

## Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside

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[Aller au sommaire du numéro](#)

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### Résumé de l'article

Les poursuites pénales contre Robert Pickton ont compris un procès devant un jury de onze mois, deux appels à la Cour d'appel de la Colombie-Britannique, un appel à la Cour suprême du Canada et soixante-seize jugements. Cet article s'interroge, par une combinaison d'analyses discursive et doctrinale de ces soixante-seize décisions, sur ce que le procès Pickton a (et n'a pas) accompli, abordant trois aspects de ce procès : la représentation judiciaire des femmes que Pickton a tué; les implications du verdict du jury; et l'impact du procès sur les familles des femmes qu'il a tué. L'article se fonde sur la notion que l'on peut caractériser ces meurtres comme étant des produits de la violence collective. Le colonialisme, l'infrastructure politique et juridique, et le discours public, de plus que les hégémonies basées sur la race, la classe, et le genre, que ces processus, ces institutions et ces pratiques maintiennent, ont produit à la fois une classe particulière de femmes vulnérables, la police qui leur a manqué et Robert Pickton lui-même. En conclusion, l'article conclut en suggère que les résultats du procès Pickton mettent en évidence les limites du système de justice pénale et offrent un cadre analytique pour l'examen d'autres réponses institutionnelles (telles que l'Enquête sur les femmes disparues) au genre de violence collective qui a provoqué la circonstance Pickton.

# PERSON(S) OF INTEREST AND MISSING WOMEN: LEGAL ABANDONMENT IN THE DOWNTOWN EASTSIDE

*Elaine Craig\**

The criminal prosecution of Robert Pickton involved an eleven-month jury trial, two appeals to the British Columbia Court of Appeal, an appeal to the Supreme Court of Canada, and seventy-six reported judicial rulings. This article, through a combination of discursive and doctrinal analyses of these seventy-six decisions, examines what was (not) achieved by the Pickton trial. It discusses three areas: the judicial representation of the women Pickton was prosecuted for murdering; the implications of the jury's verdict in the Pickton proceedings; and the impact of the Pickton trial on the families of the women he murdered. The article starts from the premise that it is correct to characterize these murders as a product of collective violence. Colonialism, political and legal infrastructure, and public discourse—and hegemonies based on race, class, and gender that these processes, institutions, and practices hold in place—produced a particular class of vulnerable women, the police who failed them, and Robert Pickton. The article concludes by suggesting that the outcomes of the Pickton prosecution both highlight the limitations of the criminal justice system and offer an analytical framework for examining other institutional responses (such as the Missing Women's Inquiry) to the kind of collective violence that gave rise to the Pickton circumstance.

Les poursuites pénales contre Robert Pickton ont compris un procès devant un jury de onze mois, deux appels à la Cour d'appel de la Colombie-Britannique, un appel à la Cour suprême du Canada et soixante-seize jugements. Cet article s'interroge, par une combinaison d'analyses discursive et doctrinale de ces soixante-seize décisions, sur ce que le procès Pickton a (et n'a pas) accompli, abordant trois aspects de ce procès : la représentation judiciaire des femmes que Pickton a tué; les implications du verdict du jury; et l'impact du procès sur les familles des femmes qu'il a tué. L'article se fonde sur la notion que l'on peut caractériser ces meurtres comme étant des produits de la violence collective. Le colonialisme, l'infrastructure politique et juridique, et le discours public, de plus que les hégémonies basées sur la race, la classe, et le genre, que ces processus, ces institutions et ces pratiques maintiennent, ont produit à la fois une classe particulière de femmes vulnérables, la police qui leur a manqué et Robert Pickton lui-même. En conclusion, l'article conclut en suggère que les résultats du procès Pickton mettent en évidence les limites du système de justice pénale et offrent un cadre analytique pour l'examen d'autres réponses institutionnelles (telles que l'Enquête sur les femmes disparues) au genre de violence collective qui a provoqué la circonstance Pickton.

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<b>I.</b>	<b>The Pickton Circumstance</b>	<b>3</b>
<b>II.</b>	<b>The Story of the Missing Women as Reported by the Courts</b>	<b>8</b>
<b>III.</b>	<b>The Pickton Prosecution Did Not Produce a Truth Account</b>	<b>22</b>
<b>IV.</b>	<b>Did the Pickton Trial Achieve Justice for the Families?</b>	<b>29</b>
<b>V.</b>	<b>Conclusions on the Limits of the Criminal Justice Response</b>	<b>36</b>

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## I. The Pickton Circumstance

Women are disappearing. Sixty-nine of them disappeared from the Downtown Eastside of Vancouver between 1997 and 2002.<sup>1</sup> Northern communities in British Columbia believe that more than forty women have gone missing from the Highway of Tears in the past thirty years.<sup>2</sup> The endangered do not come from every walk of life. Most of these women are Aboriginal. Many of them are poor.<sup>3</sup>

To be more precise then, poor women and Aboriginal women are disappearing.<sup>4</sup> Aboriginal women in particular are the targets of an undeniable epidemic of violence in Canada.<sup>5</sup> They are five to seven times more likely to be killed as a result of violence than are non-Aboriginal women.<sup>6</sup>

Robert Pickton is thought to have murdered almost fifty of the women reported as missing from the Downtown Eastside of Vancouver between 1997 and 2002. Following years of widespread indifference toward the shocking number of women that continued to disappear from this neighbourhood in Vancouver, an investigation finally resulted in Pickton's arrest in 2002. Pickton confessed to killing forty-nine women with an aspiration to make it an "even fifty".<sup>7</sup> The DNA of thirty-three missing women

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<sup>1</sup> British Columbia, Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry* (Vancouver: Missing Women Commission of Inquiry, 2012) vol 1 at 33, online: Missing Women Commission of Inquiry <[www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Forsaken-Vol-1-web-RGB.pdf](http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Forsaken-Vol-1-web-RGB.pdf)> [*Missing Women's Inquiry Vol I*].

<sup>2</sup> *Ibid* at 29.

<sup>3</sup> *Ibid* at 23–24.

<sup>4</sup> Police report that many of the women who have gone missing from the Highway of Tears area were working in the sex trade at the time of their disappearance. Many of them were Aboriginal. See Patrick Brethour, "Treat 'Highway of Tears' Victims as Woman First, Police Told", *The Globe and Mail* (17 October 2010), online: <[www.theglobeandmail.com/news/british-columbia/treat-highway-of-tears-victims-as-women-first-police-told/article1320096/](http://www.theglobeandmail.com/news/british-columbia/treat-highway-of-tears-victims-as-women-first-police-told/article1320096/)>.

<sup>5</sup> For a discussion of this epidemic and the relationship between violence against women and Aboriginal and treaty rights under *Constitution Act, 1982*, s 35, being schedule B to the Canada Act 1982 (UK), 1982, c 11 see John Burrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50:3 Osgoode Hall LJ 699.

<sup>6</sup> Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence against Indigenous Women in Canada* (London: Amnesty International Publications, 2009) at 1, online: Amnesty International <[www.amnesty.ca/sites/default/files/amr200122009enstolensistersupdate.pdf](http://www.amnesty.ca/sites/default/files/amr200122009enstolensistersupdate.pdf)>.

<sup>7</sup> *R v Pickton*, 2007 BCSC 29, [2007] BCJ No 3075 (citing a transcript of the undercover cellmate interview with Pickton: "I was gonna do one more, make it an even fifty" at para 20).

was found on his farm.<sup>8</sup> He was charged with murdering twenty-six women, and charges against him were recommended with respect to several other missing women.<sup>9</sup> Following Pickton's conviction for murder in only six of these cases,<sup>10</sup> the government of British Columbia conducted a public inquiry into police failures to investigate the disappearances in a timely manner.<sup>11</sup>

The Missing Women Commission of Inquiry concluded that "in the cold hard light of 2012, using an objective test and avoiding the unerring eye of hindsight ... the missing and murdered women investigations were a blatant failure."<sup>12</sup> According to the BC Civil Liberties Association, Pivot Legal Society and West Coast LEAF, the Missing Women Commission of Inquiry was also "an absolute failure".<sup>13</sup> The police investigation into missing and murdered women in the Downtown Eastside and the Missing Women's Inquiry into that police investigation constitute two institutional responses to these disappearances. Their failings and achievements have

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<sup>8</sup> *Missing Women's Inquiry Vol I*, *supra* note 1 at 33. See also Lori Culbert, "2 More Women Identified From DNA at Pickton Farm", *Vancouver Sun* (30 October 2009), online: <[www.canada.com/story.html?id=073750d6-ba23-4211-ac22-3f4e752186ea](http://www.canada.com/story.html?id=073750d6-ba23-4211-ac22-3f4e752186ea)>; Lori Culbert, "Police to Recommend Pickton Be Charged for Deaths of Six More Women", *Vancouver Sun* (29 October 2009), online: <[www.vancouversun.com/Police+recommend+Pickton+charged+deaths+more+women/2159939/story.html](http://www.vancouversun.com/Police+recommend+Pickton+charged+deaths+more+women/2159939/story.html)>.

<sup>9</sup> In October 2009, RCMP recommended Pickton be charged with the murders of Sharon Abraham, Stephanie Lane, Yvonne Boen, Jackie Murdock, Dawn Crey and Nancy Clark (Stevie Cameron, *On the Farm: Robert William Pickton and the Tragic Story of Vancouver's Missing Women* (Toronto: Alfred A Knopf, 2010) at 701–702 [Cameron, *On the Farm*]).

<sup>10</sup> *R v Pickton*, 2006 BCSC 1212, [2006] BCJ No 3671. One of the counts was stayed by the trial judge and twenty by the Attorney General of British Columbia, after Pickton's conviction on six counts of second-degree murder. See Rod Mickleburgh, "Pickton Legal Saga Ends as Remaining Charges Stayed" *The Globe and Mail* (4 August 2010), online: <[www.theglobeandmail.com/news/british-columbia/pickton-legal-saga-ends-as-remaining-charges-stayed/article1377540/](http://www.theglobeandmail.com/news/british-columbia/pickton-legal-saga-ends-as-remaining-charges-stayed/article1377540/)>.

<sup>11</sup> British Columbia, Missing Women Commission of Inquiry, "Terms of Reference" (Vancouver: Missing Women Commission of Inquiry, 2013), online: Missing Women Commission of Inquiry <[www.missingwomeninquiry.ca/terms-of-reference/](http://www.missingwomeninquiry.ca/terms-of-reference/)>.

<sup>12</sup> British Columbia, Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry* (Vancouver: Missing Women Commission of Inquiry, 2012) vol 2A at 1, online: Government of British Columbia <[www.ag.gov.bc.ca/public\\_inquiries/docs/Forsaken-Vol\\_2A.pdf](http://www.ag.gov.bc.ca/public_inquiries/docs/Forsaken-Vol_2A.pdf)> [*Missing Women's Inquiry Vol II*].

<sup>13</sup> Darcie Bennett et al, *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry* (Vancouver: BC Civil Liberties Association, West Coast Women's Legal Education and Action Fund, Pivot Legal Society, 2012) at 5, online: BC Civil Liberties Association <[www.bccla.org/wp-content/uploads/2012/11/20121119-Report-Missing-Women-Inquiry.pdf](http://www.bccla.org/wp-content/uploads/2012/11/20121119-Report-Missing-Women-Inquiry.pdf)>.

received public, media, and government attention.<sup>14</sup> To date, what has not received as much attention is the criminal justice system's response to the murder of these women.<sup>15</sup>

The criminal prosecution of Robert Pickton involved an eleven-month jury trial, two appeals to the British Columbia Court of Appeal, an appeal to the Supreme Court of Canada, \$12 million in defence counsel legal expenses, a \$2 million upgrade to the New Westminster courthouse, \$9 million in Crown counsel expenses, \$12 million in judicial support, trial support, security, and management costs, and seventy-six reported judicial rulings.<sup>16</sup> This article, through a combination of discursive and doctrinal analysis of these seventy-six decisions, examines what was (not) achieved by the Pickton trial. It discusses three areas: the judicial representation of the women Pickton was prosecuted for murdering; the implications of the jury's verdict in the *Pickton* proceedings; and the impact of the *Pickton* trial on the families of the women he murdered.<sup>17</sup>

The article starts from the premise that it is correct to characterize these murders as a product of collective violence. The World Health Organization defines collective violence as "the instrumental use of violence by people who identify themselves as members of a group – whether this group is transitory or has a more permanent identity – against another group or set of individuals, in order to achieve political, economic or social

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<sup>14</sup> See *ibid*; *Missing Women's Inquiry Vol I*, *supra* note 1. "Pickton Inquiry Slams 'Blatant Failures' by Police", *CBC News* (17 December 2012), online: <[www.cbc.ca/news/canada/british-columbia/story/2012/12/17/bc-pickton-missing-women-report.html](http://www.cbc.ca/news/canada/british-columbia/story/2012/12/17/bc-pickton-missing-women-report.html)>; "Families of Four Missing Women File Lawsuit Against Pickton, Police, Government", *MacLean's* (9 May 2013), online: <[www2.macleans.ca/2013/05/09/families-of-four-missing-women-file-lawsuit-against-pickton-police-government-2/](http://www2.macleans.ca/2013/05/09/families-of-four-missing-women-file-lawsuit-against-pickton-police-government-2/)>; Brian Hutchinson, "Missing Women Inquiry Beset by 'Sexism': Ex-Staff", *National Post* (3 April 2012), online: <[news.nationalpost.com/2012/04/03/missing-women-inquiry-staff-claim-abuse-highly-sexualized-workplace/](http://news.nationalpost.com/2012/04/03/missing-women-inquiry-staff-claim-abuse-highly-sexualized-workplace/)>; Brian Hutchinson, "Pickton Inquiry Gives Cold Shoulder to Key Witness", *National Post* (12 February 2013), online: <[www.fullcomment.nationalpost.com/2012/02/13/brian-hutchinson-pickton-inquiry-gives-cold-shoulder-to-key-witness/](http://www.fullcomment.nationalpost.com/2012/02/13/brian-hutchinson-pickton-inquiry-gives-cold-shoulder-to-key-witness/)>; Harsha Walia, "Why the B.C. Missing Women's Commission of Inquiry Fails" *Rabble* (11 October 2011), online: <[rabble.ca/news/2011/10/why-missing-womens-commission-inquiry-fails](http://rabble.ca/news/2011/10/why-missing-womens-commission-inquiry-fails)>.

<sup>15</sup> Quicklaw and Westlaw searches conducted on July 22, 2013 suggest that, to date, legal scholars have not produced any scholarship on the Pickton trial and appeals.

<sup>16</sup> "Pickton Prosecution Cost More Than \$100 Million", *CBC News* (16 November 2010) (reporting on figures released by British Columbia's Ministry of the Attorney General in November, 2010.), online: <[www.cbc.ca/news/canada/british-columbia/story/2010/11/16/bc-robert-pickton-trial-costs.html](http://www.cbc.ca/news/canada/british-columbia/story/2010/11/16/bc-robert-pickton-trial-costs.html)>.

<sup>17</sup> In this article, "*Pickton* trial" or "*Pickton* proceedings" refers to the proceedings generally rather than to any specific ruling out of the seventy-six reported judicial rulings.

objectives.”<sup>18</sup> Sereena Abotsway, Mona Wilson, Andrea Joesbury, Brenda Wolfe, Georgina Papin, Marnie Frey and countless others from the Downtown Eastside were rendered subhuman and disposed of well before they encountered Robert Pickton. The horror of what Robert Pickton did to these women, and of a police force that ignored what was happening for years,<sup>19</sup> pales in comparison to the collective violence that produced these subjects and their actions. Colonialism, sexism, the political and legal infrastructure, public, media and legal discourse—and the race-, class-, and gender-based hegemonies that these processes, institutions, policies, and practices hold in place—produced a class of vulnerable women, the police who failed them, and Robert Pickton.

To put it otherwise, it is unsurprising that these women in particular, from this community in particular, were murdered. “Do you think Willie Pickton just entered this picture out of the blue? I mean, we created a pool that nobody cared about, and he went to it.”<sup>20</sup> It is unsurprising that the police investigation into the murdered and missing women was a “blatant failure”.<sup>21</sup> Entrenched structural inequalities in Canadian society produced a category of illegible subjects, denied access to the social contract upon which the state’s monopoly on power and the paramilitary organizations charged with enforcing it are purportedly justified. In a sense, it is also unsurprising that Robert Pickton took Sereena Abotsway, Mona Wilson, Andrea Joesbury, Brenda Wolfe, Georgina Papin, and Marnie Frey, paid them for vaginal or oral intercourse, murdered them, dismembered their bodies, and distributed and disposed of what was left of them at the local meat shops and rendering plant where he sent the pigs he purchased each week at auction.<sup>22</sup> What Robert Pickton did to these women was the material articulation of a social, political, and legal rendering that had already occurred—“a kind of bestialization of [wo]man achieved through the

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<sup>18</sup> World Health Organization, “Collective Violence” (Geneva: World Health Organization, 2002), online: World Health Organization <[www.who.int/violence\\_injury\\_prevention/violence/world\\_report/factsheets/en/collectiveviolfacts.pdf](http://www.who.int/violence_injury_prevention/violence/world_report/factsheets/en/collectiveviolfacts.pdf)>.

<sup>19</sup> *Missing Women’s Inquiry Vol I*, *supra* note 1 at 110.

<sup>20</sup> Cameron, *On the Farm*, *supra* note 9 at 695 (quoting Don Adam, Vancouver Police Department).

<sup>21</sup> *Missing Women’s Inquiry Vol II*, *supra* note 12 at 1.

<sup>22</sup> *R v Pickton*, 2009 BCCA 299 at paras 32, 35, 288 BCAC 246 (testimony of Lynn Ellingsen and Gina Houston discussing Pickton’s practice of attending auctions each Saturday). See also Larry Pynn, “Ottawa Rates Health Risk from Human Remains in Farm Meat” *Vancouver Sun* (24 October 2004), online: <[www.missingpeople.net/ottawa\\_rates\\_health\\_risk\\_from\\_hu.htm](http://www.missingpeople.net/ottawa_rates_health_risk_from_hu.htm)>; “Human Remains from Pickton Farm May Have Reached Food Supply”, *The Globe and Mail* (10 March 2004), online: <[www.theglobeandmail.com/news/national/human-remains-from-pickton-farm-may-have-reached-food-supply/article1129161/](http://www.theglobeandmail.com/news/national/human-remains-from-pickton-farm-may-have-reached-food-supply/article1129161/)>.

most sophisticated political techniques.”<sup>23</sup> This article examines what role the criminal justice process plays in constituting or perpetuating the social relations that produce this bestialization.

While somewhat awkward, referring to the “Pickton circumstance”—rather than to Pickton’s actions—is also intentional. It emphasizes the importance of recognizing the social relations that produced this collective violence—the way in which women from the Downtown Eastside were abandoned through processes that deprived them of citizenship and humanity in order to maintain the hegemonic structures that produce citizenship and preserve humanity for some by abandoning others.

The remainder of the article is divided into four parts. Part II examines the representation of the murdered women in the judicial decisions produced throughout the *Pickton* proceedings. The prosecution of Pickton, because it produced seventy-six separate decisions, offers a unique opportunity to examine the anatomy of a case as articulated through judicial rulings.<sup>24</sup> Part II reveals that the criminal justice process as reported by the courts did not recognize the humanity and citizenship of the murdered women through the story it told about them. In fact, the judicial representation of the women murdered by Pickton perpetuates the same discursive construction of them that constitutes and reinforces the alienation of this category of individuals in broader public and political contexts. Part III briefly examines whether the *Pickton* trial and appeals produced a truth account about what happened to these women. The article concludes that this did not occur. Part IV questions whether the prosecution and conviction of Pickton on six counts of second-degree murder achieved justice for the families of the women he murdered. Part IV also rejects the possibility that the humanity and citizenship of the murdered women

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<sup>23</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) at 3 [Agamben, *Homo Sacer*] (quoting Michel Foucault).

<sup>24</sup> Consider, for example, the very high profile prosecution of Paul Bernardo. It involved less than a third as many reported decisions: *R v Bernardo*, [1995] OJ No 1374 (QL) (Gen Div); *R v Bernardo*, [1995] OJ No 1394 (QL) (Gen Div); *R v Bernardo*, [1993] OJ No 2047 (QL) (Gen Div); *R v Bernardo*, [1994] OJ No 4114 (QL) (Gen Div); *R v Bernardo*, [1994] OJ No 1718 (QL) (Gen Div); *R v Bernardo*, [1994] OJ No 4119 (QL) (Gen Div); *R v Bernardo*, 50 CRR (2d) 332, 1994 CanLII 7405 (Ont Gen Div); *R v Bernardo*, [1995] OJ No 4 (QL) (Gen Div); *R v Bernardo*, 38 CR (4th) 229, 26 WCB (2d) 343 (Ont Gen Div); *R v Bernardo* (1995), 26 WCB (2d) 328, [1995] OJ No 247 (Ont Gen Div); *R v Bernardo*, [1995] OJ No 585 (QL) (Gen Div); *R v Bernardo* (1995), 42 CR (4th) 85, 28 WCB (2d) 129 (Ont Gen Div); *R v Bernardo*, [1995] OJ No 1379 (QL) (Gen Div); *R v Bernardo*, [1995] OJ No 2247 (QL) (Gen Div); *R v Bernardo*, [1995] OJ No 2248 (QL) (Gen Div); *R v Bernardo* (1995), 42 CR (4th) 96, 28 WCB (2d) 130 (Ont Gen Div); *R v Bernardo*, [1995] OJ No 3866 (QL) (Gen Div); *R v Bernardo*, [1995] OJ No 1472 (QL) (Gen Div); *R v Bernardo*, [1995] OJ No 2988 (QL) (Gen Div).



could be restored even if justice were achieved for the family members who grieve them. One response to the claims that the *Pickton* proceedings did not represent the humanity of the murdered women, produce knowledge about what happened, or achieve justice for the families is that none of these objectives form a legitimate part of the criminal justice process. Part V, the final part of the article, offers three reasons why it is important to identify what was not achieved by the *Pickton* proceedings regardless of one's perspective on the functions and limits of the criminal justice process. It concludes by suggesting that the outcomes of the *Pickton* prosecution both highlight the limitations of the criminal justice system and offer an analytical framework for examining other institutional responses, such as the Missing Women's Inquiry, to the kind of collective violence that gave rise to the *Pickton* circumstance.

This article, examining the criminal justice response to the missing and murdered women from the Downtown Eastside, forms the first article of a two-part project. Drawing on the significant limitations of the criminal justice response identified in this article, the second article will examine the Missing Women's Inquiry as an institutional response to legal abandonment in the Downtown Eastside.

## II. The Story of the Missing Women as Reported by the Courts

"Robert William Pickton became a person of interest to the police in early 2001 when a task force began collecting the DNA of women missing from the downtown eastside of Vancouver. All the missing women were drug-dependent sex-trade workers who had frequently worked in that area."<sup>25</sup> These are the opening lines of the Supreme Court of Canada's majority opinion dismissing *Pickton*'s appeal from conviction on six counts of second-degree murder. This is Justice Charron's sole descriptive reference to the missing and murdered women.

Justice Charron's description is quite fitting. It is not apt because of its accuracy. In fact, some of the women missing from the Downtown Eastside were not drug dependent, and not all of them were working in the sex trade.<sup>26</sup> Instead, it is fitting because it encapsulates almost entirely the totality of information about the humanity of these women that can be gleaned from the seventy-five rulings that came before this decision from the Supreme Court of Canada. The story of Robert William *Pickton*'s trial, at least as told by its official texts, is not a story about the women he murdered. It is Robert *Pickton* who became a person of interest. The miss-

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<sup>25</sup> *R v Pickton*, 2010 SCC 32 at para 1, [2010] 2 SCR 198.

<sup>26</sup> *Missing Women's Inquiry Vol I*, *supra* note 1 at 18. See generally Cameron, *On the Farm*, *supra* note 9.

ing women are largely missing from these seventy-six judicial renderings.<sup>27</sup>

The seventy-six rulings emanating from Pickton's trial and appeals offer only three pieces of information about the murdered women: drug-dependent, sex-trade workers who lived in the Downtown Eastside.<sup>28</sup> These descriptors occur for the first time in an interlocutory ruling on the admissibility of similar fact evidence related to the 1997 attack by Pickton on Person X.<sup>29</sup> There are six short paragraphs, devoted one each, to the six women he stood accused of murdering.<sup>30</sup> The structure of each paragraph is the same and each opens with the same sentence:

"Ms. Abotsway was a drug dependent sex trade worker who lived and worked in Vancouver, primarily the Downtown East Side."<sup>31</sup>

"Ms. Wilson was a drug dependent sex trade worker who lived and worked in Vancouver, primarily the Downtown East Side."<sup>32</sup>

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<sup>27</sup> While the site of examination for this article is these seventy-six rulings, seventy-three of which were authored by Justice Williams of the British Columbia Supreme Court, this should not be taken as a critique of any individual judge. It is a critique of the criminal justice process, the judicial and legal culture that supports it, and the doctrinal and procedural rules that undergird it. It is true that no one among Justice Williams, the three-judge panel of the British Columbia Court of Appeal, nor the nine justices of the Supreme Court of Canada authored these decisions in a manner that recognized the humanity of these women. However, all of them operated within the same legal and professional traditions, culture, and rules. Without changing these, it is hard to assume any decision maker would have done differently.

<sup>28</sup> There is one reference to the Aboriginality of most of the missing women by the British Columbia Court of Appeal in *R v Pickton*, 2009 BCCA 300 at para 25, 260 CCC (3d) 132.

<sup>29</sup> *R v Pickton*, 2006 BCSC 1447, [2006] BCJ No 3672. Person X, whose identity remained anonymous throughout the proceedings, is the only woman known to have survived an attack by Pickton. She testified at the preliminary inquiry regarding an incident in which he picked her up from the Downtown Eastside, took her to his farm and attempted to kill her after they had engaged in sexual intercourse. Her testimony was excluded at trial (*ibid*).

<sup>30</sup> As discussed below in the section on justice for the families, Justice Williams granted a motion by the defence to have the twenty-six counts of murder against Pickton severed into two trials (*R v Pickton*, 2006 BCSC 1212, *supra* note 10 at para 39). The first (and, in the end, only) trial involved six counts arising from the murders of Sereena Abotsway, Mona Wilson, Andrea Joesbury, Brenda Wolfe, Georgina Papin and Marnie Frey (*R v Pickton*, 2006 BCSC 1447, *supra* note 29).

<sup>31</sup> *Ibid* at para 3. One might respond immediately to these observations by suggesting that both the structure and content of this judicial ruling makes sense given that this was a decision regarding the admission of similar fact evidence. This point will be addressed below.

<sup>32</sup> *Ibid* at para 4.

“Ms. Joesbury was a drug dependent sex trade worker who lived and worked in Vancouver, primarily the Downtown East Side.”<sup>33</sup>

“Ms. Wolfe was a drug dependent sex trade worker who lived and worked in Vancouver, primarily the Downtown East Side.”<sup>34</sup>

“Ms. Papin was a drug dependent sex trade worker who lived and worked in Vancouver, primarily the Downtown East Side.”<sup>35</sup>

“Ms. Frey was a drug dependent sex trade worker who lived and worked in Vancouver, primarily the Downtown East Side.”<sup>36</sup>

Following this one sentence description of each, the discussion shifts to DNA, blood, gunshot wounds to the head, and post-mortem dismemberment. It does not shift back. In these seventy-six judicial texts the drug-dependent sex-trade worker from the Downtown Eastside seamlessly and without pause becomes frozen partial remains, dismembered hands and feet, the fragment of a jawbone with teeth still attached,<sup>37</sup> and perhaps most revealingly “meat product”<sup>38</sup>—materially and symbolically indistinguishable from the other animals “butcher[ed]”<sup>39</sup> on the Pickton farm.<sup>40</sup>

Such a bestial representation of the women Pickton murdered evokes concepts such as the bare life of Giorgio Agamben’s *homo sacer* and the state of exception in which (s)he exists.<sup>41</sup> Agamben asserts that modern

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<sup>33</sup> *Ibid* at para 5.

<sup>34</sup> *Ibid* at para 6.

<sup>35</sup> *Ibid* at para 7.

<sup>36</sup> *Ibid* at para 8.

<sup>37</sup> *Ibid* at paras 3–8.

<sup>38</sup> *R v Pickton*, 2006 BCSC 1601 at para 37, [2006] BCJ No 3676.

<sup>39</sup> *R v Pickton*, 2009 BCCA 300, *supra* note 28 at para 37.

<sup>40</sup> The police found a number of plastic bags containing “ground meat” in freezers on the Pickton farm. Samples of the “meat” yielded a combination of DNA from Cynthia Feliks and Inga Hall. The samples also contained “protein characteristic of pig and human” (*R v Pickton*, 2006 BCSC 1601, *supra* note 38 at para 10. It seems telling that the sample would even be referred to as meat by the court. It is arguably more common to refer to human flesh than to human meat. The noun *meat* is habitually used to refer to the flesh of an animal as food, as material intended for consumption.

<sup>41</sup> This insight belongs to Geraldine Pratt, who brings Agamben’s theory of legal abandonment to bear on the women murdered by Robert Pickton in “Abandoned Women and Spaces of Exception” (2005) 37:5 *Antipode* 1052. According to Agamben, bare life is the “definition of a life that may be killed without the commission of a homicide ... [but that] could not be put to death following a death sentence” (Agamben, *Homo Sacer*, *supra* note 23 at 165). The bare life of the *homo sacer* is a life with no political relevance (other than its constitutive role in establishing the sovereign). It is a life that can be eliminat-

liberal democracies are founded on a state of exception—a generalized suspension of the law that he describes as the sovereign ban.<sup>42</sup> By suspending the law, a border between inclusion and exclusion is created, and entire categories of citizens are eliminated. They are legally abandoned. Such people are, in his words, rendered bare life. By bare life Agamben means the mere life of the body stripped of all the “customary forms or qualifications of lives (*bios*) in a community.”<sup>43</sup> Bare life is life reduced to matter. According to Agamben, states of exception operate by animalizing the human.<sup>44</sup> In the judicial texts of the *Pickton* proceedings women are “butcher[ed]”<sup>45</sup> and human flesh is transformed into “meat product”.<sup>46</sup>

What is missing from the legal account of the missing women is as significant to this animalistic rendering as is the story that the law does tell about them. A disproportionate number of the women that Pickton murdered were Aboriginal.<sup>47</sup> Sherene Razack would argue that because of the relationship between colonialism, racism, and prostitution even those women who were not of Aboriginal descent were racialized. For Razack, to be a woman working in prostitution in the Downtown Eastside is to be the racial Other.<sup>48</sup> However, race is invisible in the law’s story of Robert Pickton and the women he murdered. In seventy-five of the seventy-six judicial rulings produced over the course of the Pickton trial and appeals,

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ed without punishment (*ibid* at 139, 165). Presumably, for Agamben, a death sentence implies that one is still in some sense being treated as a citizen.

<sup>42</sup> *Ibid* at 15–29. In this regard, Agamben draws upon Carl Schmitt’s concept of sovereignty: “Sovereign is he who decides on the exception” (Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005) at 5).

<sup>43</sup> Leland de la Durantaye, *Giorgio Agamben: A Critical Introduction* (Stanford, California: Stanford University Press, 2009) at 207.

<sup>44</sup> Giorgio Agamben, *The Open: Man and Animal*, translated by Kevin Attell (Stanford: Stanford University Press, 2004) at 34.

<sup>45</sup> *R v Pickton*, 2009 BCCA 300, *supra* note 28 at para 37.

<sup>46</sup> *R v Pickton*, 2006 BCSC 1601, *supra* note 38 at para 37.

<sup>47</sup> *Missing Women’s Inquiry Vol I*, *supra* note 1 at 94.

<sup>48</sup> According to Razack, the desire to transgress and the repugnance in response to transgression are central to the maintenance of class, race, and gender hegemonies. All three hegemonic systems are deployed to stabilize a structure of dominance. In this way, social, legal, and political relations constitute the bodies and spaces of prostitution, and the bodies and spaces of prostitution secure a white, middle class, elite (Sherene Razack, “Race, Space, and Prostitution: The Making of the Bourgeois Subject” (1998) 10:2 CJWL 338 at 341–43, 346 [Razack, “Race, Space, and Prostitution”]). This is why, for Razack, the question is not who works as a prostitute but why other women do not work as prostitutes: “Women in prostitution are integrally connected to women who are not engaged in prostitution ... because the violence directed at some of us enables others to live lives of lesser violence. Prostitution is thus always about racial, class, and male dominance, and it is always violent” (*ibid* at 359–60).

there is no reference to the Aboriginality of these women. It is impossible to grasp the reality of the Pickton circumstance, let alone begin to formulate systemic responses to it, without recognizing that this collective violence was perpetuated against Aboriginal women in particular. Yet, in hundreds of pages of judicial text there is only one reference, by Justice Finch of the British Columbia Court of Appeal, to the fact that most of the women Pickton murdered were of Aboriginal descent.<sup>49</sup>

Discussing this same failure to signify race in the media representation of women from the Downtown Eastside, Geraldine Pratt highlights the long colonial history of assuming that Aboriginal peoples and cities are mutually exclusive—a colonial geography that makes First Nations women “almost naturally disappear” from the Downtown Eastside.<sup>50</sup> Dara Culhane refers to this as a form of “race blindness.”<sup>51</sup> She describes it as a regime of disappearance that selectively marginalizes Aboriginal women in the Downtown Eastside by privileging representations of drug addiction and commercial sex “rather than the ordinary and mundane brutality of everyday poverty” and its relationship to the ongoing effects of settler colonialism.<sup>52</sup> For Razack, this kind of “insistence on racelessness” makes the law complicit in the perpetuation of violence against Aboriginal women.<sup>53</sup>

While the gender of those whose lives were taken by Pickton is communicated in these texts, the fact that all of them were women, and in particular women living in a community where the male privilege of one well known john was maintained by police and others in authority, also does not figure in the legal analysis.<sup>54</sup> The criminal justice response to the Pickton circumstance does not tell a story of structuralized and systematized male violence against women.

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<sup>49</sup> *R v Pickton*, 2009 BCCA 300, *supra* note 28 (“[a]ll 26 victims on the original Indictment were young women who were known to be engaged in the business of providing sexual services for payment. They all practiced their trade in the DTES and lived in the vicinity. Most of the 26 victims were of Aboriginal descent. Most were addicted to illegal drugs. Sex-trade workers of this description and from this location were known to be very reluctant to work outside the DTES” at para 25).

<sup>50</sup> Pratt, *supra* note 41 at 1062.

<sup>51</sup> Dara Culhane, “Their Spirits Live Within Us: Aboriginal Women in Downtown Eastside Vancouver Emerging Into Visibility” (2013) 27:3 *American Indian Quarterly* 593 at 595.

<sup>52</sup> *Ibid.*

<sup>53</sup> Sherene Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George” (2000) 15:2 *Can J L & Soc* 91 at 95.

<sup>54</sup> See generally Cameron, *On the Farm*, *supra* note 9.

Unlike with respect to the women themselves, the official texts of the criminal justice process do tell a fuller story about both Robert Pickton and the site where he murdered, dismembered, and disposed of these women. Pickton, unlike the women he was on trial for murdering, is constructed as a whole person in the texts of these decisions. The articulation of his life has temporality and three dimensions. A reader of these texts learns about his relationship with his mother and his brother,<sup>55</sup> his mental acuity,<sup>56</sup> and his affinity for the property he owned with his siblings.<sup>57</sup>

Also apparent from these decisions is the way in which the procedural and doctrinal rules of the criminal justice system preserved some dignity for Robert Pickton throughout this process. For example, the defence was successful in having a jailhouse video edited before trial to remove segments depicting Pickton alone in a cell masturbating.<sup>58</sup> The Crown opposed the editing on the basis that the fact that Pickton was relaxed enough to masturbate contradicted the defence's assertion that Pickton was so agitated and fatigued that any statements he made during this period were unreliable. Justice Williams excluded the evidence on the basis that "the knowledge that Mr. Pickton was masturbating in his cell and the image of him doing so are reasonably capable of diminishing his dignity in the eyes of the jurors, although in a fairly minor way."<sup>59</sup>

The rulings also offer many details about the property where these women were murdered. We learn that the land was used as a farm and that its civic address was 953 Dominion Avenue, Port Coquitlam, British Columbia.<sup>60</sup> In addition to husbandry, the property was also used for a topsoil and landfill business.<sup>61</sup> It is evident from the judicial rulings that on this property there were several buildings including a workshop, a slaughterhouse, a trailer and an old farmhouse.<sup>62</sup> Several decisions make

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<sup>55</sup> See e.g. *R v Pickton*, 2006 BCSC 995, [2006] BCJ No 3667 (regarding the admissibility of Pickton's statements to the police Justice Williams wrote: "I will proceed on the assumption that Mr. Pickton is close to and cares very deeply for his brother" at para 268).

<sup>56</sup> *Ibid* ("Mr. Pickton is a simple man. ... That said, Mr. Pickton is by no means intellectually dysfunctional or unable to manage with ordinary, day to day interactions with other persons" at para 201).

<sup>57</sup> *Ibid* ("I accept that Mr. Pickton was quite attached to his property and that it was very important to him" at para 264).

<sup>58</sup> *R v Pickton*, 2007 BCSC 29, *supra* note 7.

<sup>59</sup> *Ibid* at para 12.

<sup>60</sup> See e.g. *R v Pickton*, 2006 BCSC 995, *supra* note 55 at para 95.

<sup>61</sup> Cameron, *On the Farm*, *supra* note 9 at 6.

<sup>62</sup> See e.g. *R v Pickton*, 2009 BCCA 300, *supra* note 28 at paras 19–21.

clear that it was a seventeen-acre property about thirty kilometres from the Downtown Eastside, in Port Coquitlam, a suburb of Vancouver.<sup>63</sup>

What one cannot learn from these texts about the land where these (mostly) Aboriginal women died, is that it originally belonged to the Coast Salish peoples and that it was only in the latter part of the nineteenth century that European settlers took this land from its original inhabitants and began farming in the area.<sup>64</sup> Similarly, the text of these decisions reveals that, according to the Crown, Pickton lured these women away from the Downtown Eastside to this land in Port Coquitlam by offering them additional money.<sup>65</sup> However, what cannot be gleaned from the law's story of the Pickton circumstance is that Pickton had the funds available to do this because he had subdivided and sold off significant chunks of this land,<sup>66</sup> which had been taken from the Coast Salish peoples by European settlers, acquired by Pickton's ancestors, and eventually inherited by Pickton and his siblings.<sup>67</sup> At the time of his incarceration Robert Pickton was a wealthy man.<sup>68</sup> Colonialism and its living legacy are as constitutive of Pickton in both symbolic and material ways as they are of the women he murdered.

Why was the Aboriginality of these women not part of the law's story? Similarly why do the reality and impact of colonialism not figure in the texts of these decisions? It is not that these factors are irrelevant to the factual circumstances and legal doctrine involved in the Pickton trial. For example, the defence attempted to have the Crown's forensic evidence relating to Wendy Crawford—a piece of bone recovered from a manure cistern on the Pickton property—excluded on the basis that it was not actually part of her remains.<sup>69</sup> The defence argued unsuccessfully that the bone was an Aboriginal artifact that had at some point been contaminated

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<sup>63</sup> See e.g. *ibid* at para 19; *R v Pickton*, 2006 BCSC 1212, *supra* note 10 at para 26.

<sup>64</sup> Chuck Davis, *Where Rails Meet Rivers: The Story of Port Coquitlam* (Madeira Park, BC: Harbour, 2000) at 24. The city of Vancouver, including the area that is now called the Downtown Eastside, was also land that had been owned and occupied by the Coast Salish peoples for over 10,000 years (see Culhane, *supra* note 51 at 595).

<sup>65</sup> *R v Pickton*, 2010 SCC 32, *supra* note 25 at para 15.

<sup>66</sup> Stevie Cameron, *On the Farm*, *supra* note 9 at 6.

<sup>67</sup> *Ibid*; Davis, *supra* note 64 at 24.

<sup>68</sup> In 2007, the Pickton farm was worth \$7.1 million (Stevie Cameron, *The Pickton File* (Toronto: Knopf, 2007) at 233–34).

<sup>69</sup> *R v Pickton*, 2006 BCSC 1601, *supra* note 38 at para 21. Wendy Crawford was one of the twenty other women that Pickton was charged with murdering. These twenty charges were severed from the Pickton trial. The Crown introduced evidence of Wendy Crawford's remains as similar fact evidence intended to establish a distinctive modus operandi on the part of Pickton (*ibid* at para 17).

with Wendy Crawford's DNA. They introduced expert evidence from a forensic anthropologist who testified that the bone resembled an Aboriginal artifact used for probing or piercing and that approximately 140 such artifacts had been recovered from the Pickton farm.<sup>70</sup> Presumably, the presence of so many Aboriginal artifacts on this seventeen-acre property reflects the colonial settlement of what was traditional Salish territory. The displacement of Aboriginal peoples from this land that became the Pickton farm was a relevant fact regarding the strength of the defence argument with respect to this piece of evidence. Yet it was not part of the story.

The sentencing decision in *Pickton* provides another example. Justice Williams ordered the strictest sentence legally possible—a life sentence, as required under the law, with a twenty-five-year period of parole ineligibility.<sup>71</sup> Length of parole ineligibility is to be determined based on the circumstances of the offender and the offences, as well as the degree of moral culpability.<sup>72</sup> In identifying the relevant circumstances in this case, Justice Williams described the women's troubled lives and extreme vulnerability. The factors identified as contributing to this vulnerability were addictions and involvement in survival sex work. There is no reference to the fact that four of the six women he was convicted of murdering were Aboriginal.<sup>73</sup> Conditions of vulnerability are sourced in the individual actor rather than racism and the history of colonialism. Moreover, the racial pattern of these murders is not identified as a circumstance relevant to the seriousness of Pickton's offences or the degree of moral culpability.

Consider a third example. The Crown sought to introduce several pieces of similar fact evidence in the Pickton trial.<sup>74</sup> Similar fact evidence is factual evidence of other misconduct of an accused introduced for the purpose of inferring that the accused committed the misconduct at issue in the trial.<sup>75</sup> It is only admissible in exceptional circumstances. In cases such as this one, in which it is introduced by the Crown in an effort to establish the identity of the perpetrator, the analysis regarding its admissi-

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<sup>70</sup> *Ibid.*

<sup>71</sup> *R v Pickton*, 2007 BCSC 2039 at paras 20–21, [2007] BCJ No 3109.

<sup>72</sup> *R v Shropshire*, [1995] 4 SCR 227 at 242–43, 129 DLR (4th) 657.

<sup>73</sup> *R v Pickton*, 2007 BCSC 2039, *supra* note 71 at para 20.

<sup>74</sup> *R v Pickton*, 2006 BCSC 1212, *supra* note 10. Presumably, the assumption at that point was that a second trial involving the twenty severed counts would proceed once the first trial was completed. As discussed below, this second trial never occurred. After Pickton's conviction on six counts of second-degree murder was upheld by the Supreme Court of Canada, Attorney General Wally Oppal decided to stay the additional twenty charges (Mickleburgh, *supra* note 10).

<sup>75</sup> Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 3rd ed (Toronto: Butterworths, 2009) at 676.



bility focuses almost exclusively on the similarity in *modus operandi* and evidence of signature type behavior.<sup>76</sup> In performing this analysis the court is required to conduct a two-step inquiry. The first step involves examining the similarity between the way in which the acts were committed in order to assess how likely it is that the same person committed both acts. The second step requires the court to determine whether there is some evidence linking the accused to the similar act.<sup>77</sup> The first step of this inquiry would encourage the Crown in *Pickton* to articulate a narrow and specific description or profile of the missing women in an effort to introduce the similar fact evidence of Pickton's other murders. The profile adopted was, of course, that of the drug-dependent sex-trade worker from the Downtown Eastside. The phrase drug-dependent sex-trade worker was embraced like a mantra for the Pickton trial in the media,<sup>78</sup> and in the judicial texts this phrase is repeated so frequently that it becomes a slogan-like identity category—a vacuous shibboleth capturing precisely the constitutive lack that signifies the creatures who inhabit Agamben's state of exception. It is true that the disciplining effect of the legal doctrine in this instance demands a descriptive account reduced to whatever common denominator is available.

To be admissible, similar fact evidence must be sufficiently similar.<sup>79</sup> Much of the Crown's case turned on establishing a repeated pattern of conduct involving the removal of women with a certain profile from a cer-

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<sup>76</sup> *R v Arp*, [1998] 3 SCR 339 at 365–66, 166 DLR (4th) 296. Pickton was originally charged with twenty-six murders. Ultimately, twenty of those counts were severed from the trial. This left only the six counts for which the remains of the women were discovered on Pickton's property, and the defence had conceded their deaths. Once the defence motion to sever the counts and proceed with two trials was granted, the only way for the Crown to introduce the evidence of the twenty other murders in the first trial for the six counts was as similar fact evidence. The Crown was mostly unsuccessful in introducing evidence of the murder of these twenty other women. See e.g. *R v Pickton*, 2006 BCSC 1601, *supra* note 38; *R v Pickton*, 2006 BCSC 1447, *supra* note 29. With respect to the six counts that did proceed, the jury could only consider the evidence for each one individually, unless the Crown was permitted to introduce them as cross-count similar fact evidence with respect to the others. The Crown was successful in this regard. Convictions against Pickton on counts four to six turned on cross-count similar fact evidence regarding counts one to three: "There was no forensic evidence or opinion as to the cause of death of the victims in Counts 4 through 6. Proof of homicide in each of those counts rested on count-to-count similar fact analysis" (*R v Pickton*, 2009 BCCA 299, *supra* note 22 at para 20).

<sup>77</sup> *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908.

<sup>78</sup> David Hugill, *Missing Women, Missing News: Covering Crisis in Vancouver's Downtown Eastside* (Halifax: Fernwood, 2010) at 13–14. See generally Jennifer England, "Disciplining Subjectivity and Space: Representations, Film and its Material Effects" (2004) 36:2 *Antipode* 295.

<sup>79</sup> *R v Handy*, *supra* note 77 at para 113.

tain area of Vancouver. But four of the six women he was on trial for murdering *were* Aboriginal, and a massively significant number of the other women Pickton confessed to murdering (evidence of which the Crown sought to admit as similar fact) were Aboriginal.<sup>80</sup> If race was not rendered invisible in the manner Razack suggests—if the social relations that situated Aboriginal bodies in particular in a vulnerable positionality vis-à-vis Pickton were recognized—the Aboriginality of these women would be at least as cogent and important an aspect of the similar fact analysis as was their relationship to drugs. Similarly, all of the women Pickton murdered were living in poverty.<sup>81</sup> Why was this shared socioeconomic status not a salient part of the similar fact profile?

The admissibility of similar fact evidence turns on the cogency of the similarity. The cogency of the similarity is informed, if not dictated, by culturally and socially biased assessments.<sup>82</sup> In other words, how we characterize, categorize and compare is informed by how we see the world. Both the principles underpinning the law of evidence and the application of its doctrine mirror social, political, and cultural contexts.<sup>83</sup> Indeed, the drug-dependent sex-trade worker from the Downtown Eastside was the central and almost exclusive character in the media's story—and thus the public imagination—of these women long before jurists adopted this same profile to satisfy the doctrinal demands of similar fact evidence rules.<sup>84</sup> This is not a coincidence.

Moreover, it is not that, absent the doctrinal demands of a similar fact evidence analysis, the spectre is replaced by a more three dimensional, human representation of the women who were murdered. “[D]rug dependent sex trade worker” is also used as the sole descriptor of these women in contexts where there appears to be no doctrinal justification for

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<sup>80</sup> *Missing Women's Inquiry Vol I*, *supra* note 1 at 94. See Hugill, *supra* note 78 at 46–47 (surveying estimates of the number of missing women who were Aboriginal—somewhere between one third to over half).

<sup>81</sup> Hugill, *supra* note 78 at 91–95.

<sup>82</sup> I have developed this argument in earlier work: see Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012) ch 2.

<sup>83</sup> The differing application of similar fact evidence doctrine in sexual assault cases involving child complainants and adult complainants reveals this same phenomenon. I have demonstrated this pattern in earlier work (see *ibid*).

<sup>84</sup> In describing the media representation of the missing and murdered women, Geraldine Pratt notes: “[W]omen were and continue to be represented almost exclusively as diseased, criminalized, impoverished and degenerate bodies, now—literally—as disembodied DNA or as dead contaminating [*sic*] meat” (Pratt, *supra* note 41 at 1062). See also Hugill, *supra* note 78.

its invocation.<sup>85</sup> Indeed, the names of the six women Pickton was on trial for murdering do not even appear in the overwhelming majority of the judicial texts.<sup>86</sup> The Supreme Court of Canada, in its decision upholding Pickton's conviction, does not call any of the six women by name. It refers to them only as drug-dependent sex-trade workers.<sup>87</sup>

Similarly, the names of seventeen of the other twenty women that Pickton was charged with murdering, counts which were severed from the first trial, do not appear in any of the seventy-six texts.<sup>88</sup> The combination of procedural and evidentiary doctrine with the state's ultimate decision to stay the charges for the murder of these seventeen women renders them totally invisible in the criminal justice response to the Pickton circumstance.

Why does it matter what story these texts, and the evidentiary and procedural rules that underpin them, tell? Seventy-six reported decisions issued from the criminal prosecution of Robert Pickton. That there were this many reported decisions in this trial would be remarkable even if there had been conflicting points of law to resolve. It is even more remarkable given that this was not the case. Despite the volume of judicial ink spilled on this case the precedential value of the *Pickton* proceedings is almost negligible. Indeed, in total, these seventy-six separate decisions

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<sup>85</sup> See e.g. *R v Pickton*, 2006 BCSC 1881 at para 11, [2006] BCJ No 3681; *R v Pickton*, 2010 BCSC 1198, [2010] BCJ No 1669; *R v Pickton*, 2007 BCSC 42 at para 14, [2007] BCJ No 3077; *R v Pickton*, 2005 BCSC 1240 at para 32, [2005] BCJ No 3245; *R v Pickton*, 2005 BCSC 1463 at para 6, [2005] BCJ 3247; *R v Pickton*, 2005 BCSC 967 at para 2, [2005] BCJ 3244; *R v Pickton*, 2007 BCSC 718 at para 1, [2007] BCJ No 3082. In so many of the seventy-six decisions, the words "sex trade workers" could be replaced with the word *women* or *individuals* without any legal significance. See e.g. *R v Pickton*, 2009 BCCA 299, *supra* note 22 at para 14. Even in the sentencing decision, the only account of these women's lives was of drug abuse, desperation, and sex work (*R v Pickton*, 2007 BCSC 2039, *supra* note 71).

<sup>86</sup> Brenda Ann Wolfe is called by name in only six of the seventy-six rulings. Georgina Papin's name is raised in eight of the seventy-six texts, Marnie Frey in seven. Sereena Abotsway's name appears in eleven rulings, and Andrea Joesbury's name is used in thirteen of the seventy-six decisions. These numbers are based on a Quicklaw search on 30 May 2013. In relation to the use of names in decisions, see Shulamit Almog, "As I Read, I Weep: In Praise of Judicial Narrative" (2001) 26:2 Okla City U L Rev 471 at 483 (discussing the way in which Justice Rehnquist, in *Ake v Oklahoma*, 470 US 68, 105 S Ct 1087 (1985), brings the victims into the story by calling them by name).

<sup>87</sup> *R v Pickton*, 2010 SCC 32, *supra* note 25.

<sup>88</sup> The names of these twenty women were: Jacqueline McDonnell, Dianne Rock, Heather Bottomley, Jennifer Furminger, Heather Chinnock, Sarah de Vries, Tiffany Drew, Cynthia Feliks, Inga Hall, Helen Hallmark, Tanya Holyk, Sherry Irving, Angela Jardine, Patricia Johnson, Debra Jones, Diana Melnick, Wendy Crawford, Kerry Koski, Andrea Borhaven, Cara Ellis (*Missing Women's Inquiry Vol I*, *supra* note 1 at 40–60).

have been cited less than twenty times by subsequent courts.<sup>89</sup> Neither the *Pickton* proceedings as a whole, nor any one of the seventy-six decisions in particular, is destined to become part of the legal canon. But these texts represent something more. Judicial writing has a public dimension.<sup>90</sup> In one sense a reported decision is a public normative act.<sup>91</sup> This is particularly true in the context of a case like *Pickton* in which decisions were presumably reported not for their precedential value but rather for the importance to the judiciary of ensuring public transparency in such a high profile case.

There is little reason to assume that jurists could (or would) craft their decisions with a precision that confines them solely to facts, concepts, and descriptions that are legally relevant. This is true even setting aside the important point that in many respects both the cognitive and procedural processes used to identify which facts and descriptions are deemed legally significant are socially determined.<sup>92</sup> Judicial rulings are seldom cleansed of every element that bears no specific weight on a legal determination.

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<sup>89</sup> *R v Iyanam*, 2013 ONSC 1091, 105 WCB (2d) 173; *R v Spackman*, 2012 ONCA 905, 295 CCC (3d) 177; *R c Alexandre*, 2012 QCCA 935, 94 CR (6th) 183; *R v Leslie*, 2012 BCSC 683, [2012] BCJ No 938; *R v Skeete*, 2012 ONSC 1920, 103 WCB (2d) 293; *R v Kociuk*, 2011 MBCA 85, 346 DLR (4th) 195 (citing *R v Pickton* in dissenting opinion); *R c Laroche*, 2011 QCCA 1891, 99 WCB (2d) 193; *R v Walters*, 2011 ABQB 585, 517 AR 321; *R c Leporé*, 2011 QCCA 1891, 97 WCB (2d) 247; *R c Vollant*, 2011 QCCA 1309, JE 2011-1438; *Barrington v Institute of Chartered Accounts of Ontario*, 2011 ONCA 409, 333 DLR (4th) 401; *R v Hughes*, 2011 BCCA 220, 271 CCC (3d) 448; *R v Drydgen*, 2011 BCSC 393, [2011] BCJ No 555; *R v BD*, 2011 ONCA 51, 266 CCC (3d) 197; *R v Katsis-Spalding*, 2011 ONSC 484, [2011] OJ No 218; *Ontario (Ministry of Labour) v Enbridge Gas Distribution Inc.*, 2011 ONCA 13, 328 DLR (4th) 343; *R v Earhart*, 2010 ONCA 874, 272 CCC (3d) 475 (citing *R v Pickton* in dissenting opinion); *R v Khawaja*, 2010 ONCA 862, 103 OR (3d) 321; *R v Banwait*, 2010 ONCA 869, 345 DLR (4th) 234; *Bedford v Canada (AG)*, 2010 ONCA 814, 330 DLR (4th) 162; *R v Yumnu*, 2010 ONCA 637, 260 CCC (3d) 421; *R v Sarrazin*, 2010 ONCA 577, 259 CCC (3d) 293 (citing *R v Pickton* in dissenting opinion).

<sup>90</sup> Almog, *supra* note 86 at 473.

<sup>91</sup> *Ibid* at 474. Almog suggests that judicial text has both a public normative aspect and a private dimension. For her the construction of narrative, word choice and style represent the private dimension of a legal opinion. The legal outcome, the translation of life into unimaginative legal language, represents the public dimension of a judicial text. She identifies a perpetual tension between the two. While I agree with Almog that a legal ruling has these different aspects, I do not think they are discrete and I am not compelled by the articulation of them as dichotomous. Part of what makes a judicial text a public normative act is its narrative, its choice of language, its discursive product. It is this singularity that produces Agamben's state of exception. Indeed, the political is personal. To accept that these aspects of a judicial opinion—of law—can be disaggregated into public and private is to obscure the legally abandoned.

<sup>92</sup> This point was made above with respect to the ways in which Aboriginality and colonialism could have been, but were not, perceived to be relevant to the similar fact analysis in this case.

“[I]n legal writing, facts can be emphasized or omitted, made to appear relevant when they are not, and skewed one way or another. The goals are the same [as writing a good novel]—to tell a story by using words as tools to produce a desired reaction.”<sup>93</sup> Rules of procedure and evidence, the strictures of doctrine, professional conventions and our social expectations of law are presumed to limit, if not preclude, law’s storytelling capacity. “Nevertheless narrative is ever present within the legal field. It has a way of penetrating and manifesting itself clearly and forcibly, even after being minimized, disguised or obscured by the legal course of action.”<sup>94</sup> Every written text is produced through a series of choices. These choices include the decision to relate some facts and omit others, the selection of words employed to convey a particular meaning, the choice of authorities drawn upon, and the argumentative style adopted. The constellation of these choices produces a narrative. More importantly, law’s stories in particular are normative—they make a claim to truth.<sup>95</sup> “Every judicial narrative is a *claim* of knowledge. ... When judges narrate, our initial reaction is to treat their narration as an accurate reflection of reality.”<sup>96</sup>

The figure of the drug-dependent sex-trade worker is a representation of a mismanaged life. Under this schematic, poverty is understood as the result of drug addiction rather than the cause.<sup>97</sup> Involvement in street-level sex trade reveals individual failure to acquire sufficient education or skills and poor decision making regarding the use of drugs. Under this representation, the precarity of life in the Downtown Eastside becomes a consequence of *individual choice*. In this sense, moral responsibility is equated with rational action.<sup>98</sup> Lack of opportunity, the effects of colonialism and gender discrimination, high unemployment, limited social assistance and the *political and social choices* that produced these circumstances are obscured. Correspondingly, governance models premised on such neo-liberal concepts tend “to judge moral worth in terms of self-care such that a ‘mismanaged life’ is itself evidence of and grounds for abandonment.”<sup>99</sup>

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<sup>93</sup> Jeffrey L Harrison & Sarah E Wilson, “Advocacy in Literature: Storytelling, Judicial Opinions, and *The Rainmaker*” (1996) 26:4 U Mem L Rev 1285.

<sup>94</sup> Almog, *supra* note 86 at 473.

<sup>95</sup> *Ibid* at 488.

<sup>96</sup> *Ibid* at 488.

<sup>97</sup> See Culhane, *supra* note 51 (“[p]overty is rarely analyzed as a causal condition that gives illicit drug use and sex work their particular public character and devastating consequences” at 596).

<sup>98</sup> *Ibid*.

<sup>99</sup> Pratt, *supra* note 41 at 1055, citing Wendy Brown, “Neo-Liberalism and the End of Liberal Democracy” (2003) 7:1 Theory & Event 1.

An explanation for what happened that consistently involves a story of the fallen young woman who set herself on the wrong path after getting involved with drugs, choosing the wrong guy and deciding to prostitute herself in order to support her addictions rationalizes the victimization of these women as a function of poor decision making on the part of the individual. That this was the predominant media representation and social understanding of the missing women is readily apparent in the coverage and public response to their disappearances both before and after Pickton's arrest.<sup>100</sup> The almost universal reference in every media account to their relationships to drug use, commodified sex, and little else, the invisibility of race and poverty in public and media discourse about the Pickton circumstance, and the prolonged unwillingness on the part of police and municipal politicians to respond to their disappearances are consistent with this problematic neo-liberal account of the murdered women.<sup>101</sup> The judicial texts produced as a result of the *Pickton* proceedings maintained this representation.

The voice of a judge, whether in the courtroom or in the text of a judicial ruling, represents the court and ultimately one arm of the state.<sup>102</sup> Indeed, in the context of sexual violence, judicial rulings typically serve as the only voice of the state in response to any individual violation. Women

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<sup>100</sup> See Pratt, *supra* note 41; Lisa E Sanchez, "The Global E-rotic Subject, the Ban, and the Prostitution-Free Zone: Sex Work and the Theory of Differential Exclusion" (2004) 22:6 *Environment and Planning D: Society and Space* 861; Hugill, *supra* note 78. See also Beverley A Pitman, "Re-Mediating the Spaces of Reality Television: *America's Most Wanted* and the Case of Vancouver's Missing Women" (2002) 34:1 *Environment and Planning A* 167; Yasmin Jiwani & Mary Lynn Young, "Missing and Murdered Women: Reproducing Marginality in News Discourse" (2006) 31:4 *Canadian Journal of Communication* 895.

<sup>101</sup> The political and social embrace of neo-liberalism in British Columbia contributed in significant ways to the underlying circumstances in the Downtown Eastside. Welfare spending in the province has been drastically cut in the last thirty years. Economic marginalization in British Columbia has increased steadily since 1983. The impact of these changes is most significant for the most impoverished. In other words, these policies further deprived economically marginalized women living in the Downtown Eastside. See Hugill, *supra* note 78 at 33. Neo-liberal philosophies emphasize individual responsibility, self-reliance, and autonomy from the state. Economic deregulation and business interests are privileged over environmental protection, cultural diversity and the reduction of poverty. The result is a governance model which reduces social spending and which holds the individual responsible for harms suffered by characterizing them as a function of poor choices and lack of self-care. The conception of the individual as a responsible and autonomous agent is central to neo-liberalism. Wendy Brown suggests that it is the extension of Adam Smith-esque liberal economic perspectives to social policy and the regulation of the individual that puts the *neo* in neo-liberalism (see Brown, *supra* note 99).

<sup>102</sup> Beverly B Martin, "Another Judge's Views on Writing Judicial Opinions" (2013) 51:1 *Duq L Rev* 41 at 42.

who exchange sex for money experience sexual violence at a rate that far exceeds that of the general population.<sup>103</sup> Responsiveness to the social, political, and legal infrastructure that so frequently relegates this category of individuals to subhuman status demands displacing these hegemonies rather than contributing to their discursive production through unidimensional constructs such as the drug-dependent sex-trade worker. In part, this requires reflecting in the official texts of the criminal justice process the humanity and citizenship of the women who bring these experiences to the criminal justice system. To date judicial texts have often been unsuccessful in this regard.<sup>104</sup>

It is clear that the discursive contribution of the official texts of the *Pickton* trial and the procedures and doctrine that undergird these texts did not produce an account of the murdered women as fully human citizens. Instead, these official texts perpetuated an animalistic, subhuman representation that obfuscates the social relations that produced the *Pickton* circumstance. Shifting from a textual analysis of the judicial rulings in *Pickton*, the next two sections of this article will examine two aspects of the outcome of the *Pickton* trial.

### III. The *Pickton* Prosecution Did Not Produce a Truth Account

*Pickton* was convicted of murdering six women and sentenced to life imprisonment without the possibility of parole for twenty-five years. He will likely spend the remainder of his life incarcerated, no longer able to kill with impunity the legally abandoned women of the Downtown Eastside. Does this mean that they have been returned from bare life—no longer *homines sacri*—those that can be killed without punishment?<sup>105</sup> Did *Pickton*’s trial, conviction, and sentencing—the state’s formal legal process responding to the deaths of these women—restore their humanity? If one accepts that the murder of almost seventy women from the Downtown Eastside of Vancouver was a function of collective violence then it is difficult to conclude that the conviction and incarceration of

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<sup>103</sup> See Melissa Farley, Jacqueline Lynne & Ann J Cotton, “Prostitution in Vancouver: Violence and the Colonization of First Nations Women” (2005) 42:2 *Transcultural Psychiatry* 242 (interview-based research with sex workers in Vancouver in which ninety per cent reported being physically assaulted and seventy-eight per cent reported being raped while engaged in sex work). This reality is brought starkly to the fore when one reads the biographical information about the sixty-nine missing women included in the *Missing Women’s Inquiry Vol I*, *supra* note 1.

<sup>104</sup> See e.g. *R v Yusuf*, 2011 BCSC 626, [2011] BCJ No 891; *R v Watson*, 72 WCB (2d) 333, [2007] OJ No 5; *R v Smith*, 68 WCB (2d) 401, [2005] OJ No 5273; *R v Powell*, 73 WCB (2d) 111, 215 CCC (3d) 274.

<sup>105</sup> See Agamben, *Homo Sacer*, *supra* note 23 at 165.

Robert Pickton could posthumously reinstate citizenship to any of the women he murdered. However, there are other potential outcomes of this process that should be considered. One possibility includes the production of truth.

The suggestion that the criminal justice process could yield truth or produce knowledge about what happened to many of the women who went missing from the Downtown Eastside during this time frame raises many questions, among them the following two. First, does—or should—the criminal justice process produce truth? Second, did this particular criminal justice process produce truth?

Whether the production of truth is an achievable or even a legitimate aim of the criminal justice process is controversial. The law of evidence is thoroughly imbued with tensions between the pursuit of truth and the protection of societal values such as due process.<sup>106</sup> In some cases, courts have explicitly rejected the production of truth as the aim of the criminal justice process.<sup>107</sup> Yet, judicial rulings in Canada are redolent with rhetoric about the truth seeking function of the criminal trial.<sup>108</sup> The Supreme

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<sup>106</sup> It is beyond the scope of this discussion to illuminate this claim fully. However, the most obvious example of this tension is reflected in the balancing process derived from the fundamental rule that underpins much of evidence law: relevant and material evidence, the probative value of which outweighs its prejudicial effect is generally admissible. The prejudicial effect of evidence might include prejudice to the trial process through consumption of time, prejudice to the entrenched rights of the accused through admission of unconstitutionally obtained evidence or prejudice to the privacy interests of a complainant. Evidence has probative value if the inference it gives rise to makes a material fact more or less likely. For more detail, see Lederman, Bryant & Fuerst, *supra* note 75 at 729–35.

<sup>107</sup> For example, in *R v Mullins-Johnson*, 2007 ONCA 720, 87 OR (3d) 425 the Ontario Court of Appeal refused to recognize a third verdict of “factually innocent” on the basis that it would erode the significance of the not guilty verdict (*ibid* at para 25). Their reasoning, of course, recognizes the distinction between factual innocence (a truth account) and legal innocence (a conclusion that the Crown has not met its burden of proof). I am grateful to my colleague Steve Coughlan for drawing my attention to this example. See also *R v Pittman*, [2006] 1 SCR 381, 36 CR (6th) 87 (“[t]he jury’s task is not to reconstruct what happened” at 386 [cited to SCR]); *R v Mah* (2002), 2002 NSCA 99, 207 NSR (2d) 262 (“W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened” at para 41).

<sup>108</sup> “In recent years and with increasing frequency, the Supreme Court of Canada has referred to a criminal trial as being a search for the truth” (Keith D Kilback & Michael D Tochor, “Searching for Truth but Missing the Point” (2002) 40:2 Alta L Rev 333 at 333 (discussing a problematic shift in the conceptualization of a criminal trial toward the view of the trial as a search for the truth)). There are also arguments to suggest that this emphasis on truth seeking is more than rhetorical. See e.g. Matthew Pearn, “Section 24(2): Does the Truth Cost Too Much?” (2011) 62 UNB LJ 147 (discussing the way in which the Supreme Court of Canada’s decision in *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353, has broadened the trial judge’s discretion to include unconstitutionally ob-



Court of Canada has described it in these words: “The ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth. In a criminal trial the search for truth is undertaken to determine whether the accused before the court is, beyond a reasonable doubt, guilty of the crime with which he is charged.”<sup>109</sup> The search for truth is used by courts to justify both the inclusion and the exclusion of evidence; it is relied on both to ensure and limit various procedural protections for the accused; and the search for truth justifies both the requirement and denial of crown disclosure.<sup>110</sup> While a conclusion on the proper relationship between truth and the criminal justice process is beyond the scope of this discussion, its centrality to our understanding of the criminal trial is indisputable.

The answer to the second question—did this particular criminal justice process produce truth?—is more definitive. Whether one considers the pursuit of truth to be a legitimate objective of the criminal justice process, it is clear that the outcome of this particular trial did not produce a truth account.<sup>111</sup>

Robert Pickton was charged with twenty-six counts of first-degree murder. Twenty of those counts were severed from the original trial and ultimately stayed. He was tried on six counts of first-degree murder and convicted of six counts of second-degree murder. In other words, the jury found Pickton not guilty of first-degree murder.<sup>112</sup> To find an accused guilty of either first- or second-degree murder the finder of fact (here the jury) must conclude beyond a reasonable doubt that the accused caused the victim’s death.<sup>113</sup> The difference between first and second-degree mur-

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tained evidence in the interests of seeking truth). See also *R v Hart*, 1999 NSCA 45, 174 NSR (2d) 165 (concluding that limits on cross-examination are established by the balance between fair trial and pursuit of truth)

<sup>109</sup> *R v Nikolovski*, [1996] 3 SCR 1197 at 1206, 141 DLR (4th) 647 (recognizing the importance of videotapes in the search for truth in criminal trials).

<sup>110</sup> Kilback & Tochor, *supra* note 108 at 342.

<sup>111</sup> There is a distinction between legal truth and factual truth. Factual truth refers to what might be described as historical truth. Legal truth refers to an assessment of the evidence against a legal standard of proof. Arguably, in *Pickton*, the distinction is peripheral. Neither the British Columbia Court of Appeal nor the Supreme Court of Canada accepted even the legal truth of the jury’s verdict in this case. Following the outcome of the appeals, an order for a second trial on charges of first-degree murder was permanently stayed at the request of the Crown (*R v Pickton*, 2009 BCCA 300, *supra* note 28; *R v Pickton*, 2010 SCC 32, *supra* note 25).

<sup>112</sup> *R v Pickton*, 2007 BCSC 2039, *supra* note 71 at para 8.

<sup>113</sup> In re-instructing the jury on causation, the trial judge stated: “If you find that Mr. Pickton shot Ms. Abotsway or was otherwise an active participant in her killing, you should find that the Crown has proven this element. On the other hand, if you have a reasonable doubt about whether or not he was an active participant in her killing, you must re-

der often relates to the element of planning and deliberation. Murder is first-degree murder if it is planned and deliberate.<sup>114</sup> Juries, of course, do not give reasons for their decisions. The only knowledge that can be produced from a jury trial is that which can be deduced from the verdict itself. By acquitting Pickton of first-degree murder and convicting him of second-degree murder, the jury in *Pickton* must be taken to have concluded that Pickton killed six women on six different occasions but that for him none of these murders were planned and deliberate.<sup>115</sup> This is a very unusual, if not inexplicable, outcome. Was Pickton the world's first unwitting serial killer?

Clearly neither the trial judge nor the British Columbia Court of Appeal believed that to be the case. In his sentencing decision Justice Williams commented: "This case is unique. It is unique because there are six separate convictions from six separate events, taking place over a period of approximately four years. ... The case is markedly different from virtually any other case to which I have been referred."<sup>116</sup> Presumably in an effort to do what he could to mitigate the effect of the jury's troubling verdict, Justice Williams took the relatively rare step of sentencing Pickton to the maximum period of parole ineligibility—life without eligibility of parole for twenty-five years. This is a sentence typically reserved for convictions of first-degree murder.

The Crown appealed Pickton's acquittal on first-degree murder on the basis that the trial judge erred in severing the other twenty counts of first degree murder and by excluding relevant similar fact evidence. The Crown argued that these rulings prevented it from demonstrating the overwhelming evidence of planning and deliberation on the part of Pickton. In its decision to grant the Crown's appeal, the British Columbia Court of Appeal discussed excerpts from Pickton's post arrest interview with the police in which he referred to himself as "the head honcho" and stated that he "had one more planned".<sup>117</sup> The court noted that "this is the slimmest sampling of statements in the interview from which the re-

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turn a verdict of not guilty" (*R v Pickton*, 2007 BCSC 1808 at para 9, [2007] BCJ No 3017).

<sup>114</sup> *Criminal Code*, RSC 1985, c C-46, s 231(2). Murder is also first degree murder, even without planning and deliberation, if the death is caused by the accused in specified circumstances such as while he is committing certain enumerated offences including kidnapping or forcible confinement (*ibid*, s 232(5)).

<sup>115</sup> *R v Pickton*, 2007 BCSC 2039, *supra* note 71 at para 8.

<sup>116</sup> *Ibid* at para 20.

<sup>117</sup> *R v Pickton*, 2009 BCCA 300, *supra* note 28 at paras 32–33, *aff'd* 2010 SCC 32, *supra* note 25.

spondent's responsibility for the planned and deliberate murders of the victims could be inferred."<sup>118</sup>

Pickton was never retried on these six counts of first degree murder nor was he tried on the other twenty counts. Robert Pickton was convicted of six counts of murder on six different occasions without any planning and deliberation. Despite the Crown's success on appeal this result stands. From a legal perspective, to find that the trial judge erred by excluding similar fact evidence of the other murders and severing twenty other counts and that absent other considerations a new trial should be ordered is not the same as finding Pickton guilty of first-degree murder.<sup>119</sup>

It is clear from Justice Donald's dissenting opinion in the British Columbia Court of Appeal allowing the defence appeal and ordering a new trial that he also considered the jury's verdict implausible.<sup>120</sup> "Despite the body of evidence against Pickton, the jury deliberated over nine days and reached the somewhat curious result of second degree murder."<sup>121</sup> For Justice Donald, the jury's verdict in *Pickton* brought to mind the following passage from *R. v. Cribbin*: "There comes a point where a verdict cannot be sustained if a jury is so misguided that there is a real possibility that its verdict was the product of a compromise reached out of puzzlement or frustration, albeit one that has an evidentiary foundation."<sup>122</sup> Perhaps compromise is a plausible explanation for the jury's puzzling verdict.

The possibility that the acquittals on all charges of first-degree murder were a function of compromise also raises the subject of jury nullifica-

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<sup>118</sup> *R v Pickton*, 2009 BCCA 300, *supra* note 28 at para 34.

<sup>119</sup> While the Crown's appeal was successful, an order for a new trial was permanently suspended. The Crown indicated to the Court that if the six convictions for second-degree murder were sustained following the defence appeal a second trial would serve no useful purpose and would not be sought. This is what occurred (Mickleburgh, *supra* note 10). The Pickton trial stretched on for many months, involving over one hundred witnesses, incurring enormous financial and human resource expense (*ibid*). The pragmatic justification for not pursuing a second trial of this magnitude (particularly when the sentence would be the same if convicted) is obvious. While the justification is obvious, the implications for the truth account produced by the outcome of this criminal justice process remain.

<sup>120</sup> *R v Pickton*, 2009 BCCA 299, *supra* note 22. Pickton also appealed his second degree murder convictions. He appealed on the basis that the trial judge erred in instructing the jury on co-principal liability. His appeal was dismissed by the British Columbia Court of Appeal (*ibid*) and by the Supreme Court of Canada (*R v Pickton*, 2010 SCC 32, *supra* note 25). Justice Donald of the British Columbia Court of Appeal dissented on the basis that it was an error of law not to instruct the jury on the law of aiding and abetting.

<sup>121</sup> *R v Pickton*, 2009 BCCA 299, *supra* note 22 at para 278.

<sup>122</sup> *Ibid*, quoting *R v Cribbin* (1994), 17 OR (3d) 548 at 575, 89 CCC (3d) 67.

tion. Do juries convict on second-degree murder rather than first-degree murder in cases where they consider the accused's actions to be bad but not *that* bad?<sup>123</sup> Was this what happened in *Pickton*? Recall Razack's observation that we care less about the bodies in degenerate spaces and often define out of existence the violence enacted on those bodies.<sup>124</sup> Presented only with the spectre of the drug-dependent sex-trade worker from the Downtown Eastside, was the humanity of these victims so unintelligible to the jury that they were unlikely to convict Pickton of Canada's most serious homicide?

In his discussion of high profile criminal trials in America, Lawrence Friedman examines the notion of juries, compromise verdicts, and what he calls the unwritten law.<sup>125</sup> He argues that criminal trials are very often "striking social documents. They sometimes shed a blinding light on social norms that are otherwise shrouded in darkness and would otherwise be almost impossible to document."<sup>126</sup> These social norms influence jury behaviour. To exemplify this phenomenon, Friedman points to the unwritten laws that have historically protected husbands who murder their wives' lovers and exonerated men accused of raping purportedly unchaste women.<sup>127</sup> Would the jury have acquitted Pickton of six counts of first-degree murder if the victims had been white women with professional occupations and higher socioeconomic status? While the outcome of the *Pickton* proceedings did not result in a truth account about what really happened on that farm it may well have offered a lesson about the nature of criminal justice and its relationship to the social norms that inform it. Regardless of the reason for a compromise, a jury that arrives at a verdict by finding a middle ground is neither functioning ideally nor, of course, is it producing a truth account.

The unusual outcome of Pickton's trial is also explainable if the jury accepted the defence theory of the case. The defence presented Pickton as an unsophisticated man of extremely low verbal intelligence.<sup>128</sup> They pointed to evidence that they argued implicated other individuals more

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<sup>123</sup> See e.g. the jury's verdict in *R v Latimer* (1995), 126 DLR (4th) 203 at 242, 41 CR (4th) 1 (SKCA). As Lisa Dufrainmont suggests, "[a]lthough a more planned and deliberate murder is hard to imagine, the jury at Robert Latimer's first trial convicted him of second degree murder rather than the first degree murder with which he was charged" ("Evidence Law and the Jury: A Reassessment" (2008) 53:2 McGill LJ 199 at 212).

<sup>124</sup> Razack, "Race, Space, and Prostitution", *supra* note 48 at 358.

<sup>125</sup> Lawrence M Friedman, "Front Page: Notes on the Nature and Significance of Headline Trials" (2011) 55:4 St Louis ULJ 1243 at 1268.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* at 1269.

<sup>128</sup> *R v Pickton*, 2006 BCSC 995, *supra* note 55 at para 99.

extensively than Pickton was implicated. The defence theory was that another, or possibly more than one other, individual was responsible for the murders.<sup>129</sup> On the sixth day of deliberations the jury came back to the trial judge seeking clarification as to whether they could convict Pickton if they found that he had acted indirectly in the killing of one or more of the women. Their question was about causation but it also reveals something about their deliberations. The jury wanted to know whether they could convict Pickton if they found that he had not acted alone.<sup>130</sup> It is possible that the jury concluded that Pickton was involved in killing six women on six different occasions but that this occurred without planning and deliberation on his part because someone else was the mastermind. They may have accepted the defence suggestion that Pickton lacked the intelligence necessary to have orchestrated these serial killings. Certainly if this is the explanation for the outcome of this trial the process cannot be attributed with having revealed any truth about what happened on that farm. No one else was ever charged with these murders. More importantly, based on the evidence and, as the sentencing decision, British Columbia Court of Appeal decisions, and the Supreme Court of Canada decision suggest, this conclusion seems implausible.<sup>131</sup>

Further demonstrating that the *Pickton* proceedings were not rooted in a quest for the truth, on appeal the Crown changed its account of what occurred on the Pickton farm. In its opening address at trial, the Crown emphasized that Pickton acted alone: “[t]he Crown intends to prove that these murders of these six women were the work of one man, the accused Robert William Pickton.”<sup>132</sup> For obvious strategic reasons given the jury’s verdict and one of the defence’s arguments on appeal,<sup>133</sup> in responding to

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<sup>129</sup> *R v Pickton*, 2009 BCCA 299, *supra* note 22 at para 11.

<sup>130</sup> It is evident from his response to the question that Justice Williams’ also drew this inference from the jury’s question. In responding, he drew their attention to those portions of his original charge in which he had advised them that they need not find that Pickton acted alone in order to find him guilty of the offence (*R v Pickton*, 2009 BCCA 299, *supra* note 22 at para 185). On appeal, the defence conceded that the jury was asking whether they could find him guilty if the Crown did not prove that he was the sole perpetrator (*ibid* at para 192).

<sup>131</sup> *R v Pickton*, 2009 BCCA 300, *supra* note 28; *R v Pickton*, 2009 BCCA 299, *supra* note 22; *R v Pickton*, 2010 SCC 32, *supra* note 25.

<sup>132</sup> Shannon Kari, “Pickton Had Accomplices, Crown Will Argue” *Edmonton Journal* (19 March 2010), online: <[www2.canada.com/edmontonjournal/news/story.html?id=e3af4874-0a44-4c02-97b7-a8f75c6c8d13](http://www2.canada.com/edmontonjournal/news/story.html?id=e3af4874-0a44-4c02-97b7-a8f75c6c8d13)>.

<sup>133</sup> One of the grounds of appeal by the defence was that the trial judge unfairly re-charged the jury in a way that put before them for the first time a new co-principal theory of the case. In challenging this argument, the Crown contended that it was proper for the trial judge to present the jury with the law of parties given the body of evidence before the court (*R v Pickton*, 2009 BCCA 299, *supra* note 22 at para 2).

the defence appeal before the Supreme Court of Canada, the Crown asserted that there was “considerable and obvious” evidence that Pickton was the person in charge of a “murderous joint venture”.<sup>134</sup> On appeal the Crown argued that “the pool of evidence clearly left open the possibility that others were acting in concert with Pickton.”<sup>135</sup>

For the purposes of this discussion, it does not matter whether the verdict was a function of compromise, or of the erroneous exclusion of similar fact evidence that would have established the element of planning and deliberation, or whether it occurred because the jury concluded that the mastermind is still out there. Under any of these potential explanations it is not possible to draw from the outcome of the *Pickton* trial much truth or knowledge about what really happened. Again, it may be that despite judicial rhetoric to the contrary no one really believes a criminal trial is or should be a truth seeking process. However assuming, as the Supreme Court of Canada has suggested,<sup>136</sup> that criminal justice and truth are imbricated in some fundamental respect, their union and the restoration of humanity in the face of collective violence that this union is thought to achieve are not revealed in the outcome of the *Pickton* proceedings.

#### IV. Did the Pickton Trial Achieve Justice for the Families?

In responding to criminalized violence, courts and political actors often further a narrative that involves pursuing justice for the victims and the families of the victims.<sup>137</sup> Broadly speaking there are two respects in which one might consider the criminal justice process to have achieved justice for the families of a murder victim. First, one might assert that the trial process itself, by offering the families their “day in court”, ensures justice for them. Second, the mere fact of conviction might be thought to achieve this result.

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<sup>134</sup> *R v Pickton*, 2010 SCC 32, *supra* note 25 (Factum of the Respondent at para 2).

<sup>135</sup> *Ibid.*

<sup>136</sup> *R v Nikolovski*, *supra* note 109.

<sup>137</sup> See e.g. Justine Hunter, “Decision Not to Try Pickton on 20 More Charges Outrages Families” *The Globe and Mail* (27 February 2008), online: <[www.theglobeandmail.com/news/national/decision-not-to-try-pickton-on-20-more-charges-outrages-families/article1377465/](http://www.theglobeandmail.com/news/national/decision-not-to-try-pickton-on-20-more-charges-outrages-families/article1377465/)> (opposition critic Mike Farnworth commenting on the government’s decision not to proceed with the second trial: “The victims and families deserve justice – all of them do – and the trial should go ahead”).

At one time, victims of crime were important players in the criminal justice system.<sup>138</sup> However, private prosecution and citizen action were gradually replaced by public prosecution, a professional police force, and state administered remedies.<sup>139</sup> Then, in the latter part of the twentieth century a renewed interest in victims of crime emerged in the form of victims' rights discourse, the restorative justice movement, and the concept of therapeutic jurisprudence.<sup>140</sup> This led to government policies and rules of criminal procedure aimed at creating some opportunity for victims of crime to become involved in the criminal justice process through victim impact statements, victim compensation programs, and travel funding for victims to attend court proceedings.<sup>141</sup> All three of these were made available to some family members of some of the murdered women for some of the *Pickton* proceedings.

The government provided funding for immediate family members to attend the *Pickton* trial.<sup>142</sup> According to Stevie Cameron, who interviewed several family members, many of them experienced this process as deeply problematic. They expressed grievances about the lack of information they were given about the trial, about the very modest travel funds made available to them, and about the government's policy of designating only two approved family members for each victim.<sup>143</sup> Family members of the six women *Pickton* was convicted of murdering were also given the oppor-

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<sup>138</sup> George P Fletcher, *With Justice for Some: Protecting Victims' Rights in Criminal Trials* (Reading, Mass: Addison-Wesley, 1995).

<sup>139</sup> Paul Hudson, "The Crime Victim and the Criminal Justice System: Time for a Change" (1983) 11:1 Pepp L Rev 23 at 24.

<sup>140</sup> See e.g. Fletcher, *supra* note 138, (advancing ten solutions for protecting victims' rights in criminal trials); Cornelius Prittwitz, "The Resurrection of the Victim in Penal Theory" (1999) 3:1 Buff Crim L Rev 109 (discussing refocus on victims by criminologists in the 1970s and 1980s); Robert C Davis, Arthur J Lurigio & Susan Herman, eds, *Victims of Crime*, 3rd ed (Los Angeles: Sage, 2007) (discussing developments in the criminal law's treatment of crime victims).

<sup>141</sup> See e.g. *Criminal Code*, *supra* note 114, ss 672.5(14), (15), (15.1); Department of Justice Canada, *Victims Fund*, online: Government of Canada <[www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/index.html](http://www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/index.html)>; Ministry of Justice, *Crime Victim Assistance Program, Victim Travel Assistance, & Victim Travel Fund*, online: Government of British Columbia <[www.pssg.gov.bc.ca/victimservices/financial/index.htm#cvap](http://www.pssg.gov.bc.ca/victimservices/financial/index.htm#cvap)>.

<sup>142</sup> Robert Matas, "Relatives of Robert Pickton Victims Given \$1.25 Million" *The Globe and Mail* (30 October 2011), online: <[www.theglobeandmail.com/news/british-columbia/relatives-of-robert-pickton-victims-given-125-million/article559730/](http://www.theglobeandmail.com/news/british-columbia/relatives-of-robert-pickton-victims-given-125-million/article559730/)>; Cameron, *On the Farm*, *supra* note 9 at 598.

<sup>143</sup> *Ibid* at 601. See also Greg Joyce, "Victim Services Issues Guide for Families at Coming Pickton Murder Trial" *Canadian Press* (3 January 2007), online: Missing People <[www.missingpeople.net/victim\\_services\\_issues.htm](http://www.missingpeople.net/victim_services_issues.htm)> (interview with a number of family members expressing concerns regarding the government's policies with respect to providing support and information to family members during the trial).

tunity to speak at his sentencing hearing about the impact of these deaths on them.<sup>144</sup> According to Cameron, each family was given approximately five minutes to read a statement describing their loss and its impact.<sup>145</sup>

Whether Pickton's trial provided an adequate ability to participate for some of the families such that they can be said to have had their day in court is unclear. It is clear, however, that by the time the case reached the appellate level the state did not recognize a role for the families of the women Pickton murdered. In a letter advising the families of the six women that the government would not provide travel funding for them to attend the hearing, nor would it provide them with updates during the nine day appeal, British Columbia's Attorney General informed them that the appeal was largely a technical exercise in which lawyers would submit arguments alleging potential legal errors by the trial judge.<sup>146</sup>

In terms of the mere fact of conviction, it would be difficult and problematic to make conclusive claims regarding how the families of the six women Pickton stood trial for murdering experienced his conviction. Some family members expressed relief or a sense of closure in response to Pickton's conviction on six counts of second degree murder.<sup>147</sup> For others, his acquittal on six counts of first-degree murder served as yet another example of the way in which the women he murdered were not recognized as full citizens.<sup>148</sup> Some Aboriginal community leaders also expressed significant dismay regarding Pickton's acquittals.<sup>149</sup>

What is clear is that, based on their statements to the media, many family members of the twenty women Pickton was charged with but never tried for murdering, did not experience the six convictions as having ob-

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<sup>144</sup> *R v Pickton*, 2007 BCSC 2039, *supra* note 71 at para 2.

<sup>145</sup> Cameron, *On the Farm*, *supra* note 9 at 695.

<sup>146</sup> Josh Wingrove, "Families Must Pay Own Way for Pickton Appeal Hearing" *The Globe and Mail* (23 February 2009), online: <[www.missingwomen.blogspot.ca/2009\\_02\\_01\\_archive.html](http://www.missingwomen.blogspot.ca/2009_02_01_archive.html)>.

<sup>147</sup> Petti Fong, "Pickton Verdict Deplored" *Toronto Star* (11 December 2007), online: <[www.thestar.com/news/canada/2007/12/11/pickton\\_verdict\\_deplored.html](http://www.thestar.com/news/canada/2007/12/11/pickton_verdict_deplored.html)>.

<sup>148</sup> Lori Culbert, "Pickton Now a Convicted Serial Killer" *Vancouver Sun* (9 December 2007), online: <[www2.canada.com/vancouver/features/pickton/story.html?id=9fed5df-acf7-4cbf-b254-ead666c00f58](http://www2.canada.com/vancouver/features/pickton/story.html?id=9fed5df-acf7-4cbf-b254-ead666c00f58)> (reporting on response to the verdict by the families in the courtroom).

<sup>149</sup> See e.g. statements by Haida leader Bernie "Skundaal" Williams: "I am so angry that our women have been treated like second-class citizens yet again with these second-degree-murder verdicts" ("Acquittal Would Have Led to Ugly Native Backlash" *Vancouver Province* (10 December 2007), online: <[www.canada.com/theprovince/news/story.html?id=5192348d-4285-424f-9255-eb1c18d47cba](http://www.canada.com/theprovince/news/story.html?id=5192348d-4285-424f-9255-eb1c18d47cba)>).



tained justice for the family members they lost.<sup>150</sup> One year after Pickton's conviction on the first six counts of murder, Grand Chief Doug Kelly, a member of the First Nations Leadership Council, urged the government to proceed with the remaining charges. "There has been no closure for many of the other victim's families. The Crown must plan to proceed with a second trial for Robert Pickton on all outstanding counts in order to give the remaining victims' families their day in court."<sup>151</sup> Lori-Ann Ellis, whose sister Carrie Ellis was among the twenty other women Pickton was charged with but not tried for murdering, made the following comments in response to the decision to stay the outstanding charges against Pickton: "Six of the 26 were given justice, they were given their day in court ... The families had an opportunity to speak in public ... on how it affected them. That's something this family will never have."<sup>152</sup> In discussing the decision to stay charges against Pickton for the murder of Cynthia Feliks, her stepmother commented that "[f]or a lot of us, there have only been six girls that have actually had justice done for them ... We haven't had justice for our girls."<sup>153</sup> The family of Dianne Rock wrote to numerous politicians, including the prime minister, asking that Pickton's second trial proceed. They wanted "Dianne's story told so she is not forgotten as count No. 4 on an indictment, filed away in a dusty legal folder never to be opened again."<sup>154</sup>

There were justifications for the British Columbia government's decision not to prosecute Pickton on these twenty other counts given that he was sentenced to life without parole for twenty-five years after his first trial. It may be true, as then Attorney General Wally Oppal suggested, that it would not be in the public interest to have a second lengthy and complicated trial given the six convictions and life sentence.<sup>155</sup> Presumably the economic and human cost of a second trial would be just as high as the cost of the first proceeding. However, whether this is accurate does not diminish the fact that many of the families experienced this decision as a denial of justice. The focus of this discussion is on whether the crimi-

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<sup>150</sup> Hunter, *supra* note 137.

<sup>151</sup> Union of BC Indian Chiefs, Media Release, "Some Victim's Families Still Await Justice on First Anniversary of Pickton Verdict" (9 December 2008), online: <[www.ubcic.bc.ca/News\\_Releases/UBCICNews12090801.htm](http://www.ubcic.bc.ca/News_Releases/UBCICNews12090801.htm)>.

<sup>152</sup> Hunter, *supra* note 137.

<sup>153</sup> "Pickton Victims' Families Still Seek Justice" *The Chronicle Herald* (17 December 2012), online: <[thechronicleherald.ca/canada/261745-pickton-victims-families-still-seek-justice](http://thechronicleherald.ca/canada/261745-pickton-victims-families-still-seek-justice)>.

<sup>154</sup> Lori Culbert, "A Sister Lost" *Vancouver Sun* (8 March 2008), online: <[www2.canada.com/vancouver/news/westcoastnews/story.html?id=df6c668a-dc26-41ab-9abf-0ca35bcd0d64](http://www2.canada.com/vancouver/news/westcoastnews/story.html?id=df6c668a-dc26-41ab-9abf-0ca35bcd0d64)>.

<sup>155</sup> Hunter, *supra* note 137; Mickleburgh, *supra* note 10.

nal justice response to the Pickton circumstance can be said to have attained justice for the families of his victims. With respect to the families of the women whose murders were not prosecuted—women whose names did not even appear in the judicial texts emanating from the Pickton prosecution—it is difficult to conclude that this was achieved.<sup>156</sup>

Even if Pickton had been convicted of every one of the murders for which he was originally charged, and even if all of the families of the women Pickton murdered had experienced his conviction as a performance of justice, or had been given a participatory opportunity in the process, there is a sense in which this would not have recognized the citizenship and humanity of the murdered women. While representing these women through the grief of their family members does gesture toward recognition of their humanity it does not displace the social, political and legal conceptions that reduced them to something less than human.

An obvious demonstration of this claim is provided by the sentencing decision in *Pickton*.<sup>157</sup> The decision references in a compelling way the grief of family members “whose lives have been altered and forever changed by these murders.”<sup>158</sup> In describing the murders, the court properly characterizes “[w]hat happened to them [as] senseless and despicable.”<sup>159</sup> But this same court captures the “them” in this sentence with only the following descriptors: “women who had troubled lives”; “persons who were in the ugly grasp of substance abuse and addiction”; and “persons who were selling their bodies to strangers in order to survive.”<sup>160</sup>

Even if the *Pickton* trial did return some small number of these women to their families, it returned them in metaphorical body bags sewn with the very norms and alienating discourse that rendered them bare in the first place. Moreover, as Geraldine Pratt observes:

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<sup>156</sup> In addition to the articulation of injustice expressed by the families of Dianne Rock, Cynthia Feliks, and Cara Ellis, see Neal Hall, “Pickton’s Second Trial at Least a Year Away” *National Post* (7 April 2008), online: <[www.nationalpost.com/related/topics/Pickton+second+trial+least+year+away/428809/story.html](http://www.nationalpost.com/related/topics/Pickton+second+trial+least+year+away/428809/story.html)> (regarding comments by the family of Wendy Crawford one of the remaining twenty victims Pickton was accused of killing); Robert Matas & Anupreet Sandu Bharna, “Pickton Loses Appeal, as Families Hope for Second Trial” *The Globe and Mail* (26 June 2009), online: <[www.theglobeandmail.com/news/national/pickton-loses-appeal-as-families-lose-hope-for-second-trial/article1377549/](http://www.theglobeandmail.com/news/national/pickton-loses-appeal-as-families-lose-hope-for-second-trial/article1377549/)> (Sandra Gagnon, sister of Janet Henry who went missing in 1997, expressing dismay that even if her DNA were found on Pickton’s farm there would be no trial).

<sup>157</sup> *R v Pickton*, 2007 BCSC 2039, *supra* note 71.

<sup>158</sup> *Ibid* at para 17.

<sup>159</sup> *Ibid* at para 17.

<sup>160</sup> *Ibid* at para 16.

Empathy through normalised family loss humanizes the murdered women by locating them within narratives of the middle-class family. Not only is this a gendered and heteronormative narrative, it privatizes, individualizes, and potentially depoliticizes aboriginal women's and sex workers' specific marginality in the Downtown Eastside.<sup>161</sup>

The specificity of these lives should not be obscured but rather situated in a fully contextualized and politically textured narrative. Sereena Abotsway took part in annual community marches for the missing women in the Downtown Eastside. She was physically and sexually abused as a child.<sup>162</sup> Brenda Wolfe, a member of the Kahkewistahaw First Nation, did sex work to supplement a welfare income that was insufficient to support her children. She was well known in the Downtown Eastside as someone that people could turn to for support.<sup>163</sup> Like Brenda Wolfe and many others, Patricia Johnson also struggled to make ends meet living on welfare.<sup>164</sup> Dawn Crey, a frequent visitor to the Downtown Eastside Women's Centre was a member of the Sto:lo First Nation. Her parents were residential school survivors.<sup>165</sup> Both Mona Wilson and Georgina Papin were Aboriginal women who grew up in foster care environments and were abused at young ages. Serena Abotsway, Andrea Borhaven, Dawn Crey, and Helen Hallmark were also placed in foster care as children.<sup>166</sup> Tiffany Drew was an active member of the WISH Drop-In Centre in the Downtown Eastside. She and a good friend had developed a check-in safety system. Within hours of disappearing her absence was noticed.<sup>167</sup> In journals she kept throughout her life, Sarah de Vries described the overt racism she experienced as a woman of colour in a white community.<sup>168</sup> Angela Jardine was last seen attending a community event in the Downtown Eastside called "Out of Harm's Way".<sup>169</sup>

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<sup>161</sup> Pratt, *supra* note 41 at 1064.

<sup>162</sup> *Missing Women's Inquiry Vol I*, *supra* note 1 at 37.

<sup>163</sup> *Ibid* at 70.

<sup>164</sup> *Ibid* at 57.

<sup>165</sup> *Ibid* at 42. Her DNA was found at the Pickton farm. Murder charges were recommended by the police but never laid (*ibid*).

<sup>166</sup> *Ibid* at 37, 40, 42, 54.

<sup>167</sup> *Ibid* at 45–46 (charges against Pickton for her murder were stayed after the first set of convictions was upheld).

<sup>168</sup> *Ibid* at 43–44 (charges against Pickton for her murder were stayed after the first set of convictions was upheld).

<sup>169</sup> *Ibid* at 57 (charges against Pickton for her murder were stayed after the first set of convictions was upheld).

To restore them to their full humanity these women need to be legible as citizens in their own right. “[I]t is too easy to empathize in a generalized way as mothers (or sisters or fathers or brothers) if it allows us to evade the specificity of sex workers’ lives and their particular (state regulated) vulnerability to violence.”<sup>170</sup> Their humanity as women involved in the sex trade, as Aboriginal women living in poverty, as colonial subjects in a failed social welfare state, and as citizens that belonged to an active and engaged community in the Downtown Eastside must be recognized. It is not enough to grieve these women because they were someone’s daughter or mother. The notion of “getting justice for the families” taps into a social script for which sympathy may be garnered without attributing responsibility. Drawing on Judith Butler’s concept of mourning, Geraldine Pratt suggests that to actually grieve the missing women requires a willingness to undergo a transformation through recognition of our relationship to them. She suggests that this change might be achieved by witnessing what they experienced long before their deaths: “the chilling process of abandonment within the everyday spaces of our cities, and a normalized passing across the threshold into bare life.”<sup>171</sup> Getting justice for the families may be a good in and of itself but it would not have reinstated the citizenship of this category of individuals. Moreover, as Rakhi Ruparelia has argued, the narrow definition of those “victims” recognized by the criminal law as worthy of participatory rights, such as the provision of a Victim Impact Statement, focuses attention on the individual deviant offender rather than the race, gender, and socioeconomic hierarchies that incriminate the state and society itself.<sup>172</sup>

In adjudicating the defence application to sever the twenty-six counts of first-degree murder into two trials, Justice Williams identified the parties that have an interest in ensuring that “justice will be done” as “Mr. Pickton, the Crown and the community.”<sup>173</sup> In a criminal trial, the collective interest in seeing justice done is framed as a charge against the individual accused. The rights of the community are recognized, the loss to the victims’ families might be acknowledged, and the responsibility of the individual perpetrator is accepted. However, the capacity of the criminal

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<sup>170</sup> Pratt, *supra* note 41 at 1064.

<sup>171</sup> *Ibid* at 1073.

<sup>172</sup> Rakhi Ruparelia, “All That Glitters Is Not Gold: The False Promise of Victim Impact Statements” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 665 at 669.

<sup>173</sup> *R v Pickton*, 2006 BCSC 1212, *supra* note 10 at para 35. Justice Williams identified fairness and justice as the factors to be balanced. He characterized the interests of justice as including, in addition to the interests of the accused, “the interests of the Crown, other participants in the criminal justice system and of the administration of justice” (*ibid* at para 20, citing *R v Litchfield*, [1993] 4 SCR 333, 86 CCC (3d) 97).

justice process to register its own community's responsibility for a circumstance of collective violence—to recognize *our* relationship to *our* victims—seems non-existent.

## V. Conclusions on the Limits of the Criminal Justice Response

One response to the claims advanced above is that it is not the function of the criminal trial process, nor the texts it yields, to displace these discursive exclusions, pursue knowledge or respond to the social relations that produce violence against particular categories of people. This may be true. It may be that the criminal justice process is constituted such that its gaze is always and inevitably only on the individual accused. If this is the case it makes the observations described above obvious and perhaps self-explanatory. It does not, however, make them any less significant. They are significant for at least three reasons.

First, it is always important to recognize the relationship between a legal process, such as the criminal justice system, and its constitutive role in the social context in which it operates. The women murdered by Pickton were legally abandoned—rendered to the mere life of bodies, material substance necessary to the constitution of power hierarchies, yet denied all of the qualifications and attributes of the lives of citizens.<sup>174</sup> Pickton alone did not do this. Pickton materialized an expulsion already actualized by colonialism, neo-liberalism, racism, sexism and the political, social, and legal infrastructures that support these social relations. That is to say, the process of legal abandonment imposed upon these women, the forty-three other women Pickton confessed to murdering,<sup>175</sup> and the countless other women disposed of during the same time period,<sup>176</sup> occurred long before the Vancouver Police Department ignored reports that the disappeared kept disappearing. Moreover, it continued well after the gavel dropped opening the first day of the Pickton trial in the newly anointed New Westminster courtroom. The criminal justice process forms a part of the social and legal context that perpetuates the racial and gendered specificity of violence in Canada. Criminal law as pedagogy teaches us who matters, and even more often, who does not matter.

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<sup>174</sup> See Agamben, *Homo Sacer*, *supra* note 23.

<sup>175</sup> *R v Pickton*, 2009 BCCA 299, *supra* note 22 (discussing admissibility of his statement to an undercover officer expressing intent to kill one more: “I was gonna do one more, make it an even fifty” at para 107).

<sup>176</sup> *Missing Women's Inquiry Vol I*, *supra* note 1 at 33 (according to the report of the Missing Women's Inquiry, sixty-nine women disappeared from the Downtown Eastside between 1970 and 2002).

Second, these observations about the *Pickton* proceedings are noteworthy because they exemplify limits of the criminal justice process that are frequently ignored by policy-makers and politicians. There are implications to accepting that it is not the function of the criminal justice system to recognize or restore the humanity of women such as those abandoned to (and in) the Downtown Eastside.<sup>177</sup> There is a significant disjuncture between this articulation of its limited function and a popular narrative about the criminal justice system's virtuous protection of and vindication for the victims of crime. The criminal justice system response to the *Pickton* circumstance, including the deeply problematic police response to the missing women, the seventy-six judicial renderings that issued from *Pickton's* criminal proceedings, and the ultimate outcome of these proceedings did not offer an account of the murdered women and their lives that recognized their humanity, did not produce knowledge about what happened, did not offer closure for most of the families of the women murdered by *Pickton*, and did not restore the citizenship of these women.

Admittedly, it may be that "to say that you can solve the problem of ... violence through the criminal justice system would be like saying that you can solve health problems through the exclusive use of hospital emergency departments."<sup>178</sup> If this is true, then it is time to take seriously the need to decentre the criminal justice system as the primordial institutional mechanism for addressing violence against women. In other words, either we accept that the current criminal justice model requires radical renovation if it is to recognize and respond to the social indicators of crime and vulnerability, or we accept that criminal justice is a basement not a ceiling—a decontextualized, reactive, and individualized process that contributes to, rather than disrupts, the race-, sex-, and socioeconomic-based social relations that empower some by abandoning others. Yet, as obvious an observation as this may be, the state continues to maintain this disjuncture.

In its 2010 budget, the Federal Government introduced seven initiatives intended to address the issue of missing and murdered Aboriginal women in Canada. The commitment involved millions of dollars to improve police services, including an enhanced Canadian Police Information

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<sup>177</sup> An additional point should be noted in response to the claim that it was not the function of the *Pickton* trial to restore the humanity of these women. The criminal justice response to the *Pickton* circumstance did not only fail to displace either the discursive or material circumstances that produced a state of exception in the Downtown Eastside. The criminal justice response perpetuated a conception of the drug-dependent sex-trade worker reduced to bare life, animalistic materiality (see Agamben, *Homo Sacer*, *supra* note 23).

<sup>178</sup> Alfred JC O'Marra, "The Impact of Inquests on the Criminal Justice System in Ontario: A Decade of Change, Part II" (2006) 10:3 Can Crim L Rev 237 at 250.

Centre, a National Police Support Centre for Missing Persons, a missing persons website and amendments to the *Criminal Code* provisions on wiretapping.<sup>179</sup> This 2010 initiative, which the government continued to point to in 2013 as its response to the issue of disproportionate numbers of missing and murdered Aboriginal women in Canada,<sup>180</sup> is primarily about increasing policing resources. In contrast to the millions of dollars dedicated to strengthening policing capacity, the 2010 initiative committed only \$1 million over three years to reduce the vulnerability of young Aboriginal women to violence. As a second point of comparison, the government of British Columbia spent over \$102 million on the investigation and prosecution of Robert Pickton.<sup>181</sup> If it is not the function of the criminal justice system to prevent and restore, but rather merely to respond to infractions of what we have identified through the criminal law as baseline, bare minimum standards for human behavior, then the response to an ongoing circumstance of collective violence should not be rooted in improved criminal law enforcement. Acknowledging the extremely limited capacity of the criminal justice system to respond to circumstances of collective violence must also mean prioritizing other institutional responses to fulfill functions that cannot be addressed through the criminal justice system. To begin with, this means dedicating significantly more than \$1 million to improve the social and economic circumstances of Aboriginal women in Canada. In addition to prospective strategies aimed at preventing further abandonment by addressing the social relations that maintain these forms of collective violence—a separate topic of enormous weight—this means turning to retrospective institutional processes other than the criminal justice response to pursue the kind of transformation that Pratt describes: a grieving that is rooted in recognition of our relationship to collective violence and the bare life it produces.<sup>182</sup>

This brings us to the third reason why it is worthwhile to examine what was not achieved by the *Pickton* prosecution. Identifying the interests not met by the criminal justice process can serve as an analytical framework for evaluating the impact and efficacy of other state responses to institutional and social failings such as this one. Accepting that the crimi-

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<sup>179</sup> Department of Justice, “Backgrounder A: Concrete Steps to Address the Issue of Missing and Murdered Aboriginal Women” (October 2010), online: Government of Canada <[www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc\\_32564.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32564.html)>.

<sup>180</sup> “Budget Offers Little for Murdered, Missing Indigenous Women, Silent on Calls for National Inquiry” *Aboriginal Peoples Television Network* (21 March 2013), online: <[aptn.ca/pages/news/2013/03/21/budget-offers-little-for-murdered-missing-indigenous-women-silent-on-calls-for-national-inquiry/](http://aptn.ca/pages/news/2013/03/21/budget-offers-little-for-murdered-missing-indigenous-women-silent-on-calls-for-national-inquiry/)>.

<sup>181</sup> “Serial Killer Robert Pickton’s Trial Cost \$102 Million” *CTV News* (16 November 2010), online: <[www.ctvnews.ca/serial-killer-robert-pickton-s-trial-cost-102-million-1.575485](http://www.ctvnews.ca/serial-killer-robert-pickton-s-trial-cost-102-million-1.575485)>.

<sup>182</sup> Pratt, *supra* note 41 at 1072–73.

nal justice system did not—and perhaps was not intended to—return the murdered women from bare life, it becomes important to ask whether the state has offered an institutional response to the Pickton circumstance that recognizes the social relations, displaces the problematic narratives, and challenges the social processes that produced a state of exception in the Downtown Eastside? The institutional response that comes to mind, of course, is the commission of inquiry: in this case, the government of British Columbia's Missing Women Commission of Inquiry.

Public inquiries or commissions into police conduct, state-sponsored or state-perpetuated sexual and physical abuse, and other institutional failures have become commonplace in Canada.<sup>183</sup> Arguably, apart from the criminal justice system public inquiry processes are the most significant, expensive, and high profile government response to race, sexuality, and gender-based harms in Canadian society.<sup>184</sup> Unlike with the criminal justice system, they often involve a mandate that is explicitly systemic in its orientation.<sup>185</sup> Often, as was the case following the Pickton prosecution, the impetus for these commissions originates from individual and public expressions of dissatisfaction with the formal legal response to a societal

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<sup>183</sup> See e.g. Ontario, Cornwall Public Inquiry, *Report of the Cornwall Inquiry* (Cornwall, Ont: Cornwall Public Inquiry, 2009), online: Government of Ontario <[www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/report/index.html](http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/report/index.html)> [*Cornwall Inquiry*] (regarding child sexual abuse allegations against public officials employed by the City of Cornwall, Ontario); Canada, *Commission of Inquiry Into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) (regarding use of excessive force by an all-male riot squad at a female prison); *Indian Residential Schools Settlement Agreement* (2006), online: <[www.residentialschoolsettlement.ca/settlement.html](http://www.residentialschoolsettlement.ca/settlement.html)> [*Residential School Settlement*] (settlement with former attendees for physical, psychological, and sexual abuse sustained while mandatorily forced to attend an Indian Residential School); Canada, *Report of the Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints* (St. John's: Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints, 1991) vol 1 (regarding allegations of sexual abuse by staff at the Mount Cashel Orphanage in St. John's, Newfoundland); Ontario, *Report of the Ipperwash Inquiry* (Toronto: Ipperwash Inquiry, 2007), online: Government of Ontario <[www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/index.html](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/index.html)> (inquiry into the events surrounding the death of Dudley George who was shot by police during a First Nations' protest at Ipperwash Provincial Park in Ontario).

<sup>184</sup> One reaction to the federal government's unwillingness to engage with the issue of missing Aboriginal women in a holistic manner has come from the provinces. Nine of Canada's provinces recently called for a national inquiry into missing and murdered Aboriginal women across the country ("Premiers call for inquiry on missing aboriginal women" *The Globe and Mail* (24 July 2013), online: <[www.theglobeandmail.com/news/politics/premiers-call-for-inquiry-on-missing-aboriginal-women/article13398161/](http://www.theglobeandmail.com/news/politics/premiers-call-for-inquiry-on-missing-aboriginal-women/article13398161/)>).

<sup>185</sup> See e.g. *Cornwall Inquiry*, *supra* note 183.



or institutional failing.<sup>186</sup> In other words, they are often preceded by criminal proceedings.<sup>187</sup> Moreover, they are as long if not longer, and as expensive if not more expensive, than the criminal trials that precede them.<sup>188</sup> The Missing Women's Commission of Inquiry is thought to have cost the government of British Columbia over \$10 million.<sup>189</sup> In a loose sense, there can be overlap between these two processes. Sometimes, the same government (and sometimes even the same individual) is responsible for both the criminal justice response to and public inquiry into the same situation. This is particularly well exemplified by one individual's multi-capacity involvement in the Pickton circumstance.

Wally Oppal appears for the first time in the very first reported decision in the Pickton criminal proceedings.<sup>190</sup> The decision concerned a pre-trial application to have the court room closed for the preliminary inquiry. In rejecting the application, the British Columbia Provincial Court relied extensively on then Justice Oppal's jurisprudence in a previous case.<sup>191</sup> By the time of Pickton's trial, Mr. Oppal had been elected to the legislative assembly of British Columbia and appointed as the province's Attorney General. As Attorney General, he oversaw the trial and was responsible for the decision to stay the twenty additional charges against Pickton after Pickton's second-degree murder convictions. Following his nearly five-

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<sup>186</sup> "Pickton Victim Families Press for Inquiry" *CBC News* (5 August 2010), online: <[www.cbc.ca/news/canada/british-columbia/story/2010/08/05/bc-pickton-inquiry-families.html](http://www.cbc.ca/news/canada/british-columbia/story/2010/08/05/bc-pickton-inquiry-families.html)>; "Pickton Victim Families Want Inquiry into Police" *CTV News* (15 December 2007), online: <[www.ctvnews.ca/pickton-victim-families-want-inquiry-into-police-1.267672](http://www.ctvnews.ca/pickton-victim-families-want-inquiry-into-police-1.267672)>.

<sup>187</sup> See e.g. *Missing Women's Inquiry Vol I*, *supra* note 1; Nova Scotia, *Royal Commission on the Donald Marshall Jr Prosecution: Digest of Findings and Recommendations* (Nova Scotia: Royal Commission on the Donald Marshall Jr Prosecution, 1989), online: Government of Nova Scotia <[www.novascotia.ca/just/marshall\\_inquiry/\\_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution\\_findings.pdf](http://www.novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf)>; *Residential School Settlement*, *supra* note 183.

<sup>188</sup> See e.g. *Cornwall Inquiry*, *supra* note 183, which cost the cost the Ontario government \$53 million ("Ont. premier questions cost of Cornwall sex abuse inquiry" *CBC News* (17 December 2009), online: <[www.cbc.ca/news/canada/ottawa/ont-premier-questions-cost-of-cornwall-sex-abuse-inquiry-1.861206](http://www.cbc.ca/news/canada/ottawa/ont-premier-questions-cost-of-cornwall-sex-abuse-inquiry-1.861206)>).

<sup>189</sup> Gary Mason, "The Debacle Over BC's Missing Women" *The Globe and Mail* (20 October 2011), online: <[www.theglobeandmail.com/commentary/the-debacle-over-bcs-missing-women/article4199587/](http://www.theglobeandmail.com/commentary/the-debacle-over-bcs-missing-women/article4199587/)>. The Cornwall Public Inquiry into allegations of abuse against youth and children by police and other public officials lasted almost five years and is estimated to have cost the government of Ontario \$53 million. The Cornwall Public Inquiry should not be held out as exemplary in this regard. The government of Ontario amended its public inquiries legislation in response to the cost and length of the Cornwall Public Inquiry (Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) at xxxiv).

<sup>190</sup> *R v Pickton*, 2002 BCPC 526, [2002] BCJ No 2830.

<sup>191</sup> *Ibid* at para 23, citing *R v Murrin*, [1997] BCJ No 3182 (QL) (BCSC).

year tenure as Attorney General, he went on to serve as the Commissioner of the Missing Women's Inquiry and to author of its final report: *For-saken*.<sup>192</sup> In either a dramatic coincidence or a startling indication of how thinly constituted the upper echelons of power and decision making are in a particular community, the voice of Wallace Oppal served as both the opening and closing acts in the state's institutional response to the Pickton circumstance.

The point, for the purposes of this discussion, is that the same government purse and the same cohort of political and legal decision makers established and administered both of these processes. In light of this, it seems reasonable to ask whether the Missing Women's Inquiry served any of the functions found to be lacking in the criminal justice response. The third reason it is important to observe what was not achieved by the *Pickton* prosecution is that identifying its limits provides parameters by which to evaluate the state's *other* institutional response to the Pickton circumstance.

Presumably, the Missing Women's Inquiry represents the final institutional or state sponsored process in response to the Pickton circumstance.<sup>193</sup> As noted in Part I, this article examining the criminal justice response to the missing and murdered women from the Downtown Eastside forms the first part of a two-article project. Drawing on the significant limits of the criminal justice response identified in this article, the second article will address the following questions: Under the Missing Women's Commission of Inquiry, does the drug-dependent sex-trade worker from the Downtown Eastside become a person of interest? Did the Missing Women's Inquiry produce a truth account capable of providing knowledge or restoring humanity to the murdered women? Did the family members of the murdered women experience the inquiry process as a performance of justice, and more importantly, will the Commission and its report offer

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<sup>192</sup> *Missing Women's Inquiry Vol I*, *supra* note 1; *Missing Women's Inquiry Vol II*, *supra* note 12. The entire report is available online: Missing Women Commission of Inquiry <[www.missingwomeninquiry.ca/obtain-report/](http://www.missingwomeninquiry.ca/obtain-report/)>.

<sup>193</sup> The families of four women whose remains were found on Pickton's property recently filed civil claims against the police, the provincial government and Robert Pickton. These are private law suits. Legal proceedings of this nature are not properly characterized as a state or state sponsored public response to the situation. See *Boen v British Columbia (Minister of Justice)*, Notice of Civil Claim in BCSC (7 May 2013); *De Vries v British Columbia (Minister of Justice)*, Notice of Civil Claim in BCSC (9 May 2013); *Marin v British Columbia (Minister of Justice)*, Notice of Civil Claim in BCSC (9 May 2013); *Mongovius v British Columbia (Minister of Justice)*, Notice of Civil Claim in BCSC (9 May 2013). See also James Keller, "Families of Four Missing Women Sue Robert Pickton, Police, Government" *Toronto Sun* (9 May 2013), online: <[www.thestar.com/news/canada/2013/05/09/families\\_of\\_four\\_missing\\_women\\_sue\\_robert\\_pickton\\_police\\_government.html](http://www.thestar.com/news/canada/2013/05/09/families_of_four_missing_women_sue_robert_pickton_police_government.html)>.

a transformative opportunity to realize the collective nature of the violence perpetuated against the murdered women?

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