PUNISHMENT IN CANADA

PUNISHMENT IN CANADA: EXTENDING GLADUE-LIKE PROCEDURES TO NON-INDIGENOUS OFFENDERS

By LINDSAY OLD, B.A

A Thesis Submitted to the School of Graduate Studies in Partial Fulfilment of the Requirements for the Degree Master of Arts

McMaster University MASTER OF ARTS (2021) Hamilton, Ontario (Philosophy)

TITLE: Punishment in Canada: Extending Gladue-Like Procedures to Non-Indigenous Offenders AUTHOR: Lindsay Old, B.A. (McMaster University) SUPERVISOR: Professor Wil Waluchow NUMBER OF PAGES: ii-73

Lay Abstract

Within Canadian legislation Indigenous offenders are provided an additional procedure during sentencing and its related events. This system is commonly known as the Gladue process. Gladue provides a good model for how the sentencing of vulnerable individuals and groups should be handled. However, this process or something similar to it is not provided to other offenders who may also experience vulnerability or should be comparably deserving of additional protections or mitigating factors during sentencing. This thesis argues for the plausibility of extending Gladue-like procedures to other, similarly situated, non-Indigenous offenders based on arguments for consistency of the law and respect for intersectionality. The law must treat like cases alike, and in doing so, must pay particular attention to the intersections between layers of vulnerability. The main contribution of this thesis is to make suggestions for change in Canada's sentencing procedures of vulnerable individuals and groups.

Abstract

In the Canadian criminal justice system, there is a procedure which provides additional protections to Indigenous offenders during sentencing and its related events. This procedure is commonly referred to as the Gladue process. This thesis defends the plausibility of extending Gladue-like procedures to non-Indigenous offenders on the grounds that failing to do so would be a failure of consistency of the law. The law must be consistent in the sense that it must treat like cases alike. It will be argued in this thesis that there are other individuals and groups who may be similarly deserving of additional protections during sentencing because of their significant circumstances of vulnerability. This includes black individuals, LGBTQIA+, and mentally ill persons, but this is by no means an exhaustive list. This thesis does not aim to diminish the unique experience of Indigenous persons, but rather, it suggests that extending Gladue-like processes to particular non-Indigenous persons and groups may be required based on consistency of the law and attention to intersectionality. It is my hope that this thesis brings about greater awareness to the sentencing procedures pertaining to both Indigenous and non-Indigenous offenders alike, and that it may spark discussion on the subject of extending additional legal protections to vulnerable persons. This thesis relies heavily on the hybrid theory of punishment, as presented by H.L.A. Hart, which combines both utilitarian and retributivist elements in justifying the act of punishment. Hart's theory aligns with the Canadian legislation on sentencing and provides a convincing justification for punishment while allowing the inclusion of restorative punishment practices for vulnerable persons. It

will be argued that extending restorative practices to non-Indigenous offenders is, in some cases, plausible, and at times, necessary.

Acknowledgements

I am extremely grateful to have had the support from my two supervisors, who have assisted in formulating this thesis and have guided me throughout this process. I would like to thank Dr. Wil Waluchow and Dr. Violetta Igneski for their unwavering support and assistance during this endeavour. I would also like to extend a thank you to Dr. Matt Grellette for his participation in this process.

The completion of this thesis would not have been possible without the help from my two best friends, Brooklyn and Jordan. You two have been instrumental in my progress and I do not know where I would be without you both.

This thesis is dedicated to my parents, Mike and Karen, and my siblings, Ryan and Kelly. Thank you for always believing in me. My acknowledgements would not be complete without mentioning my adoring grandparents, Marjory and John, and in loving memory of Irene and Paul.

Table of Contents

List of Abbreviations

Canadian Criminal Code (CCC)

The Corrections and Conditional Release Act (CCRA)

Lesbian, Gay, Bisexual, Transgender, Queer, Two Spirited, Intersex, A-sexual (LGBTQ2IA+)

Supreme Court of Canada (SCC)

The Not Criminally Responsible Reform Act (NCR)

Impact of Race and Culture Assessments (IRCAs)

Declaration of Academic Achievement

I, Lindsay Old, declare this thesis to be my own work. I am the sole author of this document. No part of this work has been published or submitted for publication or for a higher degree at another institution.

To the best of my knowledge, the content of this document does not infringe on anyone's copyright.

My supervisor, Dr. Wil Waluchow, and second-reader, Dr. Violetta Igneski have provided guidance and support at all stages of this project. I completed all of the research.

Introduction

Upon investigation into Canada's criminal justice system and the practice of punishment, it has become evident to me that there are areas that may require reevaluation. It is not within the scope of this thesis to evaluate all of the stages of the criminal punishment process which may or may not have problems associated with them. Therefore, for the purpose of this thesis I will focus on one feature of criminal punishment that I believe requires further discussion, that being the realm of sentencing. The goal of this thesis is to analyze the current Canadian legislation on criminal sentencing and offer some suggestions for change. I will pay particular attention to the legislation and case law dealing with sentencing Indigenous offenders for the reason that Canada extends an additional process during sentencing to criminals that identify as Indigenous.[1] This process provides alternatives to imprisonment and is seen by some as an improvement to the harsh reality of a prison sentence. This thesis will debate the plausibility of extending the rights that are conferred on Indigenous offenders to other groups of people, mainly, other groups who have experienced significant levels of systematic discrimination and loss of feasible life choices. The main cases that I will be focusing on are non-Indigenous groups such as black people, LGBTQ2IA+, and the mentally ill, but this is by no means an exhaustive list. I will aim to show that each of these groups is similarly situated enough to the Indigenous in terms of their vulnerability to the law. All of the above-mentioned groups have and continue to experience significant

[1] *Criminal Code*, RSC, 1985, c. C-46, s. 718.2(e).

levels of systemic discrimination and oppression which make them more likely to incur trouble at the hands of the criminal justice system. Intuitively, I believe that these groups may be equally deserving of additional protections during sentencing procedures in Canada based on arguments for consistency of the law and attention to intersectionality, both of which will be discussed further in chapter three. This thesis aims to evaluate my pre-reflective intuitions on this subject and intends to provide clarity on whether any or all of the above-mentioned groups are entitled to additional protections during sentencing.

The current legislation surrounding punishment and sentencing is found largely in the Canadian Criminal Code (CCC) sections 718-718.3(2), which deal with the principles and purposes of sentencing.[2] This thesis will focus intensely on s. 718.2 and its subsidiary parts. This piece of federal legislation applies generally to all Canadian citizens. In addition, Canada has special punitive practices in place for individuals that identify as Indigenous. Particularly, s. 718.2(e) of the CCC and s. 81 and 84 of *The Corrections and Conditional Release Act* (CCRA) which allow alternative, traditionally Indigenous, methods to be used during sentencing.[3] The alternatives that are provided are based on the relevant community's ideals and beliefs rather than the typically sanctioned imprisonment. The sections of the CCRA are an extension of s. 35 of the Canadian Constitution and s. 25 of the Canadian Charter of Rights and Freedoms which both recognize and guarantee existing Indigenous rights and treaties and their unique customs

[2] *Criminal Code*, s. 718 - 718.3(2).
[3] Ibid., s. 718.2(e); *Corrections and Conditional Release Act*, SC, 1992, c. 20, s. 81; *Corrections and Conditional Release Act*, s. 84.

and traditions.[4] In addition to the legislation just listed, there are two precedent-setting cases that will be discussed: *R.V. Gladue* and *R.V. Ipeelee*, from which sentencing alternatives are guaranteed to Indigenous persons and duties are placed upon judges to consider the historic and systemic injustices that have been committed against Indigenous people in Canada and worldwide.[5] These cases have provided clarification and guidance for the application of s. 718.2(e) and have made judges duty bound to consider all other available sanctions than imprisonment, especially in the case of Indigenous offenders.[6] The legislation and case law just mentioned serve many functions including remedying the over incarceration of Indigenous offenders and helping to restore the relationship of the offender with the community and the victim.[7] There are many benefits to having this system in place, yet other groups have demanded similar treatment in light of their significant levels of vulnerability and the undue hardship from which they too have suffered.[8] The concepts of vulnerability and undue hardship will be discussed further in chapter three but I will provide a brief comparative analysis to help explain the point further that other groups may require similar sentencing treatment to the Indigenous.

Consider a scenario of two men; one indigenous and one black, both living in Ontario, Canada. Both men are separately guilty of committing the same crime, and both

---

[4] *Constitution Act,* 1982, part ll, c. 11, s. 35; *Canadian Charter of Rights and Freedoms*, part l of the Constitution Act, 1982, c. 11, s. 25.
[5] *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R 433.
[6] "Spotlight on *Gladue*: Challenges, Experiences and Possibilities in Canada's Criminal Justice System," *Research and Statistics Division*, Department of Justice, Canada, September 2017: 10(4c).
[7] "Spotlight on *Gladue*: Challenges, Experiences and Possibilities in Canada's Criminal Justice System," 9.
[8] *R v Morris* [2019] ONCA 50; Dugas, Maria C., "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders," 43-1 *Dalhousie Law Journal* 103 (2020); *R. v. Jackson* [2018] ONSC 2527

are held and brought in for sentencing. The circumstances of the crimes are similar, and many features are shared among the backgrounds of the men despite their different cultures and upbringings. Historically, each man has faced systemic discrimination based on their associated groups, and it is likely that each has encountered numerous other hurdles such as poverty, violence, generational incarceration, over-policing – the list goes on.[9] These two cases, despite their similarities, will be treated vastly differently throughout sentencing and its connected events. The reason for this is due to the legislation mentioned previously which deals with sentencing Indigenous offenders. This portion of the law is also commonly referred to as the Gladue process and it provides different methods of responding to the crime that was committed and the harm that was caused. Rather than having the judge impose a traditional sentence, the judge is legally bound to consider alternative methods when accepted by the offender and their community. To my knowledge, these options are not made available to the same degree to the black man, nor to any other group within Canada. And this, in my view, is a failure of consistency of the law. The groups that I believe are deserving of similar treatment are black individuals, LGBTQ2IA+, and the mentally ill, to name a few. Again, this list is by no means exhaustive. The important feature shared among these groups is that they have all experienced a significant level of systemic discrimination. This feature allows us to recognize which individuals and groups may or may not be deserving of additional legal

[9] Common Ground – An Examination of Similarities Between Black & Aboriginal Communities APC 29 CA (2009); Boyce, J. 2016. "Victimization of Aboriginal People in Canada, 2014." Juristat. Statistics Canada. Available at: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2016001/article/14631-eng.pdf?st=CSJXxjkj; Making Real Change Happen for African Canadians, Report of the African Canadian Legal Clinic to the CERD (93rd Session, 2017).

protections during sentencing. Special protections should, for the sake of consistency, be provided to any individual or group that has experienced a significant level of systemic discrimination. None of the non-Indigenous groups previously listed are offered special punitive protocols to the same degree as the Indigenous, if at all. I see the failure to extend Gladue-like procedures to non-Indigenous persons as a lack of consistency in the law because it fails to recognize that there are other groups who have experienced similar levels of discrimination and removal of life choices. Consistency and just punishment require that individuals be treated alike when their circumstances demand it and these are necessary features of the law because they ensure the equitable treatment of persons by providing each person their rightful dues. The main point to take from this for now is that to respect and exhibit just punishments, Canada may need to reconsider to whom they apply special punitive practices.

In light of the above, I will examine whether the non-Indigenous groups previously mentioned are deserving of Gladue-like procedures. In doing so, I will give a moral explanation as to why Canada engages in differential treatment with respect to Indigenous persons and then use this to inform my answer to the question about whether there are any other groups that deserve this treatment as well.

In the first chapter, I will begin by defining what a theory of punishment includes. I will then lay out the theory of punishment that I will be using throughout this thesis. The theory I will be using relies largely on the prominent theory of punishment developed by H.L.A. Hart. In my view, Hart's theory posits that there are three main features of all instances of punishment. The main features are hard treatment, by an authority, for the

breach of a law.[10] The justification of punishment that will be given in chapter one is derived from Hart's *Prolegomenon to the Principles of Punishment*, in which Hart sketches and defends a widely accepted hybrid theory of punishment that includes both utilitarian and retributivist elements.[11] The second chapter will review the relevant Canadian legislation on criminal punishment mentioned earlier in light of Hart's theory of punishment. In the same chapter, I will address the legislation pertaining to Indigenous persons and explain why, despite a temptation to view it as offering an alternative to punishment, it in fact prescribes particular forms of punishment. This will become clearer when we discuss our typical case of punishment in chapter one. Given that we do something different when punishing Indigenous persons, the third chapter will pull from arguments for consistency of the law, just punishment, and intersectionality, to show that there may be non-Indigenous persons deserving of Gladue-like procedures. I will also suggest ways in which this theory could work by expanding s. 718.2(e) to consider other groups, and provide suggestions for how it can be applied to non-Indigenous individuals. Finally, the fourth chapter will address possible criticisms of my overall argument in this thesis. These include: the suggestion that the extension of Gladue-like procedures is unwarranted because no group has experienced the same level of disadvantage as the Indigenous; and the claim that hybrid accounts of punishment, incorporating both utilitarian and retributivist elements, are irreconcilable with restorative practices.[12]

[10] Hart, H. L. A, *Prolegomenon to the Principles of Punishment*, The Presidential Address, Proceedings of the Aristotelian Society 60 (1960): 4.
[11] Hart, 1-26.
[12] See Boonin (2008), pages 207- 212; Moore (2010), pages 97-102; and Kaufman (2012), pages 73-92.

All of this being said, my aim in this thesis is not to reduce or diminish the plight of Indigenous peoples. Rather, it is to offer suggestions for change in Canada's punitive practices by calling for consistency of the law and a deeper respect for intersectionality with respect to the groups that I have identified as candidates for procedures like Gladue. These candidates, due to their positions of undue hardship and layered vulnerability, are also as deserving of special punitive practices in particular circumstances as Indigenous offenders. Just application of the law requires that we recognize this fact and make changes to our system to account for it, and intersectionality is the tool that allows us to do so. Hence, this thesis aims to do just that by offering an avenue to expand the special considerations made in s. 718.2(e) to include other groups beyond Indigenous persons.

Chapter One: A Theory of Punishment

To begin, we should discuss what a theory of punishment is. Generally speaking, such a theory has two components: (a) a definition of punishment, and (b) an explanation of whether, why and when punishment is justifiably imposed.[13] As a start, consider the following, admittedly vague, definition: punishment is meant to treat people poorly when they have committed a wrong. This is clearly not enough, and an attempt will be made below to expand upon this preliminary definition. As for (b), we can begin with the following observation. In treating people poorly, the agent doing the harming, in our case the government, must be justified in doing so. Any agent committing a harmful act towards another agent requires special moral justification.[14] This justification arises from our prima facie or inherent moral right not to be harmed by others.[15] Following from this, others have a duty not to harm us, and therefore, any harmful conduct directed at someone must be justified in such a way that it makes the conduct permissible in light of the circumstances.[16] Therefore, any good theory of punishment requires a definition as well as a clear justification.

To give an adequate definition and justification of punishment, Hart shows us that we must ask ourselves several questions about the institution of punishment itself: "What justifies the general practice of punishment? To whom may punishment be applied [who is a candidate]? How severely may we punish? Who has standing to punish?."[17]

---

[13] Hart, 4.
[14] Kant, Immanuel, *The Science of Right (1790),* Infomotions, Inc., 2000. *ProQuest Ebook Central*: 71-75; Boonin, David. *The Problem of Punishment.* Cambridge University Press (2008): ch. 1.2.
[15] Kant, 72; Boonin, 28.
[16] Boonin, 34.
[17] Hart, 3.

In the world of punishment theory, there are two traditional approaches to answering these questions: utilitarian and retributivist theories. Historically, both of these approaches have been widely used by punishment theorists.[18] Broadly, utilitarianism is a form of consequentialism[19] that is centered on maximizing the amount of good for the greatest number of people.[20] Utilitarianism claims that punishing people for breaking the law can be morally acceptable only when the presumed utility or beneficial consequences that will result from it outweigh any disutility or harmful consequences caused by that course of action.[21] This approach is essentially forward-looking as it is based upon future consequences rather than the past crime. Punishment, from a utilitarian standpoint, is justified because punishing someone will bring about a net gain in utility or disutility as compared with not punishing them at all (or treating them in some other way). Hence, punishment is morally justified by utilitarianism because of the better overall consequences that it can sometimes bring about. A dedicated utilitarian is going to look to answer all four of Hart's questions of justification based on a singular principle of maximizing utility. In relation to the first question about the justification of punishment, a utilitarian would respond that the general justifying aim of punishment is its potential to bring about the maximization of utility. If there would be a net loss of utility if punishment did not happen, punishment is justified on these grounds. The utilitarian

[18] See Kant (1790), Berman (2012), Duff (2018) for varying retributivist accounts. See Bentham (1789), Mill (1861) for varying utilitarian accounts.
[19] Sinnot-Armstrong, Walter, "Consequentialism," *The Stanford Encyclopedia of Philosophy,* Summer 2019 Edition, Edward N. Zalta (ed.).
[20] Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation*, Batoche Books, 1999, *ProQuest Ebook Central*: 14-18.
[21] Bentham, Jeremy, *The Rationale of Punishment*, London, (1830): bk. I, ch. vi.; Boonin, 37.

would respond to the remaining questions of candidacy, severity, and standing, by appealing, again, to the maximization of utility. On this theory, candidates for punishment are those who are such that, were they to be punished, utility would be maximized. This means that candidates of this theory are anyone who by punishing them would bring about greater net benefits than if they were not punished. And, notoriously, this might include innocent parties who have done no wrong – who have, one is inclined to say, done nothing to warrant being punished. An example of this could be punishing an innocent person to prevent harm to a greater number of people. Take David Boonin's examples of a state deliberately punishing an innocent person who is widely believed to be guilty to prevent a riot if they were acquitted, or the state framing an innocent person to deter others from committing a crime.[22] In each of these examples, candidacy is determined by whether punishment will bring a greater net utility than not punishing would.

The severity of punishment is whatever level would bring about the most net gains in utility. It follows that, in some cases, what might be viewed by many as a harsh punishment would be warranted insofar as it creates the greatest maximization of utility, perhaps because of the resulting deterrence of future crime. A dedicated utilitarian may be led in a particular case to use what might seem to be an excessive punishment for a minor crime because the minimal punishment does not deter anyone.[23] An example of this is the government sentencing one person a year to death for speeding to deter other people from

[22] Boonin, 41.
[23] Ibid., 55.

speeding.[24] Thus, the implication of allowing excessive punishments is something to be wary of.

Similarly, the utilitarian position relies on the principle of utility to determine who has standing to engage in the act of punishment. Suppose, as seems plausible, that having a system of enforceable laws brings about the greatest net of utility in a society, and suppose further that you cannot have a system of laws without enforcement, and, if necessary, punishment. If this is correct, then it is reasonable to believe that the present legal authority, as defined by the definition of punishment, has the justified standing to punish, insofar as it is alone able to bring about the greatest utility. And from this it is reasonable to conclude that the Canadian federal and provincial governments have standing to punish.

In contrast to utilitarianism's forward-looking approach, retributivism is a backwards-looking theory associated with restoring the moral balance between two agents,[25] and making someone suffer for their wrongs.[26] In some instances the relevant agents are the offender and their society, or the offender and the victim(s) of their act. The foundational retributivist claim is that proportionate punishment is justified because of the past commission of a crime, regardless of the consequences that punishment will bring about.[27] Proportionality is about imposing the same level of harm on the offender as they imposed on society/their victim. Immanuel Kant, the father of retributivism, argues that

[24] Ibid.
[25] Boonin, 85.
[26] Kant, *71.*
[27] Ibid., 72.

punishment is what the criminal deserves, as it is meant to visit the same evil upon the criminal that he imposed on society (or the victim, in other theories), and it is based on the principle of "jus talionas" or the right of retaliation and the principle of "like with like."[28] In this way, retributivism is characterized by deservingness/guilt and punishment proportional to the harm committed.

In relation to Hart's four questions of justification, a dedicated retributivist's response will largely be motivated by their overall position. The general justifying aim of retributivism is to pay someone back for the harm that they caused and to make them suffer proportionately.[29] The candidates for punishment under this approach are those who are guilty of committing a crime.[30] On this basis, punishing an innocent person can never be justified according to retributivist theories. The severity of punishment is dictated by proportionality in that the imposed hard treatment must be proportional to the harm that was caused by the crime. The final question of who has standing has less of a clear answer. Retributivism does not have a clear answer for who has standing to punish, although theorists such as Dan Markel and R.A. Duff have attempted to provide answers using democracy as a tie to authoritative standing.[31] The absence of a clear answer to this question poses little problem for our analysis however. My aim is not to determine who has the authority to punish. Rather, it is to determine who, when, how, and why Canadian

[28] Ibid., 72-73.
[29] Kant, 73.
[30] Kant, 72.
[31] Duff, R.A., "Retrieving Retributivism," *Retributivism: Essays on Theory and Policy*, Oxford University Press (2011), Oxford Scholarship Online.; Markel, Dan, "What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism," *Retributivism: Essays on Theory and Policy*, Oxford University Press (2011), Oxford Scholarship Online.

government authorities are justified in punishing as a response to violations of the criminal law. For these purposes, we will assume that Canada's federal and provincial governments have standing to do so.

Although both utilitarianism and retributivism have traditionally been used to justify punishment, it has been argued in the literature that they both suffer from deficiencies. I do not have the space in this project to complete a full-scale assessment of the comparative strengths and weaknesses of the utilitarian and retributivist approaches. Instead, I will sketch the main objections summarized and discussed by Boonin and others who have provided fully worked out criticisms of both utilitarianism and retributivism. In relation to answering Hart's four questions of justification, many of the implications of these theories run contrary to our pre-reflective intuitions about how the questions should be answered. The implications of these theories on their own should lead us to be hesitant to accept their principles without further consideration.

According to Boonin, the main issues associated with utilitarian theories of punishment are guilt-sensitivity, proportionality, and punishment type. It is a supposed consequence of a solely utilitarian account that an innocent person may justifiably be punished if that would serve the cause of overall utility maximization.[32] Consider W. F. Carritt's example:

> … if some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty; indeed this would only fail to be an ideal

[32] Boonin, 41.

> instance of utilitarian 'punishment' because the victim himself would not have been so likely as a real felon to commit such a crime in the future; in all other respects it would be perfectly deterrent and therefore felicific.[33]

In this case, the utilitarian position could potentially permit the punishment of the innocent, which is an implication that leads me to want to find an alternative.

Furthermore, it seems also to follow that, given the right circumstances, it would be right not to punish a person who is undeniably guilty.[34] Again, this would be justified if refraining from punishing such a person would serve the interests of utility. Consider Boonin's examples of act-utilitarianism:

> One can imagine, to begin with, cases where the offender is so widely beloved that the anguish caused to all those who would hate to see him suffer would outweigh the benefits that would accrue from punishing him. Or one can imagine cases in which a particular offender could contribute more to the overall good in other ways than by being punished (by agreeing to leave his medically unique body to science, bequeathing his money to worthy causes, etc.). And one can imagine cases in which the state could achieve all the deterrent benefits of punishment by pretending to punish him. In all of these cases, the defender of punishment is committed to the view that it is permissible for the state to punish the offender, but in none of them can the act- utilitarian solution provide a justification for this claim.[35]

Notice that this quotation includes a reference to act-utilitarianism, but this is only one form of consequentialism, so it is not clear that other alternative forms would sanction the same result. However, since this apparent consequence does not seem in line

[33] Carritt, W.F., *Ethical and Political Thinking*, Oxford Clarendon Press (1947): 65.
[34] Boonin, 52-54.
[35] Boonin, 53.

with our moral intuitions, we seem to have good reason to search for an alternative theory to act-utilitarianism.[36]

Similarly to act-utilitarianism, rule-utilitarianism could also permit not punishing the guilty in some cases. A rule may exist which dictates that particularly beloved individuals should not be punished, even when they are known to be guilty, due to the reason that it would cause more disutility than utility to punish them. An example that comes to mind is a rule that exempts celebrities and beloved figures from being punished. It seems reasonable that the implications of act- and rule-utilitarianism would carry over to the broader theories of utilitarianism and consequentialism due to their respective focuses. Utilitarianism can foreseeably permit not punishing the guilty if more utility would be achieved than if they were to be punished. Similarly, consequentialism could permit not punishing the guilty because of its focus on good consequences. If a better consequence is produced by not punishing the guilty, than would be produced by punishing them, then consequentialism would permit not punishing the guilty. For these reasons, we may have a good reason to look beyond utilitarian and consequentialist theories of punishment.

Another problem that has been raised with the utilitarian approach is that it has the potential to lead to what seem like disproportionate punishments.[37] Lines are seemingly

[36] [For more on the guilt-sensitivity issue of utilitarianism see] "Mabbott (1939: 39), Hawkins (1944:14), Lewis (1949: 305), McCloskey (1957:468-9;1967: 93-102), Armstrong (1961: 152), Brainthwaite and Pettit (1990: 46), Gavinson (1992: 352, 256), Cragg (1992: 48-51), and Golash (2005: 43-4)" Footnote 4 in Boonin, 41.
[37] Boonin, 54.

crossed when determining the severity of a punishment based on utility alone because it can result in too little, or too harsh of a punishment in particular circumstances. For example, a disproportionate case of punishment would be to sentence a person guilty of a minor offence to death, as the harm caused by the crime does not equal the severity of the punishment. However, using a solely utilitarian view can lead a dedicated utilitarian to choose the harsher punishment because of the good consequences that it would bring about. Consider, again, the case in which the state sentences five people a year to death for speeding, as this would create greater utility overall by deterring others.[38] This is an implication that does not sit well with me, or many others.[39] Similarly, sentences can be disproportionate if handed out too lightly. A dedicated utilitarian may find themselves choosing a less severe punishment in a particular case because it will bring about the maximum level of utility.[40] As Boonin argues, a utilitarian will not wish to harm the offender more than is needed to deter others, and in particular cases this leads the utilitarian to choose a minimal punishment when that is all that is needed to deter others from committing that crime.[41] Thus, the concern is that utilitarianism as a theory struggles, at times, with proportionality of punishment because what appears to be an overly harsh or overly minimal sentence may produce the most utility. This implication makes me hesitant to accept utilitarianism without further considerations.

---

[38] Boonin, 56.

[39] Ibid., 56; Smilansky, Saul, "Two Apparent Paradoxes about Justice and the Severity of Punishment," The Southern Journal of Philosophy, vol. 30, no. 3 (1992): 124-6; [For more detailed concerns see] "Hawkins (1944: 14), Armstrong (1961: 152), Hampton (1984: 126), Primoratz (1989a: 37-8), Braithwaite and Pettit (1990: 46), Gavison (1991: 356), and Cragg (1992: 47-8)." Footnote 20 in Boonin, 54.

[40] Boonin, 56.

[41] Ibid., 57.

Lastly, in addition to the concerns raised about proportionality, there is also hesitation surrounding the types of punishments seemingly implied by a solely utilitarian account. The concern is that on utilitarian grounds, a range of punishment types could be justified because they bring about the greatest maximization of utility. The potential problem leading from this is that we may be inclined to justify and use practices that we typically deem as overly harsh or cruel in the service of maximizing the net sum of utility. This could include the use of tactics which are typically considered to be unjustified because of their cruel and unusual nature. For example, particularly cruel and unusual punishments could be justified on grounds of ensuring national security, such as allowing forms of torture like water-boarding to secure national safety in times of war or terrorism. In these particular cases, the use of cruel and unusual punishment tactics are justified on utilitarian grounds because they produce a greater net utility by the potential result in national security. Having the maximization of utility as the sole focus of punishment could seemingly justify and permit various immoral practices, and a theory in which this is an implication is one that I am not prepared to accept on its own.

The well-known objections that have been raised about retributivism are deficiencies with respect to proportionality, punishment type, and deservingness. Retributivism has apparent issues with proportionality but for different reasons than utilitarianism. It has been argued that a solely retributivist approach suffers from the absence of a clear, practicable criterion of proportionality.[42] More specifically, the

[42] Boonin, 111.

retributivist often encounters difficulty in determining what punishment would be proportionate to the harm caused by a crime.[43] Consider Boonin's example of a kidnapper who kidnaps his victim for three days and then releases him without injury.[44] The harm caused to the victim by this crime was minimal as the kidnapper took ample care of the victim's needs and wishes while in his captivity.[45] However, when caught, the kidnapper still has to suffer the full length of his prison sentence for kidnapping. In this particular case, the harm imposed on the offender by the punishment is much greater than the harm imposed on the victim by the crime. In this way, among others, retributivists struggle to proportionately punish someone for their crime.

Determining what punishment is proportionate to a certain crime can be particularly difficult if we broaden the harm caused by the offending act to include the impact on not only the victim(s), but also the families of both parties, and the community at large. These are often overlooked. Yet, when they are given their full measure, the severity of punishment seemingly justified by a utilitarian theory would increase drastically. Even in cases where only the impact on a singular party is considered (e.g. the victim(s)), it is still at times difficult to determine a proportional sentence as harm to a victim is hard to quantify. Not to mention that there may be multiple victims.

Another concern that has been raised in the literature is that a retributivist account may justify punishment types that we typically deem as cruel and unusual because they

[43] Ibid., 112.
[44] Ibid., 113.
[45] Ibid.

seem to proportionately fit the crime. A retributivist could potentially argue that a more severe punishment is justified in a particular case because the crime committed was so horrendous, thus making a more cruel or severe sentence justifiable.[46] For example, if someone were to be found guilty of torturing their victims, the proportionate punishment would seem to be to torture them in return. Torture should be ruled out based on our pre-reflective intuitions about said practice, however it could arguably be utilized using retributivist principles. Therefore, we should be skeptical about the punishment types permitted by a purely retributivist position.

Deservingness has also been shown to be a problem for solely retributivist accounts because there is no discernible criteria of deservingness. There are essentially two ways to answer the question of which factors go into determining the degree of desert. One approach is to focus only on what the person did, or in other words, to focus solely on the essence or nature of the crime regardless of individuating factors. The second approach requires that we consider why the person did what they did. The first option leads us to accept instances of mandatory minimum sentences as the nature of the crime correlates to a predetermined sentence that fits the scale of the crime. If we are unwilling to accept mandatory minimum sentences, which I am, then this option seems unsatisfactory. The alternative approach of focusing on why the person committed the crime has problems of its own. This approach is infinitely more complicated than the first approach because you must first figure out what factors go into determining the degree of

[46] Boonin, 152 - talking about Barton, Charles K. B. *Getting Even: Revenge as a Form of Justice*. Chicago: Open Court (1999): 7, 10.

desert. The retributivist struggles here because there is no discernible criterion of deservingness. Therefore, both options have their problems.

In relation to answering Hart's four questions of justification, it has been shown in the existing literature that both utilitarianism and retributivism suffer from apparent deficiencies. Many of the raised concerns run contrary to our pre-reflective intuitions about what justifies punishment, who may be punished, how severely they may be punished, and who may punish them. The implications of these theories on their own should lead us to be hesitant to accept their principles without further consideration. Some may argue that pre-reflective intuitions are not enough to invalidate a theory and that is true. However, they can lead us to question whether a certain theory should be accepted or not. I find that my pre-reflective intuitions about utilitarianism and retributivism, along with the well-developed criticisms against both, are strong enough that I am led to want to find an alternative. Therefore, an alternative will be sought in this project that resolves these deficiencies better.

Given that, as stand-alone theories, utilitarianism and retributivism seem to fail to answer Hart's four questions of justification, an alternative must be found. Among those available are hybrid theories that attempt to combine utilitarian and retributivist elements, and theories that call for the abolition of punishment altogether on the ground that there is no possible way to answer Hart's questions of justification adequately.

Let's begin with the second alternative. Abolition seems not to be a viable option, for a variety of reasons. It would be a social, political and legal disaster were punishment

suddenly abolished without some other set of institutional responses to crime put in place. Since no such alternative response is in place, or is likely to arise any time soon, we would do well, as a purely practical matter, to look for a theory that might provide adequate answers to Hart's four questions as we go about deciding when and how to punish. Since neither pure consequentialist nor pure retributivist theories seem to fit this bill, we have good reason to explore hybrid theories, in the hope that some such theory might provide adequate – or at least better – answers that show us the way towards reforming our penal practices in ways that render them at the very least less unjust. In particular, it is hoped that they might show us how and why we need to reform our penal practices in such a way as to extend Gladue-type protections to some of the other deeply disadvantaged groups mentioned earlier. None of this, of course, shows that, theoretically speaking, abolition may, in the end, be the only morally justifiable option to pursue in the long run. And if it is the only justifiable option, then we should aim for its realization at some point in the future. But until such time as it becomes a practically viable option, we do well to search for a second-best option.

The more widely-accepted alternative to using a singular-principle theory of punishment is to rely on different principles to answer the separate questions of justification. This is referred to as the hybrid method. I do not have the space to provide a full analysis of hybrid accounts, and will instead rely on Hart's highly influential version. For reasons that will become evident shortly, I will assume that Hart's theory provides a highly plausible answer to the four questions of justification he identified, and provides a plausible justification for punishment.

Hybrid approaches aim to combine features of both utilitarianism and retributivism to resolve the kinds of deficiencies sketched above and from which each has been viewed as suffering.[47] Using this approach we are able to answer Hart's four questions by appealing to a variety of principles.[48] And we are able to do so without falling prey to the perceived deficiencies of the utilitarian and retributivist accounts. This is largely because hybrid accounts are not committed to one overarching principle but to both retributivist and utilitarian principles. The problems that arise from one of the two traditional theories can be avoided by appeal to another principle central to the other. In this way, Hart's hybrid account does not run into the same problems of proportionality or guilt-sensitivity, etc, that its rivals alone do because it is able to mitigate any such problems with the use of a principle from the one theory acting as a side constraint on the application of a principle from the other.[49] These side constraints will be explained shortly.

I am not alone in finding the hybrid approach to be useful because it is less rigid than utilitarianism or retributivism on their own.[50] Having multiple principles to work from makes a hybrid account less rigid and less constrained by a sole principle. This is beneficial because it allows more room in answering the four questions of justification because we are not restricted by either utility calculations or desert-based accounts and

[47] Boonin, 207.
[48] Hart, 3.
[49] Duff, Antony and Zachary Hoskins, "Legal Punishment," *The Stanford Encyclopedia of Philosophy* (summer 2021 Edition), Edward N. Zalta (ed.), s.6 on Mixed Accounts.
[50] See Hart (1960), Feinberg (1988): 144-55; Walker (1991): ch. 11.

can take the best parts of each. A hybrid theory takes the best parts of the traditional approaches and combines them to make a more coherent and plausible argument.

Taking into consideration the apparent deficiencies of abolition and singular-principle accounts, and that hybrid accounts aim to resolve these problems, I will now proceed to explain Hart's hybrid theory of punishment. Hybrid theories, while having deficiencies of their own,[51] do seemingly fix the issues that utilitarianism and retributivism have on their own. The deficiencies inherent in hybrid theories will be addressed following an explanation of Hart's particular version.

I will not have the space in this thesis to provide a fully-worked defence of Hart's account, but I do find that Hart provides a plausible theory of punishment, if only because it manages to avoid the above mentioned deficiencies of both utilitarian and retributivist theories of punishment. My objective is not to defend the theory against objections made to it, let alone provide a philosophically adequate defence of the theory, but to use it in pursuing the line of inquiry in which I am mainly interested. Given this objective, I will assume that hybridity is an acceptable theory the implications of which are worth considering. The understanding that Hart has is that punishment cannot adequately be justified by a singular principle account.[52] Reliance on a singular principle cannot respond to the difficulty of explaining the complexity of an institution such as punishment.[53] Hart claims that this is because of the common deficiencies that all singular principle theories

[51] Boonin, 207-212.
[52] Hart, 3.
[53] Ibid.

present, as highlighted above. Further, Hart finds that singular principle theories are constrained by their sole principle so they have less ability to flex and respond to particular circumstances.[54]

Before I explain Hart's justification of punishment, it is necessary to first explain the definition. Hart defines punishment as having three main components. 1. Hard treatment, 2. By an authority, 3. For the breach of a law.[55]

Hard treatment refers to the infliction of pain or unpleasant consequences upon an unwilling subject.[56] It is something that is imposed upon you against your will. Hard treatment can be imposed in many forms such as the removal of choices (imprisonment, probation, etc), fines, and even forced rehabilitation in some (Hollywood) cases, etc. Both minimal and robust forms of hard treatment ought to be considered in a definition of hard treatment when the infliction of it is against a person's will.

By an authority, Hart is referring to the idea that punishment must be administered by a person other than the wrongdoer, and must be imposed by an authority of the legal system in which the offence was committed.[57] The authority should be an authority according to the rules of a functioning legal system – in other words, it should be a legal authority.[58]

---

[54] Ibid.
[55] Ibid., 4.
[56] Ibid.
[57] Hart, 4.
[58] Ibid.

A breach refers to the breaking of a law. Punishment must be administered to the supposed offender for their offence against a legal rule.[59] The punishment must also be administered by the recognized authority.[60] From this, Hart recognizes several "sub-standard or secondary" cases of punishment which highlight what is and what is not considered a breach under this definition.[61] The sub-standard cases refer to breaches of legal rules, in which the imposition of the sanction is decentralized because it is administered otherwise than by officials (e.g. – punishment by vigilantes). Non-legal rules or orders (punishment in family or school), among other things will also be excluded for our purposes.[62] This means that I will be excluding cases where punishment for breaches of legal rules is administered by a party other than the officials of the legal system who are authorized to impose the sanction. Only breaches of legal orders administered by authorized officials of that legal system will be considered.

Hart claims that these three main features can be described as our typical case of criminal punishment.[63] In sum, Hart's definition of punishment, and the definition that I will be using in this paper is that punishment is made up of hard treatment, by a legal authority, for the breach of a law. This definition encapsulates essentially every case of legal punishment. Cases that do not fall under this definition can be relegated as secondary or subsidiary cases of punishment.[64]

---

[59] Ibid.
[60] Ibid., 5.
[61] Ibid.
[62] Hart, 5.
[63] Ibid.
[64] Ibid.

Since I have established the definition of punishment that I will be using, I will now move on to explain the justification of punishment that Hart gives. Hart's justification of punishment is a hybrid theory that features utilitarianism with retributivist side-constraints. Again, these details will be explained shortly.

Hart finds that utilitarianism provides the basis for the general justifying aim of punishment because of the presumed good consequences that are brought about by its use.[65] The good consequences are crime prevention or crime control.[66] He agrees with utilitarians that punishment is generally justified by the utility that it produces, and disagrees with a desert-based justification.[67] I am going to assume, for purposes of this thesis, that some form of utilitarianism is a better moral theory than rival deontological accounts. Or at least that a consequentialist justification of the institution of punishment seems stronger than any rival retributivist account. For the purposes of this thesis, the justification for having a system of punishment is utilitarian because it is necessarily forward-focused and directed at the consequences rather than the nature of the offence. A state needs people to follow its laws in order to achieve the desired good consequences, so it is justified in having a system of punishment which enforces those laws. Utilitarianism provides the best account of the general aim of punishment. Although we must constrain the pursuit of that justifiable utilitarian aim with the use of retributivist side constraints.[68] Retributivist side constraints act to provide the offender with their "just

[65] Hart, 8-10; Duff, Antony and Zachary Hoskins, s.6 on Mixed Accounts.
[66] Scheid, D.E., "Constructing a Theory of Punishment, Desert, and the Distribution of Punishments," *Canadian Journal of Law and Jurisprudence*, 10 (1997): 452.
[67] Hart, 9.
[68] Ibid.,; Duff, Antony and Zachary Hoskins, s.6 on Mixed Accounts.

deserts"[69] by placing checks on the utilitarian action of punishment itself through the use of considerations of proportionality and desert. Side constraints, in this sense, act to limit the pursuit of utility by way of such things as forbidding the deliberate punishing of the innocent or excessively harsh punishment of the guilty.[70] Side constraints can be placed on severity of punishment and types of punishment that are permitted by a purely utilitarian account.

With the definition and justifying aim of punishment established, now we must answer the questions of who punishment may be applied to, how severely may they be punished, and who has standing to punish. These questions can be answered in part by retributivist claims because they are based on the character of the offence rather than punishment's consequences.[71] Hart argues that the candidates of punishment are offenders who have broken the law, voluntarily, and therefore can be justifiably punished.[72] This means that vicarious or communal punishments for people other than the offender are not allowed. Similarly, to be considered a candidate for punishment you must have committed the offence voluntarily and without force. If the requirement of committing a voluntary act is fulfilled then you are a candidate for punishment. Hart chooses a retributivist outlook for the question of who may be punished because the utilitarian approach can leave us with many questionable responses as to who may be a candidate for punishment. Resulting from the implication of utilitarianism that it can

[69] Duff, Antony and Zachary Hoskins, s.6 on Mixed Accounts.
[70] Duff, Antony and Zachary Hoskins, s.6 on Mixed Accounts.
[71] Hart, 10.
[72] Ibid.

justifiably punish the innocent, Hart and other hybrid theorists are led to choose "retribution in distribution"[73] because a desert-based account seems to reflect the pre-reflective intuitions that lay behind the objections considered above to the utilitarian theory's answer to the question of who may be justifiably punished.

Once a person has been deemed a justifiable candidate for punishment, to decide the severity of their punishment Hart looks to the general justifying aim restricted by retributivist considerations. Hart says that "the amount or severity of punishment is primarily to be determined by reference to the General Aim, yet Justice requires that those who have special difficulties to face in keeping the law which they have broken should be punished less."[74] By this, Hart means that severity of punishment should be determined by utility considerations of which amount will produce the greatest net benefit, but he looks to retributivism to justify that people should only be punished when they are guilty and in proportion to the wrong that was committed. Hart is again deterred from using utility calculations alone to answer the question of severity, so he turns to retributivism to determine a proportionate punishment that fits the crime. Mitigation is brought in to recognize the special difficulties that some people have in keeping the law.[75] The requirements of justice demand that the law mitigate punishment in cases where the offender had little or no choice but to commit the crime.[76] This helps to balance proportionality and attends to problems of deservingness. But justice also requires that

[73] Ibid.
[74] Hart, 23.
[75] Ibid., 13-16, 23.
[76] Ibid., 23.

"like cases be treated alike" and that there should be a proportionate scale of gravity of offences.[77] This means that lesser crimes should be punished to a lesser extent because there was less harm caused, despite the fact that a harsher punishment could potentially deter more. In this case, the hard treatment that is imposed by a punishment should be proportionate to the harm committed by the nature of the offence. The nature of the offence is the gravity and circumstances of the particular crime. The hard treatment imposed should not go above and beyond the harm that was caused by the offence and should be enough to warrant deterrence in the future. In this way, people are only punished as much as they deserve. Don E. Scheid gives clarification on Hart's view of desert and severity as he argues that Hart has not provided enough clarity on the content of the terms. Scheid claims that "the assertion that a wrongdoer should be given the punishment he deserves… implies at least that punishment should be imposed in virtue of past or present, negative features of the person in question and that punishment should be in parity with and in proportion to those negative features relative to the others similarly situated."[78]

As for who has standing to punish, Hart answers this by appealing to utilitarian considerations because retributivism does not give a straight answer to who has authority/standing to punish. As the definition of punishment holds, punishment must be administered by the present legal authority, and not by the offender themselves.[79] In our

[77] Ibid., 23.
[78] Scheid, 460.
[79] Hart, 4.

case, who has standing to punish is the Canadian courts and judges. The standing to punish comes from the fact that having a system of enforceable laws brings about a greater net utility, and a system of laws cannot function properly without enforcement/punishment. Thus, the state is justified in using their authority to enforce the system of laws. The state, in our case the Canadian government and courts have standing to punish.

I will assume, for the purposes of this thesis, that Hart's hybrid theory of punishment provides a plausible justification of punishment because it adequately solves the deficiencies of singular principle accounts such as utilitarianism and retributivism, but it is not without its critics. Theorists such as Boonin have argued against using hybrid theories to answer the question of whether punishment is justified as a practice at all.[80] However, disproving the arguments against hybrid theories is not in and of itself enough to warrant the acceptance of hybrid theories. It must be shown that a theory of punishment provides a plausible justification for the practice of punishment, and I find that Hart's hybrid theory does just that.

There have been deficiencies ascribed to hybrid accounts, which I will now address briefly. One of the criticisms of hybridity is that this strategy is internally inconsistent and ad hoc.[81] W. Kaufman argues that hybrid theories arbitrarily pick and choose the best elements of each account and mix them together without any rational

[80] Boonin.

[81] Kaufman, W., "The Rise and Fall of the Mixed Theory of Punishment," *International Journal of Applied Philosophy*, 22 (2008): 45-49.

basis.[82] Additionally, retributivists criticize hybridity for relegating retributivism to a secondary role as mere side constraints, when they believe that it provided the main justification for punishment.[83]

Boonin argues that the blending of utilitarian and retributivist considerations is appealing in theory, yet unsuccessful in practice.[84] One of Boonin's reasons for arguing this way against hybrid accounts will be paraphrased in the following way: the parts are defective so the sum is necessarily defective.[85] By this, Boonin means that since the individual theories are defective on their own, they will necessarily result in deficiencies when combined. For example, Boonin argues that even with a hybrid account that attends to deservingness better than utilitarianism or retributivism alone does, it still does not provide a morally adequate justification of punishment and the concern of using people as a mere means remains.[86] Some theorists, including Boonin, argue that hybrid accounts will not avoid the punishing the innocent implication due to the utilitarian element of which this is a concern.[87] Essentially, Boonin's argument is that the hybrid account will be no more successful than its conjuncts.[88]

For the purposes of this thesis, I will assume that these criticisms are not fatal to hybridity, that hybrid theories can solve the problems identified by Boonin better than its

[82] Ibid.
[83] Wood, D., "Retribution, Crime Reduction, and the Justification of Punishment," *Oxford Journal of Legal Studies*, 22 (2002): 303.
[84] Boonin, 207.
[85] Ibid., 210.
[86] Ibid., 211.
[87]Boonin, 211.
[88] Ibid., 210.

competitors, and that they potentially provide a morally plausible justification for punishment. In my view, hybrid theories are worthy of use in addressing the issues that I wish to tackle in the following chapters. Considering that hybrid accounts seem to be a plausible justification for punishment, I am confident in moving forward with Hart's approach.

In summary, the theory of punishment that will be used in this project is that punishment is defined by hard treatment, imposed by an authority, for the breach of a law, and it is justified by a hybrid theory with both utilitarian and retributivist elements. Utilitarianism provides the basis for the general justifying aim of punishment while retributivism acts as a side constraint to prevent the misuse of utility calculations on their own. In chapter two I will go over the Canadian legislation on criminal punishment and explain how their theory aligns with this one.

Chapter Two: Canadian Legislation on Punishment

As was clarified in the previous chapter, this thesis will utilize Hart's hybrid theory of punishment which consists of both utilitarian and retributive elements. It will be shown in this chapter that the theory behind the Canadian legislation on criminal punishment aligns perfectly with Hart's hybrid theory. Later in the chapter it will be displayed how Canada does something seemingly different when punishing Indigenous offenders. While some argue that the response to Indigenous offenders is not traditional punishment because it provides alternatives to imprisonment, I will argue that it is, in fact, an act of punishment, and should be considered within Hart's hybrid theory.

To start, I will begin by going through the relevant legislation on criminal punishment while highlighting how it aligns with Hart's hybrid theory of punishment. The CCC has provisions which establish the purpose and principles of sentencing criminal offenders. S. 718 of the CCC deals with the purpose of sentencing in Canada and employs both utilitarian and retributivist elements as they are found within Hart's hybrid theory. S. 718 is as follows:

> The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.[89]

[89] *Criminal Code*, s. 718.

As should be evident from the objectives found within this piece of legislation, appeals to both utilitarianism and retributivism can be discovered. I will say a bit more about each of these objectives briefly.

Objective (a) is a clear demonstration of the act of punishment. By this, I mean that to punish someone is to denounce them as well. Since denunciation is not a causal effect of punishment, it is necessarily not consequentialist as it does not focus on the consequences of punishment, but rather, it focuses on the character of punishment itself. Objectives (b), (c), and (f), all have direct ties to the utilitarian justifying aim in the hybrid theory of punishment. All four of these objectives promote a social good, or a good consequence of punishment. Section (e), which deals with reparations, is a representation of retributivist distribution methods as it deals with making up for the harm caused by the commission of a crime. The fourth objective, (d), promotes rehabilitation of the offender which is a desirable effect or consequence of punishment. An effect or consequence that helps justify punishing someone.

Furthermore, in the lead into the objectives of s. 718, the legislation uses terms such as "just sanctions" which is indicative of retributivist ideals because it assumes that there is a scale of relativity/proportionality when it comes to sentencing crimes. A rudimentary example of this is an eye for an eye. While this may not have the same nuance of the system in place today, I believe it illustrates the point. In other words, a particular crime will be paired with a fitting sentence due to the scale of just sanctions that are imposed which treat like cases alike and different cases differently.

With the fundamental purpose of Canada's legislation established, the remaining relevant sections deal with the principles of sentencing. S. 718.1 of the CCC outlines the fundamental principle of proportionality; "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[90] This section is a clear reflection of retributivism as it deals with proportionality and desert, the two foundational points of retributivism. The mention of sentences being proportionate to the degree of responsibility of the offender also reflects a consideration of mitigating and aggravating circumstances as Hart outlines them in the latter part of the *Prolegomenon*.[91] Assessments of the offender's desert will necessarily bring mitigating and aggravating circumstances to the foreground.

Moving forward, s. 718.2 highlights other important principles associated with sentencing:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.[92]

[90] *Criminal Code*, s. 718.1.
[91] Hart, 13-16.
[92] *Criminal Code*, s. 718.2.

Similarly, to s. 718.1 on proportionality, objective (a) allows for aggravating and mitigating circumstances to be considered during sentencing, while (b) deals again with proportionality. Both tie in nicely with our hybrid theory of punishment established earlier because of their roots in retributivism. Objective (c), which requires that unduly long or harsh sentences not be imposed, is again consistent with something like Hart's hybrid theory of punishment because it incorporates elements of both utilitarianism and retributivism. This objective deals with not punishing someone more than they deserve which is consistent with retributivism. This objective is also seemingly utilitarian in the sense that an unduly long or harsh sentence would not produce the greatest net gain because of the harm and disutility that it would produce in most situations. Section (e) will be an important part of this discussion as it obliges the courts to consider all available options other than imprisonment, especially in the case of Indigenous offenders. Again, this objective is consistent with the retributivist concern to make the penalty fit the crime. The more harm caused by the offending actions, the more punishment is warranted. This seems to be consistent with Hart's hybrid account.

The remaining two provisions, s. 718.3(1) and s. 718.3(2), deal with degrees of punishment and discretion respecting punishment.[93]

The sections just listed outline the purpose and principles of sentencing in Canada as outlined in the CCC. It should hopefully be evident by this point that Canada utilizes something similar to Hart's theory of hybridity in their practice of punishment.

[93] *Criminal Code*, s. 718.3(1) - 718.3(2).

Given that I have gone through the legislation and shown that it reflects similar utilitarian and retributive ideals to those found in Hart's hybrid theory of punishment, I will now take a closer look at s. 718.2(e) because it shows that Canada does something seemingly different with Indigenous people in regards to sentencing.

S. 718.2(e) pays particular attention to Indigenous offenders and finding alternative means of punishment to imprisonment. In its 1999 decision, *R.V. Gladue*, the Supreme Court of Canada (SCC), made its first attempt to interpret s. 718.2(e).[94] The accused, Jamie Tanis Gladue, a 19-year-old Cree woman, pleaded guilty to manslaughter after stabbing and killing her common-law husband, Reuben Beaver, and was sentenced to three years in prison. The accused was intoxicated at the time of the crime and suspected her husband of infidelity. Although the sentencing judge did take into account several mitigating and aggravating factors, he did not take into consideration the particular circumstances surrounding Ms. Gladue's Indigenous status because she lived off reserve and was not therefore a member of the Aboriginal community. For this reason, the judge did not think that the special circumstances associated with Indigenous status applied to this case, so he did not give it any consideration. This was later challenged as a failure to apply s. 718.2(e) of the CCC on the ground that the section applied to any Indigenous person (status or non-status Indians, First Nations, Métis, or Inuit), whether that person lives on or off a reserve. The decision of the Supreme Court was not to change the sentence, but to provide clarification for future cases.

[94] *R. v. Gladue*, [1999] 1 S.C.R. 688.

In its *Gladue* decision, the SCC clarified the special cultural considerations for Indigenous offenders that courts must take into consideration when assessing particular cases. This led to the creation of the Gladue report which takes into consideration the personal history of the offender. The Gladue report helps to identify adverse factors that are present in the offender's personal history that are associated with the offender's Indigenous status and that serve as mitigating factors in their case. The list of Gladue factors that are taken into account are: abuse, alcohol/drug abuse, attendance at residential/boarding/or day school, connection to the Indigenous community, criminal history, dislocation from the Indigenous community, early death among family or friends, employment, family breakdown, family involvement in the criminal justice system, foster care or adoption, health (mental and physical), interventions/treatments/counselling, living situation, loss or denial of Indian status or membership recognition, poverty, quality of relationships, racism, remoteness, support networks and strengths.[95] The objective of the Gladue process is to ensure that, for each Indigenous offender, their special circumstances *as an Indigenous person* are taken into consideration when determining degree of guilt or desert, and the response which the state is justified in making to that person and his or her offense.[96] The Gladue process is intended to recognize that Indigenous persons have been subject to systemic racism throughout

[95] "Gladue Report Guide: How to Prepare and Write a Gladue Report," *Legal Services Society*, BC (2018): 19-20.
[96] Ibid., 1.

Canadian society and its institutions, including the criminal justice system, and to make adjustments to respond to that.[97]

This process provides access to Gladue rights, Gladue specific courts in certain jurisdictions, Gladue trained lawyers, and a Gladue analysis/report. Typically, a Gladue report starts by contacting the subject's lawyer, and reviewing the subject's criminal record, followed by confirming their location and interviewing them.[98] From there, community resources and supports are contacted, a final interview is completed, and a finalized report is written and submitted to the courts.[99] Judges are duty bound to consider all reasonable alternatives to a jail sentence, including alternative practices if agreed to by the offender and their community, and considering the severity of the crime.[100] In addition, even when there is a mandatory minimum sentence applied, the courts still take the Gladue report into account when deciding sentence length.[101] Access to Indigenous based programs also exists in some but not all Canadian prisons.

After the developments introduced in *R. V. Gladue*, another landmark case, *R. V. Ipeelee,* clarified the principles established in *Gladue*. *R.V. Ipeelee* deals with two court cases which are commonly referred to together as *Ipeelee*.[102] In *Ipeelee*, the courts reaffirmed the decision made in *Gladue* and gave more guidance on Gladue rights.[103] It is

[97] Ibid., 1.
[98] "Gladue Report Guide: How to Prepare and Write a Gladue Report," *Legal Services Society*, BC (2018), 21-23.
[99] Ibid., 23-25.
[100] Ibid., 3.
[101] Ibid., 5.
[102] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R 433.
[103] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R 43

not up to the judge to determine whether Gladue factors apply in the case of an Indigenous person, rather, it is the right of the Indigenous subject to have those factors automatically considered.

One of the reasons that was given for the special legal considerations for Indigenous persons was proportionality.[104] An unmitigated case of sentencing would be disproportionate if applied to an Indigenous person because of the history of colonial violence against them and their overrepresentation in the criminal justice system.[105] In addition, many Indigenous communities statistically experience higher rates of violence, abuse, addictions, suicide, and unemployment.[106] This is seen in the court's decision in the *Ipeelee* case, which was as follows:

> When sentencing an Aboriginal offender … 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 economic educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and, of course, higher rates of incarceration for Aboriginal people.[107]

Thus, *Ipeelee* clarified the rights of Indigenous offenders and the duty of the judge. Beyond the core cases that set out the Gladue process, there are also several sections of *The Corrections and Conditional Release Act* (CCRA) that deal with punishing Indigenous offenders. Mainly, s. 81, s. 84, and s. 84.1, describe protocols for releasing an Indigenous inmate into the care and custody of their community.[108] These

---

[104] Ibid.; "Spotlight on *Gladue*: Challenges, Experiences and Possibilities in Canada's Criminal Justice System," *Research and Statistics Division*, Department of Justice, Canada (September 2017): 18.
[105] "Gladue Report Guide: How to Prepare and Write a Gladue Report," 11-14.
[106] "Gladue Report Guide: How to Prepare and Write a Gladue Report," 13.
[107] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R 433.
[108] *Corrections and Conditional Release Act*, s. 81, 84, 84.1.

provisions allow negotiation to take place between the Indigenous community and the Canadian correctional system, and ease the release of the offender back into the community. Other relevant sections of the CCRA include: s. 80, s. 82, and s. 83, which provide programs and a consultative body, and place Indigenous spirituality at the same status as other religions.[109]

The main sections of the CCRA that I highlighted are an extension of two major pieces of Canadian legislation which guarantee particular rights to Indigenous persons and help to enforce the special judicial considerations introduced by them. Specifically, both s. 35 of the Canadian Constitution and s. 25 of the Canadian Charter of Rights and Freedoms require respect for the existing treaty rights of Indigenous people in Canada, including their unique customs and traditions.[110] This concludes the sentencing framework around Indigenous offenders.

The approach taken with Indigenous offenders is seemingly different from the approach taken with non-Indigenous offenders because it utilizes what is defined as restorative justice practices. Restorative justice is directed at holding offenders accountable for their actions, allowing affected parties to resolve the harm committed by the offence, and preventing further harm.[111] In most instances the goal seems to be an opportunity to educate and heal rather than to punish. Education and healing, in this sense, include informing the offender and society of the wrongdoing that was committed,

---

[109] *Corrections and Conditional Release Act*, s. 80, 82, 83.

[110] *Constitution Act,* s. 35; *Canadian Charter of Rights and Freedoms*, s. 25.

[111] "Restorative Justice: Getting fair outcomes for victims in Canada's criminal justice system," *Public Engagement on the Federal Government's Criminal Justice System Review*, Office of the Federal Ombudsman for Victims of Crime (November 2017).

seeking acknowledgement by the offender of the harm caused, and finding alternative means to remedy this harm that do not add to the harm that was already committed. A restorative model in punishment attempts to reestablish a balance of sorts between the offender and the offended and the relevant communities involved. One of the aims of restorative justice is to find alternatives to traditional imprisonment in light of the fact that jail time may not be the right answer for everyone, and seldom achieves the goal of promoting healing and education. The restorative justice practices prescribed for Indigenous persons, in this sense, provide access to community-based resources, provide the options of culturally relevant healing circles and community sentences,[112] and considers the view of the community on the crime and their justice traditions, as well as provides culturally appropriate programs.[113]

Traditional punishment approaches seem so different from restorative practices that some may argue that it is not true punishment at all. It might be argued that hard treatment is not being imposed in restorative practices due to the fact that alternatives to imprisonment are being sought. If there is no hard treatment involved, then this process would seemingly not fit the definition of punishment previously given. For this reason, it might be argued, the Gladue process is non-punitive and should be excluded from the scope of Hart's hybrid theory of punishment. Additionally, it might be argued that the sentencing process for Indigenous persons does not fit Hart's definition of punishment previously given because the general justifying aims are different. If we accept Hart's

[112] Community sentences allow persons convicted of a crime to serve out at least part of their sentence in the community, but possibly all of it.
[113] "Gladue Report Guide: How to Prepare and Write a Gladue Report," 43.

theory, then the general justifying aim of punishment is utilitarian, while it might appear that the justifying aim of restorative justice is something entirely different, potentially deontological. If the justifying aims are different, then restorative models should not be included as within the scope of this theory of punishment.

In response to these arguments, I propose that the restorative process invoked for Indigenous persons through the Gladue process is, in fact, a case of punishment that fits the definition previously given. When providing the definition of punishment for this thesis, I mentioned that both minimal and robust forms of hard treatment should be included in a theory of punishment as long as the act is against the offender's will. Despite the fact that restorative justice aims at alternatives to imprisonment, with some claiming that this is being "light on crime," the responses taken still involve the act of minimal hard treatment against a person's will in response to an offence committed. Therefore, although restorative justice is a form of minimal hard treatment, it should still be considered in a theory of punishment. Similarly, although the aims of restorative justice, and punishment conceived and justified by Hart's hybrid theory, seem vastly different, they both share a utilitarian justifying aim. Both aim to achieve some good consequence through a public response to crime, and by doing so, are both forward-looking. Restorative justice is not backwards-looking because it does not focus on what the person did. Rather, it focuses on restoring a balance in the future and producing a good outcome, namely, education, healing, and acknowledgement, by the offender, of his or her wrongdoing. Along with its utilitarian justifying aim, restorative justice also requires the use of retributive side constraints of proportionality and deservingness,

presumably in recognition that an unbridled utilitarian account can often leave us with questionable results.

The sentencing procedures for Indigenous persons and non-Indigenous persons not only share a general justifying aim but they also share the other elements of Hart's hybrid account. For both, the topic of candidacy is answered by retributive ideals because it bases determinations on proportionality and deservingness rather than utility. Similarly, the severity of punishment for both is determined by retributive and utilitarian considerations, rather than utility alone. In both cases, standing is also established in the same manner.

In light of the above considerations, it seems reasonable to conclude, for the purposes of this thesis, that responses to criminal offences motivated by restorative justice indeed qualify as acts of punishment, and that they are to be justified by something similar to Hart's hybrid theory of punishment.

It should be mentioned that in addition to protections for Indigenous offenders, Canadian law includes a less-developed framework that includes protections for individuals with mental health problems. Provincially, there are Mental Health Acts which offer recourse to psychiatric facilities and guide courts and other institutions in the exercise of their powers and operations in response to possible or actual misconduct on the part of offenders suffering from mental health conditions.[114] In addition, Bill C-14 (2014) *The Not Criminally Responsible (NCR) Reform Act* allows for NCR verdicts which

[114] Mental Health Act, R.S.O. 1990, c. M.7.

can mitigate the offender's culpability in certain cases.[115] In even more informal matters, all pre-sentencing reports ask the offender if they suffer from mental health or drug abuse issues, and if they do, then additional resources will be made available.[116] These resources include in-prison programs and counselling, rather than alternatives to imprisonment as provided by the Gladue process.

Mental Health Acts, the NCR Act, and pre-sentencing reports can lead to official responses that in some ways mirror the actions taken in the Gladue process, though with a lesser degree of formality and without the clarification that was given through landmark Supreme Court cases. Judges across Canada do not have the same duties placed upon them when it comes to sentencing individuals with mental illness as they do when sentencing a person of Indigenous heritage. Some criticize the Mental Health Act for being applied provincially instead of federally as it lacks the consistency that federal acts possess.[117] The concern is that the vast differences between the provinces and territories in respect of their application of the relevant provincial Mental Health Acts result in some Canadians receiving adequate mental health assistance while others do not. There is often a good reason, whatever that may be, behind a country's decision to implement a general policy provincially versus federally. Cultural differences between provinces might, e.g., warrant provincial as opposed to federal jurisdiction over education or liquor laws. In this particular case, it may be useful to ask why we might regard Mental Health Acts as better

[115] Not Criminally Responsible Reform Act, S.C. 2014, c. 6.
[116] Bonta, J., Bourgon, G., Jesseman, R., & Yessine, A. K., *Presentence reports in Canada,* (User Report 2005-03), Ottawa: Public Safety Canada.
[117] Gray, John E. and Richard L. O'Reilly, "Clinically Significant Differences among Canadian Mental Health Acts," *The Canadian Journal of Psychiatry* 46, no. 4 (May 2001): 315-321.

dealt with at the provincial level when we deal with the treatment of Indigenous offenders at a federal level. It would seem that, for reasons of consistency, both should be dealt with at a federal level, in order to provide the same access to resources for all Canadians, rather than letting each province decide how to handle things on their own in the case of citizens with mental health issues. This idea will be explored further in the next chapter.

Equally worthy of note is that, recently, Impact of Race and Culture Assessments (IRCAs) have been introduced into Canadian Criminal Law practice with the aim of recognizing the systematic discrimination that non-Indigenous racialized groups have experienced.[118] The use of IRCAs is likened to that of Gladue at times, but IRCAs are insufficient to address each of the vulnerable categories that I mentioned in chapter one because they focus on racialized groups. IRCAs are insufficient to respond to the scope that I am seeking which protects individuals of racialized groups, as well as LGBTQIA+, mentally ill persons, and other vulnerable individuals and groups that have experienced systemic discrimination and violence. To my knowledge, there is no other existing legislation that makes accommodations for particular groups or communities in sentencing.

With the above having been said, we are left with an important question: Does implementing restorative justice considerations in the sentencing of Indigenous persons entail that Canada ought to change punitive practices elsewhere? Why is this question important/relevant? Off hand, it seems prima facie wrong to treat Indigenous persons and

[118] Dugas, Maria C., "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders," 43-1 *Dalhousie Law Journal* 103 (2020).

those similarly situated differently. Justice requires equal treatment of people equally situated in terms of their vulnerability and having been impacted by systemic discrimination. And, as will be shown below, these groups are relatively similarly situated. The fact that the sentencing procedures pertaining to these groups are so vastly different is something that needs to be addressed. This I set out to do in the following chapter.

Chapter Three: Applying Gladue-Like Procedures to Non-Indigenous Offenders

Given that Canada treats Indigenous offenders one way, and non-Indigenous offenders another way, does that entail that Canada ought to change their punitive practices? Since the processes are so different between the two groups, this is something that may need to be addressed for reasons that are based on just punishment and consistency of the law. These reasons can be discovered through an intersectional analysis.

Broadly, consistency of the law is a must to ensure that like cases are treated alike and that people receive their rightful dues. The concern is that the important legal and moral principle that like cases must be treated alike is violated when a set of laws is inconsistent with each other. Let us assume that one law (or set of laws), L1, requires one sort of punitive response for a particular group, and another law, L2, requires a different punitive response for another group in identical circumstances. L1 and L2 can be said to be inconsistent in the sense that, together, they violate the principle that like cases should be treated alike. This can be said to be an inconsistent set of laws.

More specifically for our purposes, the law can be said to be inconsistent when it fails to treat Indigenous offenders and other similarly situated non-Indigenous persons alike. As I have already addressed, and will expand on shortly, non-Indigenous offenders with similar circumstances to Indigenous offenders seem not to receive their rightful due in comparison to the treatment of the latter group. I view this as an inconsistency in the law.

In legal theory, the Rule of Law demands that the law be exercised equally on all persons, without unjustifiable differentiation.[119] If we accept this claim, then we accept that individuals and groups should be treated equally under the law unless there is a justifiable difference between them. Many will say that because of the plight of the Indigenous, there is a justifiable reason to treat offenders from that group in a special way, which I wholeheartedly agree with. However, I do not think that the Indigenous should be alone in that category, with particular regard to sentencing procedures. In the cases that I have described, I argue that there is not a justifiable difference between the groups for reasons that will be elaborated on shortly. Hence, there is no justifiable reason for treating Indigenous offenders one way, and non-Indigenous offenders another way, as demanded by the Rule of Law.

In *The Authority of Law* (1979), Raz argues that the main purpose of the Rule of Law is to provide guidance for the behaviour of those who follow it.[120] One of the conditions for this to happen is that the law must be relatively stable.[121] Stability is jeopardized if laws are inconsistent with one another. If the inconsistency is to the benefit of one party as compared with the equally deserving other party, then resentment will build and respect for the law and those who create and enforce it is likely to be threatened. This can, in turn, lead the aggrieved party to disregard the law. So there may be rule of law values in jeopardy if the law unjustly discriminates in favour of one party

[119] Fuller, L., *The Morality of Law*, New Haven: Yale University Press (1964); Raz, J., "The Rule of Law and its Virtue," in his book, *The Authority of Law,* Oxford: Oxford University Press, (1979).
[120] Raz, 213.
[121] Ibid., 214.

over another equally deserving party. For the law to be relatively stable, this means that it must treat like cases alike. The term 'relatively,' in this sense, applies to the previously mentioned idea of justifiable differentiation. The law must be 'relatively' stable in the sense that it must be relative in its application to persons, and it must not unjustifiably differentiate between them. The law must recognize when certain people are less or more deserving of punishment and treat them accordingly. However, we see that the Indigenous, in particular, see greater protections.

From a legal standpoint, s. 15 of the Charter ensures the consistent and equitable application of the law to all persons.[122] S. 15 deals with equality under the law, equal protection and benefit of the law.[123] There are exceptions made for laws that aim to ameliorate the situation of particular groups,[124] such as the Indigenous. These exceptions aim to provide equitable treatment under the law rather than simply equal treatment. However, if there are other groups that potentially require additional resources from the law in similar ways to the Indigenous, then there is a failure of equitable treatment happening.

To execute a just punishment, the ideals previously mentioned of consistency, the absence of unjustifiable differentiation, and equity all must be respected. Noting all of this, considering that the law authorizes special punitive practices with respect to Indigenous persons, and considering that the law is necessarily meant to be consistent, does this mean that Canada ought to change its punitive practices elsewhere?

---

[122] *Canadian Charter of Rights and Freedoms*, s. 15.
[123] Ibid.
[124] Affirmative Action Programs in s. 15 of the *Charter*

There are non-Indigenous individuals, and at times groups, that are similarly situated enough to the Indigenous that it would seem that they deserve the same treatment under the law. To identify which persons are equally situated to the Indigenous in terms of vulnerability to the law, it is important to take notice of the idea of intersectionality. Intersectionality refers to the understanding that social categories such as race, gender, class, etc., interconnect and overlap to create heightened levels of disadvantage and vulnerability for particular groups and persons. One way to grasp this idea comes from Florencia Luna who understands intersectionality in terms of layers of vulnerability.[125] I think Luna's theory can be applied to punishment theory because the same principles can be talked about in sentencing and her work on vulnerability. In Luna's view, social categories act as separate layers and, in this way, people can be vulnerable to multiple things at different times.[126] These circumstances stack and affect the choices that people are able to make. Luna's theory of layers allows us to view different instances of vulnerability as adding a layer to that person.[127] She explains that:

> We should assess harms, wrongs, and risks involved in the different layers (from physical to psychosocial, including the possibility of exploitation, dependency, abusive patterns, etc.). We should begin with the most harmful layers and move down to the less damaging ones. As we may have several other layers, we should begin by evaluating whether cascade layers exist. Cascade layers are frequently the most harmful. They have a cascade feature because they will exhibit a differential strength and damaging power. As what we will try to do after is to avoid its harmful effects. However, we should weigh several factors: not only the damaging effect but the probability that it will happen. We should balance the

[125] Luna, Florencia, "Identifying and Evaluating Layers of Vulnerability - A Way Forward," Wiley Bioethics 88 (2019).
[126] Luna.
[127] Luna, 89.

> possibility of their occurrence and judge how harmful these layers are, as well as the situation under analysis and the threats involved.[128]

I understand Luna to be saying that it is important to pay attention to both the possibility of the occurrence of a layer and the level of harmfulness of that layer. Vulnerability, in Luna's account, is then directed at the *possibility* of incurring harm, abuse, or exploitation from these layers. It is also important to recognize how these layers can stack and affect each other. As vulnerable individuals are identified over time, patterns will start to emerge which will reveal certain groups who may or may not experience heightened vulnerability.

What Luna has in mind here is that some individuals and groups may experience multiple instances of vulnerability at once and this needs to be accounted for in a bioethics context. I think that this idea is transferable to sentencing procedures as a way to understand the relational and dynamic way of viewing one's circumstances. The idea of intersectionality is necessary to consider in sentencing procedures because it recognizes how multiple factors can interact with each other to cause increased vulnerability and undue hardship. To understand this idea further, let us consider a case of three individuals, one Indigenous male, one black male, and one white drug-addicted and uneducated female.

Intersectionality recognizes that the Indigenous male is subject to multiple layers of vulnerability. By virtue of his culture and community, intersectionality and Luna's layers approach would recognize that this individual has experienced a variety of

[128] Luna, 92.

systemic barriers and oppressors stemming from his Indigenous heritage. Statistically, this includes experiences of violence, over-incarceration, generational drug and alcohol abuse/addiction, generational poverty, and a lack of access to vital resources and land (eg. clean drinking water on some reserves). Each of these experiences results in another layer of vulnerability added to this individual's disadvantage. Intersectionality shows just how these categories may interact and by virtue of their interaction, may result in even further trouble for this individual.

Comparatively, the black male has similarly experienced generational systematic oppression and violence.[129] He has experienced virtually each of the same systematic disadvantages and layers of vulnerability by virtue of his race. This includes features such as, over-incarceration, generational poverty and substance abuse, and over-policing, in virtue of which he experiences a new layer of vulnerability.[130] Using the lens of intersectionality, we are able to see that this individual is similarly, if not equally at times, disadvantaged to the Indigenous male.[131]

Alternatively, the third example, a white, uneducated and substance addicted female, might seem on face value, less vulnerable than both the Indigenous male and the black male because of the privilege associated with her whiteness. However, in light of her gender she is likely to experience, or has already experienced, systematic oppression

[129] Making Real Change Happen for African Canadians, Report of the African Canadian Legal Clinic to the CERD (93rd Session, 2017).
[130] Making Real Change Happen for African Canadians, Report of the African Canadian Legal Clinic to the CERD (93rd Session, 2017).
[131] Ibid.; Common Ground – An Examination of Similarities Between Black & Aboriginal Communities APC 29 CA (2009).

and a heightened prevalence of violence.[132] On top of this, the fact that she is uneducated, as well as being drug-addicted, means that she is highly likely to experience comparable disadvantages in society because of her circumstances most, if not all of which, were not her choice. Her lack of education and substance addiction greatly increases her odds of also experiencing homelessness which would add an additional layer of vulnerability. As we can see yet again, this individual statistically experiences more violence by virtue of their gender, their substance abuse, and their lack of education, each equaling a new layer of vulnerability.[133] Many of these problems could be generational, but what I would say is that this person is also looked down upon and stigmatized by society because of their inability to fit the "norm." In my view, this likely makes them no less disadvantaged than the Indigenous male and, at times, the black male. We can use Luna's layers approach and an understanding of intersectionality to recognize this in a legal context.

Taking these three cases into consideration, and using the layers approach to vulnerability and Luna's understanding of intersectionality, it seems quite plausible to suggest that each of these cases/individuals deserves similar treatment under the law. However, of the three cases, the Indigenous male is the only one entitled, by Canadian law, to recognition of the additional mitigating circumstances in sentencing considered in chapter two above. He is the only one for whom restorative justice practices in Canada can be considered and to whom the relevant additional protections under the law can be

[132] Schwan, K., Versteegh, A., Perri, M., Caplan, R., Baig, K., Dej, E., Jenkinson, J., Brais, H., Eiboff, F., & Pahlevan Chaleshtari, T. (2020). The State of Women's Housing Need & Homelessness in Canada: A Literature Review. Hache, A., Nelson, A., Kratochvil, E., & Malenfant, J. (Eds). Toronto, ON: Canadian Observatory on Homelessness Press.
[133] Ibid.

applied. Restorative justice acts to mitigate and remedy the layered vulnerability of our Indigenous male by recognizing how each of the layers interacts, resulting in heightened disadvantage. But it applies only to Indigenous persons. Personally, I see this as a lack of consistency in the law. Like cases are not being treated alike. Noting this discrepancy, I will now try to identify whether there are other groups that deserve similar special treatment under the law because of their positions of undue hardship and vulnerability.

Using the lens of intersectionality, we can see that many other individuals, and potentially groups, may be in positions of vulnerability similar to those of the Indigenous. To identify which individuals suffer from similar levels of vulnerability to the Indigenous, we must look to their specific social categories and layers of vulnerability to see how they interact and affect one another.

If an individual fits into several categories of vulnerability, then their case should be looked at with greater scrutiny as is the case with someone who identifies as Indigenous. By this, I mean that if an individual offender has multiple layers of vulnerability, then they should have their case treated with a level of caution similar to that taken with respect to Indigenous people. This would require offering the same degree of mitigation through use of some process similar to the Gladue process.

On the other hand, to identify which groups as a whole experience vulnerability similar to that of the Indigenous, we must look to groups that have had similar experiences of systematic injustice and social barriers. In Canada, the Indigenous are not the only group that have been systematically discriminated against. Black people, in light of their race, have experienced similarly traumatizing discrimination from the state and

worldwide. Another group that has experienced systematic discrimination worldwide, including Canada, is the mentally ill. Persons who suffer from severe mental illnesses have historically been treated as lesser because of their incapacities.[134] They have been mistreated by the state in systematic ways and continue to suffer because of the lasting impact that this has had on them. The ways in which the mentally ill have been mistreated by the state include historically being used as unjustified candidates for clinical research, being subject to horrendous state practices such as electroshock therapy, as well as suffering from dehumanizing institutional conditions. This mistreatment has had a long-lasting impact on those who suffer from severe mental illness.[135]

LGBTQ2IA+ persons also historically have experienced systematic discrimination and violence.[136] From being labelled as having a mental illness to having their personhood denied by the state, the LGBTQ2IA+ community has experienced traumatizing levels of mistreatment from the Canadian government and people. Any group in which there is a generational legacy of a negative connotation can arguably be said to have similarly restricted choices in life to that of the Indigenous when paired with other layers of vulnerability. For example, those persons who have generational incarceration in their family, or generational poverty, lack of education, homelessness,

[134] "Violent Victimization of Canadians with Mental Health-Related Disabilities, 2014," Juristat. Statistics Canada. Available at: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54977-eng.pdf?st=-zSxuE8i
[135] Ibid.
[136] "Experiences of Violent Victimization and Unwanted Sexual Behaviours Among Gay, Lesbian, Bisexual and Other Sexual Minority People, and the Transgender Population, in Canada, 2018," Juristat. Statistics Canada. Available at: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2020001/article/00009-eng.pdf?st=Xdf4qLFI

etc., could all be said to have experienced levels of vulnerability that are, in many instances, comparable to those experienced by the Indigenous.

The compounding of vulnerability is the major factor here. On their own, the individuals and groups that I have just identified may not be equally deserving of the special treatment to which Indigenous persons are entitled as a matter of Canadian penal law. However, when intersectionality is taken into consideration, it is clear that many of the people within these groups can at times be equally deserving of something analogous to the Gladue process. However, does it make sense to adopt similar punitive practices in case of these other groups? Is it, e.g., plausible to view the adopting of restorative practices for groups of people other than Indigenous persons as morally justifiable? In my view, the answer to this question is: Yes. We should indeed apply a restorative model, similar to the one exemplified in the Gladue process, to other vulnerable groups of people, beyond the Indigenous.

There is a history of prolonged injustices committed against vulnerable and marginalized groups that needs to be remedied, and reform of the criminal justice practices around these groups is one way to help remedy this harm. Given that restorative justice practices are prescribed for Indigenous people, they should also be available to other vulnerable individuals and groups. The Gladue process brings with it many benefits such as remedying the over-incarceration of Indigenous persons, provides the state with more options of how to deal with Indigenous offenders, and provides more leeway in deciding a sentence. The Gladue process treats Indigenous persons like moral agents capable of rationality and critical thinking. This is beneficial because incarceration

negates Indigenous people's ability to realize parts of their humanity and this is especially necessary in vulnerable groups. This method is useful because it recognizes that you can regain your humanity and your ability to do better and be better. Only Indigenous persons are provided with the benefits of the Gladue process. Other similarly vulnerable individuals and groups are denied the benefits of this Gladue process. These other vulnerable individuals and groups are, for this reason, treated unfairly. One obvious way to remedy this unfairness is to afford these other vulnerable individuals and groups the benefits of the Gladue process, or something analogous to it. Therefore, what I have done so far is provide a strong case for thinking that a restorative justice process of the kind embodied in the Gladue procedures should be extended to vulnerable individuals and groups other than those who fall within the category of Indigenous persons. The next question is: How can such an extension be carried out in practice?

My suggestion is that Canada should include more protected groups under s. 718.2(e). This could be achieved in a number of different ways, some more difficult than others. A first option could be through an amendment to s. 718.2(e) of the CCC. An amendment to include other similarly situated groups specifically by name so that it does not solely specify the Indigenous above other groups. This may require a change in text so as to single out Indigenous persons as well as any other group that is similarly situated. It is important to note, however, that amending the CCC is an incredibly difficult task, less so than amending the Charter which is constitutionally entrenched, but a tremendous task nonetheless. So, if change in practice can be brought about in a different way, then that might be best to pursue in the meantime. The second route is less burdensome and

less difficult to achieve. This option would require a change in interpretation. Arguably, s. 718.2(e) is already open to interpretation that allows recognition of these other groups. Specifically, the section states that sentences other than imprisonment should be considered, if appropriate, for "all offenders," despite going on to single out Indigenous offenders. Hence, a charitable interpretation may be the best option to pursue.

Instead of solely considering Indigenous heritage, the courts should seek to take into account all additional mitigating circumstances relevant to that person's life. The judge needs to decide whether those mitigating factors warrant Gladue-like procedures. If so, then a Gladue-like report or analysis should be performed and the relevant Gladue factors excluding Indigenous identity or status should be considered.

What has been suggested here should not be taken as a prescription of how a new Gladue-like process could come about. That task would undoubtedly have hundreds of details to be worked out. It is not my intention to outline and justify a fully-worked out Gladue-like procedure for vulnerable, non-Indigenous offenders. My aim has only been to provide reasons for thinking that we should be looking to develop and implement something like the Gladue process for non-Indigenous offenders. Tremendous difficulties would arise in devising a Gladue-like process for other vulnerable individuals and groups. One difficulty that may foreseeably arise is when an individual meets several of the vulnerable categories, and the act of determining which group they primarily belong to becomes a difficult process. It has not been my task to devise such a procedure, nor to solve the respective difficulties that may arise in arranging a Gladue-like system for non-

Indigenous offenders. Rather, I have aimed to suggest that there is some reason to think that Gladue-like procedures could, and should, be extended to non-Indigenous offenders.

Chapter Four: Objections and Responses

If my arguments thus far are sound, we seem to have good reason to extend Gladue-like procedures to groups of non-Indigenous offenders. In closing, I will attempt to answer some of the most likely objections to my argument.

One possible objection is that the account defended above seemingly places the plight of the Indigenous on the same level as other groups, and in so doing, detracts from the significance of their unique experience. I hope that I have made clear that my intention was not to detract from any Indigenous person or community's experience or suffering. That simply was not my intent, and I am open to hearing any and all concerns or grievances that this thesis may bring about. Rather, my intention has been to suggest that the Gladue process for Indigenous offenders provides a useful model for allocating additional protections to similarly situated individuals. I hope that instead of detracting from the significance of the Indigenous experience and practices, I have shown that there are others who are similarly situated enough to be considered for Gladue-like procedures.

A foreseeable criticism which follows from this is that this account is too broad and that it has the potential to allow for almost anyone to be considered for Gladue-like procedures. In dealing with this new concern, it goes without saying that not every individual who fits the categories that I have described (black, LGBTQ2IA+, mentally ill, etc.) should be deemed eligible for these procedures. There would have to be some sort of threshold built into the process. This would require that the presiding judge take a close look at the systematic oppression that had impacted the individual's life, if at all, and a determination would have to be made as to whether there are factors that would counter that impact. For example, an affluent, well-supported, educated, and well-established

black woman convicted of a criminal offence would in most cases likely not be eligible for these procedures because her affluence provides her with many opportunities in life, contrary to many others who share her race. As previously mentioned, it is the compounding of and the intersections between different categories of vulnerability that would make someone entitled to Gladue-like protections. The threshold would need to focus on the benefits and choices in one's life and whether they outweigh the mitigating factors in one's situation.

I am not, therefore, proposing that every and all individuals be candidates for Gladue-like procedures. However, I do believe that Indigenous heritage should not be the sole determining factor in deciding whether one is eligible to receive these protections. I have intended to broaden the scope of the Gladue system in order to accommodate other non-Indigenous persons who may, in particular cases, be equally deserving of this procedure. Therefore, although the concern that a Gladue-like process of the sort I am recommending for development and implementation has the potential to allow almost anyone to be considered, that was partly intentional insofar as I wished to stress the need to accommodate many of these other individuals. I believe that the misuse of my proposed extension can be avoided by applying a strong threshold, as described in the previous paragraph, and through the application of judicial discretion.

It could be argued that s. 718.2(e) already applies to all offenders, Indigenous or not, due to its wording. However, the Gladue process that has emerged from interpretation and implementation of that section only exists for persons of Indigenous heritage. Non-Indigenous persons who require access to s. 718.2(e) are relegated to a

different mechanism if this is deemed necessary. This mechanism is called the Impact of Race and Culture Assessments (IRCAs), which take into consideration how race leads to discrimination and vulnerability. The use of IRCAs has been likened to that of Gladue reports. However, IRCAs appear insufficient to render our punitive practices both consistent and fair with respect to the interests of non-Indigenous offenders whose layered vulnerabilities seem on par with the Indigenous offenders singled out by section 718.2(e). IRCAs are not mandatory, much like Gladue reports are not mandatory, but the information acquired from a Gladue report is mandatory whereas the information acquired from an IRCA is not.[137] Hence, IRCAs do not provide the same mandatory duties on courts and judges. Furthermore, it is questionable whether IRCAs can do anything to address the problems that I am seeking to resolve (overrepresentation of vulnerable persons in prison, continued harm of vulnerable groups, inconsistent application of the law, etc.) for the reason that they do not contain all of the vulnerable categories that I have previously mentioned as deserving of Gladue-like procedures. For these reasons, I do not believe that IRCAs are a sufficient alternative to the adoption of something resembling Gladue procedures for non-Indigenous offenders who display comparable levels of vulnerability.

[137] Dugas, Maria C., "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders," 43-1 *Dalhousie Law Journal* 103 (2020): 110, 120, 149.
IRCAs and Gladue reports are not mandatory, although the information acquired from them is mandatory. In other words, every Indigenous individual is entitled to having a Gladue report completed, but if they do not know to ask for one, then it may not be provided. The court is not mandated to provide a Gladue report if not requested. Similarly, IRCAs are not mandatory themselves, unless specifically asked for.

There are notable criticisms of the Gladue process itself which cite its ineffectiveness and the likelihood of its resulting in a strict conditional sentence.[138] The first of these concerns deals with the inadequate resources available to make a system like Gladue effective. There seems to be a lack of sufficient culturally appropriate resources (e.g. Aboriginal justice centers, healing centers, Gladue-specific courts, etc.) available to truly combat the overrepresentation of Indigenous persons in Canadian prisons. The latter of these critiques deals with the concern that Gladue often results in a conditional sentence which is intense, strict, and coercive.[139] Conditional sentences may be more coercive because the alternative in most cases is jail time. They may be seen as intense and strict due to the demanding restrictions placed on actions and behavior.[140] It reasonably follows that breaches of these sentences are likely to occur due to the over-policing of Indigenous communities. Breaching a conditional sentence can result in more serious and longer sentences than if the individual was sentenced directly to jail.[141] In response to these claims, I agree that culturally appropriate programs should be more widely available and there should be more resources allocated towards them. In fact, if the extension of the Gladue process outlined and defended in this thesis is to have any chance of working, then the allocation of even more resources would be necessary. However, the availability of these programs and procedures does not impact the

[138] Monchalin, Lisa, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada*, University of Toronto [Ontario] Press (2016): 270.
[139] Monchalin, 270; Williams, T., "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does It Make?," Intersectionality and Beyond: Law, Power, and the Politics of Location, eds. E. Grabham et al., Oxon: GlassHouse Books, (2008): 84-85.
[140] Monchalin, Lisa, The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada, University of Toronto [Ontario] Press (2016): 369-372.
[141] Ibid., 369.

soundness of my argument and is not critical to this account. Neither are the resulting conditional sentences that may occur. These claims are not critical to my account because they are secondary issues to the main argument. I recognize that there are institutional and infrastructural barriers in the way of achieving proper distribution of resources and access to these procedures. However, my aim is not to prescribe how the procedures and resources would be allocated or fixed. Instead, my goal is simply to illustrate the importance of extending Gladue-like procedures to other well-deserving individuals.

It has been argued in the literature that restorative justice and the traditional approach to punishment (Hart's hybrid theory, for our purposes) are irreconcilable.[142] The argument is essentially that judges would not be able to adopt principles from both approaches when applying a sentence. Traditional sentences, it seems, cannot be reconciled with what some call the lenient approach taken with the Gladue process. However, these approaches are reconcilable if portrayed in the way that I have described. They are able to function alongside each other in one cohesive theory of punishment. Restorative sentences should not be seen as being lenient because they still impose hard treatment, although minimal in some cases. Therefore, restorative sentences meet the criteria of punishment previously outlined and fit with Hart's hybrid justification.

It is not within the scope of this thesis to completely resolve any or all of the issues associated with the Gladue process. Rather, it has been my aim to suggest that the

[142] Haslip, S., "Aboriginal Sentencing Reform in Canada - Prospects for Success: Standing Tall with Both Feet Planted Firmly in the Air," Murdoch University Electronic Journal of Law 14(1)(2000): 1.; Pfefferle, B., "Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration," Manitoba Law Journal 32 (2008): 113.

Gladue system provides a framework sufficient for allocating additional protections to vulnerable persons during sentencing. The potential inadequacies of the Gladue system itself are not critical to my endeavour because they are aside from the main argument, which is to extend the rights acquired from that process to other similarly situated groups of people.

Conclusion

The aim of this thesis is to respond to the question of whether it is plausible to extend Gladue-like procedures to particular non-Indigenous offenders within Canada. This argument rests upon my initial intuition that there are certain non-Indigenous persons who may be deserving of additional protections during sentencing procedures. This includes, but is not limited to, black people, members of the LGBTQ2IA+, the severely mentally ill, and other groups previously mentioned. These persons may at times require increased resources and mitigation in the case of sentencing due to their circumstances of undue hardship and layered vulnerability. It is important to note that some of the suffering experienced by these groups was committed in part by state institutions, including the legal system. Thus, state institutions, and for our purposes, the legal system has a greater duty than most in having to remedy the harm caused by their own actions against vulnerable persons and groups. However, despite their seeming deservingness, these individuals typically do not meet the criteria to entitle them to consideration of the sort granted to Indigenous offenders by the Gladue system.

The Gladue process can act as a model framework for prescribing how the sentencing of non-Indigenous offenders with increased levels of vulnerability should be handled. Gladue can provide a pathway to assist these particular individuals by reworking the existing process and revising it to make room for non-Indigenous persons with increased vulnerability. Doing so would in part address the over-incarceration of vulnerable persons and would assist in preventing increased generational harm to these groups.

In order for this proposal to work, the new process would require judges, in virtue of a Supreme Court decision, to alter text or charitably interpret s. 718.2(e) of the CCC as entitling *all* vulnerable offenders to the Gladue-like protections the Court has already read the section as requiring in the case of Indigenous people. In virtue of fairness, any vulnerable individual or group should be deserving of these Gladue-like procedures. In other words, if the circumstances of Indigenous offenders are such as to deem them deserving of Gladue-like protections, and if the other offenders that I have described find themselves in comparable circumstances of vulnerability, then fairness requires that they be provided with a comparable set of protections. To achieve this, some acknowledgment of layered vulnerability would be necessary by legally recognizing intersectionality in sentencing procedures.

It was previously addressed that the hybrid solution discussed here is not the only potential solution to the problem of justifying the act of punishment. Abolition may be the solution that is morally required to solve all of the issues seemingly associated with the criminal justice system. However, instead of abolishing the entire system at this time, I have suggested ways to expand on and improve the existing punitive procedures in Canada while utilizing a hybrid theory of punishment.

I have argued for the plausibility of extending restorative Gladue-like procedures to groups beyond the Indigenous, and have recommended the inclusion of additional groups under s. 718.2(e) of the CCC.

I am not alone in believing that the Gladue system provides a potential framework for the sentencing of particular non-Indigenous offenders. Others have argued for the application of Gladue-like procedures for black individuals because of the similar history of systematic and institutionalized violence.[143] This illustrates not only the usefulness of a process like Gladue, but also the need for procedures like this for other deserving communities. These other theories reiterate my concerns, although I find their scope to be too narrow in only applying their described process to one additional group, that being black offenders. These other calls for the extension of Gladue-like procedures are useful, but they will not suffice to provide all deserving individuals with their rightful due. In keeping with the consistency of the law, and maintaining equitable treatment of all persons, I believe that Gladue-like procedures should be broadened in the ways that I have suggested throughout this thesis.

It goes without saying that what I have outlined here is simply a starting point. As mentioned earlier, it is not within the scope of this thesis to address all of the issues seemingly associated with the Canadian criminal justice system and its different components. Hence, it is reasonable to state that I have not solved every issue that could be resolved in respect to criminal sentencing. What I have proposed here is one small step towards a system which requires more than can be considered in one thesis. It is my hope that this proposal sparks additional discussion on the topic of extending legal protections

[143] *R. v. Morris*, 2018, ONSC 5186.

to non-Indigenous persons during sentencing, and brings attention to the ideas of intersectionality and layered vulnerability.

Lastly and most importantly, I wish to stress once again that the argument made in this thesis is not intended to diminish the plight of any Indigenous individual or group. Rather, my aim has been to justify extending Gladue-like procedures to groups beyond the Indigenous for reasons that have been addressed earlier. These include consistency of the law, just punishment, and intersectional vulnerability. In my view, Gladue-like procedures are warranted, and in some cases necessary, for the protection of vulnerable non-Indigenous persons during sentencing processes in Canada. There appears to be a lack of consistency in the application of appropriate sentences to non-Indigenous offenders who may, because of intersectional vulnerability, be just as deserving of additional protections under the law as the Indigenous. I believe that the Gladue structure provides a useful model for extending additional rights to other groups of people during sentencing procedures in Canada. The extension of this system to other persons should not detract from the recognition of the uniqueness of the Indigenous situation. Rather, it is my hope that by extending the Gladue system to non-Indigenous persons, that it brings greater awareness to the Gladue process, the ways that it can be optimized, and the status of sentencing procedures in Canada, for Indigenous and non-Indigenous offenders alike.

Bibliography

Bentham, Jeremy. An Introduction to the Principles of Morals and Legislation. Batoche Books, 1999, ProQuest Ebook Central.

Bentham, Jeremy. The Rationale of Punishment. London, (1830).

Bonta, J., Bourgon, G., Jesseman, R., & Yessine, A. K. Presentence reports in Canada. (User Report 2005-03), Ottawa: Public Safety Canada.

Boonin, David. The Problem of Punishment. Cambridge University Press (2008).

Boyce, J. 2016. "Victimization of Aboriginal People in Canada, 2014." Juristat. Statistics Canada. Available at: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2016001/article/14631-eng.pdf?st=CSJXxjkj; Making Real Change Happen for African Canadians, Report of the African Canadian Legal Clinic to the CERD (93rd Session, 2017).

Carritt, W.F. Ethical and Political Thinking. Oxford Clarendon Press (1947).

Common Ground – An Examination of Similarities Between Black & Aboriginal Communities APC 29 CA (2009).

Corrections and Conditional Release Act, SC 1992, c 20.

Criminal Code, RSC 1985, c C-46

Duff, Antony and Zachary Hoskins. "Legal Punishment." The Stanford Encyclopedia of Philosophy (summer 2021 Edition), Edward N. Zalta (ed.).

Duff, R.A. "Retrieving Retributivism." Retributivism: Essays on Theory and Policy. Oxford University Press (2011). Oxford Scholarship Online.

Dugas, Maria C. "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders." 43-1 Dalhousie Law Journal 103 (2020).

"Experiences of Violent Victimization and Unwanted Sexual Behaviours Among Gay, Lesbian, Bisexual and Other Sexual Minority People, and the Transgender Population, in Canada, 2018." Juristat. Statistics Canada. Available at: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2020001/article/00009-eng.pdf?st=Xdf4qLFI.

Fuller, L. The Morality of Law. New Haven: Yale University Press (1964).

"Gladue Report Guide: How to Prepare and Write a Gladue Report." Legal Services Society, BC (2018).

Gray, John E. and Richard L. O'Reilly. "Clinically Significant Differences among Canadian Mental Health Acts." The Canadian Journal of Psychiatry 46, no. 4 (May 2001).

Haslip, S. "Aboriginal Sentencing Reform in Canada - Prospects for Success: Standing Tall with Both Feet Planted Firmly in the Air." Murdoch University Electronic Journal of Law 14(1)(2000).

Hart, H. L. A. Prolegomenon to the Principles of Punishment. The Presidential Address. Proceedings of the Aristotelian Society 60 (1960).

Kant, Immanuel. The Science of Right (1790). Infomotions, Inc., 2000. ProQuest Ebook Central.

Kaufman, W. "The Rise and Fall of the Mixed Theory of Punishment." International Journal of Applied Philosophy, 22 (2008).

Luna, Florencia. "Identifying and Evaluating Layers of Vulnerability - A Way Forward." Wiley Bioethics 88 (2019).

Making Real Change Happen for African Canadians. Report of the African Canadian Legal Clinic to the CERD (93rd Session, 2017).

Markel, Dan. "What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism." Retributivism: Essays on Theory and Policy. Oxford University Press (2011). Oxford Scholarship Online.

Mental Health Act. R.S.O. 1990.

Monchalin, Lisa. The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada. University of Toronto [Ontario] Press (2016).

Not Criminally Responsible Reform Act. S.C. 2014.

Pfefferle, B. "Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration." Manitoba Law Journal 32 (2008).

Raz, J. "The Rule of Law and its Virtue." In his book, *The Authority of Law*. Oxford: Oxford University Press, (1979).

"Restorative Justice: Getting fair outcomes for victims in Canada's criminal justice system." Public Engagement on the Federal Government's Criminal Justice System Review. Office of the Federal Ombudsman for Victims of Crime (November 2017).

R. v. Gladue. 1999. 1 S.C.R. 688

R. v. Ipeelee. 2012. SCC 13. 2012. 1 S.C.R 433.

R. v. Jackson. 2018. ONSC 2527.

R. v. Morris. 2018. ONSC 5186.

R v Morris. 2019. ONCA 50.

Scheid, D.E. "Constructing a Theory of Punishment, Desert, and the Distribution of Punishments." Canadian Journal of Law and Jurisprudence, 10 (1997).

Schwan, K., Versteegh, A., Perri, M., Caplan, R., Baig, K., Dej, E., Jenkinson, J., Brais, H., Eiboff, F., & Pahlevan Chaleshtari, T. (2020). The State of Women's Housing Need & Homelessness in Canada: A Literature Review. Hache, A., Nelson, A., Kratochvil, E., & Malenfant, J. (Eds). Toronto, ON: Canadian Observatory on Homelessness Press.

Sinnot-Armstrong, Walter. "Consequentialism." The Stanford Encyclopedia of Philosophy. Summer 2019 Edition, Edward N. Zalta (ed.).

Smilansky, Saul. "Two Apparent Paradoxes about Justice and the Severity of Punishment." The Southern Journal of Philosophy, vol. 30, no. 3 (1992).

"Spotlight on Gladue: Challenges, Experiences and Possibilities in Canada's Criminal Justice System." Research and Statistics Division. Department of Justice, Canada (September 2017).

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

"Violent Victimization of Canadians with Mental Health-Related Disabilities, 2014." Juristat. Statistics Canada. Available at: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54977-eng.pdf?st=-zSxuE8i.

Williams, T. "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does It Make?." Intersectionality and Beyond: Law, Power, and the Politics of Location, eds. E. Grabham et al., Oxon: GlassHouse Books, (2008).

Wood, D. "Retribution, Crime Reduction, and the Justification of Punishment." Oxford Journal of Legal Studies, 22 (2002).