition. This matter demands resources, and it is the Canadian government's responsibility to ensure adequate funds are allocated. In the long-term, an improved, effective system will save lives.

CONCLUSION

Currently, there are at least 668 cases of missing and murdered Aboriginal women.[116] This tragedy has unfolded over the past decades, yet little progress has been made. The striking statistics explored in Part I demonstrate the urgency of the issue, and the contributing role that police play. Part II illustrates how Canada is in violation of many international human rights obligations. In Part III, this paper explores reports and recommendations related to missing and murdered Aboriginal women. These reports and recommendations speak to the urgency of solving this national problem; the Canadian government has taken inadequate steps, and ultimately failed, in protecting Aboriginal women's human rights. Part IV provides recommendations on next steps and shows the immediate, positive measures Canada can take.

Despite current failures, the next steps are clear. A national inquiry is needed to ensure a

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[112] Native Women's Association of Canada, *supra* note 4 at 34.
[113] Missing Women Commission of Inquiry, *supra* note 88 at 115.
[114] See Part III: Reports, Recommendations, and Responses, *above*.
[115] *Ibid*.
[116] Native Women's Association of Canada, Press Release, "NWAC Calls on All Canadians to Report Suspicions Regarding Missing or Murdered Persons" (24 October 2013), online: NWAC <www.nwac.ca/press-release-immediate-release-2013-10-24-en>.

coordinated, nation-wide response to the high rate of missing and murdered Aboriginal women. A national inquiry will identify the measures required to improve our current system. These measures could address meaningful compensation for families of the victims, effective criminal investigations, and collaboration between NGOs and police forces. It is time the Canadian government confront the longstanding problem of missing and murdered Aboriginal women. Work is needed, and there is no time to waste.

IS THE DIRECTION OF CANADIAN IMMIGRATION POLICY IN KEEPING WITH OUR COMMITMENT TO MULTICULTURALISM?

Juliana Helene Cliplef*

Canada's national character is shaped by the government's approach to immigration. Since Clifford Sifton's monumental effort to settle the west, Canada has taken on an identity much greater than the sum of its founding English, French, and Aboriginal roots. This is reflected in the contemporary Canadian attitude towards national citizenship—Canada is the only Western nation where the strength of national identification is positively correlated with support for immigration.[1] In a 2009 study exploring the correlation between ethnic diversity and social capital, Canada ranked so highly among other Western democracies that the authors proclaimed it a kind of "Canadian Exceptionalism".[2]

Such findings are significant today. Many nations, concerned by increasing migration, are rethinking their approach to citizenship.[3] Will Kymlicka, a Canadian immigration and multiculturalism expert, notes "[t]here are growing numbers of migrants in most Western countries, and these migrants often retain close ties with their country of origin [that has led] some commentators [to] argue that the whole idea of 'national citizenship' is increasingly obsolete."[4] Others argue that increasing ethnic and religious diversity requires a more active effort by governments to sustain a sense of common national citizenship.[5] "Feelings of solidarity and common values...must now be actively promoted by the state, in part by emphasizing the centrality of common citizenship."[6] This position, known as the "reevaluation of citizenship" model, is more in line with contemporary Canadian immigration policies.[7] Grounded in this broader philosophical position, current Canadian immigration, citizenship, and multiculturalism policy can be viewed as highly pragmatic. However, recent changes within Canada's immigration policy have made the system more restrictive toward newcomers.

This paper surveys recent changes in Canada's immigration policy: the expansion of the Temporary Foreign Workers Program, the introduction of more rigid language requirements in the economic immigration stream, and changes made to our asylum system by Bill C-31, *Protecting Canada's Immigration System Act*. The effect of these changes on the rights and benefits of newcomers is evaluated, considering Canada's long term interests, commitment to

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[1] Will Kymlicka, *Multiculturalism: Success, Failure, and the Future* (Washington, DC: Migration Policy Institute, 2012) at 12 [Kymlicka, *Success, Failure, and the Future*].

[2] *Ibid* at 11, citing Abdolmohammad Kazemipur, *Social Capital and Diversity: Some Lessons from Canada* (Bern: Peter Lang, 2009).

[3] Will Kymlicka, "Immigration, Citizenship, Multiculturalism: Exploring the Links" (2003) 74:s1 The Political Quarterly 195 at 195. [Kymlicka, "Exploring the Links"].

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

multiculturalism, and human rights.[8] In light of recent restrictions, I argue human rights considerations should figure more prominently into immigration, citizenship, and multiculturalism policy.

HISTORICAL CONTEXT

Although multiculturalism has long been a reality in Canada, it is a relatively recent development in the country's legal and political history. The origins of multiculturalism in legal and political discourse can be traced back to the late 1960s and the Royal Commission on Bilingualism and Biculturalism. The Commission's recommendations influenced two important developments, which gave legal definition to Canadian national identity. First, the creation of the *Official Languages Act* in 1969 recognized French and English as our official languages.[9] Second, the 1971 policy statement on multiculturalism adopted multiculturalism as an alternative to biculturalism. The 1971 policy statement was largely a means of diffusing the Anglophone and Francophone tensions preoccupying Canada at the time.[10] Thus, from the outset, official Canadian multiculturalism policies have existed within the confines of a bilingual legal framework.[11]

Despite originating as a political compromise, there are many reasons to be proud of Canada's early commitments to multiculturalism. Canada was the first Western nation to officially adopt a multiculturalism policy, and remains the only Western nation with multiculturalism enshrined in its constitution.[12] Section 27 of the *Canadian Charter of Rights and Freedoms* provides: "[t]his *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".[13]

While the Constitution provided a commitment to multiculturalism in 1982, it was not until the passage of the *Canadian Multiculturalism Act* in 1988 that the legal and political scope of Canadian multiculturalism policy was defined.[14] The preamble in the *Multiculturalism Act* acknowledges Canada's constitutional commitment to multiculturalism and strong legislative framework for human rights, citizenship, and discrimination prevention. The preamble outlines the obligations of federal institutions. The mandate of the Minister responsible for multiculturalism is also set out in the *Multiculturalism Act*; the Minister is responsible for overseeing the implementation of the multiculturalism policy.[15] The preamble also authorizes all Ministers to implement the policy within their respective mandates.

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[8] See Fay Faraday, *Summary Report of Made in Canada: How Law Constructs Migrant Worker Insecurity* (Canada: Metcalf Foundation, 2012); SOR/2012-178, (2012) C Gaz II, 2147 [Citizenship Regulation Amendments]; Regulations Amending the Immigration and Refugee Protection Regulations, (2012) C Gaz I, 2434 [Removal of Claimants Amendment]; Regulations Amending the Immigration and Refugee Protection Regulations, (2012) C Gaz I, 2443 [IRPA Regulation Amendments]; Bill C-31, *An Act to amend the Immigration and Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, 1st Sess, 41st Parl, 2012 (assented to 28 June 2012), SC 2012, c 17 [Bill C-31].

[9] RSC 1985, c 31 (4th Supp).

[10] House of Commons, Standing Committee on Multiculturalism, *Multiculturalism: Building the Canadian Mosaic: Report of the Standing Committee on Multiculturalism* (June 1987) at 17 (Chair: Gus Mitges).

[11] *Ibid.*

[12] Kymlicka, *Success, Failure and the Future*, *supra* note 1 at 10.

[13] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 27 [*Charter*].

[14] RSC 1985, c 24 (4th Supp) [*Multiculturalism Act*].

[15] *Ibid*, ss 4-7.

Canada's multiculturalism policy has typically been implemented with an internal focus, addressing the relationship between its majority and minority populations. While the *Multiculturalism Act* has been invoked in a limited number of cases to litigate issues of discrimination,[16] it has mostly been the impetus for federal government agencies to enact cultural diversity policies, and to promote political and social inclusion.[17]

When violations of Canada's multiculturalism policy occur, they are generally litigated through the *Charter* in view of the section 27 interpretive power.[18] Section 27 has implications for sections 2(a) and 15, in particular.[19] It typically appears in the context of cases dealing with hate speech, language rights, judicial impartiality, and freedom of religion.[20] It has also been used to interpret the meaning of "free and democratic society", and to define "public interest" in the *Criminal Code* hate speech provision, section 181.[21]

The Three-Legged Stool

Canada's multiculturalism does not exist in a vacuum. Multiculturalism is but one component of a broader system, which includes Canada's immigration and citizenship policies.[22] Will Kymlicka argues that immigration, citizenship, and multiculturalism can be thought of as a "three-legged stool", with each leg supporting or weakening the other two. He writes, "[w]here one leg is weak, people begin to worry about the motives and consequences of the other two legs as well. Conversely, confidence in one leg can help generate optimism and trust in the other two."[23] For example, potential citizenship policy concerns can be defused or pre-empted by strong state policies on immigration and multiculturalism.[24]

In addition to the three-legged stool, public confidence in the proper functioning of the state is an important consideration in immigration policy. In 1997, a study of nine industrialized countries concluded that in countries where citizens had more faith in their governments, society

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[16] See generally *Akinbobala v Canada (Attorney General*, 155 FTR 215, 76 ACWS (3d) 939 ; *Ayangma v Prince Edward Island*, 2000 PESCTD 74, 194 Nfld & PEIR 254 rev'd 2001 PESCAD 22, 205 Nfld & PEIR 33; *Bruker v Marcovitz*, 2007 SCC 54, [2007] 3 SCR 607; *Commissioner of the Northwest Territories v Canada*, 2001 FCA 220, [2001] 3 FC 641; *Liebmann v Canada (Minister of Netional Defence)*, [1999] 1 FC 20, 82 ACWS (3d) 899; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Quévillon*, 36 CHRR 378, REJB 1999-11880 (QCTDP).

[17] Citizenship and Immigration Canada, *Annual Report on the Operation of The Canadian Multiculturalism Act: Promoting Integration* (Ottawa, CIC, 2007-08) at 3 [CIC Multiculturalism Report].

[18] Canadian Human Rights Foundation, *Multiculturalism and the Charter: A Legal Perspective* (Toronto: Carswell, 1987) at 54.

[19] *Ibid* at 50.

[20] See generally *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567; *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*, cited to SCR]; *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673; *Elmasry v Roger's Publishing Ltd*, 2008 BCHRT 378, 64 CHRR D/509; *Ladia v Canada (Minister of Citizenship and Immigration)*, 28 Imm LR (2d) 62, [1996] IADD no 1353; *Morales v Canada (Minister of Citizenship and Immigration)*, 2012 FC 164, 211 ACWS (3d) 203; *R v Feltmate*, 2012 NSSC 319, 320 NSR (2d) 315; *R v S(RD)*, [1997] 3 SCR 484, 151 DLR (4th) 193; *R v NS*, 2012 SCC 72, [2012] 3 SCR 726; *R v Tran*, [1994] 2 SCR 951, 117 DLR (4th) 7; *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202.

[21] RSC 1985, c C-46, s 181.

[22] Kymlicka, "Exploring the Links", *supra* note 3 at 195.

[23] *Ibid* at 202.

[24] *Ibid*.

was better able to handle issues arising from the admission and integration of immigrants. These countries also experienced fewer problems with ill-conceived restrictive legislation.[25]

In 2008, Canada demonstrated commitment to these areas when the Honourable Jason Kenney was appointed Canada's first Minister of Citizenship, Immigration and Multiculturalism, vesting responsibility for the implementation of all three policies in a single office.[26] Simultaneously, the administration of Canada's multiculturalism policy was transferred from the Department of Canadian Heritage to the Department of Citizenship and Immigration Canada ("CIC").[27] This shift in administration recognizes that multiculturalism is more than a historical phenomenon in Canada. Multiculturalism is a contemporary policy concern, which continues to shape and redefine the character of our nation.

In the 2010-2011 Report on the *Multiculturalism Act* (the "Report"), Minister Kenney described Canadian multiculturalism as,

> [E]mbedded in law in the form of the *Canadian Multiculturalism Act*. It is part of a larger legislative framework that includes the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, the *Citizenship Act*, the *Employment Equity Act*, the *Official Languages Act* and the *Immigration and Refugee Protection Act*.[28]

The Report's reference to the *Immigration and Refugee Protection Act*[29] is significant. By explicitly including the *IRPA* within the framework of multiculturalism, the Report acknowledges that Canadian multiculturalism is defined internally, and extends to immigration policy. In light of this broad conception of multiculturalism, recent changes to our immigration and citizenship legislation warrant scrutiny.

EXPANSION OF THE TEMPORARY FOREIGN WORKERS PROGRAM

One controversial change to Canadian immigration policy is the expansion and administration of the Temporary Foreign Worker Program ("TFWP"). Currently under the *IRPA*, foreign nationals can apply for permanent residence status through three broad streams: economic immigration, family reunification, and claims by Convention refugees and persons in need of protection.[30] Parallel to the economic immigration stream, a number of temporary residency programs allow migrants to enter Canada for temporary work.[31] Almost two-thirds of foreign nationals applying for permanent residence arrive under the economic class.[32]

A worker's skill level determines if they can apply for permanent residence status or if their status is temporary.[33] Skill level is determined under the National Occupational Classification

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[25] Wayne A Cornelius, Philip L Martin & James F Hollifield, "Introduction: The Ambivalent Quest for Immigration Control" in Wayne A Cornelius, Philip L Martin & James J Hollifield, eds, *Controlling Immigration: A Global Perspective* (Stanford: Stanford University Press, 1994) at 14.
[26] CIC Multiculturalism Report, *supra* note 17 at iii.
[27] *Ibid* at 9.
[28] Citizenship and Immigration Canada, *Annual Report on the Operation of the Canadian Multiculturalism Act: Promoting Integration* (CIC, 2012) at 11.
[29] SC 2001, c 27 [*IRPA*].
[30] *Ibid*, s 12.
[31] Alberta Civil Liberties Research Centre, *Temporary Foreign Workers in Alberta: Human Rights Issues* (Calgary: University of Calgary, Faculty of Law, 2010) at 17 [ACLRC Report].
[32] Faraday, *supra* note 8 at 9.
[33] *Ibid*.

("NOC") system, which classifies occupations on a matrix based on skill type and level. Skill type is ranked from zero to nine, skill level is ranked from A to D.[34] Workers are considered skilled if they possess a skill type of zero, or a skill level of A or B. This includes managerial occupations and occupations requiring a university degree, or two or more years of technical, postsecondary training. By contrast, foreign nationals with occupations in the NOC categories of C and D are considered lower-skilled and, with limited exception, are barred from applying for permanent resident status.[35] While there are numerous ways for those designated as skilled workers to obtain permanent residence status, low wage migrant workers are excluded from the economic immigration class and left in a situation of insecurity.[36]

Temporary migration in Canada is not new: the first general temporary foreign worker program, the Non-Immigrant Employment Authorization Program ("NIEAP"), was introduced in 1973.[37] What has changed is the number of temporary foreign workers in Canada. Since 2000, the number of migrant workers has more than tripled. Further, the administration of temporary workers has undergone an intense shift.[38]

In 2006, temporary foreign workers began to outnumber permanent residents. By 2012, the number of temporary foreign workers surpassed permanent residents by a ratio of 1.3 to 1.[39] This trend can be attributed to the federal government's decision to use foreign workers as a source of inexpensive and flexible labour. The government has characterized the TFWP as its "principal tool to help employers meet immediate skill requirements when qualified Canadian workers cannot be found."[40]

Canada currently operates four programs to bring temporary workers into the country, based on provisions contained in the *IRPA* and its regulations, and in the *Citizenship Act*.[41] These programs are the Seasonal Agricultural Worker Program, the Live-in Caregiver Program, the NOC C and D Pilot Project, and the Agricultural Stream of the NOC C and D Pilot Project. Under all of these programs, workers are issued work permits for a single employer. The employer must request permission to hire foreign labour, through a process known as the Labour Market Opinion ("LMO") process.[42] Though the government imposes employee-protective requirements on employers through the LMO, a "significant and systemic gap between their rights on paper and their treatment in reality" is widely noted.[43]

A few high profile examples are useful to illustrate the differential treatment suffered by these workers. In preparation for the 2010 Vancouver Olympics, thirty-six Latin American construction workers—mainly from Costa Rica—were brought to Canada by SELI Canada and SNC Lavalin to work on the Vancouver SkyTrain. These workers were paid an average hourly

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[34] Human Resource and Skill Development Canada, *National Occupational Classification Matrix 2011*, online: HRSDC <www5.hrsdc.gc.ca/noc/english/noc/2011/html/matrix.html>.
[35] Faraday, *supra* note 8 at 9.
[36] *Ibid.*
[37] ACLRC Report, *supra* note 31 at 7.
[38] *Supra* note 8 at 5.
[39] *Ibid*; Citizenship and Immigration Canada, *Preliminary Tables – Permanent and Temporary Residents, 2012*, online: CIC <www.cic.gc.ca/english/resources/statistics/facts2012-preliminary/index.asp>.
[40] Employment and Social Development Canada, News Release, "Temporary Foreign Worker Program Improved for Employers in BC and Alberta" (24 September 2007), online: Government of Canada <www.news.gc.ca/web/article-en.do?nid=350829>.
[41] *Supra* note 31 at 17.
[42] *Supra* note 8 at 11, 13.
[43] *Ibid* at 27.

rate of three dollars and fifty-seven cents.[44] LMO procedure requires that employers sign an agreement to pay workers at the prevailing Canadian wage.[45] By issuing work permits under a free trade agreement between Canada and Costa Rica—using "intercompany transfers"—SELI Canada and SNC Lavalin were able to circumvent this standard LMO procedure.[46]

Fortunately for these thirty-six construction workers, when their story became public, many were persuaded to join the Construction and Specialized Workers Union ("CSWU"). On the workers' behalf, the CSWU initiated an action against SELI Canada and SNC Lavalin in the British Columbia Human Rights Tribunal.[47] The tribunal ordered the employers pay compensation to the workers, totalling more than $2.4 million.[48]

Other examples of documented abuse of migrant workers exist. For example, a group of workers sued the Denny's Restaurant chain for failing to adhere to LMO conditions for overtime wages and travel compensation. A Ugandan nanny employed through the Live-in Caregiver Program alleged she was denied over $162,250 in wages and other entitlements over a two year period.[49] Despite these documented cases, temporary workers remain in a "legally, economically and socially marginalized position".[50]

One of the major issues in protecting the rights of temporary foreign workers is the lack of enforcement mechanism for the protective measures in place.[51] Since migrant workers are employed on tied permits, they are highly dependent on the employer to maintain their status. This undermines workers' capacity to resist unfair treatment.[52] Temporary workers could leave their jobs and seek new employment, while accessing the justice system; however, workers often do not know their rights. Even when workers exercise their rights, court procedures can take so long that a worker's visa or work permit may expire long before the matter is resolved.[53]

In addition to the abuse suffered by temporary foreign workers, a further concern is the trend toward temporariness within the Canadian economy. Many of the jobs these workers fill cannot truly be characterized as temporary.[54] Migrant workers are often hired for positions in the accommodation, food service, and manufacturing industries, where real growth and an accompanying labour shortage have been projected over the long-term.[55] Minister Kenney has recognized the need to re-evaluate the medium and long-term labour market demands for certain NOC C and D occupations. However, there is no evidence that such an evaluation has been conducted.[56] As the use and promotion of temporary labour continues to expand, it seems the

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[44] Krystle Alarcon, "Imported Workers Fight Back", *The Tyee* (8 January 2013), online: The Tyee <www.thetyee.ca/News/2013/01/08/Imported-Workers-Fight-Back>. [Alarcon, "Imported Workers Fight Back"].
[45] *Ibid.*
[46] *Ibid.*
[47] *Construction and Specialized Workers' Union Local 1611 v SELI Canada Inc*, 2008 BCHRT 436, 65 CHRR D/277.
[48] *Ibid* at paras 531-560.
[49] *Dominguez v Northland Properties Corporation*, 2012 BCSC 328, [2012] CLLC para 210-027; "Nanny Sues Boss for $195K Over 'Wage Theft'", *CBC News* (29 May 2011), online: CBC <www.cbc.ca/news/canada/toronto/nanny-sues-boss-for-195k-over-wage-theft-1.1090335>.
[50] Faraday, *supra* note 8 at 5.
[51] Krystle Alarcon, "Law Leaves Migrant Workers Dangling Precariously", *The Tyee* (9 January2013), online: The Tyee <www.thetyee.ca/News/2013/01/09/Migrant-Worker-Laws>.
[52] Faraday, *supra* note 8 at 25.
[53] *Ibid* at 29.
[54] ACLRC Report, *supra* note 31 at 11.
[55] *Ibid* at 11-12.
[56] *Ibid* at 12.

only temporary aspect of many jobs staffed through the programs will be the foreign workers who fill them.[57]

Although the government places caps on all permanent immigration streams, no such mechanism exists to regulate the TFWP.[58] The Metcalf Foundation released a report in 2012 outlining "a deepening concern that Canada's temporary labour migration programs are entrenching and normalizing a low wage, low rights 'guest' workforce on terms that are incompatible with Canada's fundamental Charter rights and freedoms, human rights, and labour rights."[59] Indeed, many commentators see the expansion of the program as an invitation for exploitation. Alberta Federation of Labour president, Gil McGowan, has stated that Canada is becoming "the Dubai of the North using an exploitive guest worker program to fill our most menial and undesirable jobs."[60]

Canada's TFWP has been unfavourably compared to the *Gastarbeiter*, or Guest Worker, program in Germany. The German program was driven by labour market demand and, as the name implies, intended workers migrating under the program to stay for a short time. Yet, as the labour demand persisted, many workers remained in the country far longer than intended without access to citizenship or the rights of permanent residents.[61] Since the vision for the program was temporary, no attempt was made to integrate the workers into German society.[62]

Reforms in January of 2001 allowed the longstanding guest workers in Germany to naturalize, but the German experience should be a cautionary tale for Canadians. Alberta's Former Employment and Immigration Minister, Thomas Lukaszuk, has recognized that the TFWP is acting as a "temporary solution to a permanent problem."[63] Not taking measures to improve the condition of foreign workers could lead to a large, disenfranchised, and unintegrated migrant community, antithetical to Canada's model of multicultural inclusion.

LANGUAGE REQUIREMENTS

A second controversial change to Canadian immigration policy relates to tougher minimum language competency requirements, imposed on applicants prior to entry. In the past, Canada's immigration and citizenship policies were lauded as favourable to immigrants whose first language was not an official language. Provided applicants made a "modest good faith effort" on the citizenship test, they were likely to pass.[64] The new language requirements were created by amending the *Citizenship Regulations* and the *IRPA Regulations*. These changes affect candidates in the Canadian Experience Class ("CEC"), the newly created Federal Skilled Trades Class ("FSTC") and the re-launched Federal Skilled Workers Class ("FSWC").[65]

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[57] *Ibid* at 9.
[58] Alarcon, "Imported Workers Fight Back", *supra* note 44.
[59] Faraday, *supra* note 8 at 5.
[60] Krystle Alarcon, "Will Tories Fix Temp Foreign Worker Program?", *The Tyee* (10 January 2013) online: The Tyee <www.thetyee.ca/News/2013/01/10/Fix-Temp-Foreign-Worker-Program>.
[61] ACLRC Report, *supra* note 31 at 36.
[62] *Ibid.*
[63] Trish Audette, "Foreign Worker Program Reassessed: Airlines Benefit Most, Minister Jokes", *Edmonton Journal* (21 July 2010), online: Edmonton Journal <www2.canada.com/edmontonjournal/news/cityplus/story.html?id=b61c8005-c01b-4fc9-b613-5849500e3b9b>.
[64] Kymlicka, "Exploring the Links", *supra* note 3 at 197.
[65] Citizenship Regulation Amendments, *supra* note 8; Removal of Claimants Amendment, *supra* note 8; IRPA Regulation Amendments, *supra* note 8.

Changes to the *Citizenship Regulations* require applicants provide "objective evidence" that they have "an adequate knowledge of one of the official languages of Canada".[66] Applicants must show their level of speaking and listening in one of the official languages is at or above the "Canadian Language Benchmark (CLB) 4…when they file their application."[67] Evidence may be submitted in the form of CIC approved third party test results, the completion of secondary or postsecondary education in English or French, or through achieving the appropriate language level in certain government funded language training programs.[68] Prior to the amendment, language ability was assessed through interactions with CIC staff and through a multiple-choice citizenship exam. The citizenship exam also tested the applicant's knowledge of Canadian history, as well as the rights and responsibilities of citizenship.[69]

In the new FSWC point system, the threshold level of language proficiency is fixed at CLB 7 or an "adequate intermediate proficiency".[70] In the CEC and the FSTC, the language competency level is determined by the Minister on a discretionary basis. Though new limits may be specified in the regulations, it is believed that the initial level for the CEC will also be fixed at CLB 7.[71]

The government's stated rationale behind the changes to the *IRPA Regulations* is to "recognize the importance of language to socioeconomic integration".[72] Proponents of the stringent language requirements point to research that has consistently shown language proficiency to be a key factor in securing better employment and a higher salary.[73]

While the rationale may be sincere, the changes are not without controversy. Opponents fear the language requirements could lead to a dramatic shift in source countries, potentially excluding an entire class of people who could otherwise contribute significantly to Canada.[74] From a multiculturalism perspective, this argument is troubling. Openness has characterized Canada's immigration system since the 1960s. Since that time, Canada has rejected racially biased policies that made it difficult for non-Europeans to gain admission or to become citizens of Canada. This trend has been supported by immigrant groups.[75] If stringent language requirements shift source countries to the point of exclusion, Canadian immigration policy will have seriously deviated away from openness.

In addition to marking a shift in Canadian immigration policy, new language policies may have a discriminatory impact on immigration. Today's racial discrimination often manifests in practices, policies, and laws that appear neutral on their face, but detrimentally affect visible

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[66] Citizenship Regulation Amendments, *supra* note 8 at 2148.
[67] Citizenship and Immigration Canada, News Release, "Minister Kenney Announces New Language Rules for Citizenship Applicants" (28 September 2012), online: Government of Canada < www.news.gc.ca/web/article-en.do?nid=697099>.
[68] *Ibid.*
[69] *Ibid.*
[70] IRPA Regulation Amendments, *supra* note 8 at 2449-50.
[71] *Ibid* at 2458.
[72] *Ibid* at 2449.
[73] Ralph Dzegniuk & Divya Shahani, "Strong Fence, Wide Gate: Canada's Changing Immigration Policy", *The Epoch Times* (19 January 2013), online: The Epoch Times <www.theepochtimes.com/n2/canada/strong-fence-wide-gate-canadas-changing-immigration-policy-337388.html>. See also Naomi Alboim, Ross Finnie & Ronald Meng, "The Discounting of Immigrants' Skills in Canada: Evidence and Policy Recommendations" (2005) 11:2 IRPP Choices 1.
[74] Rafael Fabregas, "Will New Immigration Rules Affect Canada's Multiculturalism?", *Canadian Lawyer* (8 October 2012), online: Canadian Lawyer <www.canadianlawyermag.com/4367/Will-new-immigration-rules-affect-Canadas-multiculturalism.html>.
[75] Kymlicka, "Exploring the Links", *supra* note 3 at 198.

minorities.[76] "In an era when both international law and the *Canadian Charter of Rights and Freedoms* prohibit discrimination based on race, it is unlikely that one will find evidence of overtly racist law and policies."[77]

From the very beginning, Canada's commitment to multiculturalism, tolerance, and promotion of linguistic diversity was tempered by the commitment to bilingualism, enshrined in the *Official Languages Act*, the *Charter* and the *Multiculturalism Act*.[78] Given the basic principle that Canadian multiculturalism exists within a bilingual framework, it is difficult to imagine a successful claim for discrimination on the basis of language proficiency requirements in an official language. This is especially true in light of the Supreme Court of Canada's holding in *Chiarelli v Canada* that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in [Canada]."[79]

Minister Kenney has dismissed allegations that new language requirements will have a negative impact on multiculturalism in Canada.[80] He points to statistics showing that for over a decade, Canada's top immigrant source countries have been China, India, and the Philippines.[81] However, it should be noted that English has official language status in the Philippines.[82]

While the new emphasis on language may be a good faith attempt to promote economic success and integration of newcomers, it will be important to monitor the effects of this policy. Evaluation is required to determine if there is a notable shift in source countries, and if such a shift can be attributed to new language requirements.[83] If the policy has a detrimental effect on non-European immigration, its validity could be challenged as a violation of section 3(2) of the *Multiculturalism Act*. This section states, "all federal institutions shall…promote policies, programs and practices that enhance the ability of individuals and communities of all origins to contribute to the continuing evolution of Canada".[84] At a minimum, the government should consider potential negative consequences of new language requirements and heed calls for study.[85] After all, section 5(1)(b) of the *Multiculturalism Act* requires the Minister "undertake and assist research relating to Canadian multiculturalism, and to foster scholarship in the field."[86]

BILL C-31 AND THE REFUGEE DETERMINATION SYSTEM

A third and controversial change to Canadian immigration policy relates to how certain refugee claims are handled. Bill C-31 was introduced as a means to reduce the influx of false or irregular asylum claims, provide faster protection to genuine refugees, and liberalize visa

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[76] Emily Carasco et al, *Immigration and Refugee Law: Cases, Materials, and Commentary* (Toronto: Emond Montgomery Publications, 2007) at 3.
[77] *Ibid* at 2-3.
[78] *Official Languages Act, supra* note 9; *Charter, supra* note 13, ss 16-23; *Multiculturalism Act, supra* note 14, ss 3(1)(i-j).
[79] *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at 833, 90 DLR (4th) 289.
[80] Fabregas, *supra* note 74.
[81] *Ibid*.
[82] *Constitution of the Republic of the Philippines 1987,* Art XIV, s 7.
[83] Citizenship and Immigration Canada, *Facts and Figures 2011 – Immigration Overview: Permanent and Temporary Residents*, online: CIC <www.cic.gc.ca/english/resources/statistics/facts2011/permanent/10.asp>.
[84] *Supra* note 14, s 3(2)(b).
[85] Fabregas, *supra* note 74.
[86] *Supra* note 14, s 5(1)(b).

requirements for certain countries.[87] However, critics argue many of the changes contained in Bill C-31 undermine the system's integrity by denying basic rights to many, and by placing too much discretionary authority in the hands of a few.[88] The two most notable changes are: the creation of a safe country list, and the introduction of new powers over asylum seekers whose arrival is deemed irregular.[89]

A. Designated Countries of Origin

Bill C-31 amended section 109.1 of the *Balanced Refugee Reform Act*, thus amending the *IRPA*. These amendments give the Minister broad powers to list certain Designated Countries of Origin ("DCO") as safe for the purpose of refugee determination.[90] A country is designated as safe where the number of claims rejected by the Refugee Protection Division from that country surpasses a threshold designated by the Minister.[91] Of concern, paragraph 109.1(2)(b) enables the Minister to deem a country safe without passing the rejected claims threshold, if he is of the opinion that in the country:

> (i) there is an independent judicial system,
> (ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and
> (iii) civil society organizations exist.[92]

The DCO provision creates safe country lists in two separate schedules.[93] Although the rationale for designations made under Schedule 1 seems clear, it is not uncontested.[94] Listed in Schedule 1, alongside countries like France and the United States, are Hungary and the Czech Republic.[95] Hungary and the Czech Republic are known as significant sources of ethnic Roma refugee claimants. The high rate of Roma claims from these countries—and correspondingly high rate of rejection or abandonment—explains their presence on the Schedule, and is also cited as a major factor behind the creation of the Schedules in the first place.[96]

In 2011, claims made by Roma people in Canada doubled from approximately 2,500 to nearly 5,000.[97] Over that same period no analogous spike in Roma claims occurred in other countries of asylum, such as the United States.[98] This led many to conclude that claims were falsely made, in order to take advantage of Canada's generous asylum system.[99] In support of

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[87] Tobi Cohen, "Controversial Refugee Bill Set to Clear House of Commons Monday", *Postmedia News* (10 June 2012), online: National Post <news.nationalpost.com/2012/06/10/controversial-refugee-bill-set-to-clear-house-of-commons-monday>.
[88] *Ibid*.
[89] See Bill C-31, *supra* note 8, cls 58, 10.
[90] *Ibid*, cl 58.
[91] *IRPA*, *supra* note 29, s 109.1(2)(a).
[92] *Ibid*, s 109.1(2)(b).
[93] Order Designating Countries of Origin, (2012) C Gaz I, 3379 [Order Designating Countries of Origin].
[94] Louise Elliott & Laura Payton, "Refugee Reforms Include Fingerprints, No Appeals for Some", *CBC News* (15 February 2012), online: CBC News <www.cbc.ca/news/politics/refugee-reforms-include-fingerprints-no-appeals-for-some-1.1191505>.
[95] Order Designating Countries of Origin, *supra* note 93.
[96] Elliott & Payton, *supra* note 94; Cohen, *supra* note 87.
[97] Elliott & Payton, *supra* note 94.
[98] *Ibid.*
[99] *Ibid.*

this, Minister Kenney's office notes that in 2011, virtually all of the asylum applications from the European Union were abandoned, withdrawn, or rejected.[100] Canadian taxpayers were left to foot the bill for the healthcare and welfare benefits these claimants received while in the country.[101] To contrast, representatives of the Roma community in Canada claim that they are being racially discriminated against and are persecuted ethnic minorities from otherwise safe countries.[102]

Countries listed in Schedule 2 are also problematic. Conspicuously placed in the midst of stable democracies like Denmark, Sweden, and Belgium, sits Mexico.[103] Mexico is not typically regarded as an exemplar of human rights protection or the rule of law, and the country is currently in the midst of an ongoing drug war.[104] As former Immigration and Refugee Board chair Peter Showler notes, despite the political pressure placed on the Immigration and Refugee Board to refuse Mexican claims, nearly ten percent of all claimants from Mexico are still approved.[105]

While the DCO process may expedite individuals who qualify for regular visas, ineligible individuals—whose lives are genuinely at risk—face additional barriers to making successful claims under the DCO regime. The implications of a country being designated as a DCO are significant. Claimants from these countries are subject to an expedited claim process. A hearing will occur after forty-five days for claims made at a port of entry, or thirty days for inland claims. This leaves the applicant, or counsel, little time to prepare.[106] In addition, individuals from DCOs, along with all new claimants for refugee status, are denied the basic and emergency health care benefits previously available under the system. If unsuccessful, claimants from DCOs will be denied the right to appeal to the Refugee Appeal Division and face immediate deportation, even pending judicial review of the decision.[107]

The discretionary nature of DCO designation is concerning. Mexico's inclusion in Schedule 2 demonstrates the Minister may use the discretionary power to designate a country as safe in borderline cases. Such designation may be made more as a matter of political expediency to achieve other policy goals, rather than based on a factual amelioration of a country's conditions.[108]

B. Designation of Irregular Arrivals

Another significant change brought by Bill C-31 is designed to combat human smuggling and "queue jumping" by refugee claimants who arrive in the country irregularly—usually by boat and in large groups.[109] The introduction of this measure can be linked to two separate incidents in 2009 and 2010 involving large influxes of Tamil Sri Lankans.[110] These highly

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[100] *Ibid.*
[101] Cohen, *supra* note 87.
[102] *Ibid*.
[103] Order Designating Countries of Origin, *supra* note 93.
[104] Central Intelligence Agency, *The World Factbook: Mexico*, online: CIA <www.cia.gov/library/publications/the-world-factbook/geos/mx.html>.
[105] Elliot & Payton, *supra* note 94.
[106] Canadian Council for Refugees, *Concerns About Changes to the Refugee Determination System*, online: CCR <www.ccrweb.ca/en/concerns-changes-refugee-determination-system> [CCR].
[107] *Ibid.*
[108] Cohen, *supra* note 87.
[109] *Ibid*.
[110] "Tamil Migrants to be Investigated: Toews", *CBC News* (13 August 2010), online: CBC News <www.cbc.ca/news/canada/british-columbia/tamil-migrants-to-be-investigated-toews-1.898421>.

publicized mass arrivals aboard the smuggling ships MV Ocean Lady and the MV Sun Sea, linked a number of the potential claimants to Tamil Tiger rebels, and led to the groups being treated as a security threat.[111]

In response to the two incidents, the government imposed strict measures to send a strong message to those attempting to enter the country illegally or engage in human smuggling.[112] The measures, introduced to the *IRPA* as section 20.1, give the Minister of Public Safety broad discretion. The Minister of Public Safety may designate two or more foreign nationals as a group of irregular arrivals if he is of the opinion that it is in the public interest, or has reasonable grounds to suspect smuggling has occurred.[113] The threshold to establish such cause is low, especially in the context of mass, unannounced arrivals by boat.

Once an asylum claimant is designated as an irregular arrival, regardless of whether the claim is *bona fide*, the consequences include: mandatory detention for all persons aged sixteen or older, limited right of review and no right of appeal to the Refugee Appeal Division, and a prohibition on claiming permanent resident status for a minimum of five years.[114] This means that even if such claimant is admitted, there no possibility for them to sponsor their spouse and children in Canada until the five year period is over.[115]

As we examine Canadian immigration policy, it is worth bearing in mind that many refugee claimants today are desperate economic migrants. Their origin in troubled parts of the world is merely coincidental. Our low tolerance for this truth drives many to bend their stories in an effort to gain admittance.[116] As far back as 1989, Armand Petronio noted that "[b]efore [the 1980s] such economic migrants came predominantly from Europe and were welcome to Canada. Now that such migrants come from the so-called third world we insist that they meet the strict legal definition of refugee."[117] While our system must properly regulate refugee claims, many claimants are often underprivileged and exploited individuals, hoping to start new lives in Canada. For these individuals, the only means of entry available are as temporary workers, "bogus refugees",[118] or to remain undocumented. Additionally, many claimants may not meet the strict definition for a Convention refugee, but still have a genuine fear of persecution in another country.[119] On the basis of public confidence in Canada's immigration system and basic human dignity, the Canadian government should exercise compassion, instead of treating refugee claimants as criminals.[120]

The changes brought by Bill C-31 that restrict freedom of movement and limit access to basic services, such as health care, could be subject to a *Charter* challenge. These measures allow for differential treatment by the state based explicitly on one's country of origin or

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[111] *Ibid*.
[112] Citizenship and Immigration Canada, "Designating Human Smuggling Events", *Backgrounder* (29 June 2012), online: CIC <www.cic.gc.ca/english/department/media/backgrounders/2012/2012-06-29f.asp>.
[113] See Bill C-31, *supra* note 8, cl 10.
[114] *Ibid*, cls 10, 23.
[115] CCR, *supra* note 106.
[116] Armand A Petronio, "Immigration and Multiculturalism" (materials prepared for a Continuing Legal Education seminar held in Vancouver, British Columbia, 23 February 1989), (Vancouver: Continuing Legal Education Society of British Columbia, 1989) at 4.1.01.
[117] *Ibid.*
[118] Elliot & Payton, *supra* note 94 (In Minister Kenney's introduction of Bill C-31 he stated that Canadians have no tolerance for "bogus refugees", referring to the growing number of claims by Roma people origination from European Union democracies).
[119] CCR, *supra* note 106.
[120] *Ibid.*

citizenship status. The Supreme Court of Canada recognized these factors as an analogous ground under section 15 of the *Charter* in *Andrews v Law Society*.[121] Justice La Forest in *Andrews* stated, "[d]iscrimination on the basis of nationality has from early times been an inseparable companion of discrimination based on racial, national or ethnic origin."[122]

Further, the *IRPA* seeks "to fulfill Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement."[123] Provisions that expedite the adjudication of claims and deny appeals may violate Canada's international obligations under the *UN Convention Relating to the Status of Refugees*,[124] as they increase the risk refugees may be deported into situations of persecution without opportunity for appeal. As Canada has ratified the *Refugee Convention*, our immigration policy must be evaluated with that obligation in mind.

Singh v Minister of Employment and Immigration is an example of the *Refugee Convention* shaping the scope of Canada's obligations vis-à-vis Convention refugees and refugee claimants.[125] The Supreme Court of Canada took note of the *Refugee Convention*'s preamble that states:

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on December 10 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination...[and] has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms[126]

The Supreme Court of Canada interpreted fundamental rights generously, and afforded Convention refugees legal protection under section 7 of the *Charter*. This court held the right to "security of the person" encompasses the right to be free from the threat of physical punishment or suffering. The removal from Canada to a country where one's life or freedom is threatened is a breach of that right.[127] Although the appellants were refugee claimants, not Convention refugees, the court determined the claimants were entitled to fundamental justice in the adjudication of their claims because the potential consequences of a denial of status were so grave.[128]

CONCLUSION

In an era of changing notions of citizenship and increasingly fluid migration, it is important to be mindful of how Canada's citizenship, immigration, and multiculturalism policies interact to define our nation's character. Canada's identity is shaped by its commitment to multiculturalism. We rely on immigrants for continued economic growth. When making changes to any of these three policies, we should start by reflecting on what kind of country we aspire to be. Our legislative enactments make it clear that Canada aspires to be a tolerant, welcoming, and diverse

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[121] *Supra* note 20.
[122] *Ibid* at 196.
[123] *IRPA*, *supra* note 29, s 3(2)(b).
[124] 28 July 1951, 189 UNTS 137, Can TS 1969/6 [*Refugee Convention*].
[125] [1985] 1 SCR 177, 17 DLR (4th) 422 [*Singh*, cited to SCR].
[126] *Refugee Convention*, *supra* note 124, Preamble
[127] *Singh*, *supra* note 125 at 179.
[128] *Ibid.*

society, where human rights are respected—regardless of citizenship status. This is how we want to present ourselves to the world.

While the Canadian approach was previously exceptional, recent shifts in our policy raise doubts about our future path. The government's approach is based on pragmatism, with an emphasis on short-term interests. The lacking emphasis on human rights is troubling. This approach could undermine Canada's commitment to multiculturalism and human rights. The exploitation faced by guest workers, increased language requirements for newcomers, and the characterization of certain asylum seekers as criminals could decrease public support for immigration. In turn, this could change Canada's welcoming image, making it a less popular choice for the immigrants we hope to attract. In any case, as stresses between traditional views of state sovereignty and globalization are increasingly expressed in the immigration context, Canada, like other countries, will be required to continually reassess the social and economic impact of its policies, within and outside its borders.[129]

[129] See Carasco, *supra* note 76 at 1.

"TO BE" IS A VERB: REWRITING LAW THROUGH EMBODIED REFORM

Cynthia Khoo*

Just like the human body is composed of approximately seventy percent water, the *corpus juris*[1] that regulates our lives is arguably composed of seventy percent social norms, cultural values, and narratives, grand and banal. We encounter these elements through lived experience, which is also embodied experience. In the same way that personal trainers say, "you are what you eat", one might suggest that you are what you legislate or obey. The law has a profound impact on our bodies: how we view our own bodies and other people's bodies; how we relate to our own bodies; and how we move in and use—or do not use—our bodies. By extension, the various forms of oppression inherent in the law become inscribed upon, absorbed into, and perpetuated by our bodies, through the same social norms, cultural values, and narratives that constitute and mediate law in our lives. This process evokes the image of a massive, sprawling, intricate feedback loop, deeply embedded into the fabric of law and society. However, this feedback loop is inherently unstable, and requires continual input. This instability, as performer and LLM graduate Julie Lassonde points out, creates a "few centimetres of leeway" for change.[2] This paper is about those few centimetres.

Within that tiny amount of space, one can create change by recognizing and exploiting its existence, by moving through it with one's body in deliberate ways. If embodied experience, the law, and social norms are interdependent, changing any one of these elements should alter the others. However, the majority of reform initiatives focus solely on the legal and social elements of change. While legal reform and social reform are familiar terms, "embodied reform" is currently more likely to evoke a New Age yoga retreat than a social justice strategy.

This paper, however, features a possible route to legal and social reform through the body—a kind of reverse engineering, or hacking into the feedback loop to introduce new variables. If laws and social norms inscribe themselves upon our bodies, and read their own earlier inscriptions, the body can be thought of as a palimpsest. The task at hand is to inscribe our own bodies with something different, thereby intercepting the normative loop, and causing a domino effect in the rest of the system. The challenge is that we ourselves are part of this loop, making it difficult to engage in such self-inscription—particularly as the ability to engage in this process assumes that we know what to inscribe, how to inscribe, and that inscription is even necessary to begin with.

This paper investigates how one might facilitate the process of rewriting the law with one's body. Part I provides background and context, including a discussion of what "law" comprises

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[1] Robert M Cover, "Foreward: *Nomos* and Narrative" (1984) 97 Harv L Rev 4 at 9.

[2] Julie Lassonde, *Performing Law* (LLM Thesis, University of Victoria, 2006) at Spider 1: What is Performing Law?, online: University of Victoria Law <www.law.uvic.ca/lassonde/HTML/PERFORMING%20LAW%20-%203.html>.

and the role personal narrative plays in the exploration of academic, theoretical, and legal issues. Part II focuses on embodiment and praxis, including how the law and aspects of oppression affect people through embodied experience, in a way that means little beyond lived experience. Part III demonstrates that embodied oppression in part relies on the Cartesian mind-body divide, and on an associated hypocritical dismissal of the body. Part IV shows how one can resist oppression by centralizing the body, using my experience of training capoeira, an Afro-Brazilian martial art form, as an example. Finally, Part V proposes an experiment titled "Recall Theatre", an idea that combines Augusto Boal's innovation of Forum Theatre with the ideas of various theorists that may be collectively termed self-objectification.

PART I: SETTING THE STAGE

A. Defining Law

This paper assumes a broad definition of law, including social norms and any situation that could be construed as a "contested site of meaning."[3] Formal law, at the heart of it, is about contested meaning: "a decision must be made about the incidence of a legal instrument. 'Is an airplane or a baby carriage a 'vehicle' within the meaning of the statute prohibiting vehicles in the park?'…There is a conventional understanding that a certain consequence follows from...classifying a thing as 'X.'"[4] Social norms arguably operate similarly. However, instead of classifying potential vehicles, social norms classify people: their behaviour, gender, sexuality, skin colour, and so forth. A decision "must" be made. For example, *is this person a woman within the meaning of the door symbol allowing only women into this public restroom?* Depending on the classification, certain consequences follow. One also makes such decisions every day in social interactions, such as: *is this person approachable within the meaning of characteristics that define approachable people?*

The central difference between formal law and informal law, or everyday law,[5] manifests in asking: *whose* meaning? Where, when, and how did that become the set meaning? Disputes arise over meaning. With formal law, one simply refers to jurisprudence and statutes. With informal law, nothing is so obviously documented. There is no *Hansard* defining attractive or qualified, how much space one may take up on a bus or sidewalk,[6] where a woman may safely jog at midnight, or where a same-sex couple may publicly show romantic affection. Yet, everyone seems to have an understanding of the aforementioned. Everyday law also dictates meaning, yet few directly engage with the notion that "the" meaning may in fact be nothing more than their

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[3] Lassonde, *ibid*.

[4] Cover, *supra* note 1 at 6-7.

[5] Lassonde, *supra* note 2 ("Macdonald explains that 'everyday law' is a series of implicit rules that govern our lives, such as the way we decide who cooks dinner for example: 'Everyday law' is largely implicit law. Implicit law is law that is not consciously made as law—even if consciously made—by anyone" at Spider 1: What is Performing Law?).

[6] Nancy Rae Johnson, *(Un)learning Oppression Through the Body: Toward an Embodied Critical Pedagogy* (PhD Thesis, University of Toronto, 2007) [unpublished] ("She can recall numberless occasions riding the bus or subway where men sprawl over the seats to take up as much space as they want, even when that spills over into her space. As an example, Natalie talks about sitting on the bus recently when her leg muscles started to go into spasm. She then realized that because the man sitting next to her was crowding into her seat, she had constricted herself so tightly that her legs had begun to cramp. She had literally embodied the gendered message that women shouldn't take up much space, and her body had paid the price in tension and pain" at 157).

own meaning—or alternatively, someone else's meaning, with which they might disagree, if made aware of the option to do so.

Everyday law matters because its meanings and consequences often evolve into formal law. Formal law is "not radically distinct from culture and politics, but is simply one of a number of ordering mechanisms and is thoroughly imbued with the dominant philosophies."[7] Similarly, "the creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium."[8] As a result of this interdependence, "[e]ngaging with law therefore means not simply attending to the way in which law impacts upon our lived, embodied lives, but also having regard to the social regulatory norms that both construct and are constructed by law."[9] Therefore, this paper focuses on social norms and everyday experiences in the context of our embodied lives. As William Shakespeare famously writes in *The Tempest*, "we are such stuff as dreams are made on"[10]. The analysis explored in this paper is grounded in the notion that these—social norms and everyday experiences—are such stuff as laws are made on.

B. The Lived Is the Legal

In addition to focusing on social norms and everyday interactions, this paper draws upon personal narratives as an increasingly recognized form of academic research and knowledge acquisition.[11] Personal narratives are what connect legal and social norms to everyday lived experience, through all modes of interpersonal relations. In her doctoral thesis, Nancy Rae Johnson asserts that "narrative offers a way to study the phenomenon of experience, and social phenomena are a natural point of convergence for individual, collective, and cultural stories."[12] Everything of meaning in our lives is couched in one narrative framework or another, and "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[13]

According to Julie Lassonde, "trivial stories give us the substance through which we understand the world",[14] as mediated through formal and informal laws. The average person does not say to their friend, "you'll never guess the biopower I was subjected to at the doctor's office yesterday," or, "my last employer took a pre-*Vriend*[15] approach to workplace practices." This does not change what happened at the doctor's office or workplace, nor does it change how such incidents affected the individual's lived experience in these situations.[16] Using the context of

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[7] Gillian Calder & Sharon Cowan, "Re-Imagining Equality: Meaning and Movement" (2008) 29 Australian Feminist LJ 109 at 113.
[8] Cover, *supra* note 1 at 11.
[9] Calder & Cowan, *supra* note 7 at 113.
[10] William Shakespeare, *The Tempest*, ed by David Bevington & David Scott Kastan (New York, NY: Bantam Dell, 2006) at 127.
[11] Johnson, *supra* note 6 ("Increasingly, scholars and educators in the arts and humanities are examining narrative structures for their role in making meaning of lived experience" at 91).
[12] *Ibid*.
[13] *Supra* note 1 at 4.
[14] Lassonde, *supra* note 2 at Spider 3: Conclusion.
[15] *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.
[16] Having said that, knowing about biopower or *Vriend* is what opens space to engage in the process of informal law-making in a way that could change such everyday experiences. As lawyers, future lawyers, or other similarly situated actors privileged with such knowledge, we may not have a categorical obligation to wield such knowledge in the ways Lassonde or this paper suggests, but we would certainly be remiss not at least to acknowledge it, and its implications for our roles individually and as a profession.

gender, Lassonde notes, "no matter how we change statutes...if we do not get used to interacting differently with women or as women, if we do not get used to different gender performances in everyday life, none of these reforms will be powerful."[17] Everyday stories from women's lives are what reveal whether or not, and how, statutory reform produces any on-the-ground results.

Lastly, it is important to acknowledge that "no story can ever provide a complete or permanent representation of embodied experience…[and] individual stories…are not meant to represent the experiences of everyone."[18] In this sense, personal narratives may represent a drop in the ocean of larger theoretical and legal frameworks—but placing such drops under a microscope is how one uncovers secrets about the ocean.

PART II: ENTER THE BODY

A. Licensing in Blood: The Embodied Impact of Law

The law impacts how we view and relate to our bodies because we are subjected to the law through embodied experiences, mediated by forces such as social norms and ordinary interactions.[19] Since "[m]ost of everyday law is conducted performatively [and] our daily life interactions are embodied",[20] everyday law directly influences our bodily sensations, and our perceptions towards our own and each other's bodies. We "learn about social systems through patterns of interpersonal nonverbal communication,"[21] and the law is one of these systems. Thus, not only do laws and social norms read our bodies and vice versa, but we read other people's bodies and glean information by making such observations. Conversely, other people read our bodies the same way. This is what allows the possibility of "rewriting" laws with one's body. Knowing that the law is interwoven with social norms and everyday interactions that are tied to embodied experiences "expands our understanding of law to the image, the corporeal, the embodied and the daily; and demonstrates how performing law in everyday life is an effective means of engaging with and transforming the legal world."[22] In fact, law at its core is arguably rooted in a visceral experience: an intuitive understanding of what it means to be fair, moral, or just. This notion aligns with the words of performance artist Guillermo Gómez-Peña:

> Our system of thought tends to be both emotionally and corporeally based. In fact, the performance always begins in our skin and muscles, projects itself onto the social sphere, and returns via our psyche, back to our body and into our blood stream; only to be refracted back onto

[17] Lassonde, *supra* note 2 at Spider 3: Conclusion.
[18] Johnson, *supra* note 6 at 107, 172. In fact, this paper originally began with an introductory focus on the connection between laws that regulate sexuality and gender, and their impact on the body image of LGBTQI2SA individuals. I quickly moved away from this upon becoming cognizant of the volume of research I was accumulating in proportion to the assigned page limit, but more importantly, also upon realizing that, due to the highly personal nature of embodied experiences, I would not be able to write well or properly on this particular intersection without having myself lived as a member of any of the groups being written about. Consequently, I have both expanded my focus, to write about embodied experience and oppression generally, and narrowed it, drawing upon my own personal lived experiences as a heterosexual, cisgender woman.
[19] Cover, *supra* note 1 ("Law is that which licenses in blood certain transformations while authorizing others only by unanimous consent" at 9).
[20] *Supra* note 2 at Spider 1: What is Performing Law?.
[21] *Supra* note 6 at 80.
[22] Gillian Calder, "Embodied Law: Theatre of the Oppressed in the Law School Classroom" (2009) 1 Masks: The Online Journal of Law and Theatre 1 at 17.

> the social world via documentation. Whatever thoughts we can't embody, we tend to distrust. Whatever ideas we can't feel way deep inside, we tend to disregard.[23]

Criminal law, for instance, exemplifies such trust that the law places in embodied senses, in the way this area of law was once and often continues to be an overt regulator of morality.[24]

Similarly, the judiciary may go to great lengths to distinguish a case before them, overturn a particular line of law, or encourage parliament to do so, due to deep dissatisfaction with a particular decision on the facts. For example, in the House of Lords case *Cartledge et al v E Jopling & Sons Ltd*, the justices followed precedent,[25] but "[t]heir Lordships were not, however, happy with [the] result".[26] Consequently, parliament changed the law on the judges' recommendation.[27] Law reform occurred as a result of an embodied reaction by those in a position of power.

B. The Whole Body Thinks: Embodied Oppression

To use embodied performativity as a form of anti-oppression, or resistance, the ways we embody our own oppression must be recognized. As Augusto Boal said, "the whole body thinks—not just the brain".[28] When we absorb marginalization mentally and psychologically, we absorb it physically, as well. We experience embodied oppression through notions of our own identities, through visceral sensations, through the ways we move or use our bodies, and through the body language we overtly or unconsciously deploy around others.

The women interviewed by Johnson for her doctoral thesis "described the oppression on their bodies as occurring on an inner, visceral level…Zaylie spoke about the sensation of tar coating her insides."[29] Johnson compares the effects of long-term "everyday oppression" to the effects of trauma on the body, characterizing it "as a reaction to a kind of wound...that must be recognized even when no overt bodily assault occurs."[30]

Critical race theorist Lauren Doyle further contends that "we come at ourselves initially from the outside, and if the world gets there first (or more forcibly), it colonizes and refuses us clear self-access. Our access to our own bodily experience as self then must be filtered through the lens of those colonizing others."[31] Doyle's concept aligns with that of internalized colonialism, a lens through which people of colour may view their own bodies as markers of difference, and thus inferiority.

The effects of internalized oppression are cumulative, given that "the body is...regarded as a site of personal identity [and] our social status is reflected in our relationship with our body and

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[23] Guillermo Gómez-Peña, *In Defense of Performance Art*, online: Pocha Nostra <www.pochanostra.com/antes/jazz_pocha2/mainpages/in_defense.htm>.
[24] Adultery and sodomy, for instance, were once criminalized and continue to be in certain jurisdictions.
[25] *Cartledge et al v E Jopling & Sons Ltd*, [1963] 1 All ER 341, AC 758 (HL).
[26] Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36:3 UTLJ 227 at 228.
[27] *Ibid* at 229.
[28] Augusto Boal, *Games for Actors and Non-actors*, 2d ed, translated by Adrian Jackson (London, UK: Routledge, 2002) at 49 [Boal, *Games*].
[29] Johnson, *supra* note 6 at 212 ("'I started to feel uncomfortable…that there was this kind of tar coating all in my insides that was stopping me from absorbing anything. Like everything that would come into me would just pass through.' Zaylie describes this tarry substance as something she ingested from the outside world, and that now exists within her body as the residue of her experiences of oppression" at 169-70).
[30] *Ibid* at 83.
[31] *Ibid* at 53.

the body language(s) we speak".[32] This is particularly pertinent in social interactions, which form common sites of everyday oppression where "the body features prominently in the articulation of social difference."[33] Such articulation appears in body language that marks one as more or less powerful, in acts such as smiling more or less, tilting one's head or looking straight ahead, taking up much or little space, or looking down or shrinking into oneself.[34]

Through such interactions, the body plays a major role "in reproducing social patterns of inequity and injustice".[35] Those who exhibit body language marking them as privileged or oppressed have learned—whether consciously or not—how to read such markers, and thus tend to treat the other person accordingly. Consequently, the interaction serves to further affirm the meaning of their respective body language as markers of difference.[36] Moreover, "the repetitive and insidious nature of these subtle exercises in dominance and submission slip below the level of awareness...internalizing social conventions to the point where they may no longer even feel oppressive."[37] The oppression has been internalized to the point of invisibility or naturalization.

This idea dovetails with gender theorist Judith Butler's well-known theory of gender performativity. Butler argues that identity, specifically in the context of gender, is "constructed through a process of reiterative acts and gestures",[38] and "achieves its effects through its naturalization in the context of a body."[39] Performativity theory asserts that one's body and embodied identity are represented by reiterative acts, to the extent of being wholly constituted through them.[40] According to Butler, you are what you repeatedly do.

Similarly, political theorist Iris Young describes how women seem to exercise a much smaller range of motion physically, and claim less space than is physically available to them at any given moment.[41] Young applied the "I can" of French philosopher Maurice Merleau-Ponty's "intentionality in motility" to describe "[f]eminine bodily existence [as] inhibited intentionality, which simultaneously reaches towards a projected end with an 'I can' and withholds its full bodily commitment to that end in a self-imposed 'I cannot'."[42] One can imagine how certain repeated experiences, such as Natalie's bus story mentioned at footnote six, would produce such an embodied phenomenon of inhibited movement and self-restrained embodying of space.

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[32] *Ibid* at 54.
[33] *Ibid* at 49.
[34] See *ibid* at 74-79.
[35] *Ibid* at 80.
[36] *Ibid* (marginalized members of society are "constantly reminded of their inferior social status through the nonverbal messages they receive from others. They are also required to affirm that status...in the messages they themselves transmit" at 74-75).
[37] *Ibid*.
[38] *Ibid* at 53.
[39] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999) at xv.
[40] Gill Jagger, "Embodied Subjectivity, Power and Resistance: Bourdieu and Butler on the Problem of Determinism" in Stella Gonzalez-Arnal, Gill Jagger & Kathleen Lennon, eds, *Embodied Selves* (New York: Palgrave Macmillan, 2012) at 209 ("[Butler's] account of performativity builds on the Foucauldian notion that the body and subjectivity are discursively produced in and through operations of power and normalisation (rather than being something that stands outside of, and is separate from, these operations but is shaped by them" at 213).
[41] Iris Marion Young, "Throwing Like a Girl: A Phenomenology of Feminine Body Comportment Motility and Spatiality" (1980) 3:2 Human Studies 137 ("I also observed that women tend not to reach, stretch, bend, lean, or stride to the full limits of their physical capacities, even when doing so would better accomplish a task or motion. The space, that is, which is *physically* available to the feminine body is frequently of greater radius than the space which she uses and inhabits" at 149).
[42] *Ibid* at 146 [emphasis in original].

PART III: THE CASE OF THE MISSING BODY

Possibly the most fundamental, harmful, and insidious aspect of embodied oppression is the fact that oppressive systems deny the significance of the body itself. Merleau-Ponty is popularly cited for his "embodied, existential form of phenomenology that emphasizes the role of the body in human experience, and attempts to resist the traditional Cartesian separation of mind and body."[43] Upon reading Merleau-Ponty, it becomes clear that "any abstraction of the body provides an incomplete understanding"[44] of people's lived experiences, and by extension of the legal, social, and political forces pervading their experiences. Yet, abstracting the body is exactly what many forms of oppression do. The most successful systems of oppression are those that conceal their own existence or processes, such that no one is aware that such a system or process exists. One cannot address or attack what one is not aware of. Or, as the case may be, what one does not acknowledge or consider worth being aware of: the body.

As demonstrated above, the body and lived embodiment is central to the human experience in a variety of contexts, including: law, everyday life, social justice, and identity. However, people are encouraged to marginalize, abstract, and dismiss the body as unworthy of focused attention, compared to other aspects of lived experience—for instance, education, relationships, or financial stability. Because oppression occurs to an equally great degree in these realms of life, and because the Cartesian mind-body divide has erased the body as an available option for serious consideration, many are led to believe that oppression occurs solely in such areas of life, which do not immediately appear to have an overt physical component.[45] Thus, those who are marginalized do not think to address the embodied and internalized aspects of their oppression. Only external aspects of oppression, such as formal laws or workplace policies, are acknowledged or addressed.[46]

As Lassonde states, "[w]hat we assume to be less important in fact leads us to stabilize certain norms with which we too often disagree."[47] Arguably, since the body is central to sustaining oppression, much of the marginalization manifested in the above-mentioned non-physical realms of life is directly rooted in embodied oppression.[48] However, few have approached embodied reform in a similar way to how legal or social reform is approached. This has led to oppression continuing across the board, embodied and otherwise.[49] We are taught to ignore our own bodies and their role in our lives, and we are taught to consider our bodies unimportant—sometimes to the extent that it is a moral failing to think otherwise.[50] This allows our bodies to be conscripted against us.

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[43] Johnson, *supra* note 6 ("[p]henomenology is literally the study of 'phenomena' from a subjective perspective—things and events as we experience them from a first person point of view" at 34).
[44] *Ibid* at 212.
[45] *Ibid* at 33-34.
[46] *Supra* note 6 (Johnson says of her interviewees that in "nearly every case, this reclaiming of the body as source of personal and social power seems to have evolved through a process of intuitive selection and fortunate circumstance" at 203).
[47] Lassonde, *supra* note 2 at Spider 3: Conclusion.
[48] For example, how people of colour or a lower socioeconomic class are treated in predominantly white, upper-middle-class professional workplace environments, or how people select their partners or treat strangers based on weight or physical attractiveness, or how people decide whether a woman is or is not qualified for a certain job based on factors other than relevant qualifications.
[49] Richard T Twine, "Ma(r)king Essence-Ecofeminism and Embodiment" (2001) 6:2 Ethics and Environment 31 at 39.
[50] *Supra* note 6 at 33-34.

One of Johnson's interviewees, Crissy, provides a concrete example of this phenomenon:

> She notes that on some level, she is 'willingly buying into' a cultural imperative for women to have clear skin, and then calls herself vain when she attempts to address the problem. As we talk, the double bind that makes gender oppression so effective and easy to perpetuate becomes more visible—like all women, Crissy is implicitly taught the gender imperative to be beautiful, and then convinced that this imperative is self-generated.[51]

In the seemingly non-embodied realms of civil society, where bodies are deemed irrelevant, Crissy knows from lived experience that she apparently has a bodily "deficiency" and suffers for it. This realm tells her that her body is irrelevant, but penalizes her in important ways—perhaps socially or professionally—for the bodily "deficiency", and then also penalizes her if she overrides the anti-body imperative to address the root of her embodied oppression. As Natalie points out, "[b]ecause it's so subtle, because it's something that you're not really conscious of…it can have an even more devastating effect on your life."[52]

PART IV: CUE BODY, CENTRE STAGE

If embodied oppression is in part "a case of the missing body", then the solution is clear[53]: bring forth the body. As Johnson's interviewees shared, positioning the body and one's embodied experiences in the forefront counters, resists, or mitigates the effects of embodied oppression on an individual level. This section illustrates the significance of centralizing one's embodied experiences. Immersion in an environment that inherently centralizes the body, such as dance or martial arts training, can provide a path to becoming more conscious of one's own body and embodied experiences, in a way that facilitates resisting or countering everyday oppression.

As Johnson notes, Merleau-Ponty "posits that the body is central to everyday experience…[and suggests] that the body is in a constant state of becoming."[54] Thus, prioritizing the mind over the body engenders "a narrowing or constriction of consciousness that results in less freedom, fewer choices, and less functional patterns of embodied engagement with the environment."[55] While equally true from a phenomenological perspective, Johnson is speaking of somatics here, the study of "the body/mind as experienced from within."[56] This allows for the idea of somatic literacy, "the ability to access knowledge encoded in kinesthetic and non-verbal material. Somatic literacy supports authoritative knowing grounded in embodied experience. It allows us to access and use what we know in our bones."[57] In other words, somatic literacy means becoming conscious of all the knowledge our bodies have absorbed without us realizing, whether it is Butler's reiterative gestures, Young's invisible space barrier, or various body language indicators of power, privilege, and oppression.[58] It means being able to recognize such knowledge in ourselves and others. It is often through unconscious somatic knowledge displayed

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[51] *Ibid* at 146-47.
[52] *Ibid* at 157.
[53] Not to be confused with easy.
[54] Johnson, *supra* note 6 at 52.
[55] *Ibid* at 58; Jagger, *supra* note 40 (this also recalls Butler's theory that "[Bourdieu's] symbolic violence is part of the performative process that forecloses some meanings and generates others in the service of dominant power relations and systems of meaning" at 212).
[56] *Supra* note 6 at 55.
[57] *Ibid* at 63.
[58] *Ibid* at 53; Young, *supra* note 41 at 154.

in human interactions that power dynamics between the privileged and the oppressed are perpetuated.[59]

Endeavours such as intensive dance training, and in my case, capoeira, offer a potentially powerful conduit to somatic literacy. First, these practices force one, by definition, to focus on the body with more concentration and depth than in more normative aspects of life, without cutting off the mind in the process in the way that repetitious weightlifting at the gym might.

Capoeira "demands of players that they both get the job done [for instance, controlling the game, manipulating or mocking the other player, or executing take-downs] and look good while doing it".[60] The sport promotes self-knowledge of "the body/mind as experienced from within",[61] as well as heightened sensitivity to others' somatic indicators. Because "experiences of the body in action become the focus of awareness [and] become foregrounded in a way that is unusual for most people...body practitioners such as dancers, athletes, and actors...are in this intermediate mode more of the time...and thus their worlds of embodiment are different from the norm."[62]

Second, activities such as dance and capoeira often become more than just a hobby; rather, they become a lifestyle for practitioners. This allows people such as dancers, capoeiristas, and other athletes to apply their newfound somatic literacy in contexts beyond the overtly physical, while contributing to the breakdown of the mental divide between embodied experience and realms of experience, typically thought of as non-embodied.

In the sense that there are consequences to embodiment, dance and martial arts operate similarly to oppressive systems. However, there is one key difference: unlike embodied oppression, which conceals the body's significance, dance and martial arts are completely transparent about the consequences attached to one's body and embodiment. Practitioners are moulded firmly by instructors towards explicit objectives. Success and power are directly and openly related to various aspects of how practitioners inhabit and use their bodies. What emerges is a type of Foucauldian biopower[63] that practitioners are openly exposed to, and are thus able to reclaim over themselves.

Third, provided one has skilled teachers, dance or martial art classes are a way to prevent or overcome experiences such as Pat's, a participant in Johnson's doctoral thesis. "She said that she was often made to feel a lack of confidence in her body, and never felt supported in finding her own capacities, or to develop her own knowing of her body as skillful."[64] In my experience, capoeira provides the opposite experience: instructors seem to develop students' capabilities almost in spite of the students themselves, whether hindered by lack of confidence, physical obliviousness, or both.

For example, in response to Pat succumbing to Young's phenomenon of "an inhibiting effect on the size and scope of her gestures, and...feel[ing] that her movements might be seen...as 'too large' or 'too expressive'"[65], this notion is directly confronted in training capoeira movements.

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[59] Johnson, *supra* note 6 at 58.
[60] J Lowell Lewis, "Genre and Embodiment: From Brazilian *Capoeira* to the Ethnology of Human Movement" (1995) 10:2 Cultural Anthropology 221 at 234.
[61] *Supra* note 6 at 55.
[62] *Supra* note 60 at 229.
[63] *Supra* note 6 ("Foucault contrasts traditional modes of power...with the notion of *biopower* that utilizes instead an emphasis on the protection of life through the regulation of the body—via habits, health and reproductive practices, and other customs. For Foucault, biopower is literally having power over other bodies, through 'numerous and diverse techniques for achieving the subjugations of bodies'" at 46 [emphasis in original]).
[64] *Ibid* at 181.
[65] *Ibid*.

Experienced instructors are aware of the inhibitions students may have, and training occurs to a constant refrain of orders to increase the size, scope, and expressiveness of movements and motions. Training capoeira has helped me close the distance between Young's "I can" and "I cannot".[66] What began as a gulf has now alchemized into Lassonde's few centimetres, and chipping away at such embodied inhibitions in one particular context makes it easier to do the same across others.

Finally, engaging in specific contexts that encourage precisely what systems of oppression discourage, provides practitioners the opportunity to,

> be comfortably anchored in a solid felt experience of the body in relation to other bodies [which] is so phenomenologically different from the experience of 'othering' or being 'othered' that it provides a compelling counterpoint to hierarchical models of social power—a place from which to experience the world differently even when the social structures through which that experience is shaped have not yet changed.[67]

Upon contemplation, such an experience must be a rare occurrence, and would be unfathomable for those who have suffered from unrecognized embodied oppression their entire lives. As I read Johnson's narrative of discovering through dance, "how central my body was to the experience of bliss...a specific state of bodily sensation associated with artistic or creative engagement that I later came to know as flow,"[68] I realise that this bodily sensation, which may be the closest I have been to being "comfortably anchored in a solid felt experience of the body",[69] is one that I have never experienced outside of a capoeira *roda*[70]. In light of this and the current discussion, perhaps it is not so quirky or amusingly strange that I am notorious for being able to relate nearly any conversational topic or life issue back to capoeira; perhaps that is precisely what is to be expected, and I may be all the better for it.

PART V: JUST BE YOURSELF: INTRODUCING RECALL THEATRE

This section features an experiment meant to help individuals work towards embodied change, based on the theories underpinning Theatre of the Oppressed and self-objectification. Essentially, "Recall Theatre", using a working name, takes Boal's idea of Forum Theatre and applies it to the individual. It is Forum Theatre for one, so to speak.[71]

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[66] Young, *supra* note 41 ("When the woman enters a task with inhibited intentionality, she projects the possibilities of that task—thus projects an 'I *can*'—but projects them merely as the possibilities of 'someone,' and not truly *her* possibilities—and thus projects an '*I* cannot'" at 147 [emphasis in original]).

[67] Johnson, *supra* note 6 at 221.

[68] *Ibid* at 123 [emphasis in original].

[69] *Ibid* at 221.

[70] The set-up in which capoeira practitioners play capoeira: all participants stand in a circle, with the *bateria*, or orchestra of traditional instruments, at the head of the circle. Practitioners play (the capoeira version of "spar") inside the circle, one pair at a time, while those standing in the circle clap and sing.

[71] Forum Theatre is an activity in which a group of actors perform a scene in which a clear instance of oppression or marginalization occurs. Then they perform the scene once more. This second time, a member of the audience (anyone who volunteers), is supposed to say, "Stop!" at any point in the scene, then replace one of the actors on stage, assume that role, and change the ending of the scene in order to prevent, subvert, or otherwise address the oppression that would have occurred. The key to Forum theatre is that members of the audience are not just spectators—they are *spect-actors*, according to Boal, "a role of praxis," granted agency to create change in a situation seemingly closed off to them. A disruptive Joker character external to the scene "works to push against magical solutions that cannot be sustained in reality," while in others, the audience members themselves may call

Rather than replacing a separate actor in a given scene, individuals engaging in Recall Theatre replace themselves—the individual is their own spect-actor. First, the individual recalls a situation where they, or another person, were subjected to some form of oppression, and they wanted to respond in some way, but did not. The scenario could be a recent situation or one from the past that the individual feels they need to work through or address in some way. Second, the individual acts out the situation as it originally occurred, alone or with others.[72] This step may not be necessary if the individual has very strong recall about how they felt and acted in the original situation. Third, the individual acts out the scene again, and this time, they stop themselves at any point—saying, *STOP!* out loud. The individual then resumes the scene as their own spect-actor, changing the end of the scene in order to prevent, subvert, or otherwise address the instance of oppression that would have occurred.

Afterward, the individual reflects on their experience and decides if the solution was realistic. Could the individual envision themselves implementing what they did as a spect-actor, in that situation or a similar real-life scenario? Did they not do so in real life because they were unable, or simply did not think of a solution at the time? Or were they not able to gather enough courage in the moment? Ideally, the scene would be recorded, so that the individual would be able to watch their spect-actor self in the situation. The experience of watching the re-enactment may reveal things that otherwise would be missed, such as telling reiterative gestures. If the individual concludes they must call *MAGIC!* on themselves, they repeat the scene as a "new" spect-actor with a different response to the situation, until a satisfactory solution is found.[73]

Just like in Forum Theatre, "[r]eal-world agency is the desired outcome"[74] of Recall Theatre, and the activity compels "participants to transform their own worlds"[75] in a much more immediate and personal sense. As my own spect-actor, I do not have to wonder what a realistic course of action is for the average citizen. I sense in my embodied reaction, while intervening or upon reflection, what would be a better or worse, or more or less possible, solution in reality.

Theoretically, Recall Theatre as described here will succeed for several reasons, several of which are shared with Forum Theatre's effectiveness.[76] First, the theatre provides a space that does not exist in real life. This means there are no immediate external consequences to words or actions in that space, thus mitigating the risk, fear, or discomfort associated with directly addressing oppressive behaviour.[77] Although the individual is still inhibited to the extent that

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out "Magic!" to indicate an unrealistic intervention, S Leigh Thompson, "What is Theatre of the Oppressed?: Forum Theatre", The Forum Project online: The Forum Project <http://theforumproject.org>; Sanjoy Ganguly, *Jana Sanskriti: Forum Theatre and Democracy in India* (Abingdon, UK: Routledge, 2010) at 88.

[72] When I tried this at home, I was alone and acted out the scenes on my own, imagining that the other "characters" were there. Turning my mind to it, however, I can see advantages in acting out such scenes with real people, as having another person physically present could induce more of an embodied response in the scene.

[73] This idea is relatively new, and I have not yet worked out all the kinks, but I am excited about the prototype developed thus far and am offering it for the potential it may have in a more refined form.

[74] Deborah M Thomson & Julia T Wood, "Rewriting Gendered Scripts: Using Forum Theatre to Teach Feminist Agency" (2001) 13:3 Feminist Teacher 202 at 203.

[75] Calder, *supra* note 22 at 10.

[76] Forum Theatre's effectiveness has been demonstrated by the Shigang Mamas in Taiwan, Jana Sanskriti in India, and Headlines Theatre in Vancouver, Ron Smith, "Magical Realism and Theatre of the Oppressed in Taiwan: Rectifying Unbalanced Realities with Chung Chiao's Assignment Theatre (2005) 22:1 Asian Theatre Journal 107; Ganguly, *supra* note 71; "Theatre for Living", online: Headlines Theatre <www.headlinestheatre.com>.

[77] See e.g. Smith, *supra* note 76 ("Given the ultraconservative nature of Hakka culture regarding the outspokenness of women, it's highly unlikely that the Mamas would have ever felt secure or confident enough to broach these issues publicly had they not experienced the nonthreatening and safe environment of Chung Chiao's theatre workshops" at 111-12).

they are inhibited to begin with due to embodied oppression, the theatre space lessens inhibition relative to their normal state. This is a good starting point for change.

The process is meant to be ongoing: "a session of Theatre of the Oppressed has no end, because everything which happens in it must extend into life."[78] The theatre space allows an individual to bring into reality, through an artificial reality, words or actions they may never have externalized otherwise. Externalizing these words or actions in a mediated reality, however, still brings them into reality. The process moves the individual one step closer to deploying such words or actions—if found feasible—in an unmediated reality, or at least opens the individual to exploring new possibilities.

Second, Recall Theatre allows the individual to experience physically, not simply imaginatively, what it would be like to respond adequately to oppressive words or behaviour. In this sense, Recall Theatre is like training capoeira in order to play in the *roda*. Navigating social interactions and interpersonal relations, particularly in the context of an oppressive society, is an embodied activity as described in Part II. Yet, one is rarely given the opportunity to practice such interactions[79] the same way one trains athletically in preparation for the moments that count.

One of the most common lessons taught in capoeira is that you will not be able to do inside the *roda* what you cannot do outside the *roda*. If you cannot successfully complete an assigned take-down sequence on a cooperative partner, you will likely be unsuccessful deploying that take-down on someone in an unpredictable situation. In an unpredictable situation, you must improvise and the other person does everything in their power to outwit, evade, and take you down. Yet, people typically have no choice but to enter into the kinds of real-life situations featured in Theatre of the Oppressed, without having undergone any equivalent training. Thus, Recall Theatre provides a form of training as a solution, "overcoming the challenges presented in theatrical form makes participants better qualified to overcome the same challenges in reality when the situation arises."[80]

Capoeira also teaches that it is impossible to achieve a new acrobatic movement before being able to visualize one's body going through the entire range of motion involved. For example, before I was able to do handstands, I was terrified to start practicing them. I had no idea what it physically felt like to be in a handstand. I never committed to kicking up into a proper handstand position, because I had no visceral idea of what would happen on the other side. With the safety of a wall or spotter, however, I could experience what it felt like to be in a handstand without the risk of jumping straight into a full freestanding handstand. Acquiring that embodied feeling accelerated my learning of the movement, and moreover, provided a foundation for training additional and more advanced movements.

Confronting someone who has upset you is often as visceral an experience as physically turning your body upside-down, and sometimes more, as many who have fought with close ones or experienced interpersonal conflict may attest. Chrissy, one of the women interviewed in Johnson's work, describes the embodied impact on her when others deny that she experiences oppression as "feeling as though her body is being violently shaken by an external force. She feels a 'jolt of fear' course through her body, and is unable to focus to see anything...she also feels frozen, as if 'stuck between fight and flight'".[81] In recognition of this element in confronting oppression, Recall Theatre allows an individual to experience the embodied aspects

[78] Boal, *Games*, *supra* note 28 at 276.
[79] Networking sessions don't count—and no theatre could live up to that level of artificiality, at any rate.
[80] Calder, *supra* note 22 at 13.
[81] Johnson, *supra* note 6 at 144.

of falling into a handstand, or into a risky, uncomfortable situation, in safety. The purpose of the process is not necessarily to dispose of such feelings, but to become accustomed to them so that their inhibiting power lessens when such moments arrive. Boal called Forum Theatre "a rehearsal for the revolution",[82] and no one expects to be completely fearless or unperturbed in a revolution—simply prepared and ready to act.

Finally, the ability to be one's own spect-actor is based on various theories of self-objectification. First, Young posits that due to patriarchal objectification of women as objects to be looked at, "the woman lives her body as object as well as subject".[83] She is an object even to herself. "[E]xistence is self-referred in that the woman takes herself as the object of the motion rather than its originator [and] is uncertain of her body's capacities and does not feel that its motions are entirely under her control."[84] Second, "oppressions such as racism work to unhinge corporeal self-relation and produce an alienated subjectivity."[85] Third, our "[e]mbodied selves are not only sites for mediating language and experience, they are also where subjectivity meets objectivity, since...these bodies also become objects other than...our selves."[86] Finally, "everyone involved in theatre...identifies the oppressor within them and also recognises the human self."[87]

Recall Theatre exploits this pre-existing self-alienation by conceptually separating the individual, as an actor, from the self, as spect-actor. This simultaneously assists in reconciling people with themselves. To illustrate, I wrote this paper in conjunction with a parallel project where I kept a video blog and regularly posted videos of myself discussing random topics. When I watched these videos, the various forms of self-alienation described made it is easier to see my onscreen self as someone else. Thus, I could view myself with the normal level of goodwill that I usually reserve for others. As the onscreen person *is* me, however, I was able to transfer some of that perspective back onto myself, in real life. Johnson's thesis describes how Zaylie "dancing for herself [in the mirror] returns to Zaylie some of the power her body is capable of creating".[88] Similarly, talking to and observing myself as I speak to and observe others allows me to experience my person from an external, and thus more objective, perspective. This contributes to the sense of power and agency that Recall Theatre is meant to encourage individuals to develop, in order to bring about change in everyday situations.

CONCLUSION

Whether it is skin colour, gender presentation, the way one speaks or moves, body language, social norms, or formal laws, disrupting normative combinations of particular symbols and markers attached to particular kinds of bodies changes their meaning. The symbols are forced to become more inclusive, or to shift in order to cover new terrain. Put another way, social norms, laws, and embodied experiences are all functions of each other: changing any one of these variables affects the other two as output. Thus far, change and resisting or countering oppression

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[82] Augusto Boal, *Theater of the Oppressed*, translated by Emily Fryer (London, UK: Pluto Press, 2000) at 122.
[83] Young, *supra* note 41 at 153.
[84] *Ibid* at 148.
[85] Johnson, *supra* note 6 at 224.
[86] Lewis, *supra* note 60 at 222.
[87] Sandra Mills, "Theatre for Transformation and Empowerment: A Case Study of Jana Sanskriti Theathre of the Oppressed" (2009) 19:4-5 Development in Practice 550 at 557 citing Sanjoy Ganguly, "Jana Sanskriti: Annual Report" (2000) [unpublished].
[88] *Supra* note 6 at 171.

have been attempted predominantly through social or legal reforms, which trickle down to embodied experiences, and in turn reinforce social and legal norms.

This process represents a feedback loop comprised of billions of discrete transactions, and each transaction presents an opportunity to do something differently, to insert something tiny but new into the system. Embodied reform through initiatives such as centralizing one's embodied experience, acquiring somatic literacy, employing Theatre of the Oppressed strategies, and influencing everyday law as espoused by Lassonde, is an ideal channel through which to present these tiny disruptions. Returning to the ocean metaphor presented near the start of this paper, Johnson writes, "[t]o borrow the metaphor of a fish unable to see the water in which they swim, critical consciousness is about seeing the water."[89] Embodied reform, then, is about not only seeing the water, but blowing bubbles in it: physically creating small pockets of difference that by their very existence will alter the trajectory of surrounding currents.

[89] *Ibid* at 24.