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Risk's Relations: Dangerous Offender Decisions, Risk Assessment Tools, and State Accountability for Colonial Oppression

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See table of contents

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Article abstract

Sentencing law reveals a tension between judges acknowledging connections between colonialism, criminalization, and imprisonment and using individual sanctions, alone, to address what they identify as the social and institutional dimensions of conflict and harm. This article illuminates the limits of individualized sentencing as a response to colonial oppression by looking closely at judicial engagement with risk assessment tools in the context of "dangerous offender" proceedings. Judges are making progress by holding the state accountable for ensuring that risk assessment tools accurately predict an Indigenous offender's likelihood of being charged or convicted in the future and for implementing programs in prisons that provide Indigenous offenders with opportunities to change their risk scores. Judges are also acknowledging a well-established critique of these tools—the fact that they measure people's experiences of oppression for which the state ultimately bears at least some accountability. Unfortunately, even when judges acknowledge that risk is at least partially constructed and maintained by relations of power, there is no concrete outcome available to address such an acknowledgment. The dangerous offender regime requires judges to prioritize public protection through individual sanctions, alone. This analysis leads the author to suggest that some form of authority for sentencing judges to directly assess state accountability for conflict, harm, and their prevention might give rise to decisions that more clearly and fittingly identify how safety can be facilitated by not only individuals but also the state.

ARTICLE

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Sarah-jane Nussbaum

SENTENCING LAW REVEALS a tension between judges acknowledging connections between colonialism, criminalization, and imprisonment and using individual sanctions, alone, to address what they identify as the social and institutional dimensions of conflict and harm. This article illuminates the limits of individualized sentencing as a response to colonial oppression by looking closely at judicial engagement with risk assessment tools in the context of "dangerous offender" proceedings. Judges are making progress by holding the state accountable for ensuring that risk assessment tools accurately predict an Indigenous offender's likelihood of being charged or convicted in the future and for implementing programs in prisons that provide Indigenous offenders with opportunities to change their risk scores. Judges are also acknowledging a well-established critique of these tools—the fact that they measure people's experiences of oppression for which the state ultimately bears at least some accountability. Unfortunately, even when judges acknowledge that risk is at least partially constructed and maintained by relations of power, there is no concrete outcome available to address such an acknowledgment. The dangerous offender regime requires judges to prioritize public protection through individual sanctions, alone. This analysis leads the author to suggest that some form of authority for sentencing judges to directly assess state accountability

LE DROIT DES PEINES RÉVÈLE une tension entre la reconnaissance par les juges des liens entre le colonialisme, la criminalisation et l'emprisonnement et l'utilisation de sanctions individuelles, à elles seules, pour répondre à ce qu'ils et elles identifient comme les dimensions sociales et institutionnelles des conflits et des préjudices. Cet article met en lumière les limites des peines individualisées comme réponse à l'oppression coloniale en examinant de près l'engagement judiciaire à l'égard des outils d'évaluation du risque dans le contexte des procédures relatives aux « délinquants dangereux » et « délinquantes dangereuses ». Les juges réalisent des avancées en tenant l'État responsable de s'assurer que les outils d'évaluation du risque prédisent avec précision la probabilité qu'un délinquant ou délinquante autochtone soit inculpé ou condamné à l'avenir et de mettre en œuvre des programmes dans les prisons qui offrent aux délinquants et délinquantes autochtones la possibilité de modifier leur score de risque. Les juges reconnaissent également une critique bien établie de ces outils — le fait qu'ils mesurent les expériences des personnes de l'oppression pour laquelle l'État porte ultimement au moins une part de responsabilité. Malheureusement, même lorsque les juges reconnaissent que le risque est au moins partiellement conçu et maintenu par des relations de pouvoir, il n'y a pas de solution concrète disponible pour répondre à cette recon-

for conflict, harm, and their prevention might give rise to decisions that more clearly and fittingly identify how safety can be facilitated by not only individuals but also the state.

naissance. Le régime des délinquants dangereux et délinquantes dangereuses exige des juges qu'ils et elles donnent la priorité à la protection du public par le biais de sanctions individuelles, uniquement. Cette analyse amène l'autrice à suggérer qu'une certaine forme d'autorité permettant aux juges de déterminer directement la responsabilité de l'État pour des conflits, des dommages et leur prévention pourrait aboutir à des décisions qui identifient plus clairement et pertinemment la façon dont la sécurité peut être facilitée non seulement par les individus, mais aussi par l'État.

CONTENTS

Risk's Relations: Dangerous Offender Decisions, Risk Assessment Tools, and State Accountability for Colonial Oppression

Sarah-jane Nussbaum[*]

I. INTRODUCTION

In the context of sentencing, the Supreme Court of Canada has made important progress in acknowledging connections between colonialism, criminalization, and imprisonment.[1] Existing law provides space for sentencing judges to identify, and try to redress, the state's contributions towards Indigenous peoples' experiences with the settler government's imposition of laws, policies, and practices that maintain settler occupation

* Assistant Professor, Faculty of Law, University of New Brunswick. This article is adapted from my doctoral dissertation, which I wrote as a PhD candidate at Osgoode Hall Law School, York University. I am grateful to the members of my supervisory and examining committees—François Tanguay-Renaud, Benjamin Berger, Jennifer Nedelsky, Debra Parkes, Carmela Murdocca, and Jeffery Hewitt—for their invaluable feedback. I presented earlier versions of this article at the Melbourne-UNSW Doctoral Forum on Legal Theory in 2020, the Law & Society Association Global Meeting on Law & Society in 2022, the Autonomy and Criminal Law Workshop hosted by the Criminal Law Group, Department of Law, Gothenburg University in 2022, the uOttawa Public Law Centre Criminal Law Workshop in 2023, and the Canadian Law and Society Association's Annual Meeting in 2023. I am grateful to these events' organizers and participants. For helpful comments and conversations, I thank Vincent Chiao, Benjamin Ewing, Shushanna Harris, Aziz Huq, Danardo Jones, Lisa Kerr, Graham Mayeda, Sandra Mayson, Caitlin Murphy, Palma Paciocco, Sylvia Rich, Joshua Shaw, and Terry Skolnik. I am also grateful to the editorial team of this journal and to the anonymous peer reviewers for their excellent comments. I also gratefully acknowledge the financial support of the Social Sciences and Humanities Research Council of Canada Doctoral Fellowship, York University's Elia Scholarship Program and Susan Mann Dissertation Scholarship, Osgoode's Harley D. Hallett Scholarship, and the E.M. Culliton Scholarship administered by the Law Society of Saskatchewan.

1 See *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

of Indigenous lands and effort to control Indigenous peoples.[2] These laws, policies, and practices include oppressive means that interfere with Indigenous peoples' abilities to learn, exercise skills, engage with others, share, be heard, and otherwise live their lives.[3] The Supreme Court has explicitly linked colonialism, including ongoing land dispossession and the residential school system, with Indigenous peoples' experiences in, for example, education, healthcare, employment, and ultimately the criminal justice system.[4] Additionally, the Court has instructed judges to consider alternatives to imprisonment when sentencing Indigenous persons.[5] Such alternatives include sentencing methods and outcomes that are connected with Indigenous laws and Indigenous communities' perspectives and needs.[6] These developments are meant to contribute to an overarching goal of redressing the state's over-incarceration of Indigenous people,[7] but they are not without tensions. Even when judges identify colonialism's role in Indigenous peoples' experiences with the criminal justice system and related systems, judicial discourses have emphasized individual vulnerabilities, pathologies, and failures to the exclusion of the state's contemporary contributions towards socioeconomic, racial, and gender inequalities.[8] Additionally, despite the judicially acknowledged crisis of the high rates of imprisoned Indigenous persons, judges continue to use carceral sanctions.[9]

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2 See National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Vancouver: Privy Council Office, 2019) at 77.

3 See Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 38.

4 See *Ipeelee*, *supra* note 1 at para 60.

5 See *Gladue*, *supra* note 1 at paras 84, 92.

6 See Marie-Andrée Denis-Boileau, "The *Gladue* Analysis: Shedding Light on Appropriate Sentencing Procedures and Sanctions" (2021) 54:3 UBC L Rev 537 at 544–46.

7 See *Gladue*, *supra* note 1 at paras 47–48.

8 See generally Carmela Murdocca, "Ethics of Accountability: *Gladue*, Race, and the Limits of Reparative Justice" (2018) 30:3 CJWL 522; Toni Williams, "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does it Make?" in Emily Grabham et al, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Abingdon: Routledge-Cavendish, 2009) 79; Sarah-jane Nussbaum, "Bound by Blame: Sentencing, Colonialism, and Fetal Alcohol Spectrum Disorder" (2023) 39 Windsor YB Access Just 1.

9 See Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548. The language of "crisis" itself embeds a tension by bringing attention to a state failure but at the same time obscuring the fact that this failure is something that is ongoing and sustained by the state's ongoing practices of settler colonialism (see Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437 at 438–40). For an analysis of the ways in which the criminal justice system continues to uphold prison as a supposedly "necessary and normal" method for controlling

Scholarship in Canada has engaged with these tensions in various ways. For instance, some scholars have suggested that judges could better respond to the Supreme Court of Canada's call to resist sentencing processes and sanctions that are decontextualized, carceral, and unresponsive to Indigenous laws and perspectives.[10] It is possible, through existing law, for judges to remain focused on the individual offender appearing before the court and to account for colonialism by calibrating a punishment that reflects an individual's lessened culpability in the face of, for example, lesser reasons to comply with the authority of Canadian laws and diminished opportunities to construct and exercise their choices in ways that align with the law.[11] Another suggestion is that the law should change so that sentencers have the authority to undertake an independent analysis of the state's accountability for its harms and wrongdoings, such as maintaining inequalities and power imbalances that make it more likely for people to carry out criminalized conduct.[12] With this kind of approach, sentencers might be able to more clearly articulate the state's roles in systemic injustices and the actions that both individuals—and the state—ought to take to move towards more respectful relations.[13]

A small but growing body of scholarship reflects specifically on judicial engagement with colonial oppression in the context of the "dangerous offender" regime.[14] Dangerous offender designations provide judges with the authority to sentence an offender to indeterminate detention for the

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and reforming people, despite intimate links between the prison and colonialism see Vicki Chartrand, "Unsettled Times: Indigenous Incarceration and the Links between Colonialism and the Penitentiary in Canada" (2019) 61:3 Can J Corr 67 at 78.

10 See Denis-Boileau & Sylvestre, *supra* note 9 at 562, 585. For suggestions on practical implementation see also Denis-Boileau, *supra* note 6.

11 See Benjamin Ewing & Lisa Kerr, "Reconstructing *Gladue*" (2024) 74:2 UTLJ 156.

12 See Marie Manikis, "Recognising State Blame in Sentencing: A Communicative and Relational Framework" (2022) 81:2 Cambridge LJ 294 at 306, 308 [Manikis, "Recognising State Blame in Sentencing"].

13 *Ibid*.

14 See David Milward, "Locking Up Those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons" (2014) 51:3 Alberta L Rev 619; Nate Jackson, "The Substantive Application of *Gladue* in Dangerous Offender Proceedings: Reassessing Risk and Rehabilitation for Aboriginal Offenders" (2015) 20:1 Can Crim L Rev 77; Emily Lampron, *"Unmanageable Threats?" An Examination of the Canadian Dangerous Offender Designation as Applied to Indigenous People* (MA Thesis, University of Ottawa, 2022) [unpublished]; Mihael Cole, "Dangerous and Long-Term Offenders" in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 291 at 307–10. The dangerous offender regime is set out in the *Criminal Code*, RSC 1985, c C-46, Part XXIV.

purpose of "protect[ing] the public from a small group of persistent criminals with a propensity for committing violent crimes against the person."[15] Scholars have pointed out that judges tend to focus on the protection of the public without significantly considering an Indigenous offender's experiences with colonialism or community sanctions rooted in Indigenous traditions.[16]

Dangerous offender cases involve deeply troubling and harmful conduct—by definition, the criminalized conduct at issue involves sexual offences, violence, or endangerment of life in the context of serious offences such as murder.[17] When judges undertake dangerous offender designation hearings in relation to Indigenous offenders and Indigenous victims, they are faced not only with the systemic harms of the state's practice of imprisoning Indigenous people at high rates but also with the state's failure to protect Indigenous people, particularly Indigenous women, girls, and members of the 2SLGBTQIA+ community, from violence. The factual contexts of dangerous offender proceedings can raise quite starkly two key signifiers of the problems with Canada's criminal justice system. As Hadley Friedland explains:

> The most glaring statistics used to signal that something is very wrong in our criminal justice system related to Indigenous people is the high and ever-increasing rates of over-incarceration. However, equally disturbing are the stories and statistics that reveal the stark under-protection from victimization and the often-egregious treatment of victims and their families by a wide range of justice system actors.[18]

It is important for the state, including through the sentencing judge, to not only acknowledge but meaningfully respond to both of these harms.

This article explores the possibilities and challenges of redressing colonial oppression through sentencing within the particular context of dangerous offender proceedings involving criminalized Indigenous persons. In this area of the law, judges must take account of the settler colonial context and its links to violence and crime. At the same time, judges are ultimately tasked with the objective of protecting society through an individualistic

15 *R v Boutilier*, 2017 SCC 64 at para 3 [*Boutilier*].

16 See Milward, *supra* note 14; Jackson, *supra* note 14; Lampron, *supra* note 14.

17 See *Criminal Code*, *supra* note 14, s 752.

18 Hadley Friedland, "To Light a Candle: A Solution-Focused Approach Toward Transforming the Relationship Between Indigenous Legal Traditions and the Criminal Justice System" (2023) 56:1 UBC L Rev 69 at 71–72.

paradigm that treats Indigenous offenders as solely responsible for becoming "risky" in the first place and for eventually changing their likelihood of being charged or convicted of criminal offences in the future.

Through an analysis of several cases, this article shows that judges are holding the state accountable for developing risk assessment tools that enable more accurate predictions of an Indigenous offender's risk of being charged or convicted in the future and for implementing programs within prisons that provide Indigenous offenders with opportunities to change their risk scores. Judges are also acknowledging the fact that risk factors measure a person's experiences with oppression. However, judges seem to be less able to address state accountability for this feature of risk assessment. Predictions from risk assessment tools tell us about not only the individual and the kinds of changes that they might need to make in their lives in order to pursue safe relations with others but also the state's failures to redress experiences of inequality such as poverty and unequal access to education, employment, and healthcare. Even when judges identify these links, they do not have the authority or tools available to address them: judges can only address risk (even when understood as something that is constructed and maintained by relations of power) through individual sanctions. While it appears to be possible for judges to acknowledge that an individual may not be fully accountable for the risk they pose to others, there is no concrete outcome available to address such an acknowledgment. A lessened sanction for an individual, without a corresponding call for structural change, appears to be not only an unavailable legal option, but also an unsatisfying resolution when change is needed to contribute to safer communities. This analysis leads me to suggest that some form of authority for sentencing judges to hold the state accountable for its contributions to risk might help generate clearer explanations about what needs to be done to better prevent violence going forward.

This paper begins with an analysis of possibilities and challenges related to addressing colonial oppression in sentencing. Scholars working in criminal law and related fields have identified some of the ways sentencing law has developed to enable judges to account for the contexts in which Indigenous people live. This includes the consideration of the impacts of colonialism and of options for sentencing that are connected with Indigenous laws, perspectives, and community members' goals. Another line of scholarship suggests that judges could better address the state's roles in creating and maintaining wrongdoing and harm in offenders' lives if the law changed to allow them to separately hold the state itself accountable

for the wrongdoing and harms it has generated or allowed to sustain. The next part of the article brings these perspectives into the area of dangerous offender decisions. In these cases, judges lack the authority to fully engage with the colonial context of the risk that Indigenous offenders will re-encounter the criminal justice system. When judges must prioritize community safety, sentencing law's ultimate goal of only sanctioning an individual seems particularly problematic. Even if better community protection could eventually be achieved through systemic changes to the relationship between settler colonial law and Indigenous laws, and through support for housing, education, employment, and healthcare, judges cannot recommend those changes and must resort to carceral outcomes. In the conclusion, I propose that a promising avenue to explore in the dangerous offender context is the idea that the law could be changed to allow sentencing judges to hold the state accountable for its roles in sustaining colonial oppression.

II. ADDRESSING COLONIAL OPPRESSION IN SENTENCING: POSSIBILITIES AND CHALLENGES

A familiar feature of the criminal justice system is that it turns social problems into individual problems. People live in collective, institutional, historical, and political networks. Yet, when the criminal justice system encounters wrongdoing and harm, the system diminishes the significance of those contexts in an attempt to discipline and control the single individual deemed responsible.[19] As part of this approach, the law enables depictions of people that omit, or render unclear, the social dynamics contributing to people's actions and choices, particularly when those dynamics take the form of institutional failures to address inequalities affecting, for instance, people's experiences of poverty[20] and violence.[21]

The place where the criminal justice system presents itself as being the most open to meaningfully exploring an individual's social context is sentencing. For instance, through the principle of proportionality, sentencing

19 Laureen Snider, "Making Change in Neo-Liberal Times" in Gillian Balfour & Elizabeth Comack, eds, *Criminalizing Women: Gender and (In)Justice in Neo-Liberal Times* (Halifax: Fernwood Publishing, 2006) 323 at 323–24.

20 See Marie-Ève Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice" (2010) 55:4 McGill LJ 771.

21 See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 175–83.

law makes space for judges to consider gradations of an individual's level of responsibility.[22] Despite the fact that criminal law holds one guilty person fully accountable for their criminalized conduct, sentencing law recognizes that an individual's characteristics, the circumstances of their behaviour, and the social context in which they live may affect the extent to which they should be blamed.[23]

Within Canadian jurisprudence, the Supreme Court of Canada can also be regarded as developing a distinctive principle of individualized proportionality. As Benjamin Berger describes, this approach "draw[s] close to the offender, through and past questions of responsibility and blame, to reckon with the offender's experience of suffering as a consequence of wrongdoing."[24] Individualized proportionality focuses judicial attention on the question of what constitutes an appropriate sanction for the particular, contextualized individual appearing before the court. The principle tasks judges with crafting sanctions that consider an extensive range of factors that contribute to an individual's experiences of harm and suffering. As Berger explains, such factors include experiences with police violence and experiences of collateral consequences, such as immigration consequences, arising from an offence, conviction, or sentence.[25] A recent example is the judicial recognition that Black inmates' experience of inequality within the penitentiary system is relevant to the determination of a fit sentence.[26]

Another key conduit for judicial consideration of social context in sentencing is section 718.2(e) of the *Criminal Code*.[27] In *Gladue*, the Supreme Court of Canada interpreted this section as requiring judges, when sentencing Indigenous persons, to assess whether an individual's moral blameworthiness is lessened as a result of "unique systemic or background

22 See *Criminal Code*, *supra* note 14, s 718.1.

23 For an overview of the relationship between blame and proportionality, see Marie Manikis, "The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions" (2022) 59:3 Osgoode Hall LJ 587 at 596–600.

24 Benjamin L Berger, "Proportionality and the Experience of Punishment" in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 368 at 370.

25 *Ibid* at 372–75 (discussing police violence in *R v Nasogaluak*, 2010 SCC 6), 375–78 (discussing collateral consequences in *R v Pham*, 2013 SCC 15).

26 See Chris Rudnicki, "Confronting the Experience of Imprisonment in Sentencing: Lessons from the COVID-19 Jurisprudence" (2021) 99:3 Can Bar Rev 469 at 471 (discussing *R v Hearns*, 2020 ONSC 2365, and *R v Baptiste*, 2020 QCCQ 1813, on competing approaches to the relevance of prison conditions to sentencing in the context of the COVID-19 pandemic), 485–86 (discussing *R v Marfo*, 2020 ONSC 5663).

27 *Supra* note 14.

factors"[28] and to consider "[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection."[29]

The first step of the analysis asks judges to consider the ways in which an individual's moral blameworthiness might be lessened as a result of their experiences with systemic injustices. In *R v Ipeelee*, Justice LeBel explained that an Indigenous offender's experiences with systemic factors linked to colonialism, such as inequalities in access to education and employment, can diminish the level of moral blame that a judge ascribes to the person.[30] This step has the potential to ensure that judges' ascriptions of moral blameworthiness do not make Indigenous offenders fully blameworthy for experiences for which the state bears accountability.[31]

The second step of the analysis asks judges to consider the kinds of sentencing processes and sanctions that would appropriately address an individual's behaviour, given their Indigenous community's laws, practices, needs, and perspectives. In particular, Marie-Andrée Denis-Boileau articulates the relevant factors as follows:

> (1) the community's perspectives, needs and alternatives to incarceration; (2) the Aboriginal Perspective, which was interpreted as including the "laws, practices, customs and traditions of the group"; and (3) culturally sensitive, appropriate, and responsive sentences addressing the "underlying cause of the criminal conduct".[32]

This approach has the potential to support the self-determination of Indigenous communities and Nations and to lead to sentences that are more creative, meaningful, and healing.[33]

Sentencing law's claims that judges should consider an offender's degree of responsibility, an offender's experiences of harm and suffering, an Indigenous offender's experiences with systemic factors linked to colonialism, and Indigenous laws and perspectives show that the sentencing process should be attuned to the lived experiences and relational dimensions

28 *Gladue*, *supra* note 1 at paras 38, 66. See also *Ipeelee*, *supra* note 1 at paras 72–73.

29 *Gladue*, *supra* note 1 at para 66. See also *Ipeelee*, *supra* note 1 at paras 72, 74.

30 See *Ipeelee*, *supra* note 1 at paras 72–73. See also *Gladue*, *supra* note 1 at para 77.

31 See Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR (2d) 461 at 473–74 [Sylvestre, "The (Re)Discovery of the Proportionality Principle"].

32 Denis-Boileau, *supra* note 6 at 539–40.

33 *Ibid* at 559.

of the individuals appearing before the courts. An ongoing question is whether these kinds of approaches enable judges to (adequately) address the state's own roles in creating and maintaining colonial oppression.

In the context of sentencing decisions involving Indigenous people, some scholars have suggested that it is possible that the existing jurisprudence could, if carefully and thoughtfully applied, allow judges to conduct a sentencing analysis that meaningfully accounts for the state's own wrongdoings and harms that it has carried out on Indigenous individuals, communities, and Nations. For instance, following *Ipeelee*, Marie-Ève Sylvestre expressed optimism about the possibility that judges could move towards assessing state responsibility in sentencing.[34] As summarized by Sylvestre, the Supreme Court of Canada's analysis in *Ipeelee* involved a consideration of "the role of the criminal justice system itself, as well as that of the state more generally, in violating fundamental human rights and creating conditions of social and economic deprivation that may create conflicts that are criminalized."[35] Relatedly, Carmela Murdocca has suggested that the Supreme Court of Canada's approach to section 718.2(e) could be used to support not only judicial inquiry into "Indigenous subjection in settler colonialism" but also judicial inquiry into Indigenous individuals' personal, lived experiences with the various parts of the criminal process and with other systems such as healthcare, educational, and social-service systems.[36] A key element of this approach is the emphasis placed on turning the judicial gaze towards the harms and wrongdoings caused by the criminal justice system, other state systems, and state actors themselves. As Murdocca notes, "[i]f *Gladue* reports become an archive of Indigenous peoples' treatment in the criminal justice and other governmental systems, what action might it inspire and require on the part of citizens and government officials?"[37]

Recently, Sylvestre, along with Denis-Boileau, engaged further with an interpretation of *Ipeelee* as inviting judges to resist "excessive sentences," "the overrepresentation of Indigenous people in the criminal justice system," and the idea that there is just one, state-centred, legal institution.[38] Instead, *Ipeelee* encourages judges to pursue sentencing processes and

34 See Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing", *supra* note 31 at 473–74.

35 *Ibid* at 475.

36 Murdocca, *supra* note 8 at 541–42.

37 *Ibid* at 542.

38 Denis-Boileau & Sylvestre, *supra* note 9 at 553.

sanctions that are decarceral and that incorporate Indigenous laws and perspectives.[39] While Sylvestre and Denis-Boileau found that most judges have not pursued this path, they propose that this would not have to be the case: the "resistance could be overcome, in part, by supporting the efforts by certain creative judges, as well as those by Indigenous communities involved in the revitalization of their legal orders, allowing Indigenous peoples to manage the conflicts afflicting them and better coordinate these efforts with the justice system."[40]

It is also possible that the second part of a section 718.2(e) analysis—the consideration of alternatives to imprisonment—could serve as a channel for the state to recognize its compromised authority over Indigenous offenders in the context of what the *Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* describes as "a continuous policy, with shifting expressed motives but an ultimately steady intention, to destroy Indigenous peoples physically, biologically, and as social units."[41] In particular, by taking up restorative justice approaches under section 718.2(e), it is possible that judges can acknowledge and respond to the state's own compromised authority by enabling the sentencing process to move away from the state's practice of blaming an offender and towards a practice of supporting Indigenous-led efforts to restore relations between community members after an experience of harm and wrongdoing.[42]

These approaches, taken together, suggest that sentencing judges can address, and redress, the state's roles in creating and maintaining colonial oppression. Judges can do so by undertaking a sentencing analysis that identifies state wrongdoing and harm, recognizes and applies Indigenous laws, and takes into account the perspectives of multiple members of Indigenous communities. The approaches suggest that the sentencing analysis ought to be one that places an offender's responsibility and blameworthiness in context. The analysis ought to be sensitive to the ways in which the state has contributed to a person's experiences with the criminal justice system by limiting their support in domains such as education, healthcare, and the legal system, and by limiting their opportunities to interact with others in safe, non-violent ways. The analysis ought to

39 *Ibid* at 552–53.

40 *Ibid* at 554–55.

41 National Inquiry into Missing and Murdered Indigenous Women and Girls, *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Vancouver: Privy Council Office, 2019) at 24.

42 See Ewing & Kerr, *supra* note 11 at 27–29.

recognize that these systems are part of Canada's colonial past, including policies to eliminate and assimilate Indigenous peoples, and Canada's colonial present, including ongoing land dispossession. As well, judges ought to craft sanctions in ways that show regard for relevant Indigenous laws and community perspectives and needs, rather than relying on settler colonial carceral institutions.

The authors' insights into proportionality and section 718.2(e) show that sentencing can take account of state wrongdoing and harm, multiple legal systems, and the effectiveness of sentences without departing from its fundamental role of sanctioning an individual. The above analyses suggest that judges have the authority to—and indeed, ought to—identify ways in which the state has furthered systemic colonial injustices. Judges ought to remedy those injustices by factoring them into their assessments of an individual's level of blameworthiness and into the development of sentencing processes and outcomes that move away from settler colonial carceral systems and sanctions. At the same time, the above approaches do not seem to challenge the idea that judges cannot apportion liability for the criminal offence itself between the offender and the state. The Ontario Court of Appeal recently explained this limit in *R v Morris*,[43] when addressing sentencing principles in the context of anti-Black racism. The Court, comprised of Justices Fairburn, Doherty, Juriansz, Tulloch (as he then was), and Paciocco, rejected the argument that "the allocation of responsibility for the offender's crime, as between society at large and the offender, would become an objective of sentencing."[44] The Court noted that this objective is not located in section 718 of the *Criminal Code* and that there is no appellate case law "recognizing the allocation of societal fault as an objective of sentencing."[45] Yet the Court also stated it "accept[s] wholeheartedly that sentencing judges must acknowledge societal complicity in systemic racism and be alert to the possibility that the sentencing process itself may foster that complicity."[46] This latter passage seems to recognize that existing legal principles require judges to consider the state's and society's own forms of wrongdoing and harm when determining a fit sentence for an individual.[47] However, existing sentencing principles do not go so far as to permit judges to ascertain whether the state itself, or

43 2021 ONCA 680 at para 13.

44 *Ibid* at para 83.

45 *Ibid*.

46 *Ibid* at para 86.

47 See Ewing & Kerr, *supra* note 11 at 28.

society, should be held accountable through the criminal justice process or sanctioned in some way. This overall approach fits comfortably with the criminal justice system's familiar goal of imposing criminal responsibility on individuals, without distributing responsibility between individuals or between individuals and the state.

Emerging scholarship by Marie Manikis has proposed that sentencers could better engage with the state's roles in creating and maintaining wrongdoing and harm in offenders' lives if sentencers were permitted to explicitly and separately hold the state itself accountable for the wrongdoing and harms it has generated or sustained.[48] Under this approach, responsibility is relational in the sense that the state can hold to account and blame both an individual person and the state itself for wrongdoing and harm. Responsibility is also communicative in the sense that punishment ought to involve a communicated response to the wrongdoing and harm. If sentencing judges were allowed to address the responsibility of both an individual offender and the state for the criminalized conduct that occurred in a given case, sentencing judges could show more respect to the offender by acknowledging that the state must also take accountability for its own wrongdoing and harm. An independent analysis of state harm and wrongdoing would also help ensure that the state's own wrongdoings and harms do not "remain hidden, misunderstood or in part wrongly attributed."[49] Manikis specifically proposes that sentencers should be permitted to distinguish between various types of state wrongdoings and harms, such as the state's participation in creating and maintaining social inequalities, the state's contribution to creating and carrying out criminal law policies and practices that adversely impact marginalized people, the state's contribution to creating harms arising from a sentence, and state actors' conduct that violates human rights.[50] Sentencers would then share a message about these forms of wrongdoing and harm through the sentencing process by, for example, reducing a sentence, identifying institutional contributions to discrimination, proposing measures to reduce inequality, recognizing that consultation with community members is necessary to arrive at a fit sentence, proposing programs that a correctional centre should implement, recognizing the need for the state to facilitate community-based programs or services, or recognizing the jurisdiction of another sentencing body.[51] Sylvestre has proposed a similar idea: criminal

48 See Manikis, "Recognising State Blame in Sentencing", *supra* note 12 at 317–18.

49 *Ibid* at 307.

50 *Ibid* at 307–16.

51 *Ibid* at 320–21.

law practitioners (including judges and prosecutors) and community-based practitioners could take on roles similar to coroners—they could, for example, make recommendations for structural changes (such as recommendations for access to housing, healthcare, and family support) and for bringing societal attention to inequality.[52] This kind of proposal would involve not only the introduction of new types of recommendations that sentencers could make but also an expansion of the range of people involved in sentencing. To try to encourage continued dialogue and state accountability for implementing proposed changes, Manikis suggests that the state could also implement a review process to "allow for a responsive dialogue between citizens and the state."[53]

A move towards explicit identification of state accountability in sentencing might have the benefit of giving clearer authority to judges to engage with the state's contributions to the inequalities within, and beyond, the criminal justice system. Particularly in the case of Indigenous offenders, judges are already supposed to calibrate an offender's blameworthiness by contemplating the ways in which colonialism has contributed to the offender's behaviour. One challenge with the existing legal framework is that if a judge diminishes an offender's blameworthiness in light of colonial oppression, the judge is then left in the potentially troubling situation of responding to a victim's experience of harm and suffering through a sentence that acknowledges only limited responsibility and blame. Without a clear mechanism to hold the state itself to account for colonialism, it is possible that responsibility and blame for the intergenerational harms and traumas of colonialism end up resting in unknowable places or with supposed pathologies of Indigenous persons,[54] including either offenders themselves or perhaps others with whom they have personal relationships, such as their mothers.[55]

Ultimately, both sets of perspectives—engaging with state accountability within the existing sentencing structure or within a new structure—seem to have similar aims of finding paths for judges to respond to criminalized conduct by being precise about the ways in which an individual is, and is not, responsible and blameworthy for an offence, and by being thoughtful about what kinds of sanctions will actually be effective in addressing the

52 See Department of Justice Canada, "*Moving Towards a Minimalist and Transformative Criminal Justice System*": *Essay on the Reform of the Objectives and Principles of Sentencing*, by Marie-Ève Sylvestre, Catalogue No J22-29/2017E-PDF (Ottawa: DOJ, 2016) at 20–21.

53 Manikis, "Recognizing State Blame in Sentencing", *supra* note 12 at 318.

54 See Murdocca, *supra* note 8; Williams, *supra* note 8.

55 See Nussbaum, *supra* note 8.

criminalized conduct. Both sets of perspectives give serious consideration to the fact that criminalized conduct and the phases of the criminal justice process do not take place in a vacuum but instead involve interactions nested within power relations. The proposal to hold the state explicitly and separately accountable through sentencing takes a more radical approach by moving away from the criminal justice system's fundamental goal of dealing with harm and wrongdoing by sanctioning individuals alone. This kind of shift might not only face significant opposition but also major challenges and limits in implementation. For example, even if judges did receive authority to hold the state itself accountable for fostering inequalities that contribute to criminalized conduct, and then required the state to address these inequalities by, for instance, improving education and the availability of safe housing, it is not clear that the other relevant systems would follow through on implementing such change.

One of the most important ways in which the state must take accountability for both the high rates of imprisonment and victimization of Indigenous people is through a transformation of the criminal justice system's relationship with Indigenous law.[56] Friedland has recently engaged with the "crisis in legitimacy for both the Canadian criminal justice system and within Indigenous legal orders."[57] In particular, "Canadian law's legitimacy is in question as long as it can continue to be reasonably viewed as a tool of oppression that causes disorder for Indigenous peoples."[58] At the same time, "Indigenous laws' legitimacy is eroded when authoritative decision makers are undermined or ignored and their principled decisions are rendered ineffectual, especially in exigent circumstances when force is needed to ensure individual and community safety."[59] Friedland proposes that the criminal law's relationship with Indigenous laws can be improved through strategies that include addressing the limited visibility of, and settler colonial assumptions about, Indigenous laws;[60] focusing on the core principles of a criminal justice system that must "address the need for safety given the unavoidable realities of our human condition,

56 See Friedland, *supra* note 18 at 70, citing Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015) at 181–82.

57 Friedland, *supra* note 18 at 90.

58 *Ibid*.

59 *Ibid*.

60 *Ibid* at 93–98.

which includes vulnerability and violence";[61] separating principles (such as deterrence) from practices (such as imprisonment);[62] showing deference "to Indigenous jurisdiction and justice program decisions when possible";[63] and "[s]eek[ing] guidance and support from urban Indigenous organizations when possible."[64]

A mechanism to enable judges to hold the state itself accountable for its failures (including, for example, failures to redress socioeconomic inequality and to recognize the legitimacy of Indigenous legal methods for preventing and responding to harm and wrongdoing) might contribute to increased judicial engagement not only with state services that could provide support to Indigenous communities but also with Indigenous law. At the same time, such a mechanism might simply reinscribe the same colonial practice of making recommendations without deference to Indigenous jurisdiction, voices, and decisions and without movement towards actual change.

The next part of this article will bring these conversations about sentencing and state accountability for its roles in colonialism into the context of dangerous offender proceedings. The dangerous offender context is distinct because judges are mandated to prioritize community safety. This involves an assessment of the risk that the offender will come into contact with the criminal justice system again in the future. I look at the ways in which judges are engaging with links between risk and colonial oppression within dangerous offender proceedings. I also illustrate the limited space available to judges in the current system for accounting for the steps that the state would need to take to foster meaningful change in the form of moving towards safe, respectful relations between people.

III. ADDRESSING COLONIAL OPPRESSION IN DANGEROUS OFFENDER PROCEEDINGS

The *Criminal Code*'s dangerous offender regime provides the authority for judges to sentence an offender to indeterminate detention.[65] The purpose of this type of sentence is to "protect the public from a small group of persistent criminals with a propensity for committing violent crimes

61 *Ibid* at 98. See also *ibid* at 98–101.

62 *Ibid* at 101–02.

63 *Ibid* at 93. See also *ibid* at 102–04.

64 *Ibid* at 93. See also *ibid* at 104–05.

65 *Supra* note 14, Part XXIV. See especially ss 753(4), 753(4.1).

against the person."[66] The regime "is neither punitive nor reformative but primarily [consists of] segregation from society"[67] and constitutes a "preventive sanction [that] can be imposed only upon offenders for whom segregation from society is a rational means to achieve the overriding purpose of public safety."[68]

A dangerous offender designation application involves a two-step process.[69] First, the Crown must establish that an offender was convicted of "a serious personal injury offence."[70] Offences that count as serious personal injury offences for this purpose are defined in the *Criminal Code* as falling under the following two categories:

> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
> (i) the use or attempted use of violence against another person, or
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (b) an offence or attempt to commit … (sexual assault), … (sexual assault with a weapon, threats to a third party or causing bodily harm) … or … (aggravated sexual assault) ….[71]

Second, the Crown must demonstrate dangerousness resulting either from violent behaviour or from sexual behaviour.[72] With respect to violent behaviour, the Crown must show that "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons."[73] The threat must be established on the basis of the offender showing "one of … three violent patterns … of conduct"[74] by "showing a failure to restrain his or her behaviour,"[75] "showing a substantial degree of indifference … respecting the

66 *Boutilier*, *supra* note 15 at para 3.
67 *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: Privy Office Council, 1938) (Joseph Archambault) at 223, cited in *Boutilier*, *supra* note 15 at para 33.
68 *Boutilier*, *supra* note 15 at para 33.
69 *Ibid* at paras 13–18.
70 *Criminal Code*, *supra* note 14, ss 753(1)(a), 753(1)(b).
71 *Ibid*, s 752.
72 See *Boutilier*, *supra* note 15 at para 16.
73 *Criminal Code*, *supra* note 14, ss 753(1)(a).
74 *Boutilier*, *supra* note 15 at para 18.
75 *Criminal Code*, *supra* note 14, s 753(1)(a)(i).

reasonably foreseeable consequences to the persons of his or her behaviour,"[76] or being someone whose "behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint."[77] With respect to dangerousness on the basis of sexual behaviour, the *Criminal Code* refers to a person who "has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses."[78] If a judge decides to designate an offender as a dangerous offender, the judge then decides on the appropriate sentence.[79]

The Supreme Court of Canada has emphasized that, in order to be designated as a dangerous offender, a person must be highly likely to reoffend and their violent behaviour must be intractable. As Justice Côté stated in *Boutilier*, "a sentencing judge must…be satisfied on the evidence that the offender poses a high likelihood of harmful recidivism and that his or her conduct is intractable. I understand 'intractable' conduct as meaning behaviour that the offender is unable to surmount."[80]

Risk assessments are central to judicial determinations of an offender's likelihood of reoffending and the intractability of their violent behaviour.[81] Additionally, considerations relating to risk management (through treatment) play an important role in dangerous offender proceedings. In *Boutilier*, Justice Côté explained that "treatability" plays different roles at the "designation stage" (that is, determining whether someone should be designated as a dangerous offender) and the "penalty stage" (that is, the stage of determining a fit sentence): "At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the penalty stage, it helps determine the appropriate sentence to manage this threat."[82]

While predicting and managing risk of future violent behaviour is the central goal of the dangerous offender regime, judges are still required to account for section 718.2(e) of the *Criminal Code*. As noted above, this provision requires judges, when sentencing Indigenous persons, to consider alternatives to imprisonment and to assess whether an individual's moral blameworthiness is lessened as a result of "unique systemic or background

76 *Ibid*, s 753(1)(a)(ii).
77 *Ibid*, s 753(1)(a)(iii).
78 *Ibid*, s 753(1)(b).
79 *Ibid*, s 753(4).
80 *Boutilier*, *supra* note 15 at para 27.
81 See *R v Awasis*, 2020 BCCA 23 at para 70 [*Awasis*].
82 *Boutilier*, *supra* note 15 at para 45.

factors."[83] Provincial appellate courts have held that section 718.2(e) and the case law interpreting the provision continue to apply in dangerous offender proceedings. For instance, in *R v Awasis*, Justice Fisher stated, "[i]t is beyond dispute that judges have a duty to consider *Gladue* factors in determining a just and appropriate sentence in *any* case involving an Aboriginal offender, including dangerous and long-term offender proceedings."[84] Similarly, in *Natomagan*, which I will address in more detail below, the Alberta Court of Appeal held that "*Gladue* and *Ipeelee* explain how [the experience of Indigenous persons] may affect the court's assessment of the offender's moral blameworthiness. In the dangerous offender context, the experience of Indigenous Canadians is relevant to understanding the offender's past and to the accuracy of predictions about his future."[85]

In the upcoming sections, I provide an overview of the risk assessment and management model that plays a key role in dangerous offender proceedings. As part of this overview, I also summarize a well-established critique of these tools. The critique takes issue with the tools' practice of measuring experiences of oppression for which the state ultimately bears at least some accountability. I then explore how some judges have engaged with colonial oppression in dangerous offender proceedings involving Indigenous offenders. I have identified instances of judicial sensitivity to connections between colonialism and risk assessment. At the same time, judges seem to struggle to craft sentences that are responsive to such connections. This challenge relates to the legal requirements of the dangerous offender regime—and sentencing more broadly. Judges must ultimately pursue public safety through sanctions they impose on individual offenders. Judges do not, by comparison, have the authority to hold the state accountable for its role in developing and sustaining conditions of inequality that contribute to conflict and harm—and for any potential role that it could play in improving those structural conditions in the future.[86]

83 *Gladue*, *supra* note 1 at paras 38, 66. See also *Ipeelee*, *supra* note 1 at para 73.

84 *Awasis*, *supra* note 81 at para 122, citing *Ipeelee*, *supra* note 1 at para 87, *Boutilier*, *supra* note 15 at paras 53–54, 63, *R v Shanoss*, 2019 BCCA 249 at para 24, and *R v Fontaine*, 2014 BCCA 1 at para 33.

85 *R v Natomagan*, 2022 ABCA 48 [*Natomagan ABCA*] at para 92, rev'g 2019 ABQB 943 [*Natomagan ABQB*], leave to appeal to SCC refused, 40355 (2 March 2023).

86 For instance, in 2000, Deputy Justice Minister John Whyte of Saskatchewan was quoted in "Sask. Appeal Court Looking at Criminal Cases Involving Fetal Alcohol Syndrome", *Canada.com News* (28 September 2000), online: <come-over.to/FAS/Sask3.htm> ("[w]e don't believe that judges in sentencing should prescribe specific program responses when that requires the creation of a new program…The social problems they want us to deal with are ones that undoubtedly need dealing with. But there comes a point when they give

These limitations pose particular issues in the dangerous offender context, where the protection of the public takes on heightened significance. When judges must focus on protecting the public, there is very limited space for experiences with colonial oppression to have a meaningful impact. Even if judges recognize that the state's role in maintaining colonial oppression contributes to an offender's scores on risk assessment tools, judges cannot account for that oppression if doing so would pose a risk to the public. As a result, judges can only prevent immediate risk through the immediate sentencing options available to them and cannot propose broader changes to redress the oppression that contributes to risk in general.

A. Risk Assessment and Management in the Canadian Criminal Justice System

In a general sense, a risk framework aims to identify when a person may pose a risk of harm in the future and to identify, and implement, steps to prevent that harm from arising.[87] Risk assessment strives to determine the likelihood that an offender will be charged with, or convicted of, another criminal offence in the future. As a result, risk assessment is probabilistic in nature: risk assessment generates predictions of future behaviour and potential consequences resulting from that behaviour. Risk assessment therefore tells us not about a particular individual, but about what has happened to a group of people in circumstances similar to a given individual. Risk management involves the state's attempts to manage, or control, people labelled as dangerous or risky. The state may manage people who are labelled as dangerous or risky through preventive measures including control, separation, the restriction of an individual's liberty, and the offering of treatment.

The dominant model of risk assessment and management in Canadian criminal justice practices is called the Risk-Need-Responsivity Model of Offender Assessment and Treatment.[88] It was formally introduced in

orders which require executive government to make expenditure decisions, design decisions, policy and regulatory decisions which we haven't yet made, and courts don't have that authority over government").

87 A risk framework purports to serve the state's objective of managing groups of people by identifying, and classifying together, people who pose a risk of harm to others. See Malcolm M Feeley & Jonathan Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and its Implications" (1992) 30:4 Criminology 449.

88 See Guy Bourgon et al, "Offender Risk Assessment Practices Vary Across Canada" (2018) 60:2 Can J Corr 167.

1990 by DA Andrews, James Bonta, and RD Hoge,[89] and it is rooted in the General Personality Cognitive Social Learning (GPCSL) perspective of criminal behaviour.[90] Bonta and Andrews explain that a psychology theory of criminal conduct seeks "to assist in predicting who will or will not commit crimes in the future and suggest deliberate interventions that will reduce future crime."[91] The theory thus purports to have implications for both risk assessment and risk management, in that it aims to both predict future criminal charges or convictions and reduce their occurrence. Given these sought after effects, the GPCSL theory claims to have a "practical goal"—"the rehabilitation of justice-involved persons."[92] Bonta and Andrews explain that, "[b]y focusing on the causal variables suggested by theory, we have the potential to influence criminal activity through deliberate interventions."[93]

Andrews, Bonta, and Hoge introduced the Risk-Need-Responsivity Model in a context where risk assessment practices were previously dominated by professional discretion and by attention to unchangeable risk factors, such as a person's criminal record. In particular, the first generation of risk assessment, which governed in the early to mid-1900s, involved professional judgment.[94] Under this model, clinicians and correctional staff assess the level of risk posed by offenders and determine which individuals need "enhanced security or supervision."[95] Between 1970 and 1980, researchers developed second generation risk assessment instruments, which involve the use of evidence-based instruments—specifically, actuarial risk assessment instruments.[96] These instruments purport to predict behaviour by linking particular factors, such as past convictions and past substance use, with future criminal charges and convictions.[97] The more risk factors an individual has, the riskier the assessment finds them to be.

89 See DA Andrews, James Bonta & RD Hoge, "Classification for Effective Rehabilitation: Rediscovering Psychology" (1990) 17:1 Crim Justice and Behavior 19. See also Public Safety Canada, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, by James Bonta & DA Andrews (Ottawa: PSC, June 2007) at 1 [Bonta & Andrews, "Risk-Need-Responsivity Model"].

90 See James Bonta & DA Andrews, *The Psychology of Criminal Conduct*, 7th ed (New York: Routledge, 2024) at 35 [Bonta & Andrews, *Psychology of Criminal Conduct*].

91 *Ibid* at 3.

92 *Ibid* at 35.

93 *Ibid*.

94 Bonta & Andrews, "Risk-Need-Responsivity Model", *supra* note 89 at 3.

95 *Ibid*.

96 *Ibid*.

97 *Ibid*.

While studies showed that these tools were better at predicting risk than professional judgment, concerns arose due to their lack of being grounded in a theory and due to their historical or static nature—the factors can never change.[98] For example, if someone received a conviction once before, their fulfillment of that risk factor will always make them riskier than if they had never been convicted.

The third generation of risk assessment draws on the Risk-Need-Responsivity Model. In particular, third generation actuarial risk assessment instruments incorporate dynamic risk factors.[99] Dynamic risk factors (also known as criminogenic needs) are regarded as changeable factors, including, for example, "present employment," "criminal friends," and "family relationships."[100]

The GPCSL perspective, which is the theory upon which the Risk-Need-Responsivity Model is based, identifies eight "central" risk/need factors.[101] One of these factors is static: "Criminal History."[102] The others are dynamic: "Procriminal Attitudes," "Procriminal Associates," "Antisocial Personality Pattern," "Family/Marital," "School/Work," "Substance Abuse," and "Leisure/Recreation."[103] For each factor, the theory includes a "strength" and a "[d]ynamic need and promising intermediate targets of change."[104] For example, with respect to antisocial personality pattern, the theory indicates that this factor is a strength in an individual who demonstrates "[h]igh self-control and good problem-solving skills" and that the factor's dynamic needs/promising targets of change include "increas[ing] self-management skills, build[ing] empathy, anger management and improv[ing] problem-solving skills."[105]

As part of its practice of identifying central risk/need factors, the Risk-Need-Responsivity Model involves a number of guiding principles. For example, the model separates itself from criminal law principles of "deterrence, restoration, just desert, and due process," instead resting upon the claim that "[i]t is through human, clinical, and social services that the major causes of crime may be addressed."[106] Through this principle,

98 *Ibid* at 3–4.
99 *Ibid* at 4.
100 *Ibid*.
101 See Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 90 at 44.
102 *Ibid* at 45–46, Table 3.1.
103 *Ibid*.
104 *Ibid*.
105 *Ibid*.
106 *Ibid* at 188–89.

the Risk-Need-Responsivity Model moves from the territory of aiming to predict criminalized behaviour towards the domain of trying to treat the causes of criminalized behaviour.

The model's guiding principles also include risk, need, and responsivity principles. The risk principle includes two features: (1) the claim "that criminal behavior can be predicted" and (2) "the idea of matching levels of treatment services to the risk level of the client."[107] With respect to matching treatment to risk level, the model provides that "higher-risk clients need more intensive and breadth of services."[108] Through the need principle, the model distinguishes between criminogenic and non-criminogenic needs. As mentioned above, criminogenic needs are dynamic risk factors—they are "risk factors that, when changed, are associated with changes in the probability of recidivism."[109] With respect to the model's responsivity principles, these principles include both general and specific responsivity. According to the general responsivity principle, "social learning interventions are the most effective way to teach people new behaviours regardless of the type of behaviour,"[110] and according to the specific responsivity principle, treatment practices should "consider [and be tailored to] personal strengths and socio-biological-personality factors."[111]

Fourth generation risk assessment "emphasize[s] the link between assessment and case management."[112] Fourth generation risk assessment thus capitalizes on the Risk-Need-Responsivity Model's claim that treatment should be matched to an individual's risk level. In particular, the model provides that programs should treat high-risk individuals. Fourth generation tools pursue this goal by including an assessment of the "[c]entral [e]ight risk/need factors" along with specific responsivity issues and specific risk and need factors.[113] Specific responsivity issues include considerations such as an individual's motivation and intelligence level.[114] Specific risk and need factors relate to particular types of offences. For example, "a person involved in family violence would be queried about

107 *Ibid* at 189.

108 *Ibid*.

109 *Ibid* at 190.

110 Bonta & Andrews, "Risk-Need-Responsivity Model", *supra* note 89 at 5.

111 *Ibid* at 7.

112 Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 90 at 210.

113 *Ibid*.

114 *Ibid* at 211–12, Table 10.4, "A Brief Sampling of the Level of Service/Case Management Inventory™ (LS/CMI™)".

intimidating and stalking behavior."[115] Additionally, fourth generation tools integrate assessment and case management by indicating that practitioners "must prioritize criminogenic needs, engage the person in setting concrete targets for change, and choose a means to reach these goals" and by including a progress record for the individual being assessed and treated.[116]

Risk assessment instruments can also vary in terms of the amount of professional discretion that is applied in conjunction with a tool. Some tools are "purely actuarial."[117] Based on the data upon which the tool is built, purely actuarial instruments produce a risk score for the person being assessed. By comparison, some instruments involve "structured professional judgement."[118] These tools "consist of items drawn from the general literature rather than a specific data sample."[119] Additionally, "the overall assessment of risk is left to the professional's judgment and not a mechanistic formula."[120]

A key feature of contemporary risk assessment tools is their reliance on the idea that preventing harm depends upon individuals choosing to change certain behaviours. This concept of individual choice is central to dynamic risk factors, and to be sure, it has some valuable dimensions. In particular, the Risk-Need-Responsivity Model's emphasis on the potential for people to change recognizes, importantly, that people have the capacity to author their own lives. Significantly, Bonta and Andrews developed the model in response to the "nothing works" perspective—the claim, prominent in the 1970s, that "nothing works" to rehabilitate criminal offenders.[121] Instead, the Risk-Need-Responsivity Model asks clinicians and criminal justice practitioners to see individuals whom the state has criminalized in the past as individuals who may be able to change their behaviours in the future, not as inevitable reoffenders. The model thus recognizes that no individual is reducible to a single behaviour, experience, or identity.

Despite the value of viewing individuals as capable of change, risk assessment literature and instruments render this portrayal of people

115 *Ibid* at 210.

116 *Ibid* at 213, discussing the LS/CMI.

117 Public Safety Canada, *The Prediction of Risk for Mentally Disordered Offenders: A Quantitative Synthesis* by James Bonta, Julie Blais & Holly A Wilson (2013) at 4.

118 *Ibid*.

119 *Ibid*.

120 *Ibid*, citing Kirk Heilbrun, Kento Yasahura & Sanjay Shah, "Violence Risk Assessment Tools: Overview and Critical Analysis" in Randy K Douglas & Kevin S Otto, eds, *Handbook of Violence Risk Assessment* (New York: Routledge, 2010) 1.

121 See Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 90 at 240–43.

in a way that relies upon the problematic assumption that it is only an individual who needs to change, not also, or alternatively, society or the state.[122] As Stephen Wong and Audrey Gordon explain, dynamic risk factors are "changeable or potentially changeable factors that can be influenced or changed by psychological, social, or physiological means, such as treatment interventions."[123] Such factors are necessarily limited to those that can be targeted on an individual level.[124] As Kelly Hannah-Moffat explains, cognitive behavioural programs, which comprise the bedrock of custodial programming designed to reduce an individual's risk, only target "manageable" problems—problems that can change through individual changes in behaviour and lifestyle.[125] By constructing offenders as rational decision makers who have exercised poor judgment in the past and can exercise better judgment in the future, these programs "leave…intact the presumption that crime is the outcome of poor choices or decisions, and not the outcome of structural inequalities or pathology."[126] Through a focus on individual transformation, risk factors make individuals responsible for experiences that may not be their fault:[127] "[s]ystemic problems become individual problems or, more aptly, individuals' inadequacies."[128] Dynamic risk factors obscure the actions of state actors in policing, confining, and

122 See Jessica M Eaglin, "Technologically Distorted Conceptions of Punishment" (2019) 97:2 Wash U L Rev 483 at 507, citing Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016) at 31: "risk tools…grew from a larger initiative to address the sociohistorical conditions that produce crime through a one-sided approach focused on controlling the individual's behavior rather than simultaneously addressing social conditions in society."

123 Stephen CP Wong & Audrey Gordon, "The Validity and Reliability of the Violence Risk Scale: A Treatment-Friendly Violence Risk Assessment Tool" (2006) 12:3 Psychol Pub Pol'y & L 279 at 283.

124 See Kelly Hannah-Moffat, "Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty" (2005) 7:1 Punishment & Society 29 at 39, 43 [Hannah-Moffat, "Transformative Risk Subject"].

125 *Ibid* at 34, 41–43.

126 *Ibid* at 41–42.

127 *Ibid* at 42.

128 *Ibid* at 43. See also Rachel Fayter, "Social Justice Praxis within the Walls to Bridges Program: Pedagogy of Oppressed Federally Sentenced Women" (2016) 25:2 J Prisoners on Prison 56 at 60–61: "[T]he underlying structural oppressions—which form the basis of our needs—are ignored…CSC program facilitators inform us that we always have a choice, even if that choice means starving, being homeless or dying. We are told these choices are always preferable to committing a crime."

marginalizing certain populations and in failing to provide resources and supports. The framework leaves little space for an analysis of the state's own role in contributing to people's unequal contact with the criminal justice system.

The process of making individuals responsible for experiences with colonial oppression can be illustrated by the factor of procriminal associates. Patricia Monture-Angus writes that "scoring higher…is predetermined for Aboriginal persons" because "the incidence of individuals with criminal records is greater in Aboriginal communities."[129] As Monture-Angus explains (and as the Supreme Court of Canada acknowledged in *Ipeelee*[130]), substantial responsibility lies with the state and its colonial laws and practices. Yet when programs target this factor, they are premised on the claim that it is up to an individual to change the people with whom they associate. This goal suggests that a practitioner might assess an individual's rehabilitation on the basis of whether the individual has stopped associating with their "procriminal" family members and close friends. Rather than looking at the practices that bring certain groups into regular contact with the police and state agencies such as child protective services, the model simply measures the factor and then asks individuals to potentially leave members of their communities.

Risk assessment instruments do not contemplate the ways in which the process of redressing effects of colonial oppression (for example, challenges with school, work, and family and intimate relationships) requires approaches that would seek to dismantle settler colonial oppression—approaches addressing, for example, ongoing land dispossession, the colonial legal system's practices of delegitimizing Indigenous laws, the silencing of Indigenous peoples' voices, experiences, and insights, and failures to provide opportunities for safety and to reduce socioeconomic inequalities. Instead, risk assessment tools place all the responsibility to change on individuals.

The next sections explore the ways judges have engaged with links between colonialism and risk assessment tools in dangerous offender proceedings. I first demonstrate that judges have recognized that the state is accountable for ensuring the accuracy of risk assessment tools' predictions and for ensuring that incarcerated Indigenous persons have access to the

129 Patricia Monture-Angus, "Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice" (1999) 19:1/2 Can Woman Studies 24 at 27.

130 *Supra* note 1 at para 60.

kinds of programs that could reduce their risk of facing future criminal charges or convictions. I then look closely at the limitations on judges' abilities to hold the state accountable for changing social, legal, and political conditions in an effort to support Indigenous peoples' opportunities to exist within safe and supported relations.

B. State Accountability for Potential Cross-Cultural Bias in Risk Assessment Tools and State Accountability for Lack of Access to Programs in Prison

Two key types of state accountability relating to Indigenous offenders have emerged in dangerous offender decisions. First, judges have engaged with state responsibilities connected to the potential for risk assessment tools to incorporate cross-cultural bias against Indigenous people. Second, judges have engaged with state responsibilities in connection with correctional services' practices of administering prison conditions in ways that do not provide Indigenous offenders with opportunities to improve their risk scores.

The leading Supreme Court of Canada case on the possibility of cross-cultural bias in risk assessment instruments is *Ewert v Canada* (*AG*).[131] The case addressed the Correctional Service of Canada (CSC)'s use of actuarial risk assessment and psychological instruments when making decisions relating to, for example, security classifications and parole recommendations. The tools at issue included second-generation risk assessment instruments, which incorporate only static factors,[132] and a third-generation risk assessment instrument, which includes both static and dynamic factors and aims to both identify risk and plan treatments for sexual offenders.[133] The final tool at issue was a diagnostic tool, which

131 2018 SCC 30 [*Ewert*].

132 Violence Risk Appraisal Guide (VRAG) (see Vernon L Quinsey et al, *Violent Offenders: Appraising and Managing Risk*, 2nd ed (Washington: American Psychological Association, 2006) Appendix A); Sex Offender Risk Appraisal Guide (SORAG) (*ibid* at Appendix B); Static-99 (see R Karl Hanson & David Thornton, "Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales" (2000) 24:1 L & Human Behaviour 119).

133 Violence Risk Scale—Sex Offenders (VRS-SO) (see S Wong et al, *The Violence Risk Scale: Sexual Offender version* (*VRS-SO*) (Saskatoon: Regional Psychiatric Centre and University of Saskatchewan, 2003), cited in Mark E Olver et al, "Predictive Accuracy of Violence Risk Scale-Sexual Offender Version Risk and Change Scores in Treated Canadian Aboriginal and Non-Aboriginal Sexual Offenders" (2018) 30:3 Sexual Abuse 254 [Olver et al, "Predictive Accuracy of Violence Risk"]).

has been recognized as containing both static and dynamic risk factors.[134] Ewert, who is Métis, submitted that, in using these tools, which had been created and validated mainly on samples of people that excluded Indigenous people,[135] the CSC breached its obligations under the *Corrections and Conditional Release Act*[136] and infringed his section 7 and section 15 *Charter* rights.[137] Justice Wagner (as he then was), writing for the majority, rejected Ewert's *Charter* challenges but held that the CSC breached its obligations under the *CCRA*.[138] In particular, the CSC breached its obligation under section 24(1) of the *CCRA*, which provides: "The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible."[139] Justice Wagner read section 24(1) of the *CCRA* in conjunction with section 4(g). Section 4 provides guiding principles for the CSC, including the following: "(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups."[140]

Justice Wagner's judgment held the state accountable for discrimination against Indigenous people by determining that the CSC needs to take some action in relation to the risk assessment instruments at issue. In particular, the CSC has a responsibility to take reasonable steps to ensure that its risk assessments are accurate when applied in relation to Indigenous people.[141] More generally, Justice Wagner also acknowledged that the criminal justice system has carried out racist and systemically unjust practices against Indigenous people and that the criminal justice system has a role to play in redressing the harms produced through these practices.[142]

Justice Wagner's reasoning in *Ewert* identified the possibility that risk assessment tools that did not include Indigenous people in their samples may not accurately predict whether Indigenous people are likely to face future criminal charges or convictions. If that outcome were to be

134 Hare Psychopathy Checklist-Revised (PCL-R) (see Bonta & Andrews, *Psychology of Criminal Conduct*, *supra* note 90 at 101, 113 (Table 5.3).

135 See *Ewert*, *supra* note 131 at para 12.

136 SC 1992, c 20 [*CCRA*].

137 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See *Ewert*, *supra* note 131 at para 12.

138 See *Ewert*, *supra* note 131 at para 6.

139 *CCRA*, *supra* note 136, s 24(1).

140 *Ibid*, s 4(g), as amended by SC 2012, c 1.

141 See *Ewert*, *supra* note 131 at para 66.

142 *Ibid* at paras 57–58.

established, criminal justice decision makers that rely upon the tools' results would be contributing to practices that adversely impact Indigenous people.[143]

The *Ewert* case has contributed to further research into the validity of risk assessment tools. Instead of indications that the tools at issue in *Ewert* demonstrate cross-cultural bias, this research has shown that those tools (though not necessarily all actuarial risk assessment tools) are valid.[144] However, even when risk assessment tools' factors accurately predict future charges or convictions, the factors themselves are still measuring experiences that are intimately connected with settler colonial oppression.

In terms of the role of state accountability for potential cross-cultural bias in the dangerous offender context, judges are finding that the tools' potential for adverse impacts on Indigenous offenders can be minimized. For example, judges have been satisfied that the potential for cross-cultural bias has been rectified through studies validating the tools,[145] through expert evidence indicating that the predictive ability of the tools is sufficient,[146] or through expert practices that contextualize the tools' results.[147]

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143 For a summary of this type of state wrongdoing and harm see Manikis, "Recognising State Blame in Sentencing", *supra* note 12 at 310–13.

144 See Olver et al, "Predictive Accuracy of Violence Risk", *supra* note 133. This study examined the third-generation tool, the VRS-SO, and the second-generation tool, the Static-99R (Leslie Helmus et al, "Improving the Predictive Accuracy of Static-99 and Static-2002 With Older Sex Offenders: Revised Age Weights" (2012) 24:1 Sexual Abuse 64). Olver et al found that, "[a]fter controlling for risk and treatment change, Aboriginal men still had significantly higher rates of general violent recidivism post-release than non-Aboriginal men" (Olver et al, "Predictive Accuracy of Violence Risk", *supra* note 133 at 271). See also Seung C Lee, R Karl Hanson & Julie Blais, "Predictive Accuracy of the Static-99R and Static-2002R Risk Tools for Identifying Indigenous and White Individuals at High Risk for Sexual Recidivism in Canada" (2020) 61:1 Can Psychology 42, who found that the Static-99R "showed similar predictive accuracy for both White and Indigenous study groups" (at 51). The Static-99R involves a slight modification to the Static-99, which was at issue in *Ewert*. Specifically, the Static-99R involves an updated "age item" (Society for the Advancement of Actuarial Risk Needs Assessment, "Static-99R Users", online: <saarna.org/static-99>). By comparison, continued use of the Static-2002R (a tool not at issue in *Ewert*) was not supported without further research (Lee, Hanson & Blais, *supra* note 144 at 53).

145 See e.g. *R v Durocher*, 2019 NWTSC 37 at paras 198–210 [*Durocher*].

146 In his reasons for sentence, Justice Fitch noted that actuarial tool evidence could be relied on as one piece of information because the evidence showed that they were moderately predictive in relation to Indigenous people (see *R v Haley*, 2016 BCSC 1144 at para 264).

147 The contextualized information includes "criminal history", living with antisocial personality disorder and a marijuana dependence disorder, and not participating in a "comprehensive treatment program" (see *R v Gracie*, 2019 ONCA 658 at paras 20, 22, 25, 52).

R v Bouvier[148] is an example of a dangerous offender case involving validated risk assessment tools. Judge Shaigec (as he then was) described Bouvier as "a Métis man with Cree roots"[149] and designated Bouvier as a dangerous offender. Judge Shaigec sentenced Bouvier to a period of indeterminate incarceration for three of the predicate offences (assault causing bodily harm and two counts of sexual assault against a 15-year-old girl).

With respect to risk assessment, Judge Shaigec indicated that "the risk assessment tools used in this case have weaker predictive accuracy in relation to Indigenous, as opposed to non-Indigenous offenders" and that "Michel Bouvier's constrained circumstances contributed to some of his 'high scores' on the risk assessment tools."[150] Judge Shaigec outlined some of the factors incorporated into the tools, namely "elementary school maladjustment, substance abuse,…failure on conditional release," along with "employment struggles, substance abuse, traumatic experiences, and supervision response."[151] After doing so, Judge Shaigec went so far as to recognize that "[m]any of these same factors have now long been recognized as resulting from the historical injustices visited upon Indigenous people in Canada: *R v Ipeelee*…at para 60."[152] By explicitly recognizing that dynamic risk factors are themselves rooted in colonialism, the analysis recognized that the factors tell us about not only the individual but also the social context within which they live.

Despite recognizing links between colonialism and dynamic risk factors, Judge Shaigec relied on the tools' results, detailing several reasons for this decision. For instance, the expert practitioners ensured that the tools used "had been specifically validated in the Canadian Indigenous population" or had been developed on a sample of people from a correctional institution that imprisoned "a significant number of Indigenous men."[153] This reasoning addresses the state's responsibility to not rely on invalidated tools when making assessments of dangerousness. Unfortunately, the practice of incorporating the tools without tending to the root causes of the risk they measure obscures the fact—earlier acknowledged by Judge Shaigec—that the validated factors are still intimately linked with colonialism. However, Judge Shaigec did make additional effort to attempt to

148 2021 ABPC 313 [*Bouvier*].
149 *Ibid* at para 197.
150 *Ibid* at para 120.
151 *Ibid*.
152 *Ibid*.
153 *Ibid* at para 124.

account for instances of ongoing colonialism in the decision: "I heed the caution that incidents of Michel Bouvier's 'childhood misconduct,' petty crime that may be the product of over-policing, and the criminalization of his alcohol addiction through bail conditions, ought not be added to 'the matrix of facts from which a pattern [may be] discerned'."[154] In terms of the ultimate decision to still incorporate some evidence from risk assessment tools, Judge Shaigec noted that the analysis "focused on decades of conduct that was truly criminal; acts of physical and sexual violence that predominantly victimized."[155]

Judge Shaigec's analysis illustrates the possibilities and limits of using sentencing to address colonial oppression. No matter how deep a judge goes to recognize links between colonialism and an offender's circumstances and behaviours—including within the factors incorporated into risk assessment tools or other modes of assessing dangerousness—the judge must ultimately decide for only the individual offender. This requirement means that judges cannot also contemplate steps the state should take in the future to prevent further criminalized conduct.

Judges in dangerous offender proceedings have also engaged with another type of state wrongdoing and harm: correctional services' practices of administering prison conditions in ways that do not provide offenders with opportunities to improve their risk scores.[156] In particular, judges have looked at whether correctional services have failed to provide meaningful access to programs and treatments in prison and whether such failures have contributed to the offender's limited response to programming designed to reduce risk. If established, the judge may factor this finding into sentencing, such as into their determination of whether an individual's risk is intractable.[157]

A case example is *Keenatch*,[158] which involved a dangerous offender designation application. Judge Harradence delivered the judgment, dismissing the dangerous offender designation application[159] and declaring Keenatch to be a long-term offender.[160] The conviction that instigated the

154 *Ibid* at para 122, citing *R v George*, 1998 CanLII 5691 (BCCA) at para 15.

155 *Bouvier*, *supra* note 148 at para 123.

156 See *Durocher*, *supra* note 144 at paras 177–96; *R v Keenatch*, 2019 SKPC 38 at paras 40–52 [*Keenatch*].

157 See *Keenatch*, *supra* note 155 at paras 40–52.

158 *Ibid*.

159 *Ibid* at para 52.

160 *Ibid* at para 66.

proceedings was for assault causing bodily harm.[161] The assault had taken place at the Saskatchewan Penitentiary.[162] In the result, Judge Harradence sentenced Keenatch to 30 months of imprisonment to be followed by a six-year long-term supervision order.[163]

In reviewing Keenatch's background, Judge Harradence noted that "Keenatch is a member of the Big River First Nation."[164] With respect to a risk analysis, Judge Harradence reviewed the testimony of the psychiatrist Dr. Mela. Judge Harradence explained that Dr. Mela administered actuarial risk tools to determine Keenatch's "moderate to high risk of violent recidivism."[165] Additionally, as summarized by Judge Harradence, "Keenatch's risk is determined by reference to his impulsivity, his gang affiliation and participation and his substance abuse."[166] Further, "Dr. Mela opined that Keenatch needs a multi-faceted approach involving medication, grief counselling, substance abuse counselling and counselling and support to promote prosocial groups to replace his gang involvement."[167]

Judge Harradence also acknowledged that the state played a negative role in Keenatch's limited access to programming. In particular, the CSC did not modify programming to accommodate Keenatch's experiences with Partial Fetal Alcohol Syndrome.[168] Judge Harradence identified a connection between residential schools, fetal alcohol syndrome, and the state's criminalization of Indigenous people.[169] He also explained that the state's lack of accommodation constituted a failure: "The failure to modify programs to address Keenatch's disability is symptomatic of CSC's ongoing difficulties designing treatment programs to meet the needs of Indigenous offenders. The issue was recognized by Justice Wagner (as he then was) in *Ewert v Canada*."[170] Additionally, Judge Harradence explained that Keenatch is not solely responsible for his limited participation in programming. Rather, "many obstacles for Keenatch were due to institutional rules or wait lists which ignore any efforts to reduce his risk."[171] In fact, Judge Harradence

161 *Ibid* at para 2.
162 *Ibid* at para 1.
163 *Ibid* at paras 69–70.
164 *Ibid* at para 28.
165 *Ibid* at para 35.
166 *Ibid*.
167 *Ibid* at para 38.
168 *Ibid* at para 34.
169 *Ibid* at para 41.
170 *Ibid* at para 40.
171 *Ibid* at para 45.

found that Keenatch had "started programming and…indicated a motivation to continue."[172] Through this analysis, Judge Harradence expressly pointed out some of the state's contemporary responsibilities—and the state's failures in fulfilling those responsibilities—in relation to the person he was sentencing. The analysis had a meaningful impact on the sentence, as the findings contributed to the decision that Keenatch's violent conduct was not intractable.

As demonstrated by *Bouvier* and *Keenatch*, under existing law, judges can readily articulate the above two manifestations of potential state accountability: state accountability for failing to ensure that risk assessment tools do not demonstrate cross-cultural bias and state accountability for failing to ensure that offenders have access to programming to change their risk scores. These forms of state accountability fit within the logic that the criminal justice system must hold to account and sanction an individual (not the state). Even if cross-cultural bias were definitively established in relation to risk assessment tools, the harm of the state's failure to ensure that the tools were not biased would fit neatly within the logic of the criminal law: the harm is the state's failure to identify the precise factors that predict whether individual members of a given group are likely to have future interactions with the criminal justice system. Similarly, if the state errs in the ways in which it administers prison conditions, the harm involves the state's failure to carry out a sentence of imprisonment in ways that allow an individual to try to modify their behaviour.

If these harms are established, it is important that the state acknowledge and identify ways to remedy them. For instance, even if programming is not a sufficient avenue for preventing future conflict and harm, it is possible that some programming could still be an appropriate part of a sentence. David Milward notes that "evidence is starting to mount that programming that includes Aboriginal culture and spirituality can address the risk of recidivism for many Aboriginal accused."[173] Such programming

172 *Ibid* at para 52.

173 Milward, *supra* note 14 at 653. For an overview of this evidence, see *ibid* at 653–56. Milward is cautiously optimistic—before providing an overview of the evidence, he notes that there are still questions around whether changes in a person's dynamic risk factors actually result in a reduced risk of being charged or convicted again in the future (*ibid* at 653, citing Susanne Bengston, "Is Newer Better? A Cross-Validation of the Static-2002 and the Risk Matrix 2000 in a Danish Sample of Sexual Offenders" (2008) 14:2 Psychology, Crime & L 85 at 103). See also Clare-Ann Fortune & Roxanne Heffernan, "The Psychology of Criminal Conduct: A Consideration of Strengths, Weaknesses and Future Directions" (2019) 25:6 Psychology, Crime & L 659, who explain that dynamic risk factors might

might embed some shortcomings, such as involving a turn to "*selected* notions of Aboriginality" and decontextualizing Indigenous laws and practices from the social, political, legal, and institutional structures in which they exist.[174] However, it may nonetheless be desirable and necessary for correctional services to offer something (that has some empirical support) to people who are currently incarcerated.[175]

More challenging for judges to address is the role of state accountability for colonial oppression that contributes to high-risk scores for Indigenous individuals. Judge Shaigec made some movement in this direction when deciding to exclude elements of, for example, youth misconduct, petty crime that may have been criminalized due to over-policing, and bail conditions criminalizing an addiction to alcohol. The next section will show judges in the *Natomagan* case engaging with similar challenges when trying to directly confront the oppression that is baked into risk assessment tools' results.

C. State Accountability for Links between Colonial Oppression and Risk Factors

In *Natomagan*, Justice Clackson of the Alberta Court of Queen's Bench designated Natomagan as a dangerous offender and sentenced him to 20 years of imprisonment and a 10-year supervision order, less credit for time spent in pre-sentence custody.[176] Natomagan's offences included violent sexual attacks against women.[177] As explained by Justices Strekaf, Pentelechuk, and Antonio of the Alberta Court of Appeal, the state placed Natomagan's mother and older brothers in the Prince Albert Indian Residential School.[178] Growing up, Natomagan experienced racism, witnessed violence, was a victim of sexual abuse, and sometimes attended school while intoxicated.[179] With respect to risk assessment tools and psychological instruments, experts in these proceedings relied on several instruments, including two tools that typically incorporate dynamic risk factors.

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inappropriately conflate predictive factors with causal factors (that is, with factors that need to be targeted and treated).

174 Chris Andersen, "Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities Through 'Tradition'" (1999) 31 Crime L & Soc Change 303 at 318 [emphasis in original].

175 See Milward, *supra* note 14 at 658.

176 See *Natomagan ABQB*, *supra* note 85 at para 1.

177 *Ibid* at paras 2–16.

178 See *Natomagan ABCA*, *supra* note 85 at para 15.

179 *Ibid* at paras 15–23.

However, it appears that the expert evidence relating to the application of these tools in this case was limited to assessments based on historical (or static) factors.[180] As noted by the Justices of the Court of Appeal, "Mr. Natomagan chose not to participate in clinical interviews with the Crown's risk assessment experts," and as a result, "the court has no information on dynamic factors."[181]

In the sentencing judgment of *Natomagan*, Justice Clackson applied a dangerous offender designation and imposed a determinate sentence of 20 years of imprisonment, less time served in pre-sentence custody.[182] Justice Clackson did not cite *Ewert*. Nonetheless, Justice Clackson noted the same concern that Justice Wagner identified in *Ewert*—the possibility of using risk assessment tools that overestimate an Indigenous person's risk. However, Justice Clackson expressly chose to rely on the evidence from risk assessment instruments, given their predictive value:

> While it is true that the tools used can overstate risk as they are not adjusted adequately for the fact that Aboriginal offenders tend to score higher (because the factors examined seem to be more prevalently experienced by Aboriginal offenders), the fact remains uncontradicted that the risk assessment tools have predictive value and all point to Mr. Natomagan being a high risk.[183]

This passage shows the limits of validating risk assessment instruments in relation to Indigenous offenders: while risk factors may arise more frequently among Indigenous offenders, the factors may nonetheless have some predictive value. This approach can help ensure the safety of community members by identifying situations where an individual is likely to be charged or convicted again in the future. However, an ongoing challenge is that the practice of validating risk assessment tools does not highlight why risk factors may be higher for Indigenous offenders.

Despite Justice Clackson's acceptance of the tools' results, he also articulated the bind in which many sentencing judges find themselves: the judiciary does not have the tools or the authority to hold the state itself accountable for systemic injustices.[184] Instead, sentencing is currently

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180 *Ibid* at para 112: "Dr. Jellicoe administered the RSVP based on historical information only."

181 *Ibid* at para 133.

182 *Natomagan ABQB*, *supra* note 85 at para 1.

183 *Ibid* at para 37.

184 *Ibid* at paras 58–61.

rooted in a carceral paradigm that emphasizes blaming and managing individuals.[185]

Justice Clackson described the limits of sentencing by first identifying the limits of typical sentencing language. In particular, he pointed out that usual sentencing discourses harmfully obscure the Canadian state by highlighting Indigenous peoples' circumstances without acknowledging the state's role in contributing to those circumstances:

> Commonly, we use the phrase "Gladue Factors" to describe the historic treatment of Indigenous persons through the filter of a particular offender's circumstances. That phrase is somewhat offensive and I would prefer to use the general phrase: "The Impact of Canada's mistreatment of Indigenous persons." That phrase is more descriptive, accurate, and much more apt to be properly understood by all Canadians. We are here concerned with Canada's mistreatment of Indigenous persons and the impact of that mistreatment on Mr. Natomagan's life.[186]

Through this passage, Justice Clackson expressly placed accountability on the Canadian state for its mistreatment of Indigenous people.

Justice Clackson went on to explain that there are limitations on the ability of judges to remedy the state's mistreatment of Indigenous people through the sentencing process. While the Canadian state and its settler colonial policies and practices are responsible for the high rates of imprisonment among Indigenous people, sentencing judges do not have "the power to change the paradigms."[187] Instead, as Justice Clackson noted: "I am constrained by what I see now and what the future appears to hold."[188] In this case, the Crown "proved that it is more likely than not to [*sic*] Mr. Natomagan's inability to restrain his violent behaviour is intractable, in the present environment, and the environment which is most likely to exist in the future."[189] Justice Clackson also heard expert evidence that Natomagan needed a paradigm other than that offered by the CSC—"[a] paradigm centered in breaking down [his] assumptions, values and beliefs and replacing them with traditional Aboriginal values and spirituality."[190] One of the experts (a forensic psychologist) offered a detailed description

185 *Ibid*.
186 *Ibid* at para 48.
187 *Ibid* at para 61.
188 *Ibid*.
189 *Ibid* at para 62.
190 *Ibid* at para 55.

of a paradigm involving extensive participation by Elders and taking place in a remote area, rather than within a prison.[191] While Justice Clackson found that this approach would help Natomagan,[192] he unfortunately could not authorize it: "this type of program does not exist and it is beyond my authority to compel."[193] This comment highlights the limited tools available to sentencing judges to craft sentences that respond to an Indigenous person's experiences with colonial oppression.

In applying a determinate sentence of 20 years of imprisonment, less time spent in pre-sentence custody,[194] Justice Clackson also indicated that Natomagan is not alone in needing to take steps to protect the community. Instead, settler Canadians, including settler Canadian sentencing judges, are also accountable for reducing the risk that Natomagan currently poses to the community: "given his reduced moral culpability and given the fact that we non-indigenous Canadians had a hand in creating this risk, it is reasonable to accept some responsibility for the risk."[195] Justice Clackson then noted that governments have a responsibility to create the kind of paradigm that had been proposed in this case: "it is a reasonable expectation that over the next 17 years governments will embrace a new paradigm for dealing with Indigenous offenders in keeping with their obligations as itemized in the Truth and Reconciliation Report, such that the risk assumed will ultimately have been a risk worth taking."[196] Without any concrete options for holding the state itself to account, Justice Clackson instead appealed to the governments in a more general sense to reduce the risk of future conflict and harm.

The Crown appealed to the Alberta Court of Appeal.[197] Justices Strekaf, Pentelechuk, and Antonio imposed an indeterminate sentence. With respect to their ultimate decision, the Court held that Justice Clackson "erred in reasoning that because 'non-indigenous Canadians had a hand in creating [Mr. Natomagan's risk], it is reasonable to accept some responsibility for the risk'."[198] The Court explained:

191 *Ibid* at paras 52–56.
192 *Ibid* at para 57.
193 *Ibid* at para 58.
194 *Ibid* at paras 97, 101.
195 *Ibid* at para 98.
196 *Ibid*.
197 See *Natomagan ABCA*, *supra* note 85.
198 *Ibid* at para 90, citing *Natomagan ABQB*, *supra* note 85 at para 98.

> Undeniably, Canada's legacy of colonialism contributed to shaping Mr. Natomagan's life and the risk he now presents. But nothing in cases such as *Boutilier*, *Gladue*, *Ipeelee* or the statutory scheme permits a judge to expose the public to anticipated risk, however created, and nothing in the facts suggests that only non-Indigenous Canadians are at risk from Mr. Natomagan's recidivism. We reject the suggestion that imposing risk on society because a portion of society contributed to creating the risk is permissible under subsection 753(4.1).[199]

This analysis illustrates one of the significant ways in which sentencing law constrains judges. Justice Clackson saw risk as something that is constructed by—and that must be responded to by—more than one person. As a result, on Justice Clackson's approach, Natomagan is not the only one responsible for reducing his risk of reoffending. Instead, state actors and non-Indigenous communities must take responsibility for the roles of settler colonialism in constructing Indigenous persons as risks and for taking steps needed to make communities safer in the future. Justice Clackson appears to have been trying to recognize that the prevention of future harm cannot be effectively understood or pursued purely through the imposition of a carceral sanction on an individual. However, the major challenge is one that Justice Clackson also recognized: sentencing judges cannot impose sanctions on the state or communities. The practical result of Justice Clackson's approach is that he did not use the full force of sentencing law's tools to prevent harm in the future. As a result, his approach could, through the framework of sentencing law, be understood as inappropriately exposing others to risk in the future—as held by the Court. This reasoning is consistent with sentencing law's own logic, but it obscures the realities of risk that the judges otherwise acknowledged.

Despite ultimately placing accountability for risk solely in the hands of Natomagan, the Court of Appeal's judgment involved detailed descriptions of the realities that risk arises within a social context and that findings of risk embed inequalities. For instance, Justices Strekaf, Pentelechuk, and Antonio recognized that, while actuarial tools claim to measure the characteristics of an individual fairly, they also assess "how the individual has been treated by his or her parents and community and by the justice system. Where that treatment has not been equal, comparisons between individuals might not be fair."[200] Relatedly, the Court indicated that "[a]ctuarial

199 *Natomagan ABCA*, *supra* note 85 at para 90.
200 *Ibid* at para 122.

assessments may reflect the systemic racism experienced by Indigenous people in past years and decades—and today, judging from the current degree of over-representation."[201] These statements acknowledge that risk assessment tools measure experiences with inequalities, including inequalities generated or sustained by the legal system itself. The passages also locate inequalities and systemic racism not only in the past but also in the present, including within the very institutional practices with which judges themselves are involved (imprisoning Indigenous people).

The challenge in the Court of Appeal judgment is not that the Justices did not recognize a responsibility on the part of themselves and other participants in the criminal justice system to address systemic injustices. Indeed, Justices Strekaf, Pentelechuk, and Antonio held that "[a]ll criminal justice system participants should take reasonable steps to address systemic biases against Indigenous people head-on."[202] Rather, the challenge is that the Court did not have the tools or authority to require criminal justice system participants to take such steps. In the dangerous offender context, all they can do is "scrutinize the evidence of prospective risk and…understand what it measures and how."[203] In this case, this analysis resulted in the Court "accept[ing] the actuarial assessments have value, but…temper[ing] the weight…place[d] on them. The validity of these assessments is reduced for Indigenous offenders owing to social, economic, and historical factors they experience disproportionately. Relevant discriminatory factors are concrete and influential in Mr. Natomagan's case."[204] The additional evidence that established intractable risk included the brutality in Mr. Natomagan's sexual offences and "increasing premeditation" and the "dated" information that he "holds attitudes supportive of sexual offending, such as sexual entitlement and objectification."[205]

Given the law and tools available to the Court of Appeal, their analysis makes sense. Justice Clackson tried to go further and place responsibility for risk on actors and institutions beyond the individual offender. However, as Justice Clackson also recognized, no concrete tools exist for doing so. By treating Justice Clackson's approach as one that would expose the public to risk, Justices Strekaf, Pentelechuk, and Antonio worked within the limited scope of sentencing law. The Court's reasoning is realistic in

201 *Ibid* at para 124.
202 *Ibid* at para 121, citing *R v Barton*, 2019 SCC 33 at para 200.
203 *Natomagan ABCA*, *supra* note 85 at para 121.
204 *Ibid* at para 134.
205 *Ibid* at para 137.

the sense that it has no way to ask the state to, or to ensure that the state does, take responsibility for changing conditions that contribute to risk. However, in doing so, the Court strips risk, to some extent, of its otherwise acknowledged contextualized and social dimensions. Regardless of how significant a role the state has played in generating and sustaining harm, risk can only be dealt with in individualistic terms at sentencing because sentencing judges only have the authority to prevent future conflict and harm by managing individual offenders.

IV. CONCLUSION

A growing body of scholarship has called upon the academic community to study criminalization by focusing on the work of the state in the criminalization process.[206] This article engages with this kind of approach by looking closely at judicial engagement with risk and colonialism in the dangerous offender context. In this area, judges have shown an interest in exploring the colonial context in which risk is produced.

Judges in dangerous offender proceedings have identified two key ways in which the state is accountable to Indigenous offenders and communities. First, the state ought to ensure that risk assessment results accurately predict Indigenous offenders' likelihood of being charged or convicted in the future. In particular, judges have considered whether risk assessment tools show cultural bias. Second, judges have also considered whether correctional centres have maintained barriers to Indigenous offenders' access to programs that could help them reduce their risk scores.

In addition to these forms of state accountability, judges have recognized that risk scores tell us about not only people with similar experiences to the offender but also how the state has treated people with similar experiences to the offender. However, an ongoing challenge is that judges do not have the authority to address the state's broad and multifaceted roles in maintaining colonial oppression.

By ensuring that risk assessment tools' results provide accurate enough predictions and by recognizing that inadequate access to appropriate programs in prison may have compromised an offender's chances of changing

206 See Shoshana Pollack, "Therapeutic Programming as a Regulatory Practice in Women's Prisons" in Gillian Balfour & Elizabeth Comack, eds, *Criminalizing Women: Gender and (In)Justice in Neo-Liberal Times*, 1st ed (Black Point, NS: Fernwood Publishing, 2006) 236 at 246; Emma Cunliffe, "Charter Rights, State Expertise: Testing State Claims to Expert Knowledge" (2020) 94 SCLR (2d) 367 at 368.

their risk scores, judges have taken steps in a positive direction: these practices hold the state accountable for the accuracy of its determinations of risk and for the options available to incarcerated persons for changing their risk scores. However, these forms of engagement with the state's roles in constructing risk and in providing offenders with opportunities to change their risk scores do not address the underlying colonial dimensions of the dominant risk assessment and management paradigm itself. This kind of limitation makes sense in the context of the criminal justice system's ultimate goal of holding individuals accountable and punishing them for harm and wrongdoing. At the same time, the limitation sits uneasily with judges' recognition that the criminal justice system and its harmful impacts on Indigenous individuals and communities are part of a broader web of colonial oppression that includes the state's ongoing occupation of Indigenous lands, the state's ongoing imposition of settler colonial law, state failures to take seriously the safety of Indigenous persons and communities, particularly Indigenous women, children, and members of the 2SLGBTQIA+ community, and state failures to address socioeconomic disparities arising from state policies such as the residential school system. The ways these dynamics generate risk cannot be fully accounted for by judges, because judges' only way to prioritize community safety—after that safety has already been compromised—is to sanction the individual.

If judges, as sentencers, were able to undertake a separate analysis of the state's own accountability for an Indigenous offender's risk score (including but also extending beyond failures to provide access to appropriate programs in carceral settings) and of the kinds of changes that the state should make to redress the factors of oppression that contribute to high-risk scores, they might be able to maintain a more impactful focus on the state's own role in criminalization. This would, of course, be a fundamental shift in sentencing—it is a change that would broaden the criminal justice system's gaze beyond the individual (and not only for the purpose of imposing a fit sentencing on that individual), and it is a change that would likely require legislative intervention.

Such a turn to a consideration of state accountability—in addition to, and alongside, a consideration of individual accountability—in sentencing would undoubtedly constitute a fundamental shift away from the criminal justice system's traditional focus on the individual. The system's gaze, at sentencing, would be expanded beyond the individual, and not only so that judges can impose fit sentences on offenders, but also for the discreet purpose of enabling sentencers to assess the state's own contributions to

wrongdoing and harm in the person's life, circumstances, and experiences. Yet, the shift might not be significant enough. Sentencing itself is a late stage in the criminal justice process, arising after judges have already entered convictions against individuals. In dangerous offender proceedings, in particular, offenders have already carried out extremely harmful conduct against victims. It would be better if the state had facilitated earlier support in the form of, for example, improved access to housing, education, and family support, and deference to Indigenous laws and traditions. Moreover, the compromised legitimacy of Canadian law in light of its continuing contributions to harming Indigenous persons—both inside and outside prisons—means that efforts to tweak the settler colonial system alone will likely serve to maintain the system. As Jeff Ewert has written: "If colonialism is responsible for bringing large numbers of Indigenous people into Canada's prisons, then how could anyone expect that more colonialism would ever prepare us for our release back into community?"[207] Rather than turning towards the settler colonialism system for paths forward, Linda Mussell has noted that "[p]eople living through intergenerational imprisonment have the solutions to disrupt these ongoing colonial legacies."[208] Through her research, Mussell "heard that it is not enough to reform or tweak the carceral system—governments have been doing that [for] centuries, and generations of people have been targeted in that violence."[209] What is needed instead is "to listen to criminalized people and communities, and give the keys so to speak to communities, meaningfully handing over the power and resources to create change."[210]

With these cautions and insights in mind, it is also worth contemplating whether the state should support the development of an adjusted sentencing framework. Through legislative change, sentencers—who could potentially extend beyond judges to also include community members—could assess state accountability for constructing risk and ensuring community safety, alongside an assessment of how to address the individual appearing before the court in a particular moment. Such an approach might encourage increased engagement not only with the state services that could provide support to Indigenous individuals and communities but also with

207 Jeff Ewert, "Taming the Moose: The Colonialism of Canada's Subordinated Indigenous Prisoner Population in the 21st Century" (2022) 30:2 J Prisoners on Prisons 54 at 57.

208 Linda Mussell, "Disrupting Intergenerational Imprisonment" (2022) 31:2 J Prisoners on Prisons 124 at 124.

209 *Ibid*.

210 *Ibid*.

Indigenous laws and community members' perspectives and priorities. For instance, if a community-based response rooted in Indigenous law and tradition is proposed but unavailable, as happened in the *Natomagan* case, perhaps sentencers could have the authority to propose that the state should help facilitate deference to that kind of response in the future. Such a response might be better than simply not being able to proceed, or not being able to nudge further movement, in that direction. If authorized, sentencers could communicate to the other branches of the state what they have heard about what is needed to redress cycles of imprisonment for an individual: as Mussell explains, these proposals tend to focus on "moving to community autonomy and provision of supports such as housing, education, employment, health care, justice, healing, and family wrap-around support."[211] In addition, recommendations might relate to developing risk assessment instruments that incorporate community-based knowledge about risk.[212] Judges may currently be able to pursue these kinds of sentencing approaches and outcomes through more steadfast commitment to the second step of a section 718.2(e) analysis, which requires judges to consider alternatives to imprisonment that are rooted in Indigenous laws and traditions, and supported by Indigenous community members. However, perhaps the limited judicial take-up of those options signals the need for further direction to judges—direction that enables judges to directly hold the state to account for its failures to support Indigenous laws, individuals, and communities, and to communicate messages learned about how to do so in the future.

211 *Ibid* at 127-28. Sandra G Mayson suggests that it may be possible to identify the kinds of support that offenders need by utilizing risk assessment tools "in reverse", that is, "as…diagnostic [tools to identify] sites and causes of racial disparity in criminal justice" (see Sandra G Mayson, "Bias In, Bias Out" (2019) 128:8 Yale LJ 2218 at 2285).

212 See Ngozi Okidegbe, "When They Hear Us: Race, Algorithms and the Practice of Criminal Law" (2020) 29:3 Kan JL & Pub Pol'y 329; Ngozi Okidegbe, "Discredited Data: Epistemic Violence, Technology, and the Construction of Expertise" (address delivered by Ngozi Okidegbe, with Jessica Eaglin, Jamelia Morgan & India Thusi, at the Tackling Technology-Facilitated Violence Conference, 25 May 2021); Ngozi Okidegbe, "Discredited Data" (2022) 107:7 Cornell L Rev 2007.