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Bound by Blame: Sentencing, Colonialism, and Fetal Alcohol Spectrum Disorder

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Résumé de l'article

Les arrêts Gladue et Ipeelee envoient des messages importants aux juges, mais ces messages sont empreints de tensions. En effet, ils traduisent les graves problèmes liés à l'utilisation du système de justice criminelle pour faire reconnaître le rôle continus de l'État dans la discrimination à l'encontre des peuples autochtones. Étant donné que ce système est articulé autour de l'attribution d'un blâme individuel, de graves tensions sont inévitables. Dans ce contexte, j'analyse des exemples de cas où des juges jonglent avec des outils mal adaptés pour mettre en œuvre les lignes directrices formulées par la Cour suprême du Canada afin de reconnaître et de corriger les conséquences désastreuses du colonialisme alors qu'ils sont sous l'emprise de leur rôle d'attribution de blâme individuel. Malheureusement, le rôle continu de l'État canadien dans l'oppression coloniale n'est tout simplement pas reconnu. Dans cet article, j'explore ces tensions dans le contexte d'une manifestation particulière : le blâme que font porter les juges aux mères autochtones dont les fils accusés souffrent du trouble du spectre de l'alcoolisation fœtale (TSAF). L'analyse met en lumière la profondeur des tensions qui déchirent un système de justice pénale de common law dans un État colonial : appelés à déterminer la peine à infliger aux contrevenants autochtones souffrant du TSAF, les juges réprouvent vivement les principes coloniaux pernicieux, tout en les invoquant subtilement. J'explique qu'une analyse de ce recours au blâme pourrait aider les juges à reconnaître le rôle que joue l'État dans les expériences d'injustice que vivent les Autochtones et à corriger le tir. Lorsque l'État joue un tel rôle, il ne saurait justifier sa conduite en jetant le blâme sur l'individu au moyen du système de justice criminelle. Ce type d'analyse permettrait de faire ressortir et de corriger les failles du recours au blâme par l'État pour réparer les préjudices causés dans des situations marquées par le colonialisme et l'inégalité.

Bound by Blame: Sentencing, Colonialism, and Fetal Alcohol Spectrum Disorder

Sarah-jane Nussbaum[*]

Gladue *and* Ipeelee *send important messages to judges, but messages that have tensions within them that reflect the broader tensions of using the criminal law system to acknowledge ongoing state involvement in discrimination against Indigenous Peoples. The heart of the tension is that the criminal law system is built around assigning individual blame. I look closely at examples of judges struggling with inadequate tools to follow the Supreme Court of Canada's guidelines to acknowledge and redress the harmful impacts of colonialism within the constraints of their job of assigning individual blame. The result, unfortunately, is a consistent failure to recognize the Canadian state's ongoing role in colonial oppression. This article explores these tensions in the context of a particular manifestation: the judicial practice of blaming Indigenous mothers for the fetal alcohol spectrum disorder affecting their accused sons. The analysis illuminates the depth of the tensions of a common law criminal justice system in a colonial state: in the process of sentencing Indigenous offenders living with FASD, judges both strongly contest, and subtly rely upon, harmful colonial logics. I propose that a standing to blame analysis could assist judges in identifying, and responding to, the state's own role in causing, or being complicit in, an Indigenous individual's experiences of injustice. When the state has played such a role, the state is not justified in blaming the individual through the criminal law. The benefit of this kind of approach is that it would highlight the inappropriateness of the state's use of individual blame to respond to harms arising in the context of colonialism and inequality.*

Les arrêts Gladue *et* Ipeelee *envoient des messages importants aux juges, mais ces messages sont empreints de tensions. En effet, ils traduisent les graves problèmes liés à*

[*] Assistant Professor, Faculty of Law, University of New Brunswick. This article is adapted from, and builds on, portions of my doctoral dissertation, which I wrote as a PhD candidate at Osgoode Hall Law School, York University. I am deeply grateful to the members of my supervisory committee—François Tanguay-Renaud, Benjamin Berger, and Jennifer Nedelsky—for their exceptional support and invaluable feedback on earlier versions of this work. For insightful, thoughtful, and helpful comments during my PhD defence, I am also deeply grateful to Debra Parkes, Carmela Murdocca, and Jeffery Hewitt. I also thank Sonia Lawrence, Vincent Chiao, Danardo Jones, Rahina Zarma, Dana Phillips, Asma Atique, Caitlin Murphy, and Sarah Buhler for helpful comments and conversations, and I am grateful to the two anonymous peer reviewers for their excellent comments and suggestions. Thank you as well to the editorial team of this journal for their thoughtful work. I presented earlier versions of this article at the Canadian Law and Society Association's Annual Meeting in 2019 and at the Early Career Feminist Workshop, hosted by the Centre for Feminist Legal Studies UBC and Canadian Centre for Legal Innovation in Sexual Assault Response in 2022, and I am grateful to the organizers and participants. For helpful comments at these events, I thank David Milward, Jillian Rogin, Sarah Burningham, Lisa Kelly, Tess Sheldon, and Kim Brooks. I also gratefully acknowledge the financial support of the Social Sciences and Humanities Research Council of Canada Doctoral Fellowship, York University's Elia Scholars 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.

l'utilisation du système de justice criminelle pour faire reconnaître le rôle continus de l'État dans la discrimination à l'encontre des peuples autochtones. Étant donné que ce système est articulé autour de l'attribution d'un blâme individuel, de graves tensions sont inévitables. Dans ce contexte, j'analyse des exemples de cas où des juges jonglent avec des outils mal adaptés pour mettre en œuvre les lignes directrices formulées par la Cour suprême du Canada afin de reconnaître et de corriger les conséquences désastreuses du colonialisme alors qu'ils sont sous l'emprise de leur rôle d'attribution de blâme individuel. Malheureusement, le rôle continu de l'État canadien dans l'oppression coloniale n'est tout simplement pas reconnu. Dans cet article, j'explore ces tensions dans le contexte d'une manifestation particulière : le blâme que font porter les juges aux mères autochtones dont les fils accusés souffrent du trouble du spectre de l'alcoolisation fœtale (TSAF). L'analyse met en lumière la profondeur des tensions qui déchirent un système de justice pénale de common law dans un État colonial : appelés à déterminer la peine à infliger aux contrevenants autochtones souffrant du TSAF, les juges réprouvent vivement les principes coloniaux pernicieux, tout en les invoquant subtilement. J'explique qu'une analyse de ce recours au blâme pourrait aider les juges à reconnaître le rôle que joue l'État dans les expériences d'injustice que vivent les Autochtones et à corriger le tir. Lorsque l'État joue un tel rôle, il ne saurait justifier sa conduite en jetant le blâme sur l'individu au moyen du système de justice criminelle. Ce type d'analyse permettrait de faire ressortir et de corriger les failles du recours au blâme par l'État pour réparer les préjudices causés dans des situations marquées par le colonialisme et l'inégalité.

I. INTRODUCTION

R v Gladue[1] and *R v Ipeelee*[2] send important messages to judges, but messages that have tensions within them that reflect the broader tensions of using the criminal law system to acknowledge ongoing state involvement in discrimination against Indigenous Peoples.[3] The heart of the tension is that the criminal law system is built around assigning individual blame. Through the principles of culpability, the state aims

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1 *R v Gladue*, [1999] 1 SCR 688 at para 66, 133 CCC (3d) 385 [*Gladue*].

2 *R v Ipeelee*, 2012 SCC 13 at para 73, [2012] 1 SCR 433 [*Ipeelee*].

3 Throughout this article, I refer to Indigenous Peoples, Indigenous people, Indigenous persons, and Indigenous individuals. As well, some of the sources I discuss use the term Aboriginal instead of Indigenous. In the context of Canada, the term Indigenous includes First Nations, Inuit, and Métis peoples (Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*, Catalogue No RR4-2/2019E-PDF (Ottawa: Secretariat on Responsible Conduct of Research, December 2018) at 110 [*Tri-Council Policy Statement*]). As the *Tri-Council Policy Statement* notes, "First Nations, Inuit, and Métis peoples…have their own histories, cultures and languages" (*ibid*). Because the term Indigenous does not capture this diversity, I also refer to the particular nations with which some individuals identify when that information is available (*ibid*; see also e.g. Linda Mussell, "Intergenerational Imprisonment: Resistance and Resilience in Indigenous Communities" (2020) 33 J L & Soc Pol'y 15 at 18). Specifically, when discussing sentencing judgments, I mention the nation with which a criminalized Indigenous person identifies when the judgment specifies this information.

to hold morally blameworthy individuals to account,[4] and through the fundamental principle of sentencing, the state aims to sanction individuals in proportion to the seriousness of their offence and their level of moral blameworthiness.[5] By assigning individual blame, the criminal law system leaves little space for judges to address systemic injustices—for which the state itself is accountable—in a meaningful way.

As is well known, the Supreme Court of Canada has instructed judges to consider alternatives to imprisonment and to consider whether an Indigenous person's moral blameworthiness is lessened due to "unique systemic or background factors".[6] "Systemic and background factors" include experiences such as "lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and…higher levels of incarceration".[7] In *Ipeelee*, Justice LeBel drew a direct link between such factors and "the history of colonialism, displacement, and residential schools".[8] These statements are significant—they provide judges with the authority to identify, and to attempt to account for, colonialism. At the same time, the case addresses colonialism within an individualized framework—that of an individual's level of moral blameworthiness. While the practice of calibrating an offender's blameworthiness is standard in sentencing, it is not so clear how this practice ought to work (or how it ought to be effective) when the reason for reduced blameworthiness is one for which the state itself is responsible—that is, when the reason is the state's own participation, or complicity, in discrimination against Indigenous Peoples.

To be sure, the reasons in *Ipeelee*, in particular, do recognize that Indigenous offenders' experiences with systemic factors can be traced back to colonialism.[9] However, the guidance omits explicit reference to the state, in the present day, when describing Indigenous people's contemporary experiences of oppression. Such omissions may arise from simple grammatical lapses—that is, inadvertent failures to reiterate the state's ongoing role in colonialism. However, even if that is the case, such lapses risk harmfully implying that Indigenous people continue to experience colonialism's harmful effects for unknowable reasons. Such messages are in direct conflict with the judicial acknowledgment of colonialism. At the same time, such messages align well with a criminal law system designed to hold one individual to account—rather than one designed to identify and redress the state's own wrongdoings. Individual blame is so embedded in, and so central to, sentencing law that judicial efforts to acknowledge and respond to contemporary settler state wrongdoing do not invoke the key institution involved in the wrongdoing—the state—in a meaningful way.

In this article, I look closely at examples of judges struggling with the Supreme Court of Canada's guidance to acknowledge and redress state wrongdoing within an individualized sentencing framework. The result is a consistent failure to recognize and respond to the ongoing role of the Canadian state in maintaining colonialism. I explore the tensions between acknowledging colonialism and assigning individual blame in the context of a particular manifestation: the judicial practice of blaming Indigenous

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4 See Benjamin L Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2005) 51:1 McGill LJ 99.

5 See *Criminal Code*, RSC 1985, c C-46, s 718.1.

6 *Gladue*, *supra* note 1 at paras 38, 66; *Ipeelee*, *supra* note 2 at paras 73-74.

7 *Ipeelee*, *supra* note 2 at para 60.

8 *Ibid*.

9 *Ibid*.

mothers for their accused sons' experiences with fetal alcohol spectrum disorder [FASD].[10] This analysis illuminates the depth of the tensions of a common law criminal justice system in a colonial state: in the process of sentencing Indigenous offenders living with FASD, judges both strongly contest, and subtly rely upon, harmful colonial logics.

The article begins by highlighting the tensions arising from the guidance in *Gladue* and *Ipeelee*. These cases advise judges to minimize individual blame—as a way to redress systemic discrimination—without departing from individual blame. I propose that the analysis invited by *Gladue* and *Ipeelee* could potentially be strengthened if judges were to indicate that the reason for lessening individual blame is the state's lack of standing to blame a given Indigenous offender.[11] In particular, judges could indicate that, given the injustice the state has already inflicted upon a given individual, the state is not justified in blaming this person through the criminal law. The benefit of this kind of shift is that it would require a judge to clearly turn their gaze towards the state itself. The approach would also challenge and diminish the state's role in imposing further suffering on an individual through the sentencing regime.

The next sections of the article aim to further illuminate the tensions that arise when judges attempt to reduce blame without questioning criminal law's blaming function. The focus is on messages that blame Indigenous mothers for their accused sons' experiences with FASD. I first demonstrate the existence of mother-blaming messages within the public health context, and I then show their similar manifestations in sentencing judgments.

In the public health context, messages about FASD have perpetuated the idea that FASD is a matter of maternal responsibility.[12] The claim that women are responsible for FASD affecting their children will thus appear to be self-evident to many. However, empirical research suggests that prenatal exposure to

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[10] I refer to pregnant women and mothers throughout this article, because the article addresses the phenomenon of mother blame in relation to FASD, including discussions of research that specifically refers to pregnant women and mothers, and because the judges in the cases I study have specifically referred to pregnant women and mothers. This approach risks erasing pregnant people who do not identify as women. While unfortunately beyond the scope of this article, an analysis of blame in relation to pregnant people and parents who do not identify as women would be a welcome contribution to research on blame and FASD.

[11] On the issue of standing to blame, see RA Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial" (2010) 23:2 Ratio 123 [Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial"]; RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2009), ch 8; Benjamin L Berger, "Mental Disorder and the Instability of Blame in Criminal Law" in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) 117 at 134 [Berger, "Mental Disorder and the Instability of Blame in Criminal Law"].

[12] See Kirsten Bell, Darlene McNaughton & Amy Salmon, "Medicine, Morality and Mothering: Public Health Discourses on Foetal Alcohol Exposure, Smoking around Children and Childhood Overnutrition" (2009) 19:2 Critical Public Health 155; Irene Shankar, "Risky Bodies: Allocation of Risk and Responsibility within Fetal Alcohol Spectrum Disorder (FASD) Prevention Campaigns" (2016) 5:2 Canadian Journal of Disability Studies 152; Caroline L Tait, "Disruptions in Nature, Disruptions in Society: Aboriginal Peoples of Canada and the 'Making' of Fetal Alcohol Syndrome" in Laurence J Kirmayer & Gail Guthrie Valaskakis, eds, *Healing Traditions: The Mental Health of Aboriginal Peoples in Canada* (Vancouver: UBC Press, 2009) 196; Elizabeth M Armstrong, *Conceiving Risk, Bearing Responsibility: Fetal Alcohol Syndrome and the Diagnosis of Moral Disorder* (Baltimore: The Johns Hopkins University Press, 2003); Kelly Harding, Katherine Flannigan & Audrey McFarlane, *Canada FASD Research Network Policy Action Paper: Toward a Standard Definition of Fetal Alcohol Spectrum Disorder in Canada* (July 2019) at 3 [emphasis omitted], online: <https://canfasd.ca/wp-content/uploads/2019/08/Toward-a-Standard-Definition-of-FASD-Final.pdf>.

alcohol is not solely determinative of FASD. Instead, a variety of factors, such as compromised nutrition in pregnancy and the presence or absence of early life supports, can influence FASD outcomes.[13] If these other factors were attended to, the discourse could shift from one of individual failure to the failure of the state to assume responsibility.[14]

The final section of the article analyzes the ways in which individual blame intersects with mother blame in sentencing judgments. I examine a selection of sentencing judgments involving Indigenous offenders living with FASD. In the cases, judges both acknowledge colonial oppression and make Indigenous mothers blameworthy for their accused sons' experiences with FASD. The unfortunate effect is a tension between judicial acknowledgments of colonialism and judicial messages that entrench harmful colonial stereotypes about Indigenous mothers. I argue that mother blame presents as an offshoot of sentencing law's individualized approach to blame. The coexistence of mother blame with judicial attempts to situate an Indigenous offender within a context of colonialism suggests that mother blame is a (perhaps inevitable) by-product of the particular type of contextual analysis that sentencing judges pursue. This is a contextual analysis in which judges strive to redress the high rates of imprisonment among Indigenous people without significantly departing from individual blame—and without having obvious tools to do so. Instead, judges gesture towards the problems of colonialism, the criminal justice system, and blame, but seem to remain somewhat caught within the practice of continuing to assign blame to Indigenous individuals, including mothers.

II. SENTENCING, COLONIALISM, AND BLAME

In *Gladue*, Justices Cory and Iacobucci famously interpreted section 718.2(e) of the *Criminal Code* in way that calls upon judges to consider alternatives to imprisonment when sentencing Indigenous offenders and to potentially reduce Indigenous offenders' blameworthiness as a result of experiences of oppression. One set of considerations that sentencing judges are to examine is a grouping of factors related to oppression, referred to as "unique systemic and background factors".[15] In *Ipeelee*, Justice LeBel described "systemic and background factors" as including diminished socio-economic conditions and opportunities. Additionally, Justice LeBel directly stated that such factors might lead to reduced culpability on the part of an Indigenous offender:

> [S]ystemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness…Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely—if

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13 See Bell, McNaughton & Salmon, *supra* note 12 at 158; Shankar, *supra* note 12 at 155-56; Tait, *supra* note 12 at 203-205; Cheryl McQuire et al, "The Causal Web of Foetal Alcohol Spectrum Disorders: A Review and Causal Diagram" (2020) 29 European Child & Adolescent Psychiatry 575 at 586.

14 See Bell, McNaughton & Salmon, *supra* note 12; Shankar, *supra* note 12; Tait, *supra* note 12; Armstrong, *supra* note 12.

15 *Gladue*, *supra* note 1 at paras 67-69. The second set of considerations includes "sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection" (*ibid* at para 66).

> ever—attains a level where one could properly say that their actions were not *voluntary*, and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.[16]

Moreover, Justice LeBel explained that "systemic and background factors" include experiences of oppression generated by the state's own practices:

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.[17]

Justice LeBel thus identified some contextual factors that judges should consider when calibrating an Indigenous individual's blameworthiness. In identifying these factors, Justice LeBel's reasoning contains glimmers of judicial engagement with the roles that the state itself has played in contributing to Indigenous individuals' experiences with, for example, education and employment, and with how those experiences might have contributed to their experiences of being subjected to criminal justice processes by the state.

Justice LeBel recognized "the history of colonialism, displacement, and residential schools" and connections between these histories and contemporary discrimination against Indigenous Peoples. However, despite this acknowledgment, Justice LeBel simultaneously obfuscates the state. For instance, as noted above, Justice LeBel stated that "[m]any Aboriginal offenders *find themselves* in situations of social and economic deprivation".[18] The idea that Indigenous offenders simply "find themselves" in diminished socio-economic conditions removes the state from the picture. This language suggests that it is not really knowable how an Indigenous person "found themselves" in such conditions. As a result, the reasoning does not indicate the need to better understand the role that the state itself continues to play in creating or sustaining socio-economic deprivation.

Justice LeBel's language also demonstrates slippage between the concepts of criminalization and criminality: he writes that "[i]t would have been naive to suggest that sentencing Aboriginal persons differently, *without addressing the root causes of criminality*, would eliminate their overrepresentation in the criminal justice system entirely."[19] The phrase, "the root causes of criminality", brings to mind images of individuals who are criminal, rather than images of the state subjecting individuals to the criminal justice process. Justice LeBel acknowledged that "the history of colonialism, displacement, and residential schools…continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal

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16 *Ipeelee*, *supra* note 2 at para 73.
17 *Ibid* at para 60.
18 *Ibid* at para 73 [emphasis added].
19 *Ibid* at para 61 [emphasis added].

peoples".[20] Given this statement, I assume that Justice LeBel was implying that "colonialism, displacement, and residential schools" are, or at least contribute to, "the root causes of criminality". Nevertheless, the use of the term "criminality" maintains the reader's focus on individuals and on hardships endured by Indigenous people, rather than on the state's practices that cause and sustain hardships and label people as criminals.

With respect to judicial focus on Indigenous people's experiences of harm, Carmela Murdocca shows that sentencing (and bail) judgments have "advanc[ed] a particular kind of pathologized racial ontology".[21] This ontology is one that reiterates the range of "present-day vulnerabilities that Indigenous people experience in view of the history of colonialism".[22] While the ontology recognizes links between Indigenous people's experiences of harm and historical examples of colonialism, it does not reiterate, contest, or explore avenues for redressing the state's present-day practices of colonialism.

An example is Murdocca's analysis of Justice Nakatsuru's judgment in *R v Armitage*.[23] Among other parts of the judgment, Murdocca critiques Justice Nakatsuru's tree analogy. She quotes the following passage from the judgment:

> If I could describe Mr. Armitage as a tree, his roots remain hidden beneath the ground. I can see what he is now. I can see the trunk. I can see the leaves. But much of what he is and what has brought him before me, I cannot see. They are still buried. But I am sure that some of those roots involve his Aboriginal heritage and ancestry. They help define who he is. They have been a factor in his offending. They must be taken into account in his sentencing. It is also obvious that this tree is not healthy. The leaves droop and appear sickly. It does not flourish regardless of the attention paid upon it. The tree needs healing.[24]

While this analogy has been praised in the media, Murdocca argues that it portrays Mr. Armitage as intrinsically prone to suffering. With respect to the tree analogy, Murdocca observes that "Armitage is not described here for 'who he is' but, rather, for 'what he is'—a state of nature bereft of a link to a productive path towards reason and participating as a subject in a liberal society."[25] The metaphor of a "sickly tree" serves to mark Mr. Armitage as deviant: "Armitage is a 'sickly tree'…where his lived experiences, in life and through the law, evidence a deviation from what can be described or surmised as a normal state of affairs."[26] This apparent deviance removes from scrutiny the state's—including a judge's—own actions in framing a person in this way.

The practice of separating offenders from other people on the basis of deviance also enables the criminal justice system to inflict violence on offenders.[27] As Marie-Eve Sylvestre explains, criminal law

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20 *Ibid* at para 60.

21 Carmela Murdocca, "Ethics of Accountability: *Gladue*, Race, and the Limits of Reparative Justice" (2018) 30:3 CJWL 522 at 537 [Murdocca, "Ethics of Accountability"].

22 *Ibid* at 541.

23 *R v Armitage*, 2015 ONCJ 64 [*Armitage*].

24 *Ibid* at paras 55-56, quoted in Murdocca, "Ethics of Accountability", *supra* note 21 at 535.

25 Murdocca, "Ethics of Accountability", *supra* note 21 at 535.

26 *Ibid*.

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

uses deviance, or "extreme difference or 'monstrosity'", to make sense of and to justify "exclusion and punishment."[28] By marking Indigenous offenders, in particular, as "other" or less than human, participants in the criminal justice system can justify their continued framing of Indigenous people as being in need of punishment and management, even while acknowledging the harms of colonialism.

Murdocca's analysis of *Armitage* reveals a challenge that sentencing judges face. Justice Nakatsuru was following the Supreme Court's guidance and was cognizant of colonialism and the overincarceration of Indigenous people. Moreover, Justice Nakatsuru seemed to be valuably endeavouring to show respect to the individual, Armitage, appearing before him. The language that Murdocca traced in the judgment seems to stem from the tension in the Supreme Court of Canada's own jurisprudence—the tension of reducing blame in a blame-centred criminal justice system that leaves no space for meaningful engagement with the state's own responsibilities. It is understandable, though deeply troubling, that judges frame Indigenous individuals as intrinsically suffering in order to justify lesser blameworthiness—and perhaps, ultimately, a lesser sentence.

An analysis of blame could benefit from incorporating a closer look at the state itself. Given the state's own contributions towards Indigenous people's experiences of discrimination in relation to, for example, poverty, education, racialization, and interpersonal violence, a *Gladue* analysis could serve as a pathway to challenge *the state's practice* of blaming an Indigenous individual. In particular, a *Gladue* analysis could possibly invite the question of whether the state lacks the standing to blame an Indigenous individual.[29] The question would ask something along the following lines: given the injustice that the state has already inflicted upon this individual, does the state lack the standing to blame them? This approach does not diminish the responsibility, or accountability, of an individual for their conduct. Instead, by finding that the state has contributed to a person's experiences of injustice, the approach throws into question whether the state is even in a position to hold this individual to account and to then blame them.

A standing to blame analysis fits well with *Gladue* and *Ipeelee*. As called for in *Gladue* and *Ipeelee*, the analysis situates an accused person within their social context. Importantly, on a standing to blame analysis—as in *Gladue* and *Ipeelee*—social context includes the state's participation in systemic discrimination. As RA Duff explains, the state will lack standing to blame when it has "systematically excluded" a person "from significant aspects" of equal participation in the community and in the exercise of their rights.[30] In other words, the state will lack standing to blame when it has participated in, or been complicit in, oppression—in constructing or supporting structural policies and practices that impact people who identify as, or whom the state and society identify as, members of a particular social group.[31] The impacts of such policies and practices include preventing group members from learning, exercising skills, engaging with others, sharing, being heard, and otherwise living their lives.[32] These aspects of a standing to blame analysis—identifying dimensions of systemic discrimination—are already explicitly included in

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28 *Ibid* at 773 [footnote omitted].

29 On the issue of standing to blame, see Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial", *supra* note 11; Duff, *Answering for Crime*, supra note 11, ch 8; Berger, "Mental Disorder and the Instability of Blame in Criminal Law", supra note 11 at 134. While beyond the scope of this paper, another potential avenue for shifting the judicial gaze towards the state is an equality challenge under section 15 of the *Charter*: see Sonia Lawrence & Debra Parkes, "*R v Turtle*: Substantive Equality Touches Down in Treaty 5 Territory" (2021) 66 Criminal Reports (7th) 430.

30 Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial", *supra* note 11 at 138.

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

32 *Ibid*.

Gladue and *Ipeelee*. A standing to blame analysis could also, however, strengthen the analysis called for in *Gladue* and *Ipeelee* by altering the judicial gaze when there is a finding of oppression. In particular, a standing to blame analysis requires a judge to turn their gaze towards the state itself. Rather than encouraging or enabling a judge to frame an Indigenous individual as suffering (for purportedly intrinsic or unknowable reasons) in an attempt to justify a finding of lesser blameworthiness, a standing to blame analysis blames the state itself for its own wrongdoings.

Gladue and *Ipeelee* already require judges to identify the state's past wrongdoings. However, the judgments do not clearly frame those wrongdoings as practices for which the state currently bears responsibility. Instead, the judicial focus is on how those wrongdoings have manifested in an individual's life. It is, of course, important for judges to consider the individual offender appearing before the court. It is also understandable that judges focus on individuals to the exclusion of collective entities such as the state, since this is what sentencing judges are called upon to do. A standing to blame analysis rests upon the premise that, in certain circumstances, judges ought not to carry out the very work that the criminal law system ordinarily sets out to perform—the state's work of blaming individuals for crime.[33] A focus on individuals without first dealing with the state's own role in placing blame on individuals omits a key entity in the very oppression that judges are otherwise attempting to address.

The omission of the state takes on heightened significance in the context of Canada's continued colonial efforts to occupy Indigenous lands and exert domination and control over Indigenous individuals, communities, and Nations.[34] In this setting, the Supreme Court of Canada has recognized that sentencing judges ought to play a role in redressing Canada's overincarceration of Indigenous Peoples.[35] Yet the Supreme Court does not commit to a decarceral agenda, and it is perhaps precisely the judicial project of trying to reduce the imprisonment of Indigenous Peoples without fundamentally questioning the prison itself that leads to tensions between the recognition—and perpetuation—of colonial narratives. Judges are not only working within a framework of individual blame, but within a framework of individual blame that uses the prison as a tool for the state's attempts to control and manage Indigenous people.

The colonial dimensions of the prison are revealed in the history of Canada's carceral systems, which have been shown to be sustained through the colonizing relationship.[36] As Vicki Chartrand explains, Canada's carceral systems developed "as part of a process to consolidate the nation."[37] Initially, Canada used the penitentiary mostly for white settlers.[38] Instead of managing Indigenous people through the penal system, Canada aimed to segregate and assimilate Indigenous people through the reserve system,

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33 See e.g. Berger, "Mental Disorder and the Instability of Blame in Criminal Law", *supra* note 11 at 137-38. Berger argues that the very reason why judges consider FASD at sentencing (rather than within the scope of the defence of not criminally responsible on account of mental disorder) is that criminal law *functions* by attaching blame to an individual person. If judges were to broaden the scope of people who are not criminally responsible, then criminal law would no longer be able to serve its function of individualizing and containing blame.

34 *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Volume 1a, online: <https://www.mmiwg-ffada.ca/final-report/> at 77.

35 See *Gladue*, *supra* note 1 at paras 47-48.

36 Vicki Chartrand, "Unsettled Times: Indigenous Incarceration and the Links between Colonialism and the Penitentiary in Canada" (2019) 61:3 Can J Corr 67.

37 *Ibid* at 72 [footnote omitted].

38 *Ibid* at 74.

residential schools, and the criminalization of Indigenous legal, cultural, and political practices.[39] Following the Second World War, colonialism in Canada "shifted from overt domination to a cultural model of acknowledgment with apologies, occasional land titles, and financial restitutions, while the same colonizing relationship that subordinates Indigenous interests to the state was retained."[40] While contemporary settler colonial discourses portray colonialism as restricted to the past,[41] the colonizing relationship continues. For example, the colonizing relationship is present in the shift from overt assimilationist policies against Indigenous Peoples to the state's practice of increasingly imprisoning Indigenous Peoples in a context of otherwise decreasing prison populations.[42]

Canada's carceral systems continue to function precisely by not leaving space for questioning the prison.[43] Instead of questioning the prison, the criminal justice system serves a colonial purpose by upholding the prison as a supposedly "necessary and normal" method for "containment, segregation, and reformation".[44] The construction of the prison as supposedly essential and conventional masks the historical context in which the prison emerged and the contemporary context in which it continues to operate. By requiring judges to pause and ask whether the state is even justified in blaming an Indigenous individual in the face of ongoing colonialism, including through Canada's carceral practices, a standing to blame analysis might assist judges in justifying a break with carceral sanctions.

The next sections of the article aim to shed further light on the tensions that arise when judges try to redress systemic discrimination while exercising criminal law's blaming function. I analyze, in particular, messages that blame Indigenous mothers for their accused sons' experiences with FASD. I first show the prevalence, and problems, of these messages within the public health context, and I then show their similar manifestations in the sentencing context.

III. MOTHER BLAME IN PUBLIC HEALTH DISCOURSES SURROUNDING FASD

Public health discourses depict FASD as the sole responsibility and fault of individual mothers.[45]

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39 *Ibid* at 74-75.

40 *Ibid* at 76, citing Glen S Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 30-31 and Alissa Macoun & Elizabeth Strakosch, "The Ethical Demands of Settler Colonial Theory" (2013) 3:3-4 Settler Colonial Studies 426 at 435.

41 Chartrand, *supra* note 36 at 68, 78.

42 Since 1960, the state has incarcerated Indigenous persons at federal prisons at an increasing rate (*ibid* at 77). At the same time, the overall population of incarcerated persons at federal institutions has decreased since at least 2012 (*ibid* at 77).

43 *Ibid* at 78.

44 *Ibid*. Similar themes can be found in critiques of the language and quantification of the "over-representation" of Indigenous people in Canada's prisons. The concept of "over-representation" risks shifting one's attention away from the state's own failures and obscuring the colonial, racist, and structural aspects of the Canadian state's practices of imprisoning Indigenous people. See Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437 at 440; Robert Nichols, "The Colonialism of Incarceration" (2014) 17:2 Radical Philosophy Review 435; Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press, 2013) at 63; Carmela Murdocca, "From Incarceration to Restoration: National Responsibility, Gender and the Production of Cultural Difference" (2009) 18:1 Soc & Leg Stud 23 at 31.

45 Bell, McNaughton & Salmon, s*upra* note 12 at 158, 160, 161-62. See also Armstrong, *supra* note 12.

For example, definitions indicate that FASD is "caused by" a mother's consumption of alcohol during pregnancy.[46] Furthermore, definitions claim that there is "no cure" for FASD.[47] These definitions have disseminated widely and are thus widely known. However, these definitions are not empirically accurate. In fact, research indicates that prenatal exposure to alcohol is not solely determinative of FASD. Rather, compromised nutrition in pregnancy (which is indicative of poverty) influences FASD.[48] Additionally, early-life supports for infants and mothers relating to, for example, healthcare and education, can also impact FASD.[49]

By framing FASD as solely caused by an individual woman's use of alcohol while pregnant, public health discourses mask the role of social, institutional, and environmental factors that shape and limit women's access to health care and supports—care and supports that appear to be important in decreasing a child's likelihood of experiencing FASD.[50] Furthermore, as Irene Shankar explains, by portraying individual women as posing risks to their children, public health messaging relating to FASD constructs "the woman…as a dangerous object, thus erasing her own vulnerability and health needs."[51] Public health discourses therefore obscure the multiple factors that contribute to the construction and experience of FASD and the experiences and needs of women.

In addition to inaccurately portraying prenatal exposure to alcohol as the sole cause of FASD, public health policies relating to FASD in North America target Indigenous women and women of colour.[52] These policies regard Indigenous women and women of colour as being especially susceptible to using alcohol while pregnant.[53] By comparison, North American policies seldom regard the use of alcohol by white middle- and upper-class women as being risky, nor do the policies suggest that the state should step in to interfere with their use of alcohol.[54]

In Canada, public health discourses link FASD inextricably with Indigenous women, relying on individualizing and colonial racist logics.[55] As Caroline Tait demonstrates, the framing of FASD as an

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46 Harding, Flannigan & McFarlane, *supra* note 12 at 3-4.

47 *Ibid*.

48 Bell, McNaughton & Salmon, *supra* note 12 at 158, citing Nesrin Bingol et al, "The Influence of Socioeconomic Factors on the Occurrence of Fetal Alcohol Syndrome" (1987) 6:4 Advances in Alcohol & Substance Abuse 105, Ernest L Abel & John H Hannigan, "Maternal Risk Factors in Fetal Alcohol Syndrome: Provocative and Permissive Influences" (1995) 17:4 Neurotoxicology and Teratology 445; and Mary Anne George, *The Effects of Prenatal Exposure to Alcohol, Tobacco and Other Risks on Children's Health, Behaviour and Academic Abilities* (PhD Dissertation, University of British Columbia, 2001) [unpublished].

49 Bell, McNaughton & Salmon, *supra* note 12 at 158, citing M Motz et al, "Breaking the Cycle: Measures of Progress 1995-2005" (2006) 4:22 J Fetal Alcohol Syndrome S1. For further discussion, see also Shankar, *supra* note 12 at 155-56; Tait, *supra* note 12 at 203-205; McQuire et al, *supra* note 13 at 586.

50 Bell, McNaughton & Salmon, *supra* note 12 at 163-64.

51 Shankar, *supra* note 12 at 157.

52 Bell, McNaughton & Salmon, *supra* note 12 at 163. For similarities and differences between public health policies and campaigns in Canada and the United States, see Tait, *supra* note 12.

53 Bell, McNaughton & Salmon, *supra* note 12 at 163. See also Tait, *supra* note 12 at 204 (noting the high scrutiny of Indigenous women's use of alcohol among human-service providers in Canada and governmental statistics indicating that less Indigenous women choose to consume alcohol than non-Indigenous women).

54 Bell, McNaughton & Salmon, *supra* note 12 at 163, citing Amy Salmon, "'It Takes a Community': Constructing Aboriginal Mothers and Children with FAS/FAE as Objects of Moral Panic in/through a FAS/FAE Prevention Policy" (2004) 6:1 J Association for Research on Mothering 112.

55 See Tait, *supra* note 12.

Indigenous "problem" relates to governmental efforts to locate "[o]ppression of Aboriginal peoples…in the past" and to recast "the intergenerational effects of colonization…as 'treatable conditions,' like FAS, low self-esteem, and alcohol abuse – conditions that mainstream health and social services are posed to address in their efforts to improve the lives of Aboriginal peoples."[56] Public health discourses ignore "[v]arious *sources* of mental distress – endemic poverty; racism; food, water, and housing insecurities; social and economic marginalization" thus presenting FASD and its supposed causes as arising from and involving "individual pathology".[57] Furthermore, public discourses call for state agents to serve as "altruistic caregivers" by providing "individualized interventions".[58] Public health discourses thus make individual Indigenous women responsible and blameworthy for FASD by framing FASD as an individualized 'problem'. In doing so, public health discourses erase the role of the state in constructing and contributing to FASD while simultaneously embracing the state's apparent capacity to 'help' people living with FASD.

The next section demonstrates that judicial sentencing discourses rely on the same kind of individualizing logic to place blame on Indigenous mothers for their accused sons' experiences with FASD. Also reminiscent of public health discourses, the judgments incorporate the ideas that colonialism existed in the past and that state actors can and should respond to its present-day harms by identifying, labelling, and managing various hardships with which Indigenous individuals live.

IV. FASD, MOTHER BLAME, AND SENTENCING: CASE STUDIES

In this section, I turn to a textual analysis of sentencing judgments involving Indigenous offenders living with FASD. I use a method of textual analysis "that closely examines…the content and meaning of texts".[59] In particular, I examine reported sentencing judgments not only for the evidence that they provide about "the text of the law"—that is, legal rules—but also, and primarily, for the evidence that they provide about "the practice of law"—that is, narratives about how judges, as state actors participating in the criminal law system, talk about people, relationships, social issues, history, and the state.[60] Gillian Balfour expands on the method of reading reported sentencing judgments "as social practices" as follows:

> Sociologically, reported sentencing decisions can be read as social practices that are expressions of dominant cultural meanings and relations of power that operate within particular cultural and institutional contexts. In this way, we can read sentencing decisions for the representations of Aboriginal peoples and their communities, violent crimes, and the purposes of punishment that are at work in the practice of law.[61]

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56 *Ibid* at 208.
57 *Ibid*.
58 *Ibid*.
59 Sharon Lockyer, "Textual Analysis" in Lisa M Given, ed, *The Sage Encyclopedia of Qualitative Research Methods* (Thousand Oaks: Sage, 2012) 865 at 865.
60 Gillian Balfour, "Do Law Reforms Matter? Exploring the Victimization-Criminalization Continuum in the Sentencing of Aboriginal Women in Canada" (2012) 19:1 Intl Rev Victimology 85 at 88.
61 *Ibid*. See also Murdocca, "Ethics of Accountability", *supra* note 21 at 525-26.

The method of reading sentencing judgments "as social practices" thus enables researchers to share insight into some of the many assumptions, stereotypes, and relationships at work in the state's practices of incarcerating Indigenous people.

I selected a small and narrow set of judgments to examine. This approach is in keeping with a textual analysis method: as Sharon Lockyer notes, "a small number of texts" can be appropriate for textual analysis because "textual approaches provide close analyses of texts".[62] By selecting a small number of judgments, I tried to carefully identify and unpack judicial language and reasoning that incorporates discriminatory assumptions.

Given the small set of cases, I do not suggest that my findings are representative of judicial engagement with FASD in the sentencing of Indigenous people within sentencing judgments and practices across Canada (including within reported and unreported judgments and within alternative sentencing procedures). As Murdocca cautions, particular sentencing judgments do not support sweeping conclusions.[63] Nevertheless, individual judgments provide information about some of the ways in which some sentencing judges attempt to repair systemic injustice in the criminal justice system.[64] Along these lines, I found consistent examples of judges transferring individual blame away from offenders and toward their mothers. In making Indigenous women responsible and blameworthy for their children's experiences with FASD, the judgments reinforce negative stereotypes about Indigenous women and entrench individual blame.

The cases in this study include one first-instance sentencing judgment and a selection of several appellate judgments. The first-instance judgment[65] that I consider in my analysis is one that scholars have cited as recognizing that section 718.2(e) involves the attribution of some accountability to Parliament for criminal conduct carried out by Indigenous people. For instance, Jillian Rogin cites the case for the proposition that "[t]he inquiry into the systemic effects that colonization has had on an individual's life circumstances…can also be seen as an attempt by Parliament to take responsibility for the policies and legacy of colonialism that have created the circumstances leading to criminal behaviour."[66] I agree that the judgment has valuably identified national responsibility for the criminalization and imprisonment of Indigenous people. At the same time, the judgment's language in relation to pregnant women who consume alcohol is violent and blaming, threatening to diminish the significance of the recognition of state responsibility. With respect to appellate cases, I chose cases that similarly acknowledge colonialism and impose lesser periods of incarceration, while also constructing Indigenous women as responsible and blameworthy for their children's experiences with FASD.

With this backdrop in mind, I turn now to the cases and begin with the first-instance judgment, *R v Quash*.[67] The offender was Bobby Ronny Quash, and Judge Michael Cozens of the Territorial Court of

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62 Lockyer, *supra* note 59 at 865.

63 Murdocca, "Ethics of Accountability", *supra* note 21 at 526.

64 *Ibid*. Reported judgments are only one aspect of the sentencing process. While this paper focuses on reported sentencing judgments, one could also consider the language surrounding FASD emerging in other discourses, such as counsel's submissions and pre-sentence reports.

65 *R v Quash*, 2009 YKTC 54, 84 WCB (2d) 66 [*Quash*].

66 Jillian Rogin, "*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95 Can Bar Rev 325 at 331-32. See also David Milward, "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47:3 UBC L Rev 1025 at 1070-71, 1058.

67 *Supra* note 65.

Yukon delivered the sentencing judgment. Mr. Quash pled guilty to sexual assault, failing to stop a motor vehicle for a peace officer, and breach of recognizance.[68] Judge Cozens described Mr. Quash as a member of the Tahltan First Nation.[69] An FAS Diagnostic Clinic report was filed with court, diagnosing Mr. Quash with FASD.[70] Judge Cozens noted that the pre-sentence report provided "little information…concerning Mr. Quash's father's or mother's history", including "very little information as to what impact, if any,…the First Nations heritage of his parents may have had on him."[71] Judge Cozens concluded that, despite Mr. Quash's "willingness to change his life", there were no facilities in the community offering the type of supervision and support that he would need.[72] Judge Cozens thus imposed a custodial sentence of 10 months in custody plus three years' probation, after accounting for time served in pre-trial custody and diminished blameworthiness due to FASD.[73]

In sentencing Mr. Quash, Judge Cozens took into account Mr. Quash's FASD diagnosis. Judge Cozens specifically considered the diagnostic report as part of applying section 718.2(e) of the *Criminal Code*. In particular, he noted "that FASD is a serious problem that extends beyond the First Nations community"[74] and went on to explain that, "[i]n the Yukon,…[FASD] is disproportionately an issue within the First Nations peoples."[75] Judge Cozens seemed to be caught between recognizing that the depiction of FASD as an issue only within Indigenous communities is stigmatizing and, at the same time, attempting to find a way to acknowledge and respond to the high numbers of Indigenous individuals living with FASD—and to find a way to connect FASD to section 718.2(e). Judge Cozens dealt with this tension by identifying a link between FASD and systemic discrimination, writing that "[t]he problematic consumption of alcohol that has resulted in children being born suffering the permanent effects of FASD often finds its roots in the systemic discrimination of First Nations peoples and the resultant alienation they experience from their ancestry, their culture and their families."[76] This statement seems to implicitly place some accountability on the Canadian state and Canadian communities for creating and sustaining some of the conditions in which Indigenous offenders living with FASD experience and encounter in the social world. Moreover, in addition to noting this connection between systemic discrimination and FASD, Judge Cozens also identified a concrete social and political responsibility—one belonging to the federal government, provincial and territorial governments, and municipal governments, as well as to individual members of these communities—to provide understanding and community-based supports, such as access to housing, care, and programming, for offenders living with FASD. [77] While the idea that the state and social communities ought to find ways to support individuals living with FASD can reflect the colonial racist logic that Indigenous people are in need of the state's 'help', Judge Cozens' language also revealed an effort to connect FASD with systemic discrimination.

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68 *Ibid* at para 1.
69 *Ibid* at para 23.
70 *Ibid* at para 29.
71 *Ibid* at para 58.
72 *Ibid* at para 82.
73 *Ibid* at paras 85-86.
74 *Ibid* at para 61.
75 *Ibid*.
76 *Ibid* at para 62.
77 *Ibid* at paras 75-76.

Unfortunately, while Judge Cozens laudably recognized a link between systemic discrimination and FASD, this aspect of the judgment is complicated by a reference to "the crime visited upon them in the womb".[78] This statement leaves the disturbing impression of placing some criminal responsibility and blame on pregnant women. The consumption of alcohol while pregnant is conduct that is not a crime in Canada. Moreover, the statement reveals a concerning ease with which a judge can detach responsibility and blame from an Indigenous individual who has experienced colonialism's harsh impacts and simply reattach responsibility to the Indigenous person's mother.[79] The statement threatens to diminish the work carried out by Judge Cozens' discussion of the state's accountability for having created harmful conditions such as a lack of support for people living with FASD. The passage erroneously labels pregnant women as criminally responsible for FASD, and Judge Cozens applied this labelling without situating women within their own sets of relationships and experiences, most notably of which might be the ways in which systemic racism and sexism have interlocked in ways that lead to particular forms of oppression against Indigenous women. The phrase also draws the reader's attention away from the harm that is being addressed in this judgment—a sexual assault against a woman.[80] Systemic violence against women goes unaddressed.

Mother blame is not perfectly straightforward here. While Judge Cozens seemed to make Mr. Quash's mother responsible—to some degree—for Mr. Quash's FASD, Judge Cozens also acknowledged that FASD is connected with systemic discrimination. In identifying this link, Judge Cozens seemed to make some progress in distributing blame for the existence and effects of FASD beyond prenatal consumption of alcohol. Perhaps, then, the most important aspect of mother blame at issue here is the idea that FASD necessarily arises from prenatal exposure to alcohol. In other words, Judge Cozens could have strengthened his identified link between systemic discrimination and FASD by acknowledging that the depiction of FASD as arising solely from prenatal exposure to alcohol is itself a feature of colonial racist logic. By vividly depicting women as committing crimes against their wombs, Judge Cozens lost the opportunity to account for the very kinds of issues that he otherwise seemed keen to address (such as issues in inequality in relation to access to medical care, nutrition, and education).

Quash reveals that judges who are attuned to colonial racism may still perpetuate some of its logics by drawing on discourses that have been propagated by public health messages. In addition to revealing the strength of individual blame, the case also illustrates the lack of tools available for judges to meaningful redress colonial oppression through the existing sentencing framework: as noted above, Judge Cozens sentenced Mr. Quash to prison because there was a lack of appropriate community supports available. Judge Cozens could not fulfill the required sentencing objectives properly without imposing a carceral sentence.

Vivid, mother-blaming language is also present in *R v Okimaw*.[81] This case involved a sentence appeal brought by Frank Okimaw. Following trial, the trial judge found Mr. Okimaw guilty of aggravated assault

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78 *Ibid* at para 75.

79 It is not entirely clear whether Mr. Quash's mother was Indigenous. Judge Cozens noted that "Mr. Quash's father and mother spoke during the sentencing proceedings" (*ibid* at para 34). Judge Cozens lacked detailed information about Mr. Quash's parents, including their "First Nations ancestry", but appears to have identified Mr. Quash's parents as being of "First Nations heritage" (*ibid* at para 58).

80 *Ibid* at paras 1, 4-5.

81 *R v Okimaw*, 2016 ABCA 246, 340 CCC (3d) 225 [*Okimaw*].

and possession of a weapon for a dangerous purpose.[82] The judge sentenced Mr. Okimaw to 30 months' imprisonment, reduced for time spent on remand, to be followed by a period of 18 months of probation.[83] The sentence also included a mandatory DNA order and a weapons prohibition.[84] In the result, the Court of Appeal allowed Mr. Okimaw's appeal and imposed a sentence 21 months in custody, reduced for time served pre- and post-sentence.

The judgment of the Alberta Court of Appeal was delivered by the Court, which comprised Justice Jack Watson, Justice Myra Bielby, and Justice Frederica Schutz. In their analysis, the Court stated that "unique background and systemic factors" played a role in their determination of the level of blameworthiness to be attributed to Mr. Okimaw and in their determination of a fit sentence.[85] With respect to the various "background and systemic factors" in Mr. Okimaw's life, the Court referred specifically to his mother's use of alcohol while she was pregnant, using blaming language:

> Okimaw was literally conceived into the multiple intergenerational traumas that afflicted, and continue to afflict, his family…His own mother prenatally exposed Okimaw to irreparable harm by continuing to consume alcohol – ethanol squarely implicated in causing Fetal Alcohol Spectrum Disorder for which there is no known cure or ability to reverse the sequelae of malformation and organic brain damage. Okimaw's mother abandoned him.[86]

The language relating to Mr. Okimaw's mother's use of alcohol-ethanol mirrors the language used in criminal law by referencing the "irreparable harm" that she caused and the determination that her use of alcohol-ethanol was "squarely implicated in causing Fetal Alcohol Spectrum Disorder". Relatedly, the reference to conception inappropriately draws the reader's attention towards Mr. Okimaw's mother's sexual activity and her use of alcohol while pregnant. We also see again an emphasis on the lack of a "cure or [an] ability to reverse" the effects of FASD, which does not account for the research that has identified poor nutrition and lack of access to supports, such as education and healthcare, as variables contributing to FASD.[87] Rather than identifying the multiple forms of inequality that may have been imposed upon Mr. Okimaw and his mother—and the potential role of those inequalities in Mr. Okimaw's experiences with FASD—the Court erased that background and instead attributed individual responsibility and blame to Mr. Okimaw's mother.

It appears that the Court attempted to link Mr. Okimaw's mother's use of alcohol with colonialism. Specifically, the Court noted that her actions comprised a component of "the multiple intergenerational traumas that afflicted, and continue to afflict, his family."[88] Nevertheless, the Court did not meaningfully engage with the role of the state in generating and sustaining these traumas. In addition to the above comments about Mr. Okimaw's conception, the Court projected intergenerational traumas onto Mr.

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82 *Ibid* at para 3.
83 *Ibid* at para 4.
84 *Ibid*.
85 *Ibid* at para 75.
86 *Ibid* at para 76.
87 Bell, McNaughton & Salmon, *supra* note 12 at 158.
88 *Okimaw*, *supra* note 81 at para 76.

Okimaw's Indigenous family without connecting the traumas to the state's practices and policies: "Other than his kokum, family members simply could not triumph over, or ultimately surmount, the collective traumas that befell them."[89] The judgment thus presents "the collective traumas" as detached from the state or any other institutions—as simply 'falling upon' Mr. Okimaw's family. A disturbing undercurrent of suggestions of weakness is also present in the statement that his "family members *simply could not triumph over, or ultimately surmount,* the collective traumas*"*.[90] The Court leaves unmentioned the state's continued practices of surveillance, criminalization, and racialization. Rather than addressing the state's continued contributions to, and complicity in, inequalities and hardships experienced by Mr. Okimaw's family, the passage implied that the state's harmful actions existed only in the past and that somehow Mr. Okimaw's family has been unable to overcome that history.

As in *Quash*, it is understandable, though deeply troubling, that judges employ mother-blaming language. Such language is not only prominent in public health messages, but also consistent with sentencing law's emphasis on individual blame. The approach of rerouting blame to an offender's mother helps to justify a lesser sentence in a context where sentencing law has not provided judges with the arguments or tools to challenge criminal law's own blaming function.

In another case, *R v Quinn*,[91] Justice Myra Bielby's dissenting judgment similarly illustrates both an attempt to acknowledge an Indigenous person's experiences of systemic discrimination and some perpetuation of mother-blaming language. A forensic assessment report detailed Curtis Arthur Quinn's experiences with addictions and disabilities involving mental and cognitive impairments, including Partial Fetal Alcohol Spectrum Disorder.[92] Mr. Quinn appealed his sentence of five years' imprisonment.[93] The sentencing judge had imposed this sentence for Mr. Quinn's convictions for breaking and entering a dwelling-house and committing assault causing bodily harm and for breaking and entering a dwelling-house and committing assault.[94] Justices Jack Watson and Frans Slatter, for the majority of the Alberta Court of Appeal, dismissed Mr. Quinn's sentence appeal.[95] By comparison, Justice Bielby, dissenting, would have allowed Mr. Quinn's appeal and substituted a sentence of four years of imprisonment, less time served in pre-sentence custody.[96]

Justice Bielby's reasoning was based on the *Gladue* and *Ipeelee* factors that arose in the case, "particularly the appellant's FASD and the cultural connections to its cause".[97] Justice Bielby referred to Mr. Quinn's diagnosis of FASD as being an "inter-generational effect…of colonialism and residential schools."[98] She thus identified colonialism and the state's residential school practices as having contributed to Mr. Quinn's experiences with FASD. Such a practice illustrates some movement toward recognizing the role of the state in contributing to Mr. Quinn's experiences with FASD. At the same time, state accountability for harm seems to be rooted in the past, relating to previous generations' experiences

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89 *Ibid*.
90 *Ibid* [emphasis added].
91 *R v Quinn*, 2015 ABCA 250, 606 AR 233 [*Quinn*].
92 *Ibid* at para 8.
93 *Ibid* at para 1.
94 *Ibid*.
95 *Ibid* at para 27.
96 *Ibid* at para 57.
97 *Ibid* at para 54.
98 *Ibid* at para 49.

of colonialism and residential schools. Additionally, this history collapsed into references to "aboriginal ancestry" and "culture". For instance, Justice Bielby wrote: "It is difficult to imagine *a more direct link* between an offender's *aboriginal ancestry* and the circumstances underlying his commission of crime than that offered as a result of *brain damage from a parent's substance abuse during pregnancy*."[99] Justice Bielby thus presented brain damage purportedly resulting from a pregnant person's use of substances as one of the most obvious points of connection between an Indigenous person's "aboriginal ancestry" and "his commission of crime". In the same vein, Justice Bielby later wrote:

> The sentencing judge erred in putting little weight on the appellant's aboriginal culture after observing that he had little past or ongoing commitment to aboriginal culture…In so doing, she ignored the direct link between the appellant's mother's substance abuse, arising in the context of her aboriginal culture, as causing his life-long brain injury, and the well-known effects of FASD on impulsivity, the limits it places on ability to plan and the vulnerability it creates to drug and alcohol abuse.[100]

Here, Justice Bielby placed emphasis on "aboriginal culture". While Justice Bielby demonstrated an attempt to contextualize Mr. Quinn's mother's use of substances, she did so without bringing in direct reference to the state, referring instead to "the appellant's mother's substance abuse, arising in the context of her aboriginal culture".[101] This passage harmfully makes it sound like Indigenous women's use of substances is something intrinsic to "aboriginal culture". On a generous reading, Justice Bielby relied on references to "aboriginal culture" and "aboriginal ancestry" to stand in for a fuller description of colonialism and its impacts on Indigenous people. Yet even if this was the approach, it risks reinforcing negative stereotypes about Indigenous people, particularly in relation to Indigenous women and mothers. The message, even if unintended, that Indigenous women's use of substances is intrinsic to Indigenous cultures is consistent with what Megan Scribe describes as the "[p]athologizing of Indigenous bodies and cultures".[102] Scribe explains that public discourses construct Indigenous women and girls as being "more reckless than their white counterparts" in relation to using alcohol and drugs and selling sex and ascribe Indigenous women and girls' supposedly risky and immoral behaviours to Indigenous families and communities.[103] Given the existence of such stereotypes, it is important for judges to take extra care to not provide language that affirms or aligns with them.

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99 *Ibid* at para 47 [emphasis added].

100 *Ibid* at para 52.

101 *Ibid*.

102 Megan Scribe, "Pedagogy of Indifference: State Responses to Violence Against Indigenous Girls" (2017-2018) 32:1-2 Canadian Woman Studies 47 at 52.

103 *Ibid*. Relatedly, on the settler colonial "construct of the 'unfit/bad' Indigenous mother", see Laura Landertinger, "Settler Colonialism and Carceral Control of Indigenous Mothers and their Children" in Bryan Hogeveen & Joanne Cheryl Minaker, eds, *Criminalized Mothers, Criminalizing Mothering* (Bradford: Demeter Press, 2015) 59 at 60; see also *ibid*, generally. Landertinger defines this construct as arising through "narratives that portray Indigenous women as innately immoral, violent, and neglectful—Indigenous women come to signify the unruly racial Other who needs to be managed, if need be through violence and coercion, and by extension whose children need to be 'protected' by the settler society" (*ibid* at 61).

Quinn reveals another instance of a judge trying to account for colonialism and trying to reduce a sentence within an inadequate sentencing framework. To make sense of a lesser sentence, Justice Bielby drew connections between colonialism, Mr. Quinn's FASD, his mother, and his culture. In doing so, Justice Bielby arrived at a lesser sentence and contextualized Mr. Quinn to some extent. Yet, absent from the judgment is an acknowledgment of the ways in which the analysis not only supports a lesser sentence but also, in the process, perpetuates some stereotypes about Indigenous people.

In *R v Charlie*, [104] Justice Pamela Kirkpatrick, delivering the judgment of the Yukon Court of Appeal, identified a direct connection between an offender's mother's use of alcohol and her experiences in residential schools. Justice Kirkpatrick dismissed the Crown's appeal from the sentencing judge's imposition of a sentence of 9 weeks' imprisonment, in addition to the 14 months that Franklin Junior Charlie had already served on remand, to be followed by a period of 3 years of probation.[105] The judge had imposed this sentence after Mr. Charlie pled guilty to robbery.[106]

With respect to FASD and Mr. Charlie's mother's experiences in residential schools, Justice Kirkpatrick stated: "the FAS effects are directly linked to his parents' forced placement in a residential school. Specifically, the FAS is the product of Mr. Charlie's mother consuming high levels of alcohol during her pregnancy, which consumption of alcohol is linked to her experience in the residential schools."[107] In addition to expressly connecting Mr. Charlie's mother's experiences with alcohol with her experiences in residential schools, Justice Kirkpatrick referred to Mr. Charlie's mother's "forced placement in a residential school." The emphasis on these links and on the forced nature of her placement in residential schools keeps the state (though unnamed) closely within the reader's view.

Despite the direct connections that Justice Kirkpatrick drew between residential schools and Mr. Charlie's mother's use of alcohol, there is something unsettling in the emphasis on her use of alcohol. Again, we can recall Scribe's analysis that "Indigenous girls and women are depicted as *more reckless* than their white counterparts and, importantly, drinking, using drugs, and selling sex are *seen as outcomes of Indigenous cultural systems*".[108] While Justice Kirkpatrick connected Mr. Charlie's mother's use of alcohol with her forced placement in a residential school, Justice Kirkpatrick later explained that Mr. Charlie's "inability to control himself when he consumes alcohol or drugs…derives from his FAS, which, in turn, *originated from problems flowing from his Aboriginal background*."[109] The phrase, "problems flowing from his Aboriginal background", may well be a shorthand for experiences flowing from the state's oppression of Indigenous people. However, even if the phrase is a shorthand, it risks substituting state violence with "Aboriginal background" and implying that Indigenous people's experiences with alcohol and drugs arise from Indigenous cultures, families, and communities.

Similar to Justice Kirkpatrick's practice of connecting FASD with residential schools, in *R v JP*, [110] Justice Robert Leurer of the Saskatchewan Court of Appeal kept the state's actions in view throughout his analysis. Justice Leurer allowed Mr. P's sentence appeal, which related to a global sentence for various

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104 *R v Charlie*, 2015 YKCA 3, 320 CCC (3d) 479 [*Charlie*].
105 *Ibid* at paras 48, 2.
106 *Ibid* at para 1.
107 *Ibid* at para 32.
108 Scribe, *supra* note 102 [emphasis added].
109 *Charlie*, *supra* note 104 at para 42 [emphasis added].
110 *R v JP*, 2020 SKCA 52, 62 CR (7th) 328.

offences, including being a party to armed robberies.[111] Justice Leurer varied the sentence from 10 to 8 years' imprisonment, less credit for time served in pre-sentence custody.[112]

When contextualizing Mr. P's FASD diagnosis, Justice Leurer drew a direct connection between Mr. P's FASD diagnosis and the state's actions of placing his ancestors in residential schools:

> In this overall context, J.P.'s FASD presents as a Gladue factor not simply because of disproportionate FASD rates among Aboriginal communities, but because it is, in his life, an intergenerational consequence of residential schools. The Gladue report invited a connection between J.P.'s FASD, his mother's childhood experiences and pregnancy, and the life of his great-grandmother with whom his mother lived.[113]

Justice Leurer further noted: "the evidence disclosed that J.P.'s actions were an outcome of his upbringing which, in turn, was the product of the systemic background facts reviewed in the Sentencing Decision".[114] Justice Leurer thus pointed out that Mr. JP's actions and upbringing were directly connected with systemic background factors, which themselves explicitly include residential schools. This reminder is helpful, as it focuses the reader's attention on systemic background facts, rather than on a decontextualized reference to Mr. JP's upbringing. At the same time, the connection between FASD and colonialism is one that frames colonialism as having existed in the past. This is an important recognition. A further step could involve further explicit engagement with the social, institutional, and political dimensions that continue to shape FASD today.

As the previous part of this paper demonstrated, mother-blaming language in relation to FASD—and the associated practice of positioning colonialism in the past—is widespread. This might suggest that mother-blaming language in sentencing judgments arises from slips in language resulting from common turns of phrase relating to FASD. Even if the language is inadvertent, the prevalence of mother-blaming language in relation to FASD makes the practices of identifying such language and scrutinizing its potential implications important. The language can harmfully yield images of Indigenous mothers as responsible and blameworthy for their children's experiences with FASD and potentially, by extension, for their experiences with the criminal justice system. Such images risk undermining the broader judicial attempt to repair systemic harm.

The judgments above not only incorporate language that risks undermining the judicial attempt to redress the harmful effects of colonialism, but also illuminate the tensions within this sentencing project. The judgments reveal that judges try to acknowledge and redress colonialism within a framework that is ultimately unsupportive of this type of work—sentencing law does not explicitly provide appropriate avenues for holding the state itself to account, even though the state is the very entity that has caused, or has at least been complicit in, the injustices that judges acknowledge. The result is that, in justifying lesser sentences, the entire analysis of oppression takes place within the limited paradigm of individual blame. Such an approach incorporates partial and incomplete acknowledgments of state accountability and some reliance on stereotypes about Indigenous people, communities, and cultures.

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111 *Ibid* at para 2.
112 *Ibid* at para 3.
113 *Ibid* at para 45.
114 *Ibid* at para 47.

V. CONCLUSION

In sentencing Indigenous offenders living with FASD, judges have focused the reader's attention on Indigenous people's experiences of harm to the exclusion of maintaining the reader's focus on the state's own practices of generating and sustaining harm. This approach reflects what Eve Tuck describes as damage-centered research.[115] Tuck defines this mode of research as aiming "to document pain or loss in an individual, community, or tribe."[116] Damage-centered research is "socially and historically situated. It looks to historical exploitation, domination, and colonization to explain contemporary brokenness, such as poverty, poor health, and low literacy."[117] In this sense, damage-centered research, like the sentencing judgments above, recognizes at least some connection between the state's acts of oppression and Indigenous people's experiences of being oppressed. Yet despite social and historical contextualization, Tuck argues that "the danger in damage-centered research is that it is a pathologizing approach in which *the oppression singularly defines a community*."[118] Ultimately, damage-centered approaches portray Indigenous individuals, families, and communities as wholly defined by constructed pathologies. Contextualized discourses do not, then, necessarily redress the state's violence against Indigenous Peoples. Instead, contextualized discourses can harmfully construct and maintain portrayals of Indigenous people as 'damaged'.[119]

Tuck's concerns about damage-centered research are significant. For instance, damage-centered research tends to obfuscate the social and historical context within which narratives of Indigenous people's experiences of harm and suffering arise.[120] This is the same obfuscation that appears to be taking place in sentencing discourses. Additionally, Tuck questions the utility of documenting experiences of harm and suffering in the first place, querying whether such documentation even leads to material change and contemplating the costs of perpetuating images of Indigenous people as damaged.[121] Again, this skepticism is strikingly apt in the sentencing context. For over 20 years, judges have been directed, and have strived, to document social and historical factors—and to consider alternatives to imprisonment. However, Canada continues to place an increasing proportion of Indigenous Peoples in federal correctional centres.[122]

Sentencing law's emphasis on individual blame helps to explain sentencing judges' practices of casting Indigenous individuals as damaged and as causing damage, even in the face of state-imposed harms and

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115 Eve Tuck, "Suspending Damage: A Letter to Communities" (2009) 79 Harvard Educational Review 409. See also Lawrence & Parkes, *supra* note 29 at 433-35.

116 *Ibid* at 413.

117 *Ibid*.

118 *Ibid* [emphasis added].

119 In the sentencing context, such hazards are not unfamiliar. For instance, in 2006, Sonia Lawrence and Toni Williams relatedly cautioned that contextualized sentencing judgments can "other" marginalized groups of people, such as Black women living in poverty (Sonia N Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56:4 UTLJ 285 at 329-30).

120 Tuck, *supra* note 115 at 415.

121 *Ibid*.

122 Canada, Office of the Correctional Investigator, *Annual Report 2021-2022* (30 June 2022), online: <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20212022-eng.aspx>. As Ivan Zinger, the Correctional Investigator of Canada, explains in the report: "Over the last two years, federal corrections reached two new historic milestones when the proportion passed the 30% mark overall, and approached 50% for incarcerated Indigenous women."

violence. Because judges are required to assign individual blame, judges justify lesser sentences by portraying Indigenous people as less blameworthy due to purportedly individual reasons of supposed damage. While judges draw links with colonialism in the past, there is currently no mechanism in sentencing law for making the state itself bear accountability for the oppression it continues to cause or withstand. Instead, the analysis of colonialism and its impacts on Indigenous offenders' lives all takes place within the framework of individual blame.

In the context of Indigenous offenders living with FASD, we can see judges struggling to deal with the demands of individual blame. Faced with offenders who live with disabilities and experience difficulty in accessing community supports, judges seem, at moments, to escape the confines of individual blame—judges find that the offenders ought not to suffer the full weight of the sentencing regime given the offenders' experiences with inequality. In providing these reasons for lessened blameworthiness, judges unfortunately also turn to dominant public health discourses, which provide a familiar, though inaccurate and colonial, message that individual blame for FASD belongs with Indigenous mothers. What seems like an escape from individual blame turns out to be a transformation of individual blame from something that attaches to offenders to offenders' mothers.

A standing to blame analysis could help shift the direction of sentencing law by moving sentencing law away from narratives of damage and towards an engagement with the state's ongoing participation in colonialism. When the state has already imposed injustice on an offender, or when the state has been complicit in such injustice, a standing to blame analysis requires a judge to withhold the assignment of individual blame. By declining to assign individual blame, judges could avoid the tensions that arise when trying to acknowledge and redress systemic injustice as part of assigning individual blame. A standing to blame analysis would instead highlight the inappropriateness of the state's use of individual blame to respond to harms arising in the context of colonialism and inequality.