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"DOES ROOMBA KNOW ALL OF MY SECRETS?" RE-EXAMINING THE CONSUMER PRIVACY AND DATA IMPLICATIONS OF DOMESTIC ROBOT USE

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I. INTRODUCTION

Domestic robot use is slated to explode over the next decade. Current projections suggest that by 2020, one in every ten American households will own a consumer robot.[1] Such statistics not only point towards a wider societal acceptance of robotic technology, but also raise additional questions about the consumer privacy and data implications of domestic robot use. The first part of this essay will examine the skeuomorphic design cues normalizing robotic technology. This paper will argue that anthropomorphised interfaces are needed to placate human fears of unchecked automation. The use of such human-like interfaces, however, challenge our current model of user consent. Where feelings of trust and companionship are artificially cultivated through skeuomorphic design cues, personal service robots may be in a better position to manipulate the humans they are serving. Where a user's consent is implicitly obtained through anthropomorphic design, such consent may not often be meaningful. The second part of this paper will analyze the public and private frameworks regulating robotic design. Through consumer protection legislation, a commitment towards open design and an evolving common law, it is possible to redefine what constitutes acceptable domestic robot use. In protecting consumers from perniciously deceptive robots, both the public and private restrictions must operate concurrently, while still fostering a balance between regulation and innovation.

II. PART ONE: ANTHROPOMORPHISED ROBOTS AND THE BUILDING OF CONSUMER TRUST

Debuting in 1770, Wolfgang von Kempelen's *The Turk* amazed audiences the world over as one of the first fully automated chess playing machines. In beating numerous human opponents across Europe and North America, *The Turk* was naturally heralded as the product of a booming technological age.[2] Unsurprisingly in hindsight, the machine itself was nothing more than an elaborate hoax.[3] What drove societal belief in the Turk was the machine's human-like appearance as it conformed to one's understanding of what a chess-playing robot should look like. In building a degree of trust with its human opponents, *The Turk* defied societal expectations by paradoxically mimicking human behaviour. The same may be said of modern skeuomorphic design cues that rely on visual metaphor to bridge the gap between the physical and the digital. For example, in designing desktop trash bins to resemble their physical counterparts, a language of affordance is

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[1] Arjun Kharpal, "1 in 10 Americans to have robots in home by 2020", (16 December 2015), online: <www.cnbc.com/2015/12/16/1-in-10-americans-to-have-robots-in-home-by-2020.html>.

[2] Claude-Anne Lopez, *My Life with Benjamin Franklin* (New Haven: Yale University Press, 2000) at 106.

[3] Inside the machine was a human operator that was controlling *The Turk's* every move.

ultimately created.[4] Implicit in such affordance is a predetermined range of interactions governing the relationship between humans and the machines they use. For example, not only does the physical appearance of a trash bin create a shared understanding of what it may be used for, but such an understanding is re-established in the digital context. This has become the basis for our anthropomorphised understanding of robotic technologies.

Such skeuomorphic design choices are meant to both enhance human usability and placate societal fears of unchecked automation. Writing for *Medium*, authors Karen Levy and Tim Hwang acknowledge such values in design by discussing a form of "design theatres [that] are aimed not at providing direct usability cues, but at smoothing technologies' entry into social life by increasing their acceptability."[5] Nowhere is this more apparent than when an automobile manufacturer includes a steering wheel in their self-driving cars. The use of such a prop is self-evident when considering society's gradual acceptance of robotic innovation. Including a non-functioning steering wheel in a fully autonomous vehicle is itself a "design lie" that is not only actively encouraged but representative of the design theater of which we are now patrons.

In their article, Levy and Hwang adapt the work of sociologist Erving Goffman in order to examine operational design theory. Goffman's use of theater as a metaphor for our social interactions leads him to suggest that human communication is representative of the two performances happening on a theater's stage. The first is the "front stage" performance "geared towards a particular audience," and the second is the "back stage" performance, which may not be as easily discernable, but nevertheless offers a glimpse into the inner workings of the production. A server in a restaurant, for example, provides a front stage performance when interacting with patrons. In promoting that day's lunch special, a server may use a variety of techniques or tricks to guide customers toward a certain meal choice. Conversely, the same server's back stage performance occurs in the kitchen. It is likely that in the kitchen, as they collect the prepared orders, they would act differently than they would in front of customers.[6]

By using Goffman's dramaturgical analysis of social exchange, Levy and Hwang argue that a machine's back stage performances take place during its computational and internal processes. We, as humans, remain partially unaware of such algorithmic structures because the "'guts' of the system" remain backstage.[7] Likewise, "[t]he front stage is the machine's dramaturgical performance, aimed at smoothing its social interactions with humans."[8] It is through a machine's design that we as humans experience a front stage performance as interactive audience members. By employing skeuomorphic design cues, a degree of trust in such technology is created. Law Professor Ryan Calo similarly notes that robots are increasingly humanlike and socially

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[4] The term "affordance" in this context is based on author Donald Norman's use of the term as it "refers to the perceived and actual properties of [a] thing, primarily those fundamental properties that determine just how [a] thing could possibly be used."; Donald A Norman, *The Design of Everyday Things* (New York: Basic Books, 1988) at 9; In the above noted example of a desktop trash bin, the icon's resemblance to a cylindrical wire basket invites us to assume that its primary purpose is as a waste receptacle. This assumption is carried forward from the physical to the digital space.

[5] Karen Levy & Tim Hwang, "Back Stage at the Machine Theater", (10 April 2015), online: *Medium* <www.medium.com/re-form/back-stage-at-the-machine-theater-530f973db8d2> [Levy & Hwang].

[6] The effects of such a scenario forms the basis of our daily interactions with domestic consumer robots. As will be argued throughout the course of this paper, human users seldom experience a robot's "backstage performance" however it is there where our inputted information is analyzed and acted upon.

[7] Levy & Hwang, *supra* note 5.

[8] *Ibid.*

interactive in design, making them more engaging and salient to their end-users and the larger community.[9] Many studies demonstrate that people are hardwired to react to heavily anthropomorphic technologies, such as robots, as though a person were actually present, including with respect to the sensation of being observed and evaluated.

Where a human's front stage performance may involve misrepresentations or false impressions, a robot's anthropomorphic design may just as easily foster such deception. The degree and objective of this deception remains the central question shaping our understanding of robotic technology. Where it may be difficult to draw a bright line between socially benevolent and pernicious forms of deception, opaque back stage systems impede this designation. By contrasting the potentially nefarious aspects of such illusory design cues as a non-functioning steering wheel in a fully autonomous self-driving car with the necessity of introducing such technology in a societally palatable way, we may better analyze a given system creator's underlying objectives.

Discerning such objectives is by no means a straightforward process. For example, toy giant Mattel recently ended development of its virtual assistant AI for children. The device, called Aristotle, was to be marketed as a digital caregiver that could "learn patterns and autonomously act upon user habits to aid in child development and learning."[10] The product is equipped with voice recognition software and a camera, allowing it to record conversations with children in their bedrooms and upload the data to the cloud. Detractors of this product have argued that it was not only designed to "displace essential parenting functions, like soothing a crying baby or reading a bedtime story," but that children would form a human-like bond with the device.[11] Although not inherently malevolent, such technology is capable of gross misuse. Unlike certain robots that have been principally programmed to harm or deceive, the primary use of devices like Aristotle are as learning tools. Unfortunately, in pursuing such ends, these devices remain unintentionally capable of consumer exploitation. Therein lies our central problem. Any proposed regulatory framework must divorce a robot's principle purpose from its underlying capabilities. In protecting consumers, such regulatory schemes should remain cognizant of what a technology rather than merely what it has been programmed to do.[12]

Where a system designer may have the best of intentions, unforeseen market forces may nevertheless impact the final use of such products.[13] For example, one would assume that iRobot's popular Roomba vacuum cleaner was principally designed to clean a geographically defined area of one's home and not created for nefarious purposes. In carrying out such a task, an AI system was created to differentiate between piles of dust and the family dog. Privacy advocates were left

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[9] Ryan Calo, "People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship" (2010) 114:3 Penn St L Rev 809 at 811.

[10] Mattel Corporation, Media Release, "Mattel's Nabi Brand Introduces First-Ever Connected Kids Room Platform In Tandem With Microsoft And Qualcomm – Aristotle" (4 January 2017), online: News Mattel <www.news.mattel.com/news/mattel-s-nabiR-brand-introduces-first-ever-connected-kids-room-platform-in-tandem-with-microsoft-and-qualcomm-aristotleTM> [Mattel].

[11] Michaeleen Doucleff & Allison Aubrey "Alexa, Are You Safe for My Kids?" *NPR* (30 October 2017) online: *NPR* <www.npr.org/sections/health-shots/2017/10/30/559863326/alexa-are-you-safe-for-my-kids> [footnotes omitted].

[12] We see such regulation already in effect across a multitude of products. Such regulatory foresight is seen in the selling and packaging of laundry detergent packs. While these packs were principally designed for washing clothing they remain a choking hazard for small children and as such are often sold in tamperproof containers.

[13] Such market forces can be created by unlocking previously unconsidered avenues of revenue.

scrambling for answers however when iRobot CEO Colin Angle reaffirmed the company's intentions to mapping users' homes. It was further speculated that such sensitive data would then be sold to tech giants Amazon, Apple, and Google to help with their "connected home" ambitions.[14] These revelations are not only highly worrying, but also speak to a larger issue we have with welcoming personal service robots into our homes. As Woodrow Hartzog notes: "[n]ot only do we entrust [these devices] with our most intimate secrets and give them access to our most personal spaces, but we trust them with our physical well-being."[15]

This issue of trust undergirds our analysis of the consumer protection and privacy implications of domestic robot use. By anthropomorphizing our understanding of what a robot should look like, we subsequently discount the privacy implications of welcoming such technology into our daily lives. Potentially privacy compromising technology may find its way into friendly, nonthreatening robots. MIT's BlabDroid is a typical example of such technology. Designed to elicit information from the humans its meets, BlabDroid on the surface is little more than a brown cardboard box with a crudely yet heartwarmingly drawn smile on its face. The technology powering this robot is, however, quite sophisticated. The device's rudimentary design was intentional. The bot's creator suggests "[i]n a relationship with a robot, where you're being very vulnerable, the other actor in that situation has to be as vulnerable as you … So if the robot is small, tiny, made out of cardboard, you kind of feel like you can open up to him more because he's very familiar and you feel like you're in control of that situation."[16] You would likely trust such a device because of its docile, non-threatening appearance.

As is the case with marketing robotic technology, any fear or anxiety connected with the use of a robotic device should be immediately suppressed. If mass adoption of such technology is the end goal, then the appearance of safety and security remains a top priority. With respect to devices such as BlabDroid, not only do anthropomorphic design cues allay a user's fears, but they also create emotional blind spots that are ripe for manipulation. As Hartzog concurrently notes, paraphrasing Dr. Kate Darling, there is a "human tendency to form emotional bonds with robots and over-ascribe them with agency, intelligence, emotion, and feeling."[17] Not only do we want to trust the robots in our homes, but we have an active desire to treat them as emotional confidants and friends. Much like a human friendship is strengthened by duration, the longer humans interact with and are accustomed to the presence of robots, the stronger such manufactured feelings of friendship become. Where a friend may forget the odd dinner date, robots that are programmed to remember the smallest of details would seldom let such an occasion pass. Not only would these devices "have the capacity to store massive quantities of personal data in perfect, easily recalled form" but "[w]hen robots are fully realized, they will be nothing short of a perfected surveillance machine."[18] Human conversations often require a bidirectional exchange of information. Interests and opinions are swapped in the crucible of conversation. Verbal exchanges with a robot may still be guided by these underlying principles, but there is no guarantee that the information traded would not be accessed by third-parties. Although the same may be said of human conversations, a

[14] Brian Heater, "iRobot's CEO Defends Roomba Home Mapping as Privacy Concerns Arise" (25 July 2017) *Tech Crunch*, online: <www.techcrunch.com/2017/07/25/irobots-ceo-defends-roomba-home-mapping-as-privacy- concerns-arise/>.
[15] Woodrow Hartzog, "Unfair and Deceptive Robots*"* (2015) 74:785 Md L Rev 785 at 791 [Hartzog].
[16] Laura Sydell, "SXSW Debuts Robot Petting Zoo for A Personal Peek Into The Future" (18 March 2015), online: *NPR* <www.npr.org/sections/alltechconsidered/2015/03/18/393614456/sxsw-debuts-robot-petting-zoo-for-a-personal-peek-into-the-future>.
[17] Hartzog, *supra* note 15 at 805.
[18] Hartzog, *supra* note 15 at 796.

person would be far more reticent to engage in idle gossip when they are guided by a duty of loyalty or privacy. Such obligations may not bind a robot.[19]

Robot manufactures have therefore begun touting their devices' enhanced security measures to allay user fears. In a press release explaining Aristotle, the creators at Mattel not only affirmed the device's *Children's Online Privacy Protection Act* ("COPPA") compliance but lavishly praised Aristotle's 256-bit end-to-end encryption and assured users that "[a]ccess to data is through mobile devices that have been paired in close proximity to the Aristotle hub and with proper approval through parental controls."[20] However, such safeguards did not placate parental concerns. In actively lobbying against Aristotle's release, advocates at the Campaign for a Commercial-Free Childhood were quick to expose the device's worrisome capabilities and reject the device's use as a learning tool.

Devices like Aristotle may jeopardize both an individual's informational privacy and their behavioral privacy. As professor Roger Clarke suggests, the privacy of personal behaviour is "concerned with freedom of the individual to behave as they wish, without undue observation and interference from others."[21] As such freedom is deeply connected to a person's sense of self, overt or covert forms of surveillance may have a deleterious effect on individual expression. Not only would a device like Aristotle have unfettered access to one's children, but the machine itself is designed as a corrective tool to find and "fix" problem behaviour.[22] Further attention should be paid towards our domestic robots' panoptic properties.

The unidirectional flow of information between human operators and personal service robots is open to additional forms of misuse when such robotic technology is used in an intimate way. For example, sexbots created by a combination of existing "AI technology … sensory perception, synthetic physiological responses and affective computing" may not only serve as tools for sexual gratification, but exist as passive and compliant objects that collect a given user's information.[23] Such machines are systematically designed to create a sense of trust and acceptance through their programed compliance. Although the use of such robots may be for a variety of intimate purposes ranging from sexual surrogacy to masturbatory aids, their underlying function as emotional and sexual receptacles suggests that they are nevertheless an aggregator of various inputs. However, unlike a calculator or a GPS system, the information collected by a sexbot is of a profoundly personal nature. Where the collection of such information is needed to properly operate such devices, it is unclear if one's data will remain exclusively within a given unit. The potential for the manipulation or theft of such data raises renewed questions about the underlying design objectives of such robotic technology.

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[19] That is not to suggest that robots cannot be programmed to respect the personal privacy of their users. Rather, where a person chooses to respect the privacy of another, robots through no fault of their own may be incapable of such a choice.

[20] Mattel, *supra* note 10; COPPA is a US law created to protect the privacy of children under 13.

[21] Roger Clarke, "The Regulation of Civilian Drones' Impacts on Behavioural Privacy" (2014) 30 Computer L & Sec Rev 286 at 287.

[22] The device was originally envisioned as a "robot nanny" that could train children through a series of corrective beeps and bursts of light.

[23] Sinziana Gutiu, "Sex Robots and Roboticization of Consent" (Paper delivered at the We Robot Conference 2012, 3 April 2012) [unpublished].

When such technology is principally designed to deceive, we are now confronted by additional ethical, societal, and regulatory hurdles. One need only look towards a "Wizard-of-Oz setup" wherein a person "remotely operate[s] a robot, controlling any of a number of things, such as its movement, navigation, speech, gestures."[24] Such a setup creates a situation wherein everyone besides the unsuspecting human interactor knows that the robot is being controlled by a third-party intervener. The unsuspecting human interactor remains oblivious to this deception until the proverbial curtain is drawn back. Such subterfuge is problematic for a variety of reasons. Cynthia Breazeal and Jacqueline Kory Westlund of MIT Media Lab's Personal Robots Group note:

> [People] may disclose sensitive information to the robot that they would not tell a human, not realizing that a human is hearing everything they say. They may feel betrayed when they find out about the deception. Given that social robots are designed to draw us in, often engaging us emotionally and building relationships with us, the robot itself could be deceptive in that it appears to have an emotional response to you but "in reality" does not.[25]

These deceptions alter the robot-human power dynamic. Where feelings of safety and trust have been cultivated through design, suspicion, and apprehension immediately resurface when human interactors believe another individual exists behind the proverbial curtain. Moreover, the disconnect between what society believes a robot can currently do versus what they are actually capable of doing may invite human actors to fill this conceptual void.[26] Third-party human interveners controlling such devices may be needed to create a more authentic human experience.[27] A human presence within a robotic shell may soften the Uncanny Valley's otherwise steep descent.[28]

The distinction between a robot operated by native AI and a robot operated by a third-party human intervener may be less important when the result of such technology compromises an individual's emotional autonomy. Writing for *Slate*, author Margot Kaminski argues that "[w]e should be having real discussions about the ethics of the design of such interfaces, from questioning embedded gender and racial biases, to worrying about consumer protection when ScarJo bot [a robot designed to resemble actress Scarlett Johansson] asks you, in her husky voice, to buy her an upgrade."[29] While the latter concern may not necessarily constitute emotional blackmail, there nevertheless lies the possibility of emotional and financial manipulation. Where the adoption of such sexbot technology is accompanied by an understood power dynamic benefitting the individual, the use of emotionally manipulative software or design cues modifies this arrangement.

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[24] Laurel D. Riek, "Wizard of Oz Studies in HRI: A Systematic Review and New Reporting Guidelines" (2012) 1:1 J Human-Rob Inter 119 at 119.

[25] Jacqueline Kory Westlund & Cynthia Breazeal, "Deception, Secrets, Children, and Robots: What's Acceptable?" (Paper deliver at the 10TH ACM/IEEE Conference on Human-Robot Interaction 3 March 2015), [unpublished] [footnotes omitted].

[26] Hartzog, *supra* note 15 at 792–93.

[27] For example, a given sexbot's verbal cues or mannerisms may not yet be convincingly human-like. Human agents controlling the gestures, movements and speech of such technology may be needed until an artificial intelligence is capable of authentically replicating human behaviour.

[28] In such situations, human actors would not necessarily replace a nascent AI but work with such technology to compensate for its current shortcomings. Humans as imperfect beings can better replicate the human experience whereas a mechanistic AI by design feels too perfect and therefore less human-like.

[29] Margot E. Kaminski, "What the Scarlett Johansson Robot Says About the Future" (7 April 2016), online: *Slate* <http://www.slate.com/articles/technology/future_tense/2016/04/what_the_scarlett_johansson_robot_says_about_the_future.html>.

In such situations, a series of prompts advertising additional services can be programmed into these devices and when surreptitiously activated by the product's continuous use, they can compel the user to purchase these supplementary features. While not buying additional upgrades could weaken the robot's existing functionality, purchasing such add-ons could create an adverse psychological effect on the human user. By reinforcing the ownership narrative through a network of paid add-ons and upgrades, sexbot users continue the cycle of female objectification. This line of reasoning is further supported by Sinziana Gutiu, who notes that "the user's full control over a customized representation of a woman … may suggest that the appeal of sexbots is less about a fetish, and more about the feeling of control over [the] … opposite gender."[30] By pursing this idea of control, sexbot users become further deluded in their fantasies when their self-styled role as "caregiver" or "provider", made possible by the continued purchase of program upgrades, is amplified.

Equally worrisome is the theft or corporate misuse of one's personal information. As previously noted, the intimate use of such sexbot technology creates a situation ripe for manipulation and coercion. Where such devices are programmed to retain user data, there remains not only the possibility that hackers may steal and resell such information, but that technology companies themselves may use such data for nefarious purposes. For example, Standard Innovation, makers of the We-Vibe sex toy, settled a privacy class action lawsuit in 2016 for five million dollars. The company was alleged to have secretly tracked its customers' practices through the We-Vibe smartphone app. According to court documents, the app had surreptitiously recorded such information as the "time and date of use, the user-selected vibration intensity level and pattern and the temperature of the device."[31] While the collection of such intimate information is troubling, the practice of doing so signifies a wider socio-technical problem. Although it is tempting to dismiss such invasions of privacy as mere examples of corporate wrongdoing, there is a larger problem regarding the proper integration of technology into human life.

While this problem's short-term solution may lie in rejecting the use of such privacy vulnerable technology, a longer-term solution exists by creating privacy conscious robotic systems. Such a solution is part of a larger movement towards the "responsible design" of robotic technology. While the term "responsible design" may seem nebulous, it may be best understood as a fluid collection of general principles as opposed to a rigid framework of mechanical ideals. While the latter may be of partial use, it is the former that offers the chance to support both societal values and innovation. Organizations such as the Foundation for Responsible Robotics have approached the issue of "responsible design" by trying to be "accountable for the ethical developments that necessarily come with technological innovation" and "proactively taking stock of the impact these innovations will have on societal values like safety, security, privacy, and well-being."[32]

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[30] Sinziana M Gutiu, "The Roboticization of Consent" in *Robot Law*, Ryan Calo, A Michael Froomkin & Ian Kerr, eds (Cheltenham: Edward Elgar Publishing, 2016) 186 at 196.

[31] Colin Perkel, "Canadian sex toy maker that collected intimate data settles $5-million lawsuit" (23 March 2017), online: *The Globe and Mail* <https://www.theglobeandmail.com/news/national/canadian-sex-toy-maker-settles-intimate-data-lawsuit-for-5-million/article34298731/>.

[32] Foundation for Responsible Robotics, "Mission" online: <www.responsiblerobotics.org/about-us/mission/>.

Implicit in this policy statement is a role carved out for both public and private organizations. While the second part of this paper will examine the role of such public and private regulatory frameworks, our continued attention should be focused on how our inputted information is collected and retained by robotic systems.

III. PART TWO: REGULATING DESIGN OR REDESIGNING CONSENT?

In building on our discussion from the previous part of this paper, we are now faced with the issue of who will regulate what aspects of robotic technology. The question itself is not meant to produce a specific answer but rather works as a framing device to underscore the societal, legal, economic and ethical considerations shaping our evolving socio-robotic culture. The second part of this essay will continue to examine issues of privacy, fraud, and data security through the lens of private and public regulatory frameworks. For the purposes of this essay, such frameworks are to be understood in their broadest sense. Where we may easily conceptualize regulatory directives laid down by statute or through government policy, the same may not be said of market forces or societal norms and values.[33] Such concepts are just as important as any law would be in regulating the design and use of robotic technology. Where the later part of this chapter will address interrelated modalities of regulation, the subject of our initial analysis is regulatory structures that try to shape the use of robotic technology. By acknowledging the existing gaps in our regulation, we may better design a more comprehensive regulative framework.[34]

Although our current legal framework is in many ways ill-equipped to deal with the regulation of robotic technologies, these legal mechanisms are nevertheless adapting to such challenges. For example, Hartzog argues that small personal surveillance drones "might be regulated under the same theories that the [Federal Trade Commission] has used to regulate spyware."[35] Not only is our individual right to privacy enshrined in sections seven and eight of the *Canadian Charter of Rights and Freedoms*, but certain sections of the *Criminal Code* may prove applicable in deterring interceptions of private communications.[36] Moreover, provincial consumer protection regimes will play an active role in regulating the marketing and advertising of robotic technology. Where issues of unfair and deceptive trade practices are concerned, such legislation may not only protect consumer confidences, but can abstractly regulate the design and

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[33] That is not to suggest that such forces act capriciously. Rather, market forces and societal norms and values although not expressly codified often act as consistent mechanisms of regulation. Where the law may be slow to evolve in a given area, both norms and market forces are fluid enough to respond to new regulatory challenges.

[34] Such a framework may best be thought of as a fluid collection of concepts that carry governmental clout as opposed to a hierarchal set of shallow design principles. For example, government policies enshrining the right to a customer's data may better serve the philosophy behind open design rather than legislatively mandating the use of a specific line of code that would obtusely inhibit a robot's functionality.

[35] Hartzog, *supra* note 15 at 797.

[36] Sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* enshrine "the right to life, liberty and security of the person" and "the right to be secure against unreasonable search or seizure", respectively. Additionally, section 184 (1) of the *Criminal Code*, states that "[e]veryone who, by means of any electro-magnetic, acoustic, mechanical or other device, willfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years." It may be possible that these provisions will be used as part of a broader legal tool to combat issues of privacy and data security in the socio-robotic context; See *Canadian Charter of Rights and Freedoms*, s 7, 8, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Criminal Code*, RSC 1985, c C-46, s 184(1).

functionality of robots.[37] Where Hartzog argues that the Federal Trade Commission's ("FTC") existing framework of consumer protection "is robust enough to adequately protect consumers" that use robots, the same may be said of the Canadian Competition Bureau, the Office of the Privacy Commissioner of Canada ("OPC") and its provincial counterparts.[38]

With respect to a device's collection and analysis of user data, the OPC may not only conduct audits and pursue court action under the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") but is also tasked with "[p]ublicly reporting on the personal information handling practices of public and private sector organizations."[39] Although the OPC does operate under a reactionary enforcement model that requires a complaint to be file against an organization or individual before any investigative steps are taken, revised guidelines may soon shift this approach. Commissioner Daniel Therrien, in his annual report to Parliament has suggested that the OPC move in part towards a "proactive enforcement model", that would enable the agency to launch its own investigations rather than react to singular complaints.[40] While such measures still require preliminary approval, they nevertheless suggest a concerted effort toward regulating emerging cyber and robotic technologies. By eschewing a hierarchal set of shallow design choices for a fluid collection of privacy concepts that carry governmental clout, regulatory agencies are embracing a holistic form of robotic design.[41]

The OPC's 2016 report on the Internet of Things not only supports such a pragmatic approach, but the report itself may have a direct impact on the future of robotic design and connectivity. The report notes that "[w]hile tracking in the Internet of Things involves the tracking of a device, the motivation is to understand the behaviour of the individual behind the device. Indeed, value is derived from the rich information about the individual, their activities, their movements and their preferences."[42] Such a revelation has a profound impact on the way we design robots. Imagine a myriad of ScarJo bots or Roombas that are interconnected across the same global network and share information with one another. Such an arrangement would not only breach a user's trust in their device, but create a series of user data points that may then be used to augment a robot's operating program.[43]

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[37] For example, where legislation expressly prohibits the use of drone technology within a given geographic area (such as an elementary school or an airport), product designers may be compelled to incorporate GPS technology to make their devices inoperable should they venture into such restricted locations.

[38] Hartzog, *supra* note 15 at 788.

[39] "What we do" (last accessed 26 October 2018), online: Office of the Privacy Commissioner <www.priv.gc.ca/en/about-the-opc/what-we-do/>.

[40] Canada, Office of the Privacy Commissioner of Canada, *2016–17 Annual Report to Parliament on the Personal Information Protection and Electronic Documents Act and the Privacy Act* 9 (Ottawa: Privacy Commissioner of Canada, 2017), online: <www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201617/ar_201617/#heading-0-0-3-1>; Matthew Braga, "Privacy Commissioner Aims to Start More Investigations Rather Than Wait for Complaints" (21 September 2017) online: CBC News <ww.cbc.ca/news/technology/privacy-commissioner-opc-annual-report-2017-outdated-laws-1.4301219>.

[41] "Shallow design choices" are measures that unnecessarily inhibit a robot's functionality under the guise of privacy. For example, autonomous lawnmowers that automatically delete their memory drives after mowing a user's lawn. The answer is not to make smart robots dumb but to make consumer protection one of the central trends of smart technology.

[42] Canada, Office of the Privacy Commissioner of Canada, *The Internet of Things: An Introduction to Privacy Issues with a Focus on the Retail and Home Environments*, (Ottawa: Policy and Research Group of the Office of the Privacy Commissioner of Canada, 2016) at 16 [*The Internet of Things*].

[43] Under such a scenario, a network of connected sexbots' could not only share user data but use such aggregate data to alter or improve their own programming.

Underlying our analysis of the consumer privacy implications of domestic robot use has been the issue of consent. As was argued in the previous chapter, though a user's consent is implicitly obtained by skeuomorphic design cues, it is not often meaningful consent. A user's consent is often formally obtained through needlessly abstruse privacy policies that are inconveniently printed alongside a robot's packaging. Moreover, the smiling face of a personal service robot builds more trust in its use than does an indecipherable privacy policy. It is precisely that same smiling face which can often hide a serious number of privacy and data concerns. In addressing such concerns from a design standpoint, we may find a solution through Dr. Ann Cavoukian's theory of Privacy by Design. Dr. Cavoukian's Seven Foundational Principles for the Implementation and Mapping of Fair Information Practices may serve as the basis for a regulatory framework guiding the use of domestic robots.[44] The Privacy by Design approach "is characterized by proactive rather than reactive measures."[45]

While each of the seven principles are equally important and operate concurrently, special attention should be paid to both the sixth and seventh principles, as they offer a pragmatic approach towards regulating robotic design. Rather than offering rigid rules, these principles stress the importance of visibility, transparency and respect for user privacy. Where "visibility and transparency are essential to establishing accountability and trust," compliance protocols and redress mechanisms are equally important to preserving such trust.[46] Users should have an open and transparent understanding of the technology they are using. This involves ensuring that they have accessible methods of communicating with the manufacturers, designers, and regulators of these technologies. Such a seemingly tripartite solution, involving industry, government, and individual users is only possible through a balanced approach between innovation and consumer protection. Individual interests must however remain at the forefront of any design calculus. Under such a privacy by design paradigm, strong privacy defaults, appropriate notice warnings, and the empowering of user-friendly options can all contribute to create meaningful consent.[47]

Much of our current understanding of user consent is rooted in a binary, one-time model that reflects "a decision at a moment in time in the past, under specific circumstances and are tied to the original context for the decision."[48] Such an outdated way of obtaining user consent fails to appreciate the fluid and flexible characteristics of robotic technology. Although asking for a user's consent to carry out each specific task or process may seem onerous, there are ways to ensure meaningful consent is given without impeding a robot's overall functionality. For example, "setting machine-based rules for proxy-decision making" or ensuring that a device learns what future actions are acceptable based on previous user inputs are tenable ways of promoting user privacy and autonomy. The latter option is especially interesting as it suggests privacy safeguards may become a fundamental pillar of machine learning. Instituting these privacy protocols allows robotic algorithms to remember privacy preferences and change how they respond to future stimuli based on privacy concerns that are important to the user—even if the concerns were not originally

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[44] For a full list of the seven foundation principles please see Ann Cavoukian, "Privacy by Design: The 7 Foundational Principles Implementation and Mapping of Fair Information Practices", online (pdf): <www.iab.org/wp-content/IAB-uploads/2011/03/fred_carter.pdf>.
[45] *Ibid* at 2.
[46] *Ibid* at 4.
[47] *Ibid* at 5.
[48] *The Internet of Things*, *supra* note 42 at 16.

envisioned at the start.[49] As robotic technology becomes ubiquitous, the concept of meaningful consent is even more necessary. Such meaningful consent is attainable through a privacy by design approach.[50]

Where public regulatory actors are unable or unwilling to support meaningful user consent, individuals may find alternative support through private civil actions. Although the time and cost of doing so may be prohibitive, private actions may nevertheless shape industry-wide policy. Such tort actions not only move the common law forward, but also act as an important form of behaviour modification. For example, causes of action based in negligence, breach of privacy or violations of consumer protection statutes can place offending programmers and designers on notice. As the argument goes, once such lawsuits reach a critical mass, the industry will be forced to curtail their exploitative data management practices. However, such arguments are not without their detractors.[51] Given the scope of this paper, it would not be possible to address the modificative validity of tort actions against a specific robotics manufacturer. Rather, in appealing towards the private bar, we concede that private actions play a vital role in our current regulatory system. Although such a system is itself a patchwork of interrelated laws, societal norms, and market forces, it can nevertheless protect consumers against "deceptive robots."[52]

Individual robot manufacturers that actively abuse consumer information, install lax privacy protocols or inefficient data management systems may be societally reprimanded and may even face sizeable fines or damage awards. One need only recall the spate of product liability lawsuits facing the automotive industry during the past century to better understand industry's need to proactively fix defective products and systems.[53] While would-be corporate defendants are not held to a standard of perfection, opaque governmental regulations must not conversely breed corporate inaction. Robot manufactures should not rely on such lax or non-existent governmental regulations as an excuse against industry self-regulation.

In witnessing the rise of privacy class action lawsuits as a punitive tool against data mismanagement, robot manufactures should be increasingly weary of the information their devices are now indiscriminately collecting. For every device like a *Kuri Home Robot* that elicits consumer information through its disarmingly anthropomorphic design, manufacturers should remain cognizant of the potential privacy torts awaiting them.[54] For example, the mass use of the tort of

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[49] Such developments may paradoxically introduce a sense of opacity "since the algorithm's processes may not be totally intelligible to a human operator." Where we have access to "an algorithm's source code, we still might not know how or why it reached its decision"; Elizabeth E Joh, "Policing Police Robots" (2016) 64 UCLA L Rev Disc 516 at 532.

[50] For example, government regulatory bodies such as the FTC even require companies to "implement privacy by design in its consent orders through 'comprehensive privacy programs'"; Hartzog, *supra* note 15 at 820 [footnotes omitted].

[51] For example, Professor Benjamin Ewing of Duke Law has argued that "while tort law likely does have important deterrence effects, it does not appear to reflect a comprehensive calculus about optimal deterrence."; Benjamin Ewing, "The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility" (2017) 8:1 J Tort Law 1 at 5.

[52] Lawrence Lessig addresses such forms of regulative modality in his work *Code Version 2.0*; Lawrence Lessig, *Code Version 2.0* (New York: Basic Books, 2006) at 94.

[53] Consumer protection advocate Ralph Nader addresses these issues in his work "Unsafe at Any Speed: The Designed-In Dangers of the American Automobile"; Ralph Nader, "Unsafe at Any Speed: The Designed-in Dangers of the America Automobile" (2011) 101:2 Am J Public Health 254 at 254–56.

[54] Andrew Gebhart, "Kuri is a Robot Nanny that Charms the Kids and Watches Your Place" (3 January 2017), online: CNET <www.cnet.com/products/mayfield-robotics-kuri/preview/>.

intrusion upon seclusion—which holds robot manufacturers liable for the improper disclosure of consumer data—may effectively re-determine what type of information that corporations are willing to collect.[55]

> Regardless of whether the answer to the question of who will protect consumers from deceptive robots lies in private tort action or in public regulatory agencies that champion a privacy by design mandate, our informed understanding of what such devices are truly capable of should shape our continued use of robotic technology.[56]

IV. CONCLUSION

When issues of fraud, privacy, and data security frame the conversation about the responsible design of robots, both industry and government are confronted by a societal mandate to act. Conceding the need for some skeuomorphic deception, robot manufacturers should nevertheless be encouraged to embrace open design platforms that are both transparent and respectful of consumer information. While they may seem wishful, these goals are achievable under an expanded regulatory framework. Through increased governmental policies advocating a privacy by design approach and through the individual choices of consumers, robot manufacturers can be compelled to change their current data management practices and models of user consent.

Although it is tempting to shift the blame of perniciously "deceptive robots" squarely onto device manufactures, consumers must also bear a degree of responsibility. A rudimentary, albeit active understanding of what the personal service robots in our households are truly doing is needed. As the proliferation of robotic technology restructures whole swaths of our economy and society, further study is needed towards the holistic integration of such technology into our daily lives. Without the proper consumer protection protocols in place, all parties may pay a hefty price when informational privacy is irredeemably sacrificed. As is often the case with any emerging technology, a flexible balance between innovation and regulation must be struck.

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[55] For an articulation of the tort of intrusion upon seclusion please see *Jones v Tsige*, 2012 ONCA 32 at para 66, 108 OR (3d) 241.

[56] Ryan Calo addresses some of these issues in his work "Against Notice Skepticism in Privacy (And Elsewhere)" which advocates for a form of visceral notice that leverages "a consumer's very experience of a product or service to warn or inform." Such forms of visceral notice include loud beeps or bright lights to warn of a device's impending actions or processes; Ryan Calo "Against Notice Skepticism in Privacy (And Elsewhere)" (2012) 87:3 Notre Dame L Rev 1027.

DIGNITY IN MEMORY: LESSONS FOR RECONCILIATION AND TRUTH IN POST-WAR SRI LANKA

Archana Ravichandradeva*

Indigenous diaspora
to be *out of place yet in place*
a displacement
causing a mind-body-spirit dis-ease
with symptoms no doctor can identify
there will be no diagnosis of an illness
due to being placeless today

The spectrum of diaspora doesn't cover this
the experience of reconfigured landscapes and loss
while you are forced to stand by and watch
has no fancy concept to back it up
no diagnostic description under the DSM
so we fly under the radar yet again

You see,
there are stories just beneath the city streets
that your bones are trying to remember
there are trail ways laying just behind those barbed wire fences
that you just can't reach
there are ancestors bodies in these manicured landscapes
that have mixed and mingled with the earth
knowing this, you try to listen closely in these trafficked spaces
holding breath, keeping silent
knowing that a blood memory might be trying to speak
These losses accumulated result in a type of trauma known only by the dispossessed
something intangible that you don't have the words for and don't know how to grieve

The landscape continues to shift
gets a facelift according to Eurocentric definitions of beauty
These acts
redefine connection to land to that of owner to property
We know that these waters had dominion over themselves
long before man ever had the audacity to plug up the rivers with dams
or the stupidity to turn the potable into poison
Water has a long term memory
every place tells a story
There are still attempts at the erasure of our history
by the continued writing of stories overtop of our own
In the form of buildings and pavilions
through roadways and oil rigs
through the creation of structures that act as a testament of our absence

Out of place in place

I watch as history repeats itself
I am only 29 but 1867 still leaves a bitter taste in my mouth
My mind is still sharp you see but
I am rapidly losing my place-memory

I weep over empty berry bowls

There are more bushes elsewhere
Someone will surely cry
but not the bushes where I first plucked bulging berry
placed it in my small mixed blood mouth
and *tasted home*
tasted land
tasted connection
Where I brought my son
so he could eat more berries than he would ever place in his bowl
boasting berry blues and reds on his hands and face
as he stood in place, *in place*

Maybe this is just an *Indian girl dilemma*
Mourning the loss of berry bushes
the loss of access to river to lay offerings
the loss of place to pick medicines

Out of place in place
What is the word for that in your language?

My Grandmother reconfigured her identity
to adjust to shifting maps and dreams
I will do the same
to give my son the best of me
Give him new memories in old places
so that he will not forget
the taste of home
the taste of land
the taste of connection
all jumbled up in his little mixed blood mouth
because no matter the changes that come to pass,
there are some stories that refuse to be forgotten

— Helen K[1]

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I. INTRODUCTION

The Sri Lankan government defeated the Liberation Tigers of Tamil Eelam (the "LTTE") in a stunningly brutal campaign in 2009, bringing an end to one of Asia's longest and most protracted wars.[2] The end of the war marked the demise of the LTTE's de facto state of Tamil Eelam amidst claims of genocide, crimes against humanity, and war crimes perpetrated by both sides. The war was won by the machinations of the staunchly repressive and nationalistic government under then-President Mahinda Rajapakse, who saw the LTTE as a terrorist threat that needed to be exorcised from the country. The end of the war upended the political status quo that existed for decades and changed the island's history forever. The hope, and many political promises, that came with the end of the war centered around the idea of the establishment of "peace" and bringing the country together in harmony and reconciliation.[3] This was meant to be achieved through the re-establishment of a unitary Sri Lankan entity, replacing the local tensions that existed between the predominantly Tamil North and East and the Sinhalese South and Central parts of the country that had divided Sri Lanka for decades.

This essay challenges the Sri Lankan government's official narrative of reconciliation and the mechanisms through which it is being orchestrated. Looking particularly at the ways in which the war, the LTTE, and the end of the Tamil Eelam dream are considered in the discourse of the post-war consolidation process, this essay will argue that the triumphalist narrative of the victorious regime and the exclusionary politics it practiced were the antithesis of reconciliation and healing. This essay envisions transitional justice in Sri Lanka as both an objective and discursive project, where the narrative of peace is just as important as the means through which it is sought to be achieved. It is important to consider both "presence" and "absence" in this official narrative: the presence of overtly triumphalist memorials and monuments commemorating the war, and the absence of mourning, memory, and acknowledgement of the loss of both Tamil lives and legitimate Tamil political aspirations.

Echoing the language of the poem in the epigraph of this essay, which was written by an Indigenous poet to describe the dispossession and lack of acknowledgment that she believes affect her community, this essay in its very essence seeks to remember. Drawing on literature from anthropology, memory studies, and transitional justice, it will argue that Sri Lanka is in a state of what I call "disenfranchised memory", where the political establishment prioritizes certain official narratives while discarding others. This, I argue, amounts to a denial of the dignity of Tamil lives, Tamil deaths, and Tamil aspirations. As in the words of Palestinian academic Edward Said in the context of the Palestinian dispossession: "perhaps the greatest battle Palestinians have waged as a people has been over the right to a remembered presence and, with that presence, the right to possess and reclaim a collective historical reality."[4] Similarly, the disenfranchisement of memory being perpetrated by the Sri Lankan state is a denial of the Tamil community's right to a

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Canadian Association for Refugee Lawyers Windsor Law Chapter, and was a Transitional Law and Justice Network Fellow.

[1] Helen K, "Indigenous Diaspora: Out of Place in Place" (26 April 2017), *Reclaim the Warrior* (blog), online:<www.reclaimthewarrior.com/ 2017/04/26/indigenous-diaspora-out-of-place-in-place/>.

[2] Amarnath Amarasingam & Daniel Bass, "Introduction: Problems and Prospects for Post-War Sri Lanka" in Daniel Bass & Amarnath Amarasingam, eds, *Sri Lanka: The Struggle for Peace in the Aftermath of War* (London: Hurst & Company, 2016) 1 at 1 [Amarasingam & Bass].

[3] *Ibid* at 6.

[4] Edward W Said, "Invention, Memory and Place" (2000) 26:2 Crit Inquiry 175 at 184 [Said].

remembered presence, and considering the thousands of deaths during the war, a right to a remembered absence as well. It is only in the remembrance and acknowledgement of the Tamil narrative, which exists outside the official one created by the state, that the potential of dignity for Sri Lanka's Tamil community can truly be fulfilled.

II. PART I: ACKNOWLEDGEMENT OF SELF

North Eastern Sri Lanka is known for the dryness of its air, and the redness of its soil. It is a harsh landscape, missing the lush forests and waterfalls of the predominantly Sinhalese-populated Central and South Sri Lanka. It is the land of my Tamil forefathers. Yet, because of my own family's displacement and dispossession during the 30 year civil war, I see the island with the eyes of an intimately tied stranger. I will never have the experiences and memories of having grown up on the island. However, the stories and community narratives imparted on me by my family, friends, and community members, the snapshots of belonging I experience on my vacations and the information I hungrily imbibe through media, keep my homeland close. In my exile, memory and landscape become tied together, creating memory-scapes of transnational belonging. This is the power of narrative and story-telling, where objects such as photographs, old *saris*, and my mother's fish curry serve as commemorations and monuments to my heritage and to my identity.

This essay will explore this idea of story-telling, commemoration, and memory-making in the eyes of a displaced Tamil, one who did not feel the trauma of the war directly but rather through the networks of connection that span the global Tamil diaspora. This essay positions itself at a cross-roads, a Janus-faced observation of the past atrocities, political mistakes, regrets, and defeats my community, and the country as a whole, has experienced, while also looking hopefully, but cautiously, into the future. Much of this hope comes from the foregrounding of the concept of dignity in the essay's discourse; an acknowledgement of dignity stands for the upending of didactic and simplistic narratives for a broader, truer acknowledgement of truth and lived realities. It places empathy and care at its forefront, and takes upon its goal the recognition of suffering and common humanity.[5] This framework lays the potential for humanity to flourish.[6]

III. PART II: WHAT IS DIGNITY? DIGNITY AND ITS ASPIRATION

The concept of human dignity is varied and complex, and takes on different appearances depending on the context and historical perspective in which it is being seen.[7] This essay adopts Arnd Pollman's four conceptualizations of human dignity, where dignity is the purpose of human rights.[8] In this, humans are seen as being embodied with self-respect, or at least the potential for self-respect. This potential for a "life of a 'higher' quality" must be implemented and established through the language of human rights and the law.[9] For this, Pollman argues that respect, self-respect, and the expression of self-respect are some of the fundamental characteristics needed for

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[5] Sophie Oliver, "Dehumanization: Perceiving the Body as (In)Human" in Paulus Kaufmann et al, eds, *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht: Springer, 2011) 85 at 95–96 [Oliver].
[6] Arnd Pollmann, "Embodied Self-Respect and the Fragility of Human Dignity: A Human Rights Approach" in Paulus Kaufmann et al, eds, *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht: Springer, 2011) 243 at 253 [Pollmann].
[7] *Ibid* at 248.
[8] *Ibid* at 251–52.
[9] *Ibid* at 252–53.

the flourishing of human dignity.[10] This requires that humans are treated in a decent and humane way and that they are incorporated within social realities with respect and the acknowledgement that they are being treated like equals, within or amongst equals.[11] Part of this concept of human dignity, he argues, is the idea of having equal social recognition of the "inner world" while being respected enough to be able to express vulnerability.[12]

The ideas of respect, acknowledgment of diversity in people's inner worlds, and the respect that they still deserve are important theoretical concepts that underlie the foundations of this essay. Within the context of memory making and story-telling in post-war Sri Lanka, and in transitional countries more generally, these are some central elements that need to be officially acknowledged for the fulfillment of the potential for dignity. This is especially important in the context of a "defeated" population.

This is not to say that the Tamil population lacks dignity within their hearts and minds, and that the Sri Lankan state needs to provide it.[13] There are countless stories of resistance and agency within the Tamil populace both during and after the war. Even now, agency is visible as people crowd the roads of villages in the Tamil areas of Sri Lanka calling for the return of their lands, the demilitarization of their cities, and the return of their missing children. Dignity is inherent in their struggle, and in their tenacious battle for survival even after collective trauma and loss. However, the focus of this essay is on the need for the Sri Lankan state to inform each aspect of their transitional justice project with the idea of human dignity, which is far from the current reality.

Sophie Oliver contemplates how the politics of exclusion and other-ing processes create indignity, such as by projecting animalistic or mechanistic metaphors on certain segments of a population, which leads to the breaking down of social capital.[14] These processes negate interpersonal warmth, individuality, and agency. This in turn leads to the dehumanization, objectification, or lack of acknowledgment for the lived realities of segments of the population, regardless of how much agency those segments are willing to show. As a way to counter this, Oliver calls on bystanders, witnesses, and the organizers of the exclusion themselves to look towards communication and solidarity as a means to reject dehumanization.[15] In a particularly compelling paragraph, she states: "[t]he failure of the bystander, witness, or receiver of testimony to acknowledge the victim's experience, to listen to her story, and to recognize as human the traumatized body of atrocity is itself a reiteration of the logic of dehumanization encountered in magnified form in torture: Voice, recognition, and worldly self-extension are obscured behind the totality of the body in pain."[16] Oliver also asserts that the way to move from such dehumanization is through the recognition of the corporeal aspects of humans. Oliver compellingly states that "to resist dehumanization, whether materially or conceptually, must recognize the embodiment of the human subject" and return "to the lived experience of human beings".[17]

> From here we may establish the imperative to recognize the position of the body within processes and narratives of dehumanization. To truly think dignity as embodied, however, implies more than

[10] *Ibid* at 253, 255.
[11] *Ibid* at 255.
[12] *Ibid*.
[13] Amarasingam & Bass, *supra* note 2 at 5.
[14] Oliver, *supra* note 5 at 88.
[15] *Ibid* at 93–94.
[16] *Ibid* at 93.
[17] *Ibid* at 95.

> this: it involves a re-imagining of the human so as to include within its category that which was hitherto excluded. It involves bearing witness to the body as part of human as well as inhuman experience, thereby refusing to accept bodily suffering and abjection as dehumanizing. If dignity is embodied, then it is inclusive of pleasure and suffering, beauty and disease, strength and vulnerability, life and death.[18]

The lived realities of humans become the source of dignity: respect, acknowledgement, the sharing of space, and the willingness to listen to stories brings people together in dignity.

Indignity occurs, for instance, when narratives that paint people as animals or machines are used to lessen their humanity, according to Oliver.[19] Similarly, according Paulus Kaufman, indignity occurs when somebody is used as a tool or as a means to some end.[20] There are three conditions that must be met: first, there must be something done with the tool, second, the interaction must include some goal that is not directed towards the state of the tool itself, and third, the tool must be used and interacted with because the user believes it to be useful for their own purposes.[21] Human beings are not meant to be used as tools, and the acknowledgement of human dignity acts as a constraint against this type of behavior. Instead, Kauffman turns to consent and co-operation as the means to build proper person-person relationships, as opposed to person-tool relationships.[22]

Respect, both self-respect and respect, conferred onto oneself when treated as an equal by others, becomes a fundamental part of acknowledging and upholding the dignity of human beings. How can we apply these concepts to the context of post-war Sri Lanka? I will argue that in Sri Lanka there is a large scale denial of the Tamil population's human dignity in the war affected zones, and of their right to practice their politics and be understood and acknowledged as special, but equal, members of the Sri Lankan polity.

We must take the literature on human dignity outlined above, and rather than apply it towards an individual, apply it towards an entire political and cultural community. The same doctrines can apply to both if we extract three important principles of the dignity paradigm: first, do not act in ways that instrumentalize a group of people, second, have a willingness to consider and acknowledge the stories of the group in question, and third, meaningfully apply human rights standards to allow the potential of human dignity within this group to flourish. This essay will look at presences and absences within the landscape and memory-scape of Sri Lanka to argue that none of these three important principles are being followed with regards to the Tamil population. As a result, Tamils are living in a state of indignity both physically and spiritually. I believe that without these principles, the potential for true and meaningful reconciliation and peace is lost. It is through commemoration, memory, empathy, and care that we can try to plant the seeds of dignity and allow the entire nation to flourish.

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[18] *Ibid.*
[19] *Ibid* at 88.
[20] Paulus Kaufman, "Instrumentalization: What Does It Mean to Use a Person?" in Paulus Kaufmann et al, eds, *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht: Springer, 2011) 57 at 60.
[21] *Ibid* at 60–61.
[22] *Ibid* at 65.

IV. PART III: ON PRESENCE AND MEMORY

This part of the essay will consider the landscape and memory-scape of Sri Lanka. Place is always changing, and meaning is always being appropriated and altered through change.[23] When the war ended, the Sri Lankan state was given access to the land of the North and East that, until then, had been under de facto control of the LTTE. The LTTE ran this region like its own separate country with their own separate check points, police stations, and banks. The LTTE required that travelers show their passports when entering areas within their control, and even introduced a 13-minute time difference from Colombo. The roads were not paved and travel was difficult from the South to the North without the express approval of the LTTE. These efforts by the LTTE were a means of exercising control over the territory, and marking the difference between themselves and the central government. However, during the Sri Lankan government's 2009 military campaign, the LTTE was pushed into an increasingly smaller and smaller piece of land in the island's coast, losing control over the territory they had held onto previously.[24] When the end of the war came, it was followed by promises from the Sri Lankan government that now that the entire island was under their power, the North and East was on the verge of a new, bountiful future of racial harmony and connectedness with the South.

The problem is that this form of "reconciliation" is a victor's peace, top-down and militarily enforced. The official memory and narrative of the conflict focused on triumphalism and the fervor and bravery of the Sri Lankan state, while vilifying the LTTE. The LTTE continued to be portrayed as a terrorist organization in the eyes of the victorious government, who couched their brutal and violent victory, which included human rights abuses and violations of international law, as a "humanitarian exercise" to protect the Tamil people from the LTTE. While both sides committed crimes during the war, it is important to recognize that many of the Tamil deaths, which the United Nations has estimated to be 40,000 in total, were the result of the indiscriminate shelling and violence of the Sri Lankan government.[25] To add insult to injury, the government would not acknowledge that there were any civilian Tamil deaths during the war until they were severely pressured by first-hand accounts and video evidence. At the conclusion of the conflict, the language used by the Rajapakse regime was filled with nationalistic fervor, focused on triumph, the defeat of terrorism, and described the people of Sri Lanka as filling the streets to celebrate the victory, without considering the magnitude of pain and suffering felt by those who actually experienced the war.[26]

The nationalistic government's post-war discourse, authored for the Sinhala population, is an example of the "smooth unfolding of a singular narrative of triumph."[27] As a result, the pain and suffering of the Tamils were left unacknowledged. Scholars have noted that in a transition stage post war, political elite have the ability to craft a narrative that suits their particular vision

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[23] Piotr M Szpunar, "Monuments, Mundanity and Memory: Altering 'Place' and 'Space' at the National War Memorial (Canada)" (2010) 3:4 Memory Stud 379 at 391 [Szpunar].
[24] Amarasingam & Bass, *supra* note 2 at 3.
[25] United Nations Secretary General, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (31 March 2011) at 41; Amarasingam & Bass, *supra* note 2 at 2.
[26] Kumaravadivel Guruparan, "The Politics of the Discourse on Post-War Reconciliation in Sri Lanka: Some Preliminary Notes" in Daniel Bass & Amarnath Amarasingam, eds, *Sri Lanka: The Struggle for Peace in the Aftermath of War* (London: Hurst & Co, 2016) 15 at 21–22 [Guruparan].
[27] Katharina Schramm, "Introduction: Landscapes of Violence: Memory and Sacred Space" (2011) 23:1 History & Memory 5 at 12 [Schramm].

for the country, doing so under the guise of nation building.[28] In what Katharina Schramm describes as the "truth-making machine", national solidarity is strengthened by overcoming past divisions through selective remembrance by the victors of war.[29] The "truth-making machine" is used not only to help people remember past events but also to forget divisive events.[30] However, as Schramm argues, the memory of violence can never be forgotten even when the narrative of the state is overtaken by exuberant and fiery nationalism.[31] Schramm notes that "the memory of violence is not only embedded in peoples' bodies and minds but also inscribed onto space in all kinds of settings: memorials, religious shrines, border zones or the natural environment."[32] The state and the bureaucracy work together to orchestrate systems of remembering and forgetting that, as Brian Osborne argues, favours the memory of the elite over popular memory.[33] Osborne makes the distinction between "official memory" and "vernacular memory" and it is the latter that represents the diversity and carried interests of the complexity of the polity.[34]

An interesting facet in the Sri Lankan context is that the official memory seeks not only to favour its own particular version of what occurred during the war, but also to completely erase the vernacular narrative of the Tamil population. In the government's quest for dominance over the lands, hearts, and minds of the Tamil populations in the North and East, which for decades had been living under the control of the LTTE, it sought to completely delegitimize the politics of Tamil separatism. This is not new in Sri Lanka. In 1983, after the first round of major anti-Tamil pogroms engulfed the capital city of Colombo in flames, and Tamil militancy began to rise, the government introduced a new amendment to the constitution that outlawed support for a separate state in Sri Lanka.[35] As the Tamil United Liberation Front, the main Tamil political party at the time, were separatist, they refused to take the oath of allegiance and were removed from Parliament. After this occurred, there was a vacuum in Tamil political representation outside of the powerful militant groups, of which the LTTE was the strongest. With the military defeat of the LTTE in 2009 came the end of Tamil political aspirations as they had been realized for decades.[36] At the conclusion of the conflict it was still illegal to call for separatism, and is so to this day.[37] As such, the ability of the Tamil populace to truly participate in politics is curtailed. While this is one very small aspect of the political structure of Sri Lanka, which is beyond the scope of this paper, it does highlight the constraints on the ability of Tamils to express their inner selves politically. With the arrival of the triumphalist majoritarian and nationalist Rajapakse regime, just as the LTTE ceased to exist, the vulnerability of the Tamil population was heightened. Despite the end of the violence, the political climate of Sri Lanka encapsulates nationalist politics of victory, which excludes Tamils from the Sri Lankan polis.[38]

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[28] *Ibid* at 9
[29] *Ibid*.
[30] Jennifer Hyndman & Amarnath Amarasingam, "Touring 'Terrorism': Landscapes of Memory in Post-War Sri Lanka" (2014) 8:8 Geography Compass 560 at 561 [Hyndman & Amarasingam].
[31] Schramm, *supra* note 27 at 5.
[32] *Ibid*.
[33] Brian S Osborne, "Landscapes, Memory, Monuments, and Commemoration: Putting Identity in its Place" (2001) 33:3 Can Ethnic Studies 39 at 45 [Osborne].
[34] *Ibid*.
[35] Amarasingam & Bass, s*upra* note 2 at 3.
[36] *Ibid*.
[37] *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978, art 157A.
[38] Hyndman & Amarasingam, *supra* note 30 at 560.

How exactly did this unfold? The official story of post-victory Sri Lanka involves processes of place-making, or the "choreography of state-making and identity-making through landscapes, myths and memories, narratives and hero[in]es, and pageants and fireworks," which Osborne collectively calls the geography of identity.[39] Commemoration and landscape making, through the introduction of particular spaces like monuments, memorials, streets, and parks, enables emotional bonding with particular histories and geographies.[40] In the case of Sri Lanka, these are ways in which the State can force their own narrative on the Tamil population. Schramm considers landscape as a process, where violence plays an important role in demarcating the grounds for the creation of national myths, including those of resistance, victory, and defeat.[41] For instance, in Sri Lanka, new monuments and memorials have been built extolling the virtues of the armed forces, which brought such a bloody end to the war. In doing so, the government has tried to create a collective memory of victory, dispelling the dark days of the LTTE. On one of the monuments, a picture of President Rajapakse, was melded together with particular symbols and imagery to evoke the great kings of the ancient Sinhalese past, portraying him as a valiant warrior.[42] It is interesting how such monuments "fuel distinct and sometimes contradictory versions of memory" for Sri Lanka's two distinct communities or nations.[43] While the narrative espoused by the government is readily believed by Sinhalese communities who did not suffer the effects of the government's so-called "humanitarian intervention", the existence of these war monuments is at odds with the war-ravaged landscape and suspicious psyche of the Tamils.

There is more than just a deep discomfort with the existence of these types of war memorials and monuments within the North and East of Sri Lanka. The creation of a new landscape needs to be considered in relation to the broader political project unfolding in Sri Lanka under the guise of transitional justice and development. Amarnath Amarasingam and Daniel Bass have gone further into detail on this process, which is beyond the scope of this essay. However, in their book *Sri Lanka: The Struggle for Peace in the Aftermath of War*, they highlight the processes of Sinhalization, colonization, militarization, and suppression of Tamil political will by the government. Contributing to Amarasingam and Bass' text, Kumaravadivel Guruparan argues that the language of development is being used to establish and consolidate the gains made by the military in a "victor's peace".[44] As such, land that was taken over when families were displaced during the war continues to be in the hands of the government. Records of who was killed and who was made missing by the government and army remain under tight lock and seal. The government is creating new Buddhist stupas in the predominantly Hindu North and East, inventing stories that these temples existed before and were destroyed by the LTTE. Moreover, Sinhala residents are being asked to settle in the North and East in order to dilute the concentration of the Tamil population. While the opening up of societies and the melding of communal rifts is incredibly important to building peace, what is unfolding in Sri Lanka is deeply settling, partly because it is so one-sided. Guruparan also cites the normalization of the military in the North and East, noting that military–civilian ratio estimates range from 1:4 to 1:11, which highlights the changed reality of the Tamil experience.[45] No one can truly relax when there are so many soldiers afoot, especially those that had been involved in the atrocities of the war just a few years earlier. There has been no

[39] Osborne, *supra* note 33 at 40.
[40] *Ibid* at 41–42.
[41] Schramm, *supra* note 27 at 8, 10.
[42] Hyndman & Amarasingam, *supra* note 30 at 566.
[43] Farhat Shahzad, "Collective Memories: A Complex Construction" (2012) 5:4 Memory Studies 378 at 379.
[44] Guruparan, *supra* note 26 at 22.
[45] *Ibid* at 25.

accountability mechanism and there is a continuing criminalization of the politics of self-determination.[46] As such, the official narrative of reconciliation and peace unravels upon consideration of the means and modes through which it is being achieved.

This essay focuses particularly on the lack of acknowledgement, or remorse, shown by the government in relation to the war, coupled with the incredibly insensitive monuments erected to celebrate what was an incredibly traumatic experience for Tamils across the globe. I argue that this policy creates and perpetuates indignities against the Tamil populace, and thus undermines their ability to fulfill the potential of human dignity. Moreover, drawing on literature on instrumentalization, this essay will show how the lives and politics of LTTE fighters became tools for the Sri Lankan government to concoct a particular version of events, one that furthers the indignities perpetuated against the Tamil community.

The Sri Lankan state's power to narrate the war and characterize the enemy is an expression of triumphalist nationalism and selective memory.[47] Amarasingam and Jennifer Hyndman argue that the Sri Lankan government is attempting to selectively remember the Tamil Tigers and dead Tamil civilians to stoke Sinhalese nationalism, which reproduces the LTTE as a future potential threat.[48] In doing so, they not only justify their own violence, but also the ongoing militarization of civilian spaces by the state and the marginalization of Tamils and other minority groups.[49]

One way in which they do that is to create what Fearghal Cochrane referred to as "dark tourism," wherein people are told to come to sites of previous violence as a means to learn the history and engage in commemorative acts.[50] However, this kind of "tourism" calls into question what kind of history is being told. While these touristic activities could potentially be labelled as part of the economic revival of the country, this justification does not make sense in Sri Lanka as it was the army that ran most of the tourist spots. Cochrane argues that tourist initiatives after violent conflict are inherently political and need to be seen as such.[51] He argues that conflict tourism embodies an inherent paradox wherein a desire to remember and commemorate violent conflict simultaneously politicizes it, which is especially true if the politicians and military are running the tourism.[52]

One such example is the tourist site marking the destruction of the Kilinocchi Water Tank by the LTTE as they were fleeing government forces during the end of the war. The language on the commemorative plaque beside the destroyed tank is quite telling:

> This fallen tower was once the source of water – the fountain of life – for the people of Kilinocchi. Destroyed by the LTTE terrorists in the face of valiant troops converging on Kilinocchi in Jan 2009, this tower is a silent witness to the brutality of terrorism. Yet, terrorists did not succeed in destroying our determination to secure freedom and peace. This is a monument to the futility of terror — and to the resilience of the human spirit. Terrorism shall never rise again in our great land. We are free.[53]

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[46] *Ibid* at 22, 29–30.
[47] Hyndman & Amarasingam, *supra* note 30 at 560.
[48] *Ibid* at 561.
[49] *Ibid*.
[50] Feargal Cochrane, "The Paradox of Conflict Tourism: The Commodification of War or Conflict Transformation in Practice?" (2015) 22:1 Brown J World Affairs 51 at 54.
[51] *Ibid*
[52] *Ibid* at 53.
[53] Hyndman & Amarasingam, *supra* note 30 at 569.

The language of triumphant nationalism and the simultaneous demonizing of the LTTE from the commemorative plaque is clear, and it shows no understanding or acknowledgement of the complexities of the conflict nor any remorse for the civilians killed by government fire. This type of memorialization becomes even more sinister when one considers that the government actually opened up LTTE leader Velupillai Prabhakaran's bunker and home for tourists after the war.[54] The language used at this tourist attraction is also upsetting. Showcasing pictures of Prabhakaran's family celebrating birthdays and swimming in pools, the captions used to describe the pictures show a callous disregard for the complexity of the leader's life as a father and husband, and further promotes this idea of indignity. Tourists, predominantly Sinhalese civilians who journeyed north for the first time with fanny packs and cameras, were invited to gawk at Prabhakaran's bed, still complete with its bedsheet. Prabhakaran's children's toys were on display with captions that said "LTTE leader's luxurious family life" and "only my children can play".[55] This vaguely voyeuristic and deeply disrespectful observation of the life and property of a dead man and his family reflect the government's use of both to further the narrative that the Tamil community was suffering under the autocratic rule of a leader who coveted luxuries for himself and his family. In this way, his life and his legacy are instrumentalized for the furtherance of the official government story, furthering the indignity.

This same pattern was repeated with captured LTTE weapons. Their boats and ships are put on display for tourists to see, with no signs or information contextualizing the struggle and providing a nuanced retelling of the history of the war. Instead, the complex and fraught nature of Tamil politics and self-determination were reduced to mere images of boats and planes; war paraphernalia was displayed to showcase the might of the victorious Sinhala military and the defeat of the LTTE, a worthy enemy that may rear its head again in the North if not controlled through the militarization.[56] While Kauffman discussed instrumentalizing humans, I argue that we must expand that concept to include the instrumentalization of communities, lives lived, and political aspirations, which can create dehumanizing effects if utilized by a ruling party. While the museum depicting LTTE weapons and war machines no longer exists, the fact that a tourist can look around Prabhakaran's house, a man whose name was demonized within the Sinhala populace for years and then enjoy a coffee served by an armed soldier at the adjacent café speaks to the disrespectful absurdity of this charade.[57]

What is even more disturbing is that tourists can witness the spectre of Prabhakaran's son Balachandran in pictures, being fed birthday cake and playing with his toy car. Upon the end of the war, photos were released of Balachandran sitting with army personnel looking tired and war-weary but very much alive after having been captured. His father, his family, and their protection detail had mostly been killed. However, shortly after, sickening photos were released of the boy, his body riddled with bullets.[58] The perpetrator remains at large; there has been no accountability, and there is nothing left to commemorate his life other than a tourist attraction that allows tourists to gawk at photos of him and his family. This, to me, is indignity.

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[54] *Ibid.*
[55] *Ibid* at 570–71.
[56] Guruparan, s*upra* note 26 at 27.
[57] Hyndman & Amarasingam, *supra* note 30 at 569.
[58] Andrew Buncombe, "Handed a Snack, and then Executed: The Last Hours of the 12-year-old Son of a Tamil Tiger", *The Independent* (18 February 2013), online: <www.independent.co.uk/news/world/asia/handed-a-snack-and-then-executed-the-last-hours-of-the-12-year-old-son-of-a-tamil-tiger-8500295.html>.

Stacy Douglas speaks about the political value of museums, stating that they use repressive modes of identification through the creation and deployment of political narratives with which individual identities are then asked to comply.[59] She considers these "limiting, confining, and ultimately oppressive practices of cultural essentialism," which, without nuanced counter-narratives, can produce one-dimensional understandings of history.[60] She further states: "what is significant about the advent of the museum as a tool for popular education is that it advances a conception of itself as part and parcel of a democratizing project, while simultaneously acting as a chief producer of public manners and civility."[61] Thus, civility and normalcy are created even in a topsy-turvy world, where militarization and suppression are the norm.

This phenomenon is also apparent with the memorials and monuments dotted across the landscape. Memorials and monuments have always been considered important sites of collective memory and Osborne argues that monuments are spatial and temporal landmarks, loaded with memory.[62] They perform a didactic function, signalling national progress, and use the figures of heroes to represent symbols of rights and liberties.[63] The monuments that exist in Sri Lanka today are bold and triumphant, showing soldiers holding weapons in the air. The fact that some of them have signage and captions only in the Sinhala language in predominantly Tamil areas shows that the official memory is being portrayed. Performances associated with memorials and monuments can be interpreted as public theater so it is important to ask: who is the audience, what is the actual play on stage, and are there actually several simultaneous dramas?[64] As Marko Lehti, Matti Jutila, and Markku Jokisipilä note: "[n]arrative brings the nation into being as a unique, particular and privileged entity, thus forming a crucial source of national dignity."[65]

V. PART IV: ON ABSENCE AND MEMORY

The type of dignity referred to above is not open to all members of the community. So far, I have argued that the creation and change of the landscapes and memoryscapes of the post-war North and East have contributed to indignities perpetuated against the Tamil population. I will now argue that the refusal to acknowledge certain narratives and stories, which I refer to as absences, further entrenches and perpetuates these indignities. The fact that there are no memorials or statues commemorating the victims of the violence, and that community participation in commemorative and remembrance celebrations continues to be outlawed in the North and East, are indignities upon indignities.[66]

Schramm argues that we must consider the relationship between absence and presence and attempt to recreate a presence out of absence.[67] Absence and loss is a "topography" that shows us that nothing and "not knowledge, empathy, commemoration, indignation, mourning, or shame—

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[59] Stacy Douglas, "Museums as Constitutions: A Commentary on Constitutions and Constitution Making" (2015) 11:3 L, Culture & Humanities 349 at 351.
[60] *Ibid*.
[61] *Ibid* at 359.
[62] Szpunar, *supra* note 23 at 381.
[63] Osborne, *supra* note 33 at 50.
[64] Marko Lehti, Matti Jutila & Markku Jokisipilä, "Never-Ending Second World War: Public Performances of National Dignity and the Drama of the Bronze Soldier" (2008) 39:4 J Baltic Studies 393 at 394.
[65] *Ibid* at 395.
[66] Amarasingam & Bass, s*upra* note 2 at 3.
[67] Schramm, *supra* note 27 at 10.

can fill these silent spaces."[68] The absences in the post-war period haunt me, even thousands of miles away.

Absence and loss are most clearly articulated in a poem by Udhayani Navaratnam and translated by Malathi de Alwis in her work "Trauma, Memory and Forgetting". The poem is entitled "Scorched Sentinels", and reads:

> We are mere headless bodies
> mute, unfeeling, empty
> war exhibits to be gawked at
> assume all those who pass by
>
> We have borne witness
> to the unfolding history
> We have withstood
> tsunamis of RPG and AK47 fire
>
> We are mere headless bodies
> our torsos blackened and bullet riddled
> but our roots dig deep into the earth
> holding tight to our terrifying truths
>
> We await a historian, as in ages past
> to chisel on stone our saga of suffering,
> We hold our breath until that moment
> headless, silent, resolute.[69]

The tone of this poem is chilling, and speaks to the feelings of emptiness and aloneness that arise when narratives and stories of violence and dispossession are not acknowledged or remembered. The government's silence on the atrocities of the war and its own complicity, its lack of acknowledgement, suffering, or sharing of grief strike me as the final blows to the dignity of the war-affected Tamil population. The government's conscious attempts at forgetting, as well as repression, layers memories of violence together.[70]

There are many deafening gaps and silences in Sri Lanka. As a Tamil, this is what haunts me most, as the remembrance of the dead is an integral part of Tamil culture. When the LTTE was still in control in the North and East, elaborate commemoration ceremonies were held every year at cemeteries for families to remember their loved ones. While the political legacy of the LTTE ought to be rightly analyzed and criticized, the government of Sri Lanka instead razed all the cemeteries and removed any marking or acknowledgement of what had previously occupied the landscape. Coupled with the fact that there are still no full accounts of what happened during the war, the government's tight-lipped unwillingness to acknowledge its own faults and those still missing, and the lack of true accountability, makes the situation in Sri Lanka dark. If one also considers the triumphalist monuments on top of these hidden graves and lost lives, the end result is a callous and crass disregard for the dignity of the Tamil population.

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[68] *Ibid* at 11.
[69] Malathi de Alwis, "Trauma, Memory, Forgetting" in Daniel Bass & Amarnath Amarasingam, eds, *Sri Lanka: The Struggle for Peace in the Aftermath of War* (London: Hurst & Company, 2016) 147 at 147 [Alwis].
[70] Schramm, *supra* note 27 at 11.

There is a large debate within transitional justice literature that has been termed the peace–justice divide. The debate centers around the idea that it may be better to forget past atrocities and communal discord. Ross Poole calls this theory the "oblivion" and argues that in some cases "oblivion" is necessary: "it may sometimes be necessary to forget, especially in so called transitional societies [where] there is the very real danger that too much emphasis on what is owed to the past will reproduce past conflicts and traumas."[71] He further argues that memory represents what has been, but that we also have responsibilities towards what is to come.[72] He acknowledges a paradox, with the command to forget but also with the command to remember, when he states: "those who are in a position to obey the command have no need of it; those who need to obey it, would not know how to. So the seemingly paradoxical nature of acts of oblivion is also a feature of acts of memory. It is not a superficial matter, but points towards some deep issues about the role of memory in our lives."[73]

While the debate between moving forward to the future and looking backward to the past has animated questions of justice and accountability mechanisms for many years and in many different contexts, this essay has taken the difficult stance of being Janus-faced. As such, to me "the past continues to torment because it is not past," and "simultaneous living, the past and present are continuous agglutinated mass fantasies, distortions, myths, and lies."[74] Taking this position recognizes the realm of collective memory in a post-war society as a "cramped space" where politics arise among those who lack and refuse to follow the coherent identity being imposed by the state.[75] Instead, I turn back to Edward Said's comment about the right of a people to a "remembered presence".[76] If we see dignity as potential that can be fulfilled through human rights, which includes the right to be remembered, then the past needs to inform the present. It needs to shape the ways in which we envision the future, and it needs us to stop and take a moment to breathe and ponder the histories and lives of those lost. Ironically, this is one of the functions of a monument or a memorial. It is telling that there is no such place to take a breath and remember in Sri Lanka.

VI. PART V: ON ACKNOWLEDGEMENT, SHARING STORIES, AND SHARING SPACE

History, memory, and forgetting play a central role in the construction and reconstruction of all national collectivities.[77] Vasuki Nesiah asks that one consider what truth means in the midst of a contested and pluralized terrain of social struggle and debate.[78] This essay posits that post-conflict peace building must repair the social and psychological divisions underlying collective violence, and address the breakdown of societal relationships.[79] If memory has the potential to create official

[71] Ross Poole, "Enacting Oblivion" (2009) 22:2 Intl J Politics, Culture & Society 149 at 150.
[72] *Ibid* at 152.
[73] *Ibid* at 151.
[74] Teodora Todorova, "'Giving Memory a Future': Confronting the Legacy of Mass Rape in Bosnia Herzegovina" (2011) 12:2 J Intl Women's Studies 3 at 7 [Todorova].
[75] Nicholas Thoburn, "The People Are Missing: Cramped Space, Social Relations, and the Mediators of Politics" (2016) 29:4 Intl J Politics, Culture & Society 367 at 367.
[76] Said, *supra* note 4 at 184.
[77] Todorova, *supra* note 74 at 6.
[78] Vasuki Nesiah, "Truth vs. Justice? Commissions and Courts" in Julie A Mertus & Jeffrey W Helsing, eds, *Human Rights & Conflict* (Washington, DC: United States Institute of Peace, 2006) 375 at 377.
[79] Nevin T Aiken, "Post-Conflict Peacebuilding and the Politics of Identity: Insights for Restoration and Reconciliation in Transitional Justice" (2008) 40:2 Peace Research 9 at 10.

narratives of what happened in highly contested and political conflicts, I argue that it is flexible enough to account for more nuanced and complicated sharing of stories and facts. In doing so, it is possible for groups to work against the indignities perpetuated against them by the state and move towards the fulfillment of the entire community's potential for dignity. Oliver argues that dignity: "Calls for a politics or ethics of witnessing that acknowledges and listens to the lived experience of those who have been excluded and dehumanized both past and present; it calls for us all, as bystanders and spectators of suffering, to attend to the concrete and individual humanity of the one who suffers and to reclaim, through recognition, their status as member of the human community."[80]

Laurence Kirmayer, as cited by Schramm, also argues that "trauma shared by a whole community creates a potential public space for retelling. If a community agrees traumatic events occurred and weaves this fact into its identity, then collective memory survives and individual memory can find a place (albeit transformed) within that landscape."[81] Collective memory, given that it is a discursive process informed by stories both told and not told, is vulnerable to actions intended to alter it, and counter narratives and counter stories help change official narratives. Memory is intimately social, and individuals are capable of recalling it and acting on it when one "places oneself within the social frameworks of memory."[82] In some way, my place in this remembrance in writing this article is a part of the counter narrative that seeks to argue against these "official" narratives.

In this context, which is dominated by triumphalist Sinhala nationalism and an authoritarian government, "there is little political space to openly interrogate soldiers, government officials and those curating these sites about their meaning, history, and purpose."[83] It also is not solely up to the members of the Tamil community to engage in listening and sharing of stories: as Pollmann notes, when social realities are stacked against you, it is difficult to hold on to your dignity.[84]

The state, civil society, researchers, academics, and humanity in general has a duty to engage in "reflexive historiography" to correct, criticize, and even "refute the memory of a community by seeking to address the silences of history by giving a voice to the voiceless."[85] This is a "political project of reintegrating the experiences, memories, and testimonies of the forgotten victims" in a post-conflict context in which "individual testimonies also serve as alternative sources of memory which have been expunged from 'official memory'."[86] As the poet Navaratnam tells us, it is by listening to the stories of those left behind, by undertaking archeological studies into the silences of the scorched bodies of the war's casualties, that dignity can then be remade.[87]

Veena Das compels us, and I compel the Sri Lankan state and the broader Sri Lankan polity, especially the Sinhalese citizens of the South, or erstwhile tourists, to "give another's pain

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[80] Oliver, *supra* note 5 at 96.
[81] Laurence J Kirmayer, "Landscapes of Memory: Trauma, narrative, and Dissociation", in Paul Antze & Michael Lambek, eds, *Tense Past: Cultural Essays in Trauma and Memory* (London: Routledge, 1996) 173 at 189–90 cited in Schramm, *supra* note 27 at 9.
[82] Szpunar, *supra* note 23 at 380.
[83] Hyndman & Amarasingam, *supra* note 30 at 561.
[84] Pollman, *supra* note 6 at 256–57.
[85] Todorova, *supra* note 74 at 7.
[86] *Ibid*.
[87] Alwis, *supra* note 69 at 147.

a place in [one's] body."[88] By doing that, it is possible to humanize and dignify the "other" and change the narrative of the Sri Lankan conflict so it is no longer seen through the lens of war, victory, defeat, triumphalism, or of a concocted image of a unitary identity. Instead, it becomes about shared grief, of dreams and aspirations and the acknowledgement of loss. In this way, the entire country can flourish in dignity.

In a fascinating article entitled "Responsibility and National Memory: Israel and the Palestinian Refugee Problem", Farid Abdel-Nour considers the question of how contemporary civilian Israelis ought to consider their role as citizens in light of the *nakba* and the dispossession of the Palestinian people of their state.[89] He argues that the concept of responsibility here is key, and how conceptualizations of responsibilities influence Israeli understandings of self.[90] He argues that once the Israeli community's eyes are opened to the nature of the trauma and loss, there would be an expectation that they would be transformed and would adopt more complicated notions of recognition, "injecting a note of bitterness in their joy at having realized statehood."[91] However, he states that this is unlikely, as national belonging and solidarity are powerful forces, and empathizing with a community that has been dehumanized and devalued is a difficult task. As such, he cautions that "Israelis and Palestinians must simply accept the limits of their possible reconciliation."[92] While this can be read as a pessimistic prediction, it is realistic. For how many days did I sit and fume that there was not in the very least a moment of silence for the lives lost, or an apology for the thousands of deaths within the official narrative. Even to this day there has not made any official form of acknowledgement by the Sri Lankan government.

As much as we want to believe that sharing stories and recollections may lead to a broader acknowledgement of shared humanity, there may just be an end point to which two differing communities who are in opposition with each other can share understandings. Can there be dignity when the two sides have very different perceptions of dignity? I think that in this context access to equal political capital must be an inherent part of dignity, though that is beyond the scope of this essay. However, in Sri Lanka, the capacity to share stories and remembrances, and acknowledge the lived reality of individuals has not yet been fulfilled. In fact, even with a new government in Sri Lanka, it is just beginning. Moreover, if there is to be true healing in the country, dignity must be given to the Tamil community. This is the only way in which all parties can participate equally in the post-conflict transformation process.

VII. CONCLUSION

Said's vision of a "right to a remembered presence" was used in this essay in order to capture the goal of the dignity exercise in the Sri Lankan context.[93] It calls on the need for those in power to be aware of their actions, to acknowledge loss, and to share grief. When this is done with intent and compassion, it will lead to a sharing of dignity towards the Tamil community and an escalation

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[88] Veena Das, "Language and Body: Transactions in the Construction of Pain" in Arthur Kleinman, Veena Das & Margaret Lock, eds, *Social Suffering* (Berkeley: University of California Press, 1997) 67 at 69 cited in Todorova, *supra* note 74 at 8.
[89] Farid Abdel-Nour, "Responsibility and National Memory: Israel and the Palestinian Refugee Problem" (2004) 17:3 Intl J Politics, Culture & Society 339 at 339.
[90] *Ibid* at 340.
[91] *Ibid* at 353.
[92] *Ibid* at 359.
[93] Said, *supra* note 4 at 184.

of the dignity of the Sri Lankan state, which until now has only taken undignified actions. As such, the dignity potential of all those involved in the island can be uplifted.

VIII. POSTSCRIPT: A MEMORIAL

Ghosts, memories, and spaces haunt the Sri Lankan landscape. While the impetus is on development, clear "carpet roads" hide mass graves and missing bodies. Part of this dignity exercise, in my opinion, calls for the creation of a new monument or memorial in Sri Lanka, on the shores of the Nandikadal Lagoon, where the war came to its brutal end. On these sandy beaches, I envision a particular kind of memorial. Though I am not an architect, I have had the pleasure of visiting the monuments and memorials in Germany and Poland commemorating the Holocaust, and greatly respect the silence and sacredness of such places. Far from the crude arrogance of the victory monuments currently dotted across Sri Lanka, I envision a space meant for the reflection and remembrance of the presence of the thousands that died.

The structure should be made of glass: the blood spilt on the sand and the fire of the artillery speaks to the need for something clear, beautiful, and delicate to rechristen the landscape. The clearness of glass evokes the transparency that the country and its political institutions so desperately need. Instead of a large statue or monument, I envision a large mirror pooled on the ground, with benches around it. Here, we could come and look into the memorial, seeing ourselves and all of the dreams and lives that died reflected back. Seeing our faces may also help us remember that such atrocities should never happen again, and that we are just as vulnerable. It will also help us humanize the lives lost on either side of the conflict, reflecting the complexity of the issue. I also envision an eternal flame, to guide us in constant remembrance of the past. The benches around the memorial may then be shared spaces where we can share our own lived realities and learn to acknowledge and share the lived realities of others. Together, perhaps, we could all live together and share stories in dignity.

AN OVERVIEW OF MISTAKES AND SOLUTIONS IN *R V GLADUE*: THE IMPACT OF COLONIALISM AND SITUATIONS OF ANOMIE AND STRAIN IN JUDICIAL DECISIONS

Sukhraaj Singh Shergill*

I. INTRODUCTION

R v Gladue is a landmark case with respect to sentencing in Canadian criminal cases.[1] It highlighted a number of concerns with regards to Canada's criminal justice system. First, *R v Gladue* revealed the importance of Canada's courts acknowledging and comprehending historical injustices and unequal opportunities. Second, this case emphasized the issue of the over-incarceration of the Indigenous peoples in Canada. While it attempted to address the over-incarceration of Indigenous peoples, it failed to properly do so, as it did not also address the underlying motivations for criminal activity.

On the first reading of the decision, it is clear that a perceived special status of Indigenous peoples in Canada is highlighted by the court. The decision underlines the limitations of the judiciary in terms of responding to the root of a systemic problem that is a vestige of colonialism. However, a superficial reading is not enough for a reader to understand how and why the judiciary is limited in its approach. To do so, one must possess an understanding of the Supreme Court's reasoning in *R v Gladue*. This in depth comprehension of the decision must also be supplemented by a basic understanding of the criminological concepts of over-incarceration, colonialism, anomie, strain, and the neoliberal *cordon sanitaire*. Once this understanding has been established, not only can one uncover the issues missed by the Supreme Court when making this decision in 1999, but also propose a possible solution to fill the gaps missed by the judiciary. Canada must develop policy to address the problem of over-incarceration of Indigenous peoples, to whom it owes a fiduciary duty.

This paper will attempt to establish a framework for assessing the Supreme Court's decision in *R v Gladue*, identifying what the court missed and presenting solutions to those issues. To do so, first the paper will provide an overview of the relevant literature. Second, it will highlight how and why over-incarceration exists, before progressing to an analysis of how the judiciary commonly opts to utilize incarceration as a sentencing tool. Third, it will analyze the legacy of colonialism that has systematically led communities into situations of anomie and strain and thus to crime. Fourth, this paper will give a brief overview of criminal law in Canada. Fifth, it will scrutinize *R v Gladue* and note the issues that the decision missed for future policy consideration and note the limitations of the judicial system to respond to a social problem.

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[1] [1999] 1 SCR 688, 1999 CanLII 679 [*Gladue* SCC].

II. PART I: LITERATURE REVIEW

An overview of the literature on the topic of over-incarceration shows some of the dominant theories that attempt to outline the phenomenon of over-incarceration, causations of crime, and crime control ideologies. Samantha Jeffries and Christine Bond attempt to explain the over-incarceration of Indigenous peoples and the possible social and political influences upon the judiciary and sentencing.[2] One could suggest that these influences over the judiciary would affect the reputation of the justice system. Courtenay Daum and Eric Ishiwata discuss the concept of invidious discrimination, while Lisa Monchalin provides a brief synthesis of colonialism.[3] The theories of Anomie,[4] General Strain Theory,[5] and the neoliberal concept of the *cordon sanitaire*,[6] form the end of this literature review. All of the above are important concepts to take into account when drafting policy regarding this issue of over-incarceration.

III. PART II: OVER-INCARCERATION AND HYPOTHESES FOR DISPARITIES IN INDIGENOUS SENTENCING

Canada's Truth and Reconciliation Commission drew attention to Indigenous issues in 2015, and highlighted the atrocities faced by Indigenous peoples from Canada's Residential School System.[7] One of their calls to action specifically spoke to the fact that Indigenous peoples are over-incarcerated within Canada's prison system and recommended that the government take steps to address the issue of over-incarceration.[8] Present solutions by the judiciary, as noted by the court in *R v Gladue*, that focus on reducing sentences for Indigenous offenders, do not touch on the underlying reasons why this demographic comes into contact with the justice system more frequently than others. In other words, they do not provide a solution prior to adjudication before the courts; instead, Indigenous people are left in a situation that can lead to involvement with the criminal justice system. It is only after a conviction where the solution proposed in *R v Gladue* comes into play. However, to actually solve the problem one must delve into the reasons as to why there are a disproportionate number of Indigenous inmates in comparison to non-Indigenous inmates.

Jeffries and Bond focus on defining the key disparities between Indigenous and non-Indigenous incarceration rates as part of three different approaches: differential involvement,

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[2] Samantha Jeffries & Christine EW Bond, "The Impact of Indigenous Status on Adult Sentencing: A Review of the Statistical Research Literature" (2012) 10:3 J Ethnicity in Crim Just 223 at 223, 239 [Jeffries & Bond, "Indigenous Status on Adult Sentencing"].

[3] Courtenay W Daum & Eric Ishiwata, "From the Myth of Formal Equality to the Politics of Social Justice: Race and the Legal Attack on Native Entitlements" (2010) 44:3 Law & Soc'y Rev 843 at 843 [Daum & Ishiwata]; Lisa Monchalin, *The Colonial Problem*: *An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016) at 61 [Monchalin].

[4] Robert K Merton, "Social Structure and Anomie" (1938) 3:5 Am Soc Rev 672 at 672 [Merton].

[5] Robert Agnew, "Foundation for a General Strain Theory of Crime and Delinquency" (1992) 30:1 Criminol 47 at 47–49 [Agnew].

[6] Jock Young, *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity* (London: Sage Publications, 1999) at 19 [Young].

[7] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission, 2015) [TRC].

[8] *Ibid* at 219.

negative discrimination, and positive discrimination.[9] The authors rely on these theories to explain the disparities in sentencing that they found when comparing the rates of over-incarceration of Indigenous people in Canadian, American, and Australian prisons.[10]

a. The Differential Involvement Hypothesis

Jeffries and Bond's research found that one possible theory for over-incarceration is the differential involvement hypothesis. Essentially, this hypothesis espouses that subjective qualities such as race and culture are so expansive that if one race or culture has concerns attended to by the judiciary, it would only be fair that the judiciary attend to the concerns of all other races and cultures. However, this would create so much subjective analysis for the judiciary that it would further hinder the judicial process. This would also result in substantially different sentences for similar crimes committed by people from different cultures (or any other subjective factor) because their culture (or any other subjective factor that is used by the judiciary) is different, resulting in unusable general precedent.

The differential involvement hypothesis arises when an offender is examined in relation to broader society, such as when Indigenous offenders are contrasted with non-Indigenous persons.[11] Focusing on the subjective realities of both individuals would result in a situation where the inclusion of subjective factors, such as race, culture, societal environment, and the upbringing of an offender becomes irrelevant, as there would be too many factors to take into account.[12] The hypothesis further posits that if one were to embark upon a subjective sentencing process that includes every subjective factor that influenced an offender to commit a crime, the criminal justice system would become unpredictable. In such an unpredictable system, the notion of order espoused by the legal system would hold much less weight. Cases that are similar in structure and content would result in wildly different sentences based on racial, cultural, or ethnic considerations. Jeffries and Bond echo this sentiment when they note:

> Indigenous people[s] tend to experience higher levels of social and economic disadvantage and associated poverty, victimisation, substance abuse and ill health, inequities with roots in the historical contexts of colonisation and governmental Indigenous policies … Indigenous differences in offender constraints could mitigate sentence severity and lead to more lenient outcomes for them … [resulting in a situation where] … Indigenous offenders could be perceived as less blameworthy than their non-Indigenous counterparts because of the historical legacy of colonisation.[13]

Such perceptions of blame could translate into a situation where the criminal justice system is perceived as harbouring favouritism for Indigenous offenders given that the option for more mitigating factors in sentencing exist in comparison to the non-Indigenous offender. Public perceptions like this could bring the justice system into disrepute.[14] Further, Jeffries and Bond suggest that political will to reduce Indigenous over-representation, as found in *R v Gladue* and

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[9] Jeffries & Bond, "Indigenous Status on Adult Sentencing", *supra* note 2 at 223.
[10] *Ibid*.
[11] *Ibid* at 225.
[12] *Ibid* at 227.
[13] *Ibid* at 226.
[14] See Samantha Jeffries & Christine Bond, "Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia's Higher Courts" (2009) 42:1 Austl & NZ J Crim 47 at 47 [Jeffries & Bond, "Does Indigeneity Matter"].

other cases, could translate into unfair influences on the judiciary.[15] This could also bring the criminal justice system into further disrepute.[16] Jeffries and Bond then progress to discuss the applicability of the negative discrimination hypothesis to the issue of Indigenous over-incarceration.

b. The Negative Discrimination Hypothesis

The negative discrimination hypothesis that Jeffries and Bond discuss should be disregarded with respect to the case of *R v Gladue*, as it is prefaced upon the offender facing harsher sentencing outcomes.[17] As explained in a further section of this paper, the hypothesis contradicts the Supreme Court's interpretation of section 718.2(e) of the *Criminal Code* as it was at the time of the decision.[18] This hypothesis initially viewed minority groups as threats to the dominant colonial power. This is because, prior to colonisation, minority groups had their own governance structure and criminal justice system that were substantially different from those of the colonial power, undermining its values.[19] However over time, the negative discrimination hypothesis has shifted to focal concerns, such as time constraints with respect to the cases dealt with by the judiciary. The hypothesis contends that these constraints lead to negative stereotypical understandings of defendants based on race or ethnic status, which result in harsher sentences.[20] This leaves the third hypothesis posed by Jeffries and Bond, the positive discrimination hypothesis, which arises when dealing with the issue of over-incarceration.

c. The Positive Discrimination Hypothesis

The last theory that Jeffries and Bond propose is that of positive discrimination. Positive discrimination theory essentially recommends that policy should carry the goal of correcting historical harms as well as the effects of colonialism by favouring a certain group that was at a severe historical disadvantage. This is at the expense of the group that was not at a historical disadvantage.[21] The group non-historically disadvantaged group—Caucasian men, for example—is then discriminated against to provide the historically disadvantaged group, such as Indigenous peoples, with the opportunity to reach the same level that the non-historically disadvantaged group currently enjoys. This is grounded as a substantive equality approach that attempts to "level the playing field". This theory is directly related to the case of *R v Gladue*.

Jeffries and Bond surmise that the Supreme Court's interpretation of section 718.2(e) of the *Criminal Code* is a direct result of this positive discrimination theory.[22] Jeffries and Bond also suggest that as a result of *R v Gladue*, "there is likely to be judicial recognition of the marginalised

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[15] Darrell Steffensmeier, Jeffery Ulmer & John Kramer, "The Interaction of Race, Gender and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male" (1998) 36:4 Criminol 763, cited in *ibid* at 51.
[16] *Ibid*.
[17] Jeffries & Bond, "Indigenous Status on Adult Sentencing", *supra* note 2 at 228.
[18] *Criminal Code*, RSC 1985, c C-46, s 718.2(e) [*Criminal Code*].
[19] Ruth D Peterson & John Hagan, "Changing Conceptions of Race: Towards an Account of Anomalous Findings of Sentencing Research" (1984) 49:1 Am Soc Rev 56, cited in Jeffries & Bond, "Does Indigeneity Matter", *supra* note 14 at 50.
[20] Jeffries & Bond, "Indigenous Status on Adult Sentencing", *supra* note 2 at 229.
[21] *Ibid* at 228.
[22] *Ibid* at 233.

status of Indigenous defendants [when] connected to broader societal concerns regarding the 'plight' of Indigenous peoples as a colonised group within the criminal justice system."[23] This assumes that courts take or should take into account the history of Indigenous peoples. This includes the history of being colonised across North America. The theory of positive discrimination and its effects were further studied by Daum and Ishiwata, who narrow the scope to focus on two decisions of the United States Supreme Court.

d. Policies of Invidious Discrimination

Daum and Ishiwata focus on the cases of *Morton v Mancari*,[24] and *Rice v Cayetano*,[25] raising the concept of invidious discrimination. They highlight that the questions in both of these cases revolved around whether or not race should play a role in law, as well as whether or not special rights are indicative of racism. If special rights are indicative of racism, where does the limit to these special rights lie?[26]

i. Morton v Mancari: Political Immunity to Invidious Discrimination

Morton v Mancari focused on the *Indian Reorganization Act*, which was passed in the hopes of increasing Indigenous self-government of Indigenous affairs. One such measure was to provide provisions for employers to be able to have preferential hiring policies towards Indigenous peoples that were federally recognized as part of a tribe or Band.[27]

These preferential hiring policies were put into place at the United States Bureau of Indian Affairs and, in 1972, non-Indigenous employees raised concerns that the preferential hiring provisions of the *Indian Reorganization Act* were contrary to the *Equal Employment Opportunity Act*. The *Equal Employment Opportunity Act* prohibited discrimination on the grounds of race under Title VII of the *Civil Rights Act* and based on the act non-Indigenous employees alleged that such practices were indicative of racism in the workplace.[28]

The United States Supreme Court found that these practices would indeed be indicative of racism and discrimination, but only if Indigenous peoples were viewed as a racial group. However, the United States Supreme Court decided that these policies were not invidiously discriminative in nature, as Indigenous peoples were not viewed as a racial group.[29] These policies were not intended to be racially divisive and discriminatory in the intent of the legislation of the *Indian Reorganization Act*. Instead, Congress intended to include Indigenous peoples into the discussion of policies that affected them as a way of repayment for historical dispossession, forced assimilation, and the legacy of colonialism.[30] These policies limited the application of such special rights only to Indigenous groups that were recognized by the Federal Government. The United States Supreme Court reasoned that, due to the legislative intent of Congress when passing the *Indian Reorganization Act*, Indigenous peoples were not treated as a racial group, but as a political

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[23] *Ibid* at 228.
[24] 94 S Ct 2474 (1974) [*Morton*].
[25] 120 S Ct 1044 (2000) [*Rice*].
[26] Daum & Ishiwata, *supra* note 3 at 846.
[27] *Ibid* at 854.
[28] *Ibid.*
[29] *Ibid* at 858–59.
[30] *Ibid.*

category and thus the hiring policies of the United States Bureau of Indian Affairs were not invidious in nature. This discussion of the concept of invidious discrimination extends to the *Rice v Cayetano* case.

ii. Rice v Cayetano: Isolationist Policies as Invidious Discrimination

Rice v Cayetano, like *Morton v Mancari*, focused on whether preferential practices that highlighted specific races were indicative of racism. However, where *Morton v Mancari* revolved around preferential hiring practices, *Rice v Cayetano* revolved around preferential voting practices. The Office of Hawaiian Affairs was a State Office mandated in 1978 to create programs for people of Hawaiian descent. Non-Indigenous Hawaiians voluntarily opted-out of being involved in the matters of the Office of Hawaiian Affairs when it was created.[31] This voluntary opting-out created a situation where only Hawaiians with verifiable Indigenous roots could be elected to serve on the Board of Trustees of the Office of Hawaiian Affairs.[32] Harold Rice, a non-Indigenous Hawaiian, alleged that this practice violated the Fourteenth and Fifteenth Amendments of the *United States Constitution* and the *Voting Rights Act* with respect to non-discriminatory rights to vote.[33] The United States Supreme Court decided that such practices were invidious in nature and indicative of racism as "ancestry [was used] as a racial definition and for a racial purpose."[34] If the voting policy were allowed, it would indefinitely isolate non-Indigenous Hawaiians from being involved in the affairs of a State Office contrary to the Fifteenth Amendment of the *United States Constitution*.[35]

While understanding that intentionally racist and discriminatory policy is viewed as invidious, one must still be aware that decisions of the courts of the United States are not binding within Canada; among other foreign judicial decisions, they may only be used as a persuasive tool.[36] However, the histories of both countries are similar with regards to the systemic dispossession of rights and lands from Indigenous peoples. As such, it is worthy to note Canada's colonial past as it plays a role in understanding the underpinnings of the *R v Gladue* decision.

IV. PART III: THE LEGACY OF COLONIALISM IN CANADA

Monchalin provides a brief overview of Canada's colonial past with respect to Indigenous peoples. She delves into legal principles that give an understanding to the logic of the justice system and context to the decision of *R v Gladue*.

a. The Doctrine of Terra Nullius

In her text named *The Colonial Problem*: *An Indigenous Perspective on Crime and Injustice in Canada*, Monchalin explains the legal principle of *terra nullius* that began with the Spanish

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[31] *Ibid* at 860.
[32] *Ibid*.
[33] *Ibid*.
[34] *Rice*, *supra* note 25 at 1056, cited in Daum & Ishiwata, *supra* note 3 at 860.
[35] *Ibid*.
[36] Rebecca Lefler, "A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia" (2001) 11:1 S Cal Interdisciplinary LJ 165 at 169, 182 [Lefler].

conquest of the Americas led by Christopher Columbus in 1492.[37] Supplemented by the authority of Papal Bulls, the doctrine of *terra nullius* essentially states that prior to European sovereignty over the land, the land had no sovereign or rightful owner.[38] This allowed any colonising European Empire to plant their flag and claim sovereignty over the land.[39] This doctrine, from 1492 forward, began the systematic dispossession of Indigenous peoples from their land and their means of living so that the European systems of law, governance, belief, and religion could be imposed upon Indigenous peoples. Monchalin notes:

> [W]hen Europeans travelled to the Americas in 1492, they brought with them pre-existing and ingrained ideas regarding ownership, property and people. Using the Catholic faith as their principle rationalization for conquest, they advanced their authority over Indigenous Peoples (and lands) by dehumanizing them, casting the first inhabitants of the Americas as "the other" and demonizing the people—calling them "beasts," "savages," and "infidels".[40]

Monchalin also notes that scholars in the field still believe that the doctrine of *terra nullius* is still a practice within the Canadian legal system, however, the Supreme Court rejected the doctrine of *terra nullius* in *Tsilhqot'in Nation v British Columbia*, a 2014 judgment.[41]

The Supreme Court, in *Tsilhqot'in Nation v British*, discusses a land claim made by Tsilhqot'in Nation. At paragraph 69, the Supreme Court refutes the doctrine of *terra nullius*, deciding that:

> At the time of [the] assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of [Indigenous] people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763.[42]

While this eliminated the doctrine of *terra nullius*, it does not raise the notion of cessation that arises from things such as treaties. Monchalin highlights that "[c]essation usually entails an official transfer of territory (through a treaty for example) from one autonomous political entity to another."[43] However, Canada has been found to not be upholding its obligations in other court cases as well.

b. Canada's Failure to Uphold Responsibilities of Fiduciary Duty to Indigenous Peoples

In paragraph 69 of the *Tsilhqot'in Nation v British Columbia* decision, the Supreme Court notes previous decisions, such as *Guerin v The Quee*n, which examined the notion of whether Canada has a fiduciary duty or a duty to act in the best interests of the Indigenous peoples when dealing with Indigenous peoples. The Supreme Court recognized that a fiduciary duty exists.[44]

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[37] Monchalin, *supra* note 3 at 62.
[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid* at 63.
[41] *Ibid*.
[42] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 69, [2014] 2 SCR 257 [*Tsilhqot'in*].
[43] Monchalin, *supra* note 4 at 64.
[44] *Tsilhqot'in*, *supra* note 42 at para 69.

However, this fiduciary duty is not upheld in the criminal justice system if it does not recognize that this systematic dispossession of lands, religion, beliefs, practices, and territory in Canada's colonial past had devastating effects on Indigenous communities in Canada. Christina Hackett and her colleagues studied the effects that the Residential School System had on survivors and their descendants.[45] They analyzed five different outcomes in relation to attendance at the Residential Schools, focusing on self-perceived health, mental health, distress, suicidal ideation, and suicide attempts.[46] Most notably, the study found that individuals who had family members that were in the Residential School System, or were victims of the Residential School System themselves, were at a higher risk of experiencing stressors such as poor self-perceived health and mental health, as well as at a higher risk of being in distress, having suicidal ideations, or attempting suicide. Survivors and their descendants were found to have double the odds of attempting suicide in comparison to people who had no ties to the Residential School System.[47]

Confirming such findings, the government-mandated Canadian Truth and Reconciliation Commission found that Indigenous Canadians are still over-represented in the justice system today.[48] The Commission also found that food and water security is a concern in Indigenous communities.[49] The Truth and Reconciliation Commission found that for many survivors of the Residential School System "the path from [R]esidential [S]chool to prison was a short one" paved with many resulting stories of crime from addiction and dysfunctional family units.[50] The lasting impact of colonialism created stressors on Indigenous communities that can cause the crimes that eventually lead to a continued over-incarceration of Canada's Indigenous population.

c. Anomie and General Strain Theory

The theories of Anomie and General Strain can be analyzed alongside the aforementioned theories of incarceration to uncover the roots of the over-incarceration of Indigenous people. One must analyze the theories of Anomie and General Strain as a way of understanding why individuals and communities can be forced to resort to crime. The theories of over-incarceration examined previously deal with the problems that arise after the justice system process is completed. However, the theories of Anomie and General Strain can be used to uncover the reasons as to why crimes are committed in the first place and rectify the problem of over-incarceration at its societal root.

i. The Theory of Anomie

The Theory of Anomie was first proposed by Emile Durkheim in 1899.[51] Anomie can be described as people who choose to commit crimes due to a lack of legitimate means to obtain their stated goals to improve their quality of life, which often include financial security. In other words, Anomie theorises that people may commit crimes out of necessity. These individuals may resort

[45] Christina Hackett, David Feeny & Emile Tompa, "Canada's Residential School System: Measuring the Intergenerational Impact of Familial Attendance on Health and Mental Health Outcomes" (2016) 70:1 J Epid & Community Health 1096 at 1096.
[46] *Ibid*.
[47] *Ibid* at 1103.
[48] TRC, *supra* note 7 at 170.
[49] *Ibid* at 378.
[50] *Ibid* at 136.
[51] Merton, *supra* note 3 at 673.

to illegitimate means to achieve their goals, as they may feel there are no other viable alternatives.[52] Canadian society and culture consider financial security as being indicative of success: however, many people, including some Indigenous people, do not have the means to reach this level of success. The Theory of Anomie can be used to describe the motives for crimes such as theft and robbery, crimes that help people attain certain goals.[53]

ii. General Strain Theory: Advances on the Theory of Anomie

In contrast, General Strain Theory as explained by Agnew, concerns itself with the emotional and expressive crimes that the Theory of Anomie overlooks. While Anomie focuses on the lack of legitimate opportunities as the reason for crime, General Strain Theory examines effects of behaviours such as stress that are caused by Anomie.[54] Improving upon Merton's conception of the Theory of Anomie, General Strain Theory points to harmful effects from the offender's social environment as the motives to commit crimes, such as their negative relationships with others, loss of any object, tangible or intangible, that a person may value, or all forms of abuse, among many other stressors. Strain, as noted within Merton's Theory of Anomie, often occurs when an offender is blocked from attaining a goal or skill that they wish to obtain. Strain can also occur if the person identifies a threat of losing something they value or the inevitability of pain.[55] Agnew argues that strain occurs from negative emotions, which fuel the motive for crime. However, Agnew's theorization of General Strain only applies to negative emotions and focuses upon the threat of blockage, loss, or pain. Notably, it fails to comment upon positive wants, such as the want to be respected and belong to a community. General Strain Theory is further examined and tested within Stephen Baron's study of the impacts of such negative strain and its connection to crime causation.[56]

Baron's article examines ten types of strain, which can lead to crime as a response to the emotion of anger: homelessness, exposure to poverty, robbery and violent victimization, emotional, physical, and sexual abuse, unemployment, monetary satisfaction, and relative deprivation.[57] Baron found that monetary dissatisfaction, violent victimization, relative deprivation, as well as emotional, physical, and sexual abuse have a significant relationship with anger and can lead to crime.[58] Over-incarceration can be influenced by these factors, as the justice system is forced to incarcerate these individuals for their actions even though some factors, such as homelessness and exposure to poverty, can affect the entire community of the offender and not solely the offenders themselves. The Indigenous offender who has had their traditional land systematically dispossessed, language torn away from them, and been thrust into an isolated situation of poverty can be susceptible to both anomie and strain. Anomie and Strain are both connected to economic variables as they can both arise when economic stability is threatened. This is discussed by John Cochran and Beth Bjerregaard.

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[52] *Ibid* at 672.
[53] *Ibid* at 673.
[54] Agnew, *supra* note 5 at 47–49.
[55] *Ibid* at 50–51.
[56] Stephen W Baron, "General Strain, Street Youth and Crime: A Test of Agnew's Revised Theory" (2004) 42:2 Criminol 457 at 459 [Baron].
[57] *Ibid*.
[58] *Ibid*.

iii. The Economic Connections of Anomie and Strain

Cochran and Bjerregaard compare the prevalence of anomie and strain resulting in crime by comparing economic freedom, Gross Domestic Product ("GDP"), and the Gini coefficient in an equation: structural anomie = economic freedom x GDP x Gini coefficient.[59] Analyzing data from various sources, such as the International Criminal Police Organization ("INTERPOL"), World Health Organization ("WHO"), United Nations ("UN"), and the World Bank, they found that "[anomie] = cultural emphasis on wealth accrual x economic strength x blocked opportunity."[60] The authors further note that anomie exists in economically developed societies where status is derived from possessions and wealth.[61] Society then separates people into segments where certain populations are blocked from legitimate means to achieve those goals. This forces those populations to engage in illegitimate means, such as theft, to obtain possessions and wealth and thus status, beginning the process of over-incarceration in these populations.[62] Essentially, Anomie is the result of a relationship between wealth and a person's wants. Cultural emphasis on wealth accrual connects situations of over-incarceration that occur as a result of anomie and strain with modern neoliberal crime control ideology.

d. Neoliberal Crime Control and the Cordon Sanitaire

Neoliberal crime control represents a shift from the rehabilitative crime control procedures of the welfare era, as David Garland notes.[63] The focus of the criminal justice system is to punish the violation of laws and societal norms, but not to remedy the root cause of crime.[64] In fact, crime is now an accepted fact in neoliberal era societies, where it is expected to occur and one must take steps to minimize its impacts.[65] Garland notes that "we have seen the reappearance of the 'just deserts' retribution as a generalized policy goal."[66] For example, should a crime be committed, the goal is not to rectify the situational elements of anomie or possible present criminogenic environments that push the offender to commit a crime. Instead the goal is to severely punish the individual as a deterrent against future crime as opposed to addressing the root social causes. Punishment has become the common key response to crime under neoliberal ideology that also idealizes economic production.

i. Neoliberal Economic Connections in Creating Situations of Anomie and Strain

Neoliberal policies intend to create the economically contributing citizen. Wendy Brown terms this type of person "*homo oeconomicus*", which, she states, "takes its shape as human capital seeking to strengthen its competitive positioning and appreciate its value."[67] *Homo oeconomicus*

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[59] John K Cochran & Beth Bjerregaard, "Structural Anomie and Crime: A Cross-National Test" (2012) 56:2 Int'l J Off Ther & Comp Crim 203 at 207.
[60] *Ibid* at 212.
[61] *Ibid* at 212–13.
[62] *Ibid* at 213.
[63] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: The University of Chicago Press, 2001) at 8 [Garland, *Culture of Control*].
[64] *Ibid*.
[65] David Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society" (1996) 36:4 Brit J Crim 445 at 446.
[66] Garland, *Culture of Control*, *supra* note 63 at 9.
[67] Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015) at 33 [Brown].

is the being that modern crime control systems attempt to separate from the criminals by funnelling criminals into the prison system through the criminal justice system's use of incarceration. This separation prevents criminals from competing economically within society. As criminals are not contributing economically to society by strengthening their financial position, or making money, they are seen as a drain on the system.

ii. The Pressures of Homo Oeconomicus: Creating the Cordon Sanitaire

As criminals are viewed as draining the system's resources, they are forced into situations of anomie and strain to attempt to fit themselves into the ranks of economically contributing society. Situations of anomie and strain are created by the barrier between the public and the criminal. Incarceration is meant to protect society, but it results in "othering" criminals, who are separated from the rest of society, while those who are not criminal are afforded easier access to employment.

This separation from society illustrates Young's idea of the *cordon sanitaire*, where there are essentially two groups in society.[68] The criminal and the non-criminal, rich and the poor, and educated and the uneducated are all dichotomous groups separated by a barrier, or a *cordon sanitaire*, that prevents easy travel from one group to the other. The *cordon sanitaire* results in a situation of anomie or strain when someone affected by stressors wants to traverse the gap. The person suffering from this stressor may then face the possibility of committing a crime to traverse the gap, which would result in an interaction with the criminal justice system and possibly incarceration.

Young asserts that these dichotomous groups can be categorized into two ideals: the central core group and the outgroup, separated by a *cordon sanitaire*. The *cordon sanitaire* can manifest itself in a number of ways, including homelessness, unemployment, abuse that occurred within the Residential School System, or the dispossession of traditional lands. Baron notes that however the *cordon sanitaire* is manifested, it is a cause of strain that leads an individual to commit a crime and, thus, incarceration.[69] As more and more people who are incarcerated are linked by the *cordon sanitaire*, the over-incarceration of certain racial populations is evident by the factors that lead to the criminogenic environments resulting from colonialism.

Young explains the notion of the "central core" as a group that are people with: "full-time work, with career structures and biographies which are secure and embedded. Here is the realm of meritocracy ... [within which] ... neo-classicism operates within the criminal justice system just as meritocracy occurs within work and school."[70] People in the central core group fit into the ideology of neoliberalism. They conform to the concept of being a proper *homo oeconomicus*, as they have a stable career and do not need to commit crime to survive.[71] They can readily contribute to the economic structure of society as they have employment, benefits, and education and are thus not seen as a drain on the resources of the state.

This class structure also means that a portion of society must be formed by a group that is the opposite of the "central core" group. Young describes this group as the "outgroup" who are "a

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[68] Young, *supra* note 6 at 19.
[69] Baron, *supra* note 56 at 459.
[70] Young, *supra* note 6 at 19.
[71] Brown, *supra* note 67 at 33.

scapegoat for the troubles of the wider society ... the underclass who live in *idleness* and crime."[72] Young's utilization of the word "idleness" underlines the importance that modern neoliberal societies have placed on people conforming to *homo oeconomicus*: idle citizens are not contributing to the economic structure of society.[73] However, it must be noted that class division is created because of the *cordon sanitaire*, where a member of the outgroup cannot easily become part of the central core group because of anomie and strain as class mobility is limited.

Before proposing a solution to the problem of the over-incarceration of Indigenous people, I consider the process that leads to situations of over-incarceration. This includes not only the justice system's systemic problems, as noted in the hypotheses proposed by Jeffries and Bond and the concept of invidious discrimination posited by Daum and Ishiwata, but also the history of colonialism proposed by Monchalin and the stressors that push individuals to commit crime. The societal factors, such as the *cordon sanitaire*, create anomie and strain that push people to commit crime, leading to interactions with the justice system. To effectively respond to over-incarceration, a plan must address the pre-interaction with the justice system, the interaction with the justice system itself, and post-interaction with the justice system. Outlining a plan in response to the over-incarceration of Indigenous people also requires a basic knowledge of how criminal convictions occur in Canadian criminal law.

V. PART IV: OVERVIEW OF CRIMINAL LAW IN CANADA

Over-incarceration rests on the premise that an offender has gone through the criminal justice system. After understanding *how* Indigenous people come into contact with the justice system, an understanding of the criminal process, with a focus on *R v Gladue*, is imperative before it is possible to make recommendations intended to reduce the over-representation of Indigenous people in the justice system. While the theories examined above address events prior to and after an interaction with the justice system, a knowledge of the process of criminal convictions can aid in correcting the problem of incarceration by focusing on the judicial system itself.

a. Actus Reus and Mens Rea in Canadian Criminal Law

Criminal law concentrates on acts that are seen as offensive by the general populace. The Crown becomes an actor in these cases, responding on behalf of all Canadians. Thus, a criminal offence is tried against the state, instead of against a private individual as is the case in civil law.[74] For a crime to lead to a conviction in Canada, the prosecution must prove that the offender has the requisite *actus reus*, that is, the offender must be guilty of actually committing the act.[75] The Crown must also prove that the offender has the requisite *mens rea*, that is, the offender must have had the intent to commit the crime, or was wilfully blind of the consequences or was reckless.[76] Both the *actus reus* and *mens rea* must be proven by the prosecution beyond a reasonable doubt.[77] The

[72] Young, *supra* note 6 at 20 [emphasis added].
[73] Brown, *supra* note 67 at 33.
[74] Canada, Department of Justice, "Civil and Criminal Cases" (Ottawa: 16 October 2017).
[75] Simon N Verdun-Jones, *Criminal Law in Canada* (Toronto: Nelson Education, 2014) at 23.
[76] *Ibid* at 77.
[77] *Ibid* at 23.

mens rea portion of the offence can be argued in two different ways: objectively and subjectively. The objective *mens rea* can be proven where there is:

> [P]roof that [the accused] person deliberately intended to bring about a [crime] or even that they subjectively appreciated the risk that their conduct might produce such a result. Objective *mens rea* is predicated on the principle that [the reasonable person], in the same circumstances and with the same knowledge of those circumstances as the accused, would have appreciated that their conduct was creating a risk of producing [the crime].[78]

The accused does not have to know that their actions constituted a crime, all that is required is that a reasonable person, in the same situation, must know that their actions constitute a crime. However, subjective *mens rea* is based on whether or not the accused subjectively foresaw that their actions were criminal. Subjectivity spills over into sentencing as situations of anomie and strain that are created by the *cordon sanitaire* force a person into crime, and it is expected that the criminal within a situation of anomie or strain subjectively knew that their actions would constitute a criminal act and they still committed it due to the pressing necessity.[79] This discussion of *mens rea* proves invaluable in understanding the reasoning of the Supreme Court in *R v Gladue*.

VI. PART V: *R V GLADUE*

a. A Background to the Supreme Court Case

The case revolved around an Indigenous woman named Jamie Gladue who was charged with second-degree murder. It was alleged that the victim, Gladue's common law husband, was having an affair with her sister.[80] Gladue was convicted after pleading guilty to manslaughter, which required assenting to both the *actus reus* and the *mens rea* of the offence. However, the second understanding of *mens rea*, that of the subjective *mens rea*, needed to be included in her sentencing. The case reached the Supreme Court based on the issue of the mitigating factors that were excluded in the sentencing of Gladue.[81] The specific point of contention revolved around section 718.2(e) of the *Criminal Code*, which states: "[a]ll available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of [Indigenous] offenders."[82] The trial judge that initially sentenced Gladue interpreted section 718.2(e). According to the trial judge, as neither Gladue, nor her common law husband lived in an Indigenous community or on Reserve, Gladue did not have a sufficient claim to warrant a consideration of her Indigenous background in her sentencing.[83] Notably, this notion ignored the effects of colonialism that occurred outside of Reserve lands. The trial judge's decision attempted to tie the notion of Indigenous ancestry solely to life on Reserve.

The British Columbia Court of Appeal did not agree with the trial judge on their interpretation of section 718.2(e) that it was only to be applied to Indigenous peoples that lived on Reserve. It recognized that being Indigenous is not limited to living on Reserve and that the

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[78] *Ibid* at 78.
[79] *Ibid*.
[80] Sanjeev Anand, "The Sentencing of Aboriginal Offenders, Continued Confusion and Persisting Problems: A Comment on the Decision in *R. v. Gladue*" (2000) 42:3 Can J Crim 412 at 413.
[81] *Gladue* SCC, *supra* note 1 at para 19.
[82] *Criminal Code*, *supra* note 18.
[83] *R v Gladue* (1997), 98 BCAC 120 at para 88, 1997 CanLII 3015 (BCCA) [*Gladue* BCCA].

language, beliefs, culture, and practices continue off Reserve as well. However, the British Columbia Court of Appeal agreed with the trial judge's application of a standard of formal equality that all people must be given the same sentence for identical crimes regardless of circumstance. This standard was that a sentence that is given to a non-Indigenous person off Reserve should be the same as a sentence given to an Indigenous person who resides off Reserve for the same crime.[84] The case progressed to the Supreme Court where, instead of a formal equality approach to sentencing that did not consider the current position of the offender or certain subjective factors such as history, race, and culture, a substantive equality approach was attempted. The substantive equality approach tried to provide the disadvantaged offender with a "level the playing field" so that the disadvantaged offender could be on equal footing with those who were not disadvantaged in the first place.

b. R v Gladue: An Attempt at the Substantive Equality Approach

The Supreme Court employed a strategy that embodied the principles of substantive equality and attempted to level the playing field for over-incarcerated populations in the Canadian criminal justice system. The subjectivity of the law is evident as specific attention is given to the unique circumstances of Indigenous peoples. The circumstances for Indigenous peoples are markedly different from other Canadian citizens as a result of a legacy of systematic dispossession through colonialism that perpetuate environments of anomie and strain.

In terms of equality, the Supreme Court had two schools of thought that it could appeal to. The Supreme Court could have applied a formal equality approach that would have been similar to what the lower courts applied. No considerations would have been given to the disadvantages that colonialism forced upon one group but not another. The formal equality approach would put the disadvantaged group on par with the group that was not disadvantaged while also providing the group that was not disadvantaged with the exact same opportunity to advance further as well. The problem with this formal equality approach is that the gap between the disadvantaged and the non-disadvantaged is not closed or lessened. By providing the same opportunity to both groups, the gap between them is maintained.

The formal equality approach was used by the trial judge in *R v Gladue* who limited the interpretation of section 718.2(e) so that Indigenous peoples that lived off Reserve did not have a claim to section 718.2(e). This approach considered being on Reserve as sufficient redress for the historic injustices and systematic dispossession of colonialism that were faced by Indigenous peoples. This limited interpretation held that only the individuals on Reserve had a valid claim to warrant special consideration during sentencing under section 718.2(e). In contrast, the Supreme Court opted for a substantive equality approach in their decision, which provided special considerations for Indigenous peoples that were disadvantaged due to the effects of colonialism. This was done in an effort to bring Indigenous peoples to the level that the non-disadvantaged other groups of society were at already. The legacy of colonialism created situations of anomie and strain that formed a *cordon sanitaire* within Indigenous communities resulting in an environment that was conducive to criminal activity. The Supreme Court's decision stated:

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[84] *Ibid*.

> Section 718.2(e) directs sentencing judges to undertake the sentencing of [Indigenous] offenders individually, but also differently, because the circumstances of [Indigenous] people are unique. In sentencing an [Indigenous] offender, the judge must consider:
>
> (A) The unique systemic or background factors which may have played a part in bringing the particular [Indigenous] offender before the courts; and
>
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular [Indigenous] heritage or connection.[85]

This passage has brought about the use of what is termed the *Gladue* Report and an emphasis on restorative justice. The Supreme Court notes in paragraph 93 of its judgment in *R v Gladue*:

> In order to undertake these considerations the trial judge will require *information pertaining to the accused.* Judges may take judicial notice of the *broad systemic and background factors affecting [Indigenous] people*, and of the priority given in [Indigenous] cultures to a r*estorative approach to sentencing*. In the usual course of events, *additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6*, which in turn may come from representations of the relevant [Indigenous] community which will usually be that of the offender. The offender may waive the gathering of that information.[86]

The emphasis added above points to the basis for *Gladue* Reports. A *Gladue* Report synthesizes information about the accused that includes the special circumstances that Indigenous peoples and communities experience.[87] While providing an analysis of the subjective factors that may have led the offender to commit a crime, it also balances the interests of the state with helping the offender after their interaction with the justice system by providing a recommendation of a suitable sentence.[88] Restorative justice is one of the possible approaches, the crux of which is restoring the victim to a similar state that they were in prior to the crime.[89] It is important to note that section 718.2(e) underlines that these restorative approaches that avoid the punitive measure of incarceration are available for all offenders, but a focus is placed on Indigenous peoples in an attempt to combat high rates of incarceration and avoid the invidious nature of discriminatory policy.[90]

c. R v Gladue: Links to the Royal Commission on Aboriginal Peoples as Motive

However, the issue of the over-incarceration of Indigenous peoples in Canada stretches farther back than the *R v Gladue* decision. To correctly understand what the Supreme Court is addressing, one needs to delve into the findings of the Royal Commission on Aboriginal Peoples (the "RCAP"). RCAP details the root causes of Indigenous peoples and crime and the failure of Canada's justice system to prevent it.

Joane Martel and his colleagues explain the finding of the RCAP that colonial policies severely harmed Indigenous communities. In all three RCAP Reports, it was underlined that the

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[85] *Gladue* SCC, *supra* note 1 at para 93.
[86] *Ibid* [emphasis added].
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid*.
[90] Jonathan Rudin, "Aboriginal Over-Representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40:1 Sup Ct L Rev 687 at 689 [Rudin].

"Canadian criminal justice system had failed Indigenous peoples and that the key indicator of this failure was their steadily increasing overrepresentation in penitentiaries and prisons."[91] In response to the findings of the RCAP and the *R v Gladue* decision before them, the Supreme Court decided that section 718.2(e) of the *Criminal Code*, while it applied to the sentencing of all offenders, provided special consideration for Indigenous peoples and their specific histories that were fraught with criminogenic factors as a result of the legacy of colonialism. This allows the decision to avoid an invidious nature (recall paragraph 93 of the judgment, above).

Section 718.2(e) directs sentencing judges to undertake the sentencing of offenders individually, but also differently, because people's circumstances are unique. In sentencing an offender, the judge must consider: "A) The unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and B) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular heritage or connection."[92] Each of these findings is vitally important when the court is considering punishments. However, A) brings direct reference to the findings of the RCAP. Martel and his colleagues note that RCAP uncovered:

> [N]otable destructuring of the political, economic and cultural foundations of Indigenous communities that has been linked analytically, time and again, to a host of challenging life circumstances such as dispossession from traditional territories, under-employment, wavering family support, social isolation, modest educational assets and unsound residential situation that thread the path to intergenerational trauma, suicides, violence and substance or sexual abuse.[93]

Without directly referencing the RCAP, the Supreme Court alluded to the unique and debilitating life circumstances that Indigenous communities suffered as a result of the imperialist nature of colonialism. Now it is important to note that the decision in *R v Gladue* attempted to broaden the scope of the RCAP so that over-incarceration and a reliance on the penal system could possibly be avoided for society as a whole. It is worthy to highlight once again that section 718.2(e), as was referenced in the Supreme Court's judgment, read "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for *all* offenders" prior to focusing on Indigenous issues.[94] The idea here is to lower all rates of over-incarceration, but the specific focus on Indigenous over-incarceration underlines just how serious that problem is so that society and the judiciary can respond.[95]

d. R v Gladue: Handling the Cordon Sanitaire

Subparagraph B) of paragraph 93.6 of the Supreme Court's judgment in *R v Gladue* highlights Young's conception of the *cordon sanitaire*. The increasing rate of incarceration that is found in the RCAP's 1996 reports and the attempted response of *R v Gladue* supports the point that the Supreme Court refers to in A) that requires the courts to consider "[t]he unique systemic or background factors which may have played a part in bringing the particular [Indigenous] offender

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[91] Joane Martel, Renee Brassard & Mylene Jaccoud, "When Two Worlds Collide: Aboriginal Risk Management in Canadian Corrections" (2011) 51:2 Brit J Crim 235 at 236 [Martel, Brassard & Jaccoud].
[92] *Gladue* SCC, *supra* note 1 at para 93.
[93] Martel, Brassard & Jaccoud, *supra* note 91 at 235.
[94] *Gladue* SCC, *supra* note 1 at para 24 [emphasis added].
[95] Rudin, *supra* note 90 at 689–90.

before the courts."[96] The problem this presents for the general public, who are unaware of the sociological and legal causes of the disproportionate Indigenous incarceration, is that Indigenous peoples and communities are perceived as the opposite of the proper, functioning version of *homo oeconimicus*, as iterated by Brown.[97]

Young's theory of the *cordon sanitaire* sees Indigenous peoples as the outgroup and the general public as the central core group. Due to the appearance that Indigenous peoples receive special consideration and special rights by the court, they are considered uneducated, idle, and unable to contribute to the economic structure of the state, so they resort to crime. However, if one continues to apply Young's theory of the *cordon sanitaire* in conjunction with the Theory of Anomie and Agnew's General Strain Theory, one realizes that Indigenous peoples have been disadvantaged since colonisation.[98] The means with which they could traverse the *cordon sanitaire* were ripped from their communities by colonising forces, while their culture, language, and belief systems were decimated by the Residential School System.[99] The Supreme Court attempted to rectify this disadvantage in *R v Gladue*; however, there are areas that the Supreme Court did not address in their judgment.

e. R v Gladue: The Deficient or Missing Links

The *Gladue* Report attempts to address the "broad systemic and background factors affecting [Indigenous] people" caused by colonialism.[100] The roots of Indigenous over-incarceration in the Canadian criminal justice system lie in colonialism and any effective response needs to respond to the impact of colonialism directly.[101] However, there are many issues with respect to the execution of the judgment *R v Gladue*.

i. The Problem of Over-Incarceration

The *R v Gladue* decision was intended to reduce the number of Indigenous people in the prison population as other sentencing options were to be prioritized.[102] However, as Jonathan Rudin notes, incarceration rates actually increased after *R v Gladue* as *Gladue* Reports were not effectively utilized.[103]

Rudin indicates that "the key reason that rates of [Indigenous] over-representation have not decreased is that the process by which judges are to get information about [Indigenous] offenders proposed in *R v Gladue* does not work in practice ... judges need information, both about the offender and about the systemic factors that have played a role in the life of the offender."[104] The problem lies with how judges are to obtain succinct explanations of the subjective factors that

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[96] *Gladue* SCC, *supra* note 1 at para 93.
[97] Brown, *supra* note 67 at 33.
[98] Young, *supra* note 6 at 18–20; Merton, *supra* note 4 at 672; Agnew, *supra* note 5 at 47–49.
[99] Martel, Brassard & Jaccoud, *supra* note 91 at 235.
[100] *Gladue* SCC, *supra* note 1 at para 93.
[101] Loic Wacquant, "Deadly Symbiosis — When Ghetto and Prison Meet and Mesh" (2001) 3:1 Punishment & Soc'y 95 at 98.
[102] Rudin, *supra* note 90 at 700.
[103] *Ibid* at 702.
[104] *Ibid* at 702–03.

caused a person to commit a crime, as the responsibility for drafting these reports lies with defence counsel, who are likely not knowledgeable on the subject. Rudin highlights that "[d]efence counsel do not have any particular knowledge or expertise on the systemic factors that have led to [Indigenous] over-representation. Nor do defence counsel necessarily have the skills to gather information on the life history of their client."[105] In this manner, *R v Gladue* actually disadvantages an Indigenous offender as their defence counsel is not properly trained to provide a *Gladue* Report. However, Rudin also counters this notion by noting that "[e]ven if counsel do[es] possess the skills necessary to gather the requisite information for a substantive sentencing submission, they do not necessarily get remunerated for this work."[106] Put simply, defence lawyers do not get paid for their drafting of *Gladue* Reports.

However, the issues of remuneration and expertise are visible and have led to the creation of the *Gladue* Courts in Toronto where relatively useful *Gladue* Reports are put forth. In these Reports "the court is presented with information that locates an [Indigenous] defendant's behaviour within collective histories and experiences of oppression. In addition, alternatives to custody and information about the factors that perpetuate patterns of over-incarceration are also brought before the court."[107] It is this type of information that subjectively informs the judge in the case and gives rise to the positive discrimination hypothesis that is posited by Jeffries and Bond by including factors that explain an understanding of subjective *mens rea*.[108] These Reports contextualize the behaviour of the accused so that the societal root can be uncovered and responded to as a matter of policy. Their goal is to appeal to subjective *mens rea* within sentencing, including environmental stressors that affect an Indigenous offender.[109] However, to do this, the *Gladue* Report must include references to the impact of colonialism on Indigenous peoples.

ii. The Problem of Anomie and a Criminogenic Environment

Criminal records can perpetuate an environment in which people are left with no other alternative to survive but to engage in criminal activity. This essentially ties the Theory of Anomie as deliberated by Merton, and improved upon by Agnew, into the General Strain Theory, as well as Heather Ann Thompson's findings of the problems that individuals face post-incarceration.[110] Thompson highlights that, post-incarceration, individuals are primarily concerned with obtaining employment so they can support themselves and their families.[111] Thompson's study also indicated that "a majority of employers 'would not knowingly hire an ex-offender.'"[112] Without employment, bills cannot be paid and in need of income, one may resort to crime.

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[105] *Ibid*.
[106] *Ibid*.
[107] Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 CJLS 451 at 452.
[108] *Ibid* at 453.
[109] *Ibid*.
[110] Merton, *supra* note 4 at 672.
[111] Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History" (2010) 97:3 J Am History 703 at 714.
[112] *Ibid*.

The theories of Anomie and General Strain identify economic loss as a possible stressor and catalyst for a situation of anomie or strain to occur. Stable, predictable and reliable employment generates income systematically in line with the idealistic *homo oeconomicus*.[113] If this system of generating money was suddenly inaccessible for one person, by way of loss of employment, a breakdown in that system, or one person being generally unemployable, this person can enter into a situation of anomie and strain. In a society that views *homo oeconomicus* as the norm, not being *homo oeconomicus* and having no alternative, results in a situation where a norm is broken and of normlessness. As postulated by Durkheim, normlessness leads to deviant behaviour that results in moral confusion and, ultimately, crime.[114] It is as a result of these feelings that a person willingly chooses to engage in criminal activity; there is no other alternative for the person other than crime to meet the ideological benchmark of *homo oeconomicus*.[115]

With a criminal record, the challenge of obtaining employment with suitable pay can lead to the stress of being unable to afford to pay bills or certain items they wish to own. It also underlines the fact that people who cannot obtain gainful employment risk not having the vital securities and necessities of life and so resort to crime to obtain these items. Essentially, the legacy that colonialism has created in Indigenous communities and cultures creates a historical stressor that pushes individuals to commit crimes and progress through the criminal justice system which can lead to incarceration. This starts a cycle, as the prison system does not prepare inmates for success post-incarceration, which leaves individuals who are released from incarceration with no choice but to commit crimes to survive. In recommending a solution to the issue of over-incarceration, one must address each section of the cycle outlined above, but there are also limitations that are inherent in the justice system.

VII. CONCLUSION

R v Gladue is a legal response to the socio-legal problem of the over-incarceration of Indigenous people. An effective response must deal with both the roots of the sociological part of the problem as well as the legal part of the problem. Since the courts can only address the legal portion, when one is already involved with the criminal justice system, a combined solution that deals with both the root societal causes of crime, as well as a legal response to handle over-incarceration and inequality, must be implemented.

The court should note a person's motivation to commit a crime and whether or not it is an environmentally centered factor. The court must be able to ask whether or not an environmentally centered factor can be mitigating in sentencing, given the premise that the offender resorted to criminal activity not out of choice, but out of necessity. The *Gladue* Report must include a summary of the impacts of colonisation as well as a critical view of policies enacted by the Canadian Government that have led to Indigenous peoples being over-incarcerated. The court must entertain solutions and sentences that take into account stressors that result in crime as well as programs to give offenders the skills to rectify these stressors.

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[113] Brown, *supra* note 67 at 33.
[114] Frank E Hagan, *Crime Types & Criminals* (Thousand Oaks, California: Sage Publications, 2010) at 84.
[115] Anthony Walsh & Lee Ellis, *Criminology: An Interdisciplinary Approach* (Thousand Oaks, California: Sage Publications, 2007) at 87–89.

R v Gladue does not address the societal causes of crime. The decision did not curb rates of crime in Indigenous communities as in some areas basic necessities, education, and good employment can be difficult to obtain. As explained above, due to these stressors, crime becomes a necessity for survival, not a choice. The law, through the judiciary, can only handle issues of legality. For a true substantive equality approach, the approach must address the historical systemic inequalities that are present as a result of the legacy of colonialism, and communities must be provided with the necessities that level the playing field in terms of opportunity.