

To Right Historical Wrongs

Race, Gender, and Sentencing in Canada

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Law and Society Series

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Introduction

On 28 February 1995 in Ottawa, Martha Flaherty, president of Pauktuutit (the Inuit women's association of Canada), presented a submission to the Standing Committee on Justice and Legal Affairs concerning a proposal to overhaul the sentencing guidelines in the *Criminal Code* of Canada.¹ Much like today, the incarceration of indigenous peoples in 1995 had reached record levels, and many justice and public inquiries were pointing to the need to address the problem. Bill C-41 contained proposals to amend the *Criminal Code* in order to encourage judges to consider historical and systemic issues when sentencing Aboriginal and Inuit offenders. The amendments were intended to also incorporate restorative justice principles in the sentencing process that would help to address the problem of overincarceration of Aboriginal peoples in Canadian prisons and detention centres.² Flaherty and Pauktuutit were most troubled by the proposed changes to the principles of sentencing that would instruct judges to offer alternative sanctions to imprisonment for all offenders, while encouraging judges to pay particular attention to the historical and contemporary circumstances of Aboriginal offenders.³ In her oral submission to the committee, Flaherty recounted the ways in which Canada's criminal justice system had failed the women of her community, who experience ongoing

colonialism and violence in every aspect of their lives. “Without sounding like a broken record,” Flaherty explained to the committee, “women and children are not safe from abuse and assault. To suggest the purpose of sentencing is to maintain the safe society we live in ignores this reality.”⁴ Flaherty was concerned that the proposed changes would not address the very real issues of violence and marginalization in the lives of the women she represents.

Pauktuutit demonstrated that when issues of violence are at stake in law notions of indigenous culture have often been distorted, with effects that put Inuit women at increased risk of violence. As Flaherty explained,

when non-Inuit judges take into account mitigating factors that are based on cultural issues, such as the man being a good hunter and providing for his family, not knowing that what he did was not acceptable in the law since it is acceptable in Inuit culture, and failing to fully understand the extent of the harm and violence of sexual assault as a violent act, not just a matter of sex without affection – we believe this is a violation of our rights. We fear that Bill C-41 will not address the injustice of the current system, but instead will result in greater violations and inequities for Inuit women.⁵

In directly addressing the proposed amendments to the *Criminal Code*, Flaherty’s submission was underpinned by the following questions. If amendments to sentencing will not benefit Aboriginal and Inuit communities, and women in particular, then who will be the beneficiary of this amendment? What is its intended purpose? Indeed, a new approach to sentencing has been part of a much longer history of Aboriginal and Inuit negotiations with the Canadian government, in which notions of cultural distinctiveness and cultural difference have been central. The unease that Pauktuutit identified regarding the new sentencing guidelines suggested that these proposals would continue the history of the legal system appropriating the notion of culture in perilous ways. In expressing the anxieties of her organization regarding the proposed bill, Flaherty asked: “What do we have to give up to get what the government

is offering us through this bill?” “For some Inuit Women,” Flaherty insisted, “the effectiveness of any new approach to dealing with accused offenders could be a matter of life and death.”⁶ Pauktuutit’s concerns notwithstanding, the amendment was proclaimed as law a year later.

The *Criminal Code* now contains a unique sentencing provision aimed at offering alternatives to incarceration for Aboriginal peoples. Section 718.2(e) of the *Criminal Code* states: “A court that imposes a sentence shall take into consideration the following principles: ... (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”⁷ This provision was developed by the Canadian government in order to address the overincarceration rates of indigenous people in Canadian prisons. The aspiration (on the part of the government) was to recognize the history of colonization (as well as the historical circumstances and experiences of indigenous peoples that may bring them into more frequent contact with the criminal justice system) and to take national responsibility for the egregious numbers of incarcerated indigenous people. Since the amendment, sentencing decisions have also considered the application of section 718.2(e) to the sentencing of black Canadian women, who experience systemic racism in the criminal justice system.

This book traces the emergence, implications, and application of section 718.2(e) of the *Criminal Code*, as it pertains to the legal production of indigenous and racialized subjects in the context of considerations of the relationship between criminalization and historical forms of injustice. Since section 718.2(e) of the *Criminal Code* is oriented towards a concern about the injustices of the past and the relationship of these injustices to the present, I suggest that this sentencing provision requires that we think critically about how ideas concerning reparative justice are pursued in law. In this book, I trace three aspects of section 718.2(e): (1) the racial and gendered implications of section 718.2(e) for indigenous and other racialized groups; (2) the generative function of appeals to historical injustice in sentencing decisions; and (3) the contestations that result from negotiating ideas about reparative justice in law. I argue that restorative approaches in sentencing entrench rather

than alleviate certain forms of racism and sexism when they are structured as appeals to cultural difference. This book is informed by socio-legal, post-colonial, anthropological, and critical race scholarship.

Given the many interactions and contestations between indigenous communities and federal and provincial governments in Canada, Pauktuutit's submission to the Standing Committee on Justice and Legal Affairs is a familiar historical moment in the context of Aboriginal, Métis, and Inuit peoples' dissatisfaction with attempts by the Canadian government to develop policy incentives that aim to benefit indigenous communities. A parliamentary committee is one of the many sites where indigenous people articulate their dissatisfaction with experiences of government regulation. This archive of official interaction with the state shows that such exchanges do not amount to simple appeals for indigenous agency but, rather, show the density of indigenous political subjectivity when operative in the official legal and public domain. Pauktuutit's submission highlights the many ways in which contestations around the government regulation of "indigenous affairs" reveal that particular ideas about cultural difference are central to the production of gendered and racial knowledge about indigenous peoples. As Pauktuutit points out, cultural approaches to understanding indigenous communities often saturate the legal process for indigenous peoples.

This book pursues an analysis of section 718.2(e) beyond the context of its legal machinations in order to examine the ways in which ideas about reparation and reconciliation are intertwined and emerge out of processes of criminalization. Indeed, the links between criminalization and reparation have been established by appeals to truth and reconciliation and are often motivated by the experience and evidence of extreme forms of violence and criminalization. Criminality is often and increasingly the ground upon which questions of justice, moral responsibility, and the ethical responses of states are opened up to contestation and consideration. While these considerations frequently take place in the context of mass atrocities and extreme forms of violence and degradation, and are often motivated by appeals to a global community, this book urges us to consider these questions as also and equally emerging from (and being constituted by) distinctly national provisions that are

ultimately manifest in the everyday workings of the criminal justice system.

An analysis of section 718.2(e) allows us to think through the many ways in which forms of racial governance occasion, and are occasioned by, a system of regulation that is at once national and global.⁸ This sentencing provision, I argue, can be considered a practice of reparative justice because it bears the traces of an approach to ameliorating the overincarceration of Aboriginal peoples that is inflected with a reconciliatory and reparative framework. This sentencing provision demands and compels an engagement with the past in its assessment of the present realities of Aboriginal offenders. It is in this sense that I suggest that section 718.2(e) is a practice of reparative justice. “Reparative justice” is a broad phrase that refers to the social, political, artistic, and legal practices that orient to the past in considering the present (a broader analysis of the definitional contours of reparative and restorative justice is contained in Chapter 1).

Mark D. Walters suggests that Canadian law is unique to the extent that an idea of reconciliation is embedded in forms of legality concerning indigenous peoples.⁹ Walters canvasses Aboriginal rights cases and suggests that a “jurisprudence of reconciliation” permeates much of the legal discourse concerning indigenous peoples in Canada.¹⁰ While the proposed sentencing amendments explicitly invoke the idea that the government should take national responsibility for disproportionate incarceration, as I show in subsequent chapters, the amendments also provide the ground upon which to consider the epistemological basis of racial and gendered subjectivities in the context of legal considerations of historical injustice. It is indeed a unique practice to consider historical experiences of injustice at the moment of sentencing, and this book reveals that it may be a pernicious practice, not least because this provision invokes notions of cultural difference in the context of systemic injustice. The use of section 718.2(e) in sentencing decisions highlights the different and often paradoxical meanings that culture acquires in law.

Although there has been considerable academic interest in this sentencing provision in Canada, much of it has been focused primarily on

a strict reading of its legal implications and its effect within the criminal justice domain.¹¹ Other scholars have shown the ways in which this legal provision has had varied effects and limited success concerning the overincarceration of Aboriginal peoples.¹² Scholars also examine the ways in which this legal provision involves issues concerning restorative justice.¹³ This research points also to the limits of sentencing as a criminal justice practice to respond to systemic issues in the criminal justice system. A practice embedded at the end of the criminal justice process cannot alone undo the social, political, and economic forms of marginalization that result in indigenous and racialized people having more frequent contact with the criminal justice system. For example, sentencing as a response to overincarceration does not address the broader processes of criminalization that include how crimes are identified and constructed, the historical specificity of sentences, and how sentences relate to practices of police discretion.¹⁴ In this regard, the limits of the role of sentencing judges in addressing systemic issues and the nature and practice of individualized sentencing (that is, sentences that are tailored to the specific offence and specific offender as revealed by the evidentiary facts of a case) have also formed the basis of scholarship pertaining to section 718.2(e).¹⁵

To date, little of this literature locates this legal provision within the broader context of examining the production of racial knowledge through the notion of cultural difference, gendered forms of racism and violence, and legal subjectivity for racialized peoples (indigenous and non-indigenous) when invocations of historical injustice are at stake. This book examines the practical and ontological barriers of addressing questions of historical injustice in the sentencing process for both indigenous and other racialized Canadians. Arguably, as I will assess in subsequent chapters, these barriers emerge through a “jurisprudence of reconciliation.”¹⁶ This book examines section 718.2(e) of the *Criminal Code* for what it reveals about the ways in which liberal considerations of historical injustice produce indigenous and racialized subjects through reparative sentencing mechanisms. My aim is to show how the production of particular modes of racial governance is central to the current and robust interest in issues of historical injustice, reparations, and

multiculturalism in Canada. This book develops and advances a framework for understanding the contemporary production of indigenous and racialized subjects in the context of reparative justice projects.

The title of the book is derived from a significant case (examined in Chapter 4) concerning two black women charged with the crime of cocaine importation where the Ontario Court of Appeal reasoned that sentencing was not the place “*to right perceived societal wrongs ... or ‘make up’ for perceived social injustices.*”¹⁷ Although the court suggested that sentencing was not the place to right historical wrongs, the emergence and contingency of the statement suggests that forms of criminalization and incarceration are tethered to ethical and moral imperatives concerning temporalities that link past and present injustices. Pursuing these linkages motivates the questions that guide this book. How does race-based sentencing offer us a way to consider the connections between historical injustices and contemporary racisms? How do different racialized communities make similar and different claims to the legal notions of historical disadvantage and systemic racism? How is responsibility articulated as a national interest in criminal sentencing? What kinds of national subjects are produced because of, and despite, these claims?

Some Background

In 1994, a comprehensive sentencing reform bill, Bill C-41, was introduced in the Parliament of Canada. Bill C-41 eventually led to an overhaul of the *Criminal Code* and, specifically, to the addition of section 718.2(e) in 1996. Legal scholars have suggested that the 1996 overhaul of the *Criminal Code* began in 1979, when the federal government unanimously decided that a comprehensive review of the *Criminal Code* was needed, owing to a number of concerns pertaining to punishment and incarceration. These concerns included, as Toni Williams notes, “three main concerns about established practices: the broad scope of judicial discretion at sentencing; general over-use of incarceration in penal sanctions; and the disproportionate representation of Aboriginal people in Canadian prisons.”¹⁸ There is evidence to suggest that section 718.2(e) in particular was the direct result of much government attention in the form of public inquiries, the Royal Commission on Aboriginal

Peoples, community legal pressure, and other reports regarding the need to take national responsibility for addressing the disproportionate representation of Aboriginal peoples in the criminal justice system.¹⁹ Williams suggests that sentencing reform needs to be understood within the broader context of industrialized and democratic nations that have sought in the last twenty-five years to “restructure aspects of criminalization and crime control practice,” including “decisions about punishment – what kind, how much, and under what conditions.”²⁰ These preoccupations and new policy strategies took place in Canada in the context of “an increase in imprisonment that had occurred in the 1980s and early 1990s.”²¹ It was not until 1999, when the Supreme Court of Canada released *R. v Gladue*, that the meaning of section 718.2(e) was interpreted judicially and thus acquired the status of a significant legal precedent.²² In this case, the Court reasoned (following Parliament’s lead) that Canadian judges who sentence Aboriginal offenders must consider the historical and systemic disadvantage that First Nations people and communities have endured and must contemplate creative, remedial, or restorative justice principles in the application of alternative sentencing in order to address and reduce the number of indigenous people who are incarcerated.

The aspirations for section 718.2(e) have not yet been realized, even though the impact of the *Gladue* decision has led to a significant shift in criminal justice practices, including the institutionalized development of Aboriginal courts in Canada, the addition of *Gladue* principles in the 2002 *Youth Criminal Justice Act*, and the fact that in Ontario *Gladue* “now applies throughout the court process whenever the liberty of an Aboriginal person is at stake,” including bail hearings,²³ parole eligibility, dangerous offender applications, and consideration in the civil contempt of court cases and disposition hearings at the Ontario Review Board.²⁴ While *Gladue* has become an important catalyst for a range of new institutional practices and procedures, we must temper our heralding of *Gladue* as a “signpost of social change” or the changes it has ushered as “totemic markers of irrevocable social change.”²⁵ One legal decision does not change historical and systemic challenges.

As a number of scholars and government reports note, Aboriginal overrepresentation has continued to increase since the introduction of

section 718.2(e).²⁶ Notably, although there has been a decline in Canada's total incarceration rates, "analysis shows significant and troubling variations among different populations, with Aboriginal women being imprisoned disproportionately and at higher rates than in the past."²⁷ A Statistics Canada reports show that,

from 1998/1999 to 2007/2008, there has been a slower decrease in the number of Aboriginal people admitted to provincial and territorial sentenced custody compared to non-Aboriginal persons ... Consequently, their proportion increased from 13% to 18%. Among females, this increase in representation was even greater, moving from 17% to 24%.²⁸

Significantly, since section 718.2(e) was implemented, the following statistics reflect the number of Aboriginal women who have been incarcerated in federal institutions:

The Aboriginal female population has doubled, (from 64 women in 1996 to 128 women in 2006), since 1996, whereas the non-Aboriginal female population has increased by 14%, (from 244 women to 280 women). As a result of this difference, Aboriginal women represented close to one in three (31%) federal female prisoners in 2006, up from one in five (21%) in 1996.²⁹

These numbers represent those who are federally incarcerated. It should be noted that in "2007/2008, there were about 369,200 admissions to corrections services (and an increase of 3,464 from 2006/2007) of Aboriginal peoples."³⁰

These admissions include a range of criminal justice practices, including remand, custody, probation, provincial parole, conditional sentences, and community releases. These increases are due to a number of issues that have worked against the aspirations of section 718.2(e), including the increase of mandatory minimum sentences, discretion by police and Crown attorneys to charge defendants with indictable or summary offences, and the continuing racialization of violent and serious crime.³¹ These factors will be revisited in Chapter 3. Sentencing decisions have

also considered the impact of systemic racism against the black community in Canada by invoking the possible use of section 718.2(e). Judges have attempted to reduce sentences for black offenders, recognizing how structural disadvantage and systemic racism have affected their lives and their crimes. These sentencing cases mark the first decisions that have attempted to extend the provisions set out in the *Criminal Code* by applying them to a racialized community other than Aboriginal peoples. These cases are examined in Chapter 4.

The chapters that follow are dedicated to examining particular forms of racial and gendered governance, the knowledge that is produced through notions of cultural difference, the political rationalities that underpin legal responses to historical injustices, and the contestations and contradictions that inhere and cohere legal subjectivity for marginalized peoples. In grounding these motivations, I turn to a brief sketch of the analytic fields that coalesce, converge, and produce the questions that guide this inquiry.

Reparative Justice in White Settler Societies

In this book, I use the phrase “reparative justice” to refer to a range of practices concerning invocations of historical and ongoing injustice in the present, including restorative justice approaches in sentencing. “Reparative justice,” therefore, is a catch-all phrase to include social, political, representational, artistic, and legal practices that orient to the past in considering the present. Scholars of reparations often frame reparation politics as a “field of related activities” that range from transitional justice, reparations, apologies, and also “communicative histories,” which include memory, memorials, and historical consciousness, or, indeed, any legal or national compensation measure.³² Chapter 1 places section 718.2(e) into the context of reparative justice and explores important distinctions and overlaps between reparative justice, restorative justice, and reconciliation. One crucial element that this “field of related activities” requires is the necessary signpost in reparation politics – a perpetrator that acts as a historical referent. Legal discussions in Canada that have occurred in the context of reconciliation for the colonization of Aboriginal peoples have often been plagued by the question of responsibility – what was done, who is to blame, and what

is the appropriate legal and political response now. As Janna Thompson similarly notes for the Australian context, “public debates that have occurred about historical responsibility and justice for Aborigines indicate that traditional ideas about reparation are difficult to apply to cases where it is not clear who (if anyone) now counts as a perpetrator or a victim or what reparation requires when a return to an ante-justice state of affairs is neither possible nor morally desirable.”³³ The context of settler colonialism complicates the terrain of reparations in Canada.

Indigenous scholars insist that the recognition that Canada is a white settler regime requires an understanding of the continued political and spatial effects of internal colonialism for Aboriginal, Métis, and Inuit peoples.³⁴ Internal colonialism refers to “the historical process and political reality defined in the structures and techniques of government that consolidate the domination of indigenous peoples by a foreign yet sovereign settler state.”³⁵ These scholars note that it is imperative to understand the relationship between indigenous peoples and the colonial state within a framework that recognizes the centrality of law and the impact of legal doctrines on Aboriginal communities.³⁶ Taiaiake Alfred argues that “‘Aboriginal rights’ and ‘tribal sovereignty’ are in fact the benefits accrued by indigenous peoples who have agreed to abandon autonomy to enter the settler state’s legal and political framework.”³⁷ The insistence on framing Aboriginal claims to the land in terms of “Aboriginal rights,” for example, works to further consolidate white settler governance as it promotes a particular version of white settler history that, in turn, constructs the history of the nation through the categorical exclusion of Aboriginal history. Notably, Alfred observes: “Not throwing indigenous people in jail for fishing is certainly a mark of progress given Canada’s shameful history. But to what extent does the state regulated ‘right’ to fish represent justice when you consider that indigenous people have been fishing on their rivers and seas since time began?”³⁸

For other racialized groups, including black Canadians, nation building also included practices of spatial containment and control. For example, the practice of slavery in Canada shows that the histories of racial control of indigenous people and black people were, in some regions, intertwined. Historical records show evidence that black people often

replaced indigenous people as slaves in the late seventeenth century.³⁹ The practice of slavery (and the disavowal of the practice of slavery in Canada), fears about interracial mixing, and practices of criminalization towards racialized groups, including Chinese and Japanese Canadians, emerge with and through the production of a settler colonial state.⁴⁰ In Canada, recovering the national story of a white settler nation has been central to recognizing the historical and political roots of projects of racialized governance and regulation. It is imperative to understand the relationship between indigenous peoples and the colonial state within a framework that recognizes the centrality of law and the impact of legal doctrines on Aboriginal communities and other racialized groups. Post-colonial scholars and legal historians identify the need to make direct connections between concrete colonial projects, the acquisition of land and territory, and the ideological and cultural formations that sustain colonial projects.⁴¹

The difficulty of applying traditional ideas about reparation in white settler societies stems from the fact that such societies are legally organized through a doctrine of *terra nullius* and, as a result, are anchored by the idea of white settler entitlement to the land. As Sherene Razack explains, white settler stories follow a distinct narrative:

White people came first and it is they who principally developed the land; Aboriginal peoples are presumed to be mostly dead or assimilated. European settlers thus *become* the original inhabitants and the group most entitled to the fruits of citizenship. A quintessential feature of white settler mythologies is, therefore, the disavowal of conquest, genocide, slavery, and the exploitation of the labour of peoples of colour.⁴²

As a result of the disavowal of colonial forms of expropriation and violence, a phantom perpetrator obliterated by history often haunts debates and negotiations of reconciliation and reparation in white settler societies. Consequently, responsibility for past injustice in white settler societies frequently moves away from traditional models of reparations (with clearly delineated perpetrators and victims) to a field

of reconciliation politics often organized through rhetoric of national responsibility. Furthermore, in white settler societies, the acknowledgment of historical injustices and violence has taken many forms, some of which have ranged from legal, political, or monetary compensation and/or (in the case of land claims) the return of what was stolen.

In pursuing reparative justice in criminal sentencing, a particular political rationality concerning questions of historical and contemporary injustices is set in motion. The idea of taking national responsibility for disproportionate incarceration emerges through a wide array of political, legal, and ethical contexts where questions of justice and injustice, the global and local, are considered. The specifically national character of responsibility emerges out of a consideration of the idea of collective responsibility, a concept perhaps made most famous by Hannah Arendt, who suggests that two conditions must be present for collective responsibility: “I must be held responsible for something I have not done, and the reason for my responsibility must be my membership in a group [a collective].”⁴³ Arendt argues that “this kind of responsibility is always political ... when a whole community takes it upon itself to be responsible for whatever one of its members has done, or whether a community is to be held responsible for what has been done in its name.”⁴⁴

Questions and considerations of responsibility are also determined and shaped by forms of power that constitute political hierarchies. As Andrew Schaap explains,

the notion of responsibility ... forms a natural part of our vocabulary of power and invests the criteria of power with a normative dimension. Consequently, to attribute power to an agent amounts to something like an accusation, while to acknowledge that one exercises power is to acknowledge responsibility, which invites moral justification.⁴⁵

Indeed, the moral contours that contribute to articulations of national responsibility invest individuals and institutions with particular forms of power. In his book *National Responsibility and Global Justice*, David Miller advocates for an approach to the consideration of social injustices

that is specifically national. He argues for an idea of national responsibility that binds the notion of “personal ethics” to institutional arrangements that “will bring about a globally fair allocation of rights, opportunities, resources and so forth.”⁴⁶ National responsibility thus requires a sense of personal as well as political and institutional obligation.⁴⁷ Similarly, Farid Abdel-Nour offers an account of national responsibility that insists upon “individual national responsibility.” He identifies the “individual” in discourses of national responsibility in order to move away from accounts of responsibility that posit a “meta-subject or a collective agent.”⁴⁸ Abdel-Nour argues that approaches to reparations politics that aim to identify collective responsibility

inevitably lead ... to intractable controversies over collective agency. Theorists of collective responsibility are haunted by questions pertaining to whether groups can have beliefs and intentions, and whether they can act. Without an affirmative answer to the last of these questions, they cannot ascribe responsibility to collectivities.⁴⁹

In examining the question of national responsibility as it pertains to section 718.2(e), I follow scholars who argue that the law relies upon national narratives for meaning and that, in turn, the law constructs categories through such national narratives in order to determine certain historical “truths” and to appeal to particular forms of justice.⁵⁰ As Elazar Barkan points out, “despite the dissimilar temporality and rationality, there is an overlap between historical injustice and contemporary discrimination.”⁵¹ This book aims to contribute to the development of a historically situated legal framework that identifies the reality of past injustice experienced by racialized communities, in addition to a framework that investigates this “overlap” and recognizes the meaning of injustice and its contemporary (legal) implications both for the perpetrators and the victims.

Colonial, post-colonial, and indigenous legal scholars have long noted the many ways in which processes of criminalization have regulated and produced particular forms of racial difference in colonial and white settler legal contexts.⁵² Criminalization is often recognized as one of the grounds upon which colonial and settler forms of governance

produce and regulate ideas about subjectivity, violation, protection, intimacies, and civic participation. Recently, scholars have demonstrated the ways in which multicultural and emerging democratic forms of government require notions of criminalization in the regulation and governance of racialized and other marginalized groups, in different global locations. Jean and John Comaroff maintain that “criminality with violence ... has become endemic to the postcolonial condition.”⁵³ They suggest that the twin concepts of law and lawlessness “are conditions of each other’s possibility,” insofar as an increasing “fetish[ization]” of the law represents a “dialectic of law and dis/order, framed by neoliberal mechanisms of deregulation and new modes of mediating human transaction at once politico-economic and cultural, moral, and mortal.”⁵⁴

The language of criminalization and law (from debates about rates of crime, types of crime, crime and poverty, and so on) evidences that the law, and practices of criminalization in particular, often functions to control and contain overlapping, but not similar, sets of people – indigenous people, people of colour, working-class and poor people, workers, immigrants, refugees, migrants, and cheap labour pools. As a result, racialized people (in Canada and elsewhere) are often invoked in the context of discussions concerning criminalization through the distinct, yet nonetheless interrelated, historical trajectories of colonialism, multiculturalism, democratization, transnational markets and economies, and racial injustice.⁵⁵ As many prison activists and scholars point out, the criminal justice system is not a place in which any kind of justice is dispensed, articulated, or imagined. Indeed, these scholars and activists suggest that the growing prison industrial complex exists as part of a nexus of government regulation, corporate and neoliberal transactional expansion, “community development,” the growth of cheap and free labour for prison workers and prisoners, the military and arms development sector, corrupt economies, democratic and transitional governments, international courts and other international governing mechanisms, and the widening of the criminal justice system into aspects of everyday life.⁵⁶

In this context, when forms of legality play a part in the recognition of historical injustice and systemic racism in the lives of Aboriginal

peoples and people of colour, it is, indeed, an anti-racist legal practice. We might further consider that we are, as Gayatri Spivak suggests (in her now famous formulation), in a historical time where rights are “that which we cannot not want.”⁵⁷ While we are witnessing a global wave of reconciliation, memorialization, and other commemorative and legal projects aimed at negotiating and recognizing historical forms of injustice and violence, it can also be said that such projects and their international prominence, following Spivak, are “that which we cannot not want.” The ethical demands of our global order suggest that we should acknowledge historical injustices. As Wendy Brown notes, there is in “Spivak’s grammar a condition of constraint in the production of our desire so radical that it perhaps even turns that desire onto itself, foreclosing our hopes in a language we can neither escape nor wield on our own behalf.”⁵⁸ This book attempts to push against this bind in considerations of historical injustice and is motivated by the idea that it is necessary to investigate what appear to be anti-racist and anti-colonial legal incentives (incentives that identify a nation’s own role and complicity in past injustice) and to examine how they work in implicit and/or explicit ways to consolidate a particular version of the nation that is upheld by the implementation of individual and group justice. This book is driven by the idea that social justice actors need to refract history onto their legal and political strategies as well as onto themselves in order to be better equipped to understand the shape and targets of their anti-racist platforms, the histories upon which they rely, and the colonial tricks that those invested in social justice have inadvertently reproduced in their efforts to adjust the political lens of legal practices.

The Biopolitics of Racial and Cultural Difference

In their submission to the Standing Committee on Justice and Legal Affairs, Pauktuutit argued that any new approach to sentencing could be a matter of life and death for the women in their communities. Forms of legality and criminalization bear upon questions of life and death and the powers inherent in the regulation and interaction of these spheres for particular groups of people. The work of Michel Foucault, and in particular his concepts of biopower and biopolitics, is often

invoked in the context of examining the modern state and legal apparatus as well as the regulation of the life possibilities of people and entire populations. I use the concepts of biopower and biopolitics throughout the book in order to illuminate the ways in which ideas about racial difference constitute and produce particular subjects in law.

The main objective of Foucault's work was to "create a history of the different modes by which, in our culture, human beings are made subjects."⁵⁹ Law is a pivotal site for examining how citizens and subjects are produced. This process of biopolitics emerged through the Enlightenment, at a time when the idea of a respectable society became tied up with regulating the life processes of bodies. For instance, in volume 1 of *The History of Sexuality*, Foucault argues that in nineteenth-century modern Europe a bourgeois moral and social order developed through the policing of sexuality and sexual repression. This regulating mechanism took shape at the same time that scientific racism became central to the politics of the nation-state. Foucault explains:

Beginning in the second half of the nineteenth century, the thematics of blood was sometimes called on to lend its entire historical weight toward revitalizing the type of political power that was exercised through devices of sexuality. Racism took shape at this point (racism in its modern, "biologizing" statist form): it was then that a whole politics of settlement (peuplement), family, marriage, education, social hierarchization, and property, accompanied by a long series of permanent interventions at the level of the body, conduct, health and everyday life, received their color, and their justification from the mythical concern with protecting the purity of the blood and ensuring the triumph of the race.⁶⁰

Foucault introduced the concept of biopower in order to provide a conceptual framework to address these new configurations of power in the second half of the nineteenth century. This period saw a shift from sovereign forms of power to disciplinary forms of power that inserted themselves into the management of the life and death processes of individuals and entire populations. These new forms of power were made possible through the emergence of a range of sciences and professional

discourses that rendered people and populations thinkable, translatable, and manageable to forms of government and political/economic systems. For example, life processes of birth, disease, illness, death, reproduction, and sexuality became sites of biopower and became productive forms of power. In volume 1 of *The History of Sexuality*, Foucault defines “biopower as a political technology that brought life and its mechanisms into the realm of explicit calculations and made knowledge/power an agent of transformation of human life.”⁶¹ Biopower functions through state power and is connected to state policies because certain populations can be adjusted in accordance with state processes involved in the process of nation building. Foucault suggests that manufacturing subjects in the service of state and nation requires a dual process of the operation of biopower.

The dual operation of biopower works through technologies of governance (or governmentality) that bring together both the disciplinary effects of state practices and the interpolative consequences of individual subjects. First, biopower operates directly on the body of individual subjects in order to individually classify and constitute these subjects as a population in accordance with state practice. Second, biopower operates through what Foucault describes as “technologies of the self” – the interpolative consequence of governance – which refers to the range of practices through which individuals constitute themselves within and through systems of power regulating their bodies, their thoughts, and their conduct.⁶² It is these interpolative consequences for indigenous and racialized subjects that I track most closely in this book.

Foucault’s concept of biopower provides a framework for understanding how specific legal practices require and constitute racial and gendered performances. In *Race and the Education of Desire: Foucault’s History of Sexuality and the Colonial Order of Things*, Ann Laura Stoler reminds us that although “colonialism was clearly outside of Foucault’s analytic concern,” he did recognize the productive function of state racism in his formulation of biopolitics.⁶³ Biopolitics is the condition of emergence for biopower, insofar as biopower designates a particular mode of power, and biopolitics often refers to its manifestation in the context of political and economic regimes of power.⁶⁴ Foucault maintains that the “state can scarcely function without becoming involved with racism” and that

“once the state functions in the biopower mode, racism alone can justify the murderous function of the state.”⁶⁵ State racism is described as “warfare” against a particular population within a “social body.”⁶⁶

Nikolas Rose suggests that the production and constitution of political rationalities of rule occur through discourse and discursive regimes.⁶⁷ Political rationalities can be identified, differentiated, and mobilized by means of discourse analysis. In particular, as Rose points out, it is imperative to pay attention to the moral form of political rationalities (“the ideals and principles to which government should be directed – freedom, justice, equality, mutual responsibility, citizenship, common sense,” and so on), the epistemological character of political rationalities (how objects of government are conceptualized), and the “distinctive idiom” of political rationalities, which is to say, the language through which historical, political, and legal reality is made comprehensible and translatable to government.⁶⁸ As will be shown through an analysis of legal and political discourse, the framework of biopower is useful because it opens up questions concerning how particular racialized and gendered bodies are organized through the political rationalities that underpin programmatic and legal governance.

Questions concerning biopower and biopolitics and their connection to state and legal practices are at the core of formulations of race that are utilized in much of socio-legal and social science literature and analysis. The biopolitical use of race in law is often highlighted through political and legal discourse.⁶⁹ The reliance upon Foucault’s notion of the biopolitics of state racism can have the effect of, on the one hand, conflating race with biology and biological processes and paradigms and, on the other hand, constituting race by tracking its governmental and disciplinary effects and practices. Barnor Hesse suggests that scholarship on race falls into two analytic traditions: “race/modernity studies” and “historical modernity and the structure of racism” studies.⁷⁰ In these accounts, “racism structur[es] modernity” in particular and ongoing ways. Each of these analytic fields, Hesse argues, maintains a “biological idea of race” and, hence, reifies race in the first instance. Hesse calls for an “analytics” of “racialized modernity,” where “race invokes the historically instituted colonial relation ‘*European/nonEuropean*’ ... and racialization describes its sustained configuration in discrete markings of various

assemblages of social identities (e.g. polities, corporealities, histories, knowledges, communities).”⁷¹

Tracing the connections between colonialism and modernity, Edward Said argues not only that the struggle for colonial dominance depends upon geographical determinations marked by armed conflict, militarized occupation, and land acquisition (though these are indeed central to the project of colonialism) but also that the colonial project is/was dependent upon persuasive and coercive representational practices.⁷² Said argues that in order to solidify the “hegemony of empire” through militarized occupation, violence, and land acquisition, what was/is needed is the “imagination of empire” – the production and reproduction of a culture of empire that accompanies these material practices.⁷³ Rather than showing the ways in which race and gender are constituted by law or, conversely, the ways in which race and gender constitute law, the task is to break apart and uncover the very epistemologies and ontologies that are defined through colonial projects in our analysis of racial formations and racial forms of governance. The subsequent analysis of section 718.2(e) shows how the biopolitics of law are produced through distinct ontologies about race, gender, and cultural difference.

A white settler society often relies for its coherence upon the production of a particular type of racial difference, namely that of cultural difference. The idea of cultural difference has extensive colonial genealogies that are historical, sociological, scientific, anthropological, and political.⁷⁴ As Paul Gilroy reminds us, “whether biology or culture claimed ultimate precedence, an underlying logic expressed through racial ontologies ... provided important legitimation for brutality, terror, and historically mandated ethnocide of the different and the inferior.”⁷⁵ Nasser Hussain maintains that racial difference has a long history, “which extends from eighteenth century conceptions of cultural difference – the primitive, the oriental despot – to nineteenth century racial conceptions based on blood.”⁷⁶ What is key, however, is that these discourses consistently tie together forms of difference with forms of rule. In a reading of Frantz Fanon’s work, Homi Bhabha suggests that there is a temporality to the emergence of racialized subjectivity as cultural difference embedded in Fanon’s work. Bhabha notes: “Fanon writes from that temporal

caesura, the time-lag of cultural difference, in a space between symbolization of the social and the 'sign' of its representation of subjects and agencies."⁷⁷ The "time-lag of cultural difference," as sign and caesura, functions as a form of biopower and simultaneously as a temporal designation of difference. These racial logics of cultural difference suggest that cultural difference, as an analytic category, should not simply be understood as social construction (that is, the social construction of race as cultural difference).⁷⁸ Instead, appeals to, and designations of, cultural difference codify and depend on the political and moral rationalities that underpin historical trajectories of colonialism and racism.

There is much literature in Canada and other white settler societies that documents the many ways in which notions of indigenesness, "Indian culture," cultural difference, and cultural distinctiveness have been produced and worked through a range of legal and political arenas, including questions of sovereignty, claims to land and resources, access to government programs, criminal justice programs and policies, and other social arenas.⁷⁹ As Paige Raibmon argues in her study of the production of indigenous identity on the Northwest Coast in the late nineteenth century and early twentieth century, "whether they used definitions of Indianness in the context of policy, religion, amusement, or science, colonizers shared an understanding of authenticity."⁸⁰ Importantly, Raibmon maintains that the production of "authentic Indians" cannot be understood as entirely a top-down process of colonial governance and administrations. Claims and performances of cultural authenticity occurred in keeping with the range of contestations and collaborations (distinctly unequal) that were constitutive of colonial projects.⁸¹ Ann Stoler and Frederick Cooper suggest that in studies of colonial projects the colonizer and the colonized (as well as the metropole and the colony) must be understood within the same conceptual field in order to resist the tendency to "draw a stark dichotomy of colonizer and colonized" and in order to examine, among other practices and social forms, "how a grammar of difference was continuously and vigilantly crafted as people in colonies refashioned and contested European claims to superiority."⁸²

Cultural difference frameworks often obscure the ongoing material violence of colonization and exploitation faced by Aboriginal communities and communities of colour in favour of designating certain bodies as being outside of the sphere of political and personal agency. Cultural diversity and cultural difference function as a particular technology of racial governance in multicultural societies. Cultural difference is one of the ways in which indigenous peoples have been managed through colonial state governance and colonial “*political rationalities*.”⁸³ As David Scott suggests, the politics of colonial governance should be understood in relation to how it continues to structure power relations, state practices, and state projects.⁸⁴

Sherene Razack’s examination of two different legal contexts – that of sexual violence against women and gender-based asylum – reveals the perils of what she calls “culture talk” in the context of Canadian law. Echoing the sentiments of the women of Pauktuutit, cited at the outset of this introduction, who argued that “culturally sensitive” approaches to sentencing often result in further violence against Aboriginal and Inuit women, Razack argues that “culture talk is clearly a double-edged sword. It packages difference as inferiority and obscures both gender-based and racial domination, yet cultural considerations are important for contextualizing oppressed groups’ claims for justice, for improving their access to services, and for requiring dominant groups to examine the invisible cultural advantages they enjoy.”⁸⁵ In her examination of the perils of “cultural conversations” that occur in the legal process when the issue is violence against Aboriginal women and women of colour, Razack determines that “culture becomes the framework” deployed through the law in a white settler context in order to “pre-empt both racism and sexism in a process” that she refers to as “culturalization.”⁸⁶ Using an interlocking analysis of race and gender, Razack demonstrates that “culturalized racism” works: (1) to obscure the ways in which cultural paradigms support the operation of racism in the law; (2) to elide responsibility on the part of individuals and nations; and (3) as the explanatory framework for oppression.⁸⁷ Indigenous scholars and others argue that cultural difference paradigms and cultural sensitivity frameworks are necessary to address specific processes and concerns that exist within communities. However, they also warn that cultural difference

and cultural sensitivity paradigms often function as a form of racial governance that impedes indigenous practices of self-determination and can work to obscure the realities of marginalization in urban and rural communities. The challenge, as I demonstrate in the following chapters, is to examine the deployment of paradigms of culture to identify the way in which they can operate as biopolitical forms of racial governance. In short, we must examine cultural paradigms for their potential and their perils, for the partial stories they produce, and for the dominant relations they often maintain.⁸⁸

Organization

The analysis contained in each of the chapters is based upon close readings of a range of sources, including official government documents, reports and inquiries, legal decisions, transcripts from legal hearings, public records, media reports, and reports by Aboriginal, Métis, and Inuit organizations, the African Canadian Legal Clinic, and other community groups. These texts provide for an examination of the multiple ways in which contestations concerning the production of racialized and gendered political subjectivity play out in the context of criminalization, sentencing, and reparative justice. In pursuing an analysis concerning the racial and gendered implications of this provision for indigenous people and black Canadians, the chapters are organized so as to highlight how section 718.2(e) affects different racial and gendered groups in distinct, overlapping, and contradictory ways.

In the first chapter, I set out reasons for placing section 718.2(e) in the context of restorative justice, in particular, and reparative justice, more generally. I identify definitions for restorative justice and reparative justice and explain why we must understand restorative approaches in sentencing in the context of Canadian and global trends for addressing historical injustices in the post-Second World War period. In addition, I examine three government reports that have been central to national, political, and legal debates related to Canada's new sentencing regime. I examine the report of the Royal Commission on Aboriginal Peoples entitled *Bridging the Cultural Divide* (1996), the *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), and the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1995) for the ways

in which race and culture are understood in these significant documents concerning the overrepresentation of indigenous and racialized people.⁸⁹

My objective in the second chapter is to address the possible meaning of reparative justice and national responsibility as it is shaped by the emergence of section 718.2(e). Following arguments made in Parliament and before the Standing Committee on Justice and Legal Affairs, I argue that section 718.2(e) shows that the impetus behind this sentencing provision obscures a focus on historical injustice and national responsibility. Instead, my analysis reveals the manner in which reparative and restorative sentencing continues to rely upon the colonial management of racialized populations, whereby Aboriginal women continue to bear the burden of this state management. I demonstrate that one of the ways in which this burden is manifest is through the obfuscation of gendered racial violence, as highlighted by the objections of Aboriginal women's advocates to this provision. I offer a brief historical account of Bill C-41 and examine the legal and political dialogue related to section 718.2(e), which includes parliamentary transcripts of Bill C-11 as well as the transcripts from the Standing Committee on Justice and Legal Affairs (which heard from forty-two witnesses, including community groups, lobby groups, legal organizations, social justice organizations, as well as individuals). Examining the arguments made by these groups, I highlight the production of gendered racial knowledge against the backdrop of concerns relating to new sentencing provisions.

Chapter 3 examines *R. v Gladue* (1999), arguably the most significant judicial interpretation of section 718.2(e) in the history of the *Criminal Code*. I examine how the production of Aboriginal identity through the idea of cultural difference obscures histories of colonialism and gendered racism that together have worked to produce contemporary over-incarceration rates. This chapter reveals that reparative justice in sentencing can work in rather pernicious ways to shore up particular forms of gendered racism while obscuring the impact of colonialism.

In Chapter 4, I examine *R. v Hamilton* (2003), a sentencing decision by the Ontario Superior Court of Justice concerning two black Caribbean women, Marsha Hamilton and Donna Mason, who were charged with the crime of cocaine importation. The decision is significant because in determining the sentence for each woman, the Ontario

Superior Court of Justice considered the impact of systemic racism on black Canadians. The fact that the court did so meant that both Hamilton and Mason received what were dubbed “reduced” sentences. *Hamilton* marked the first case in which section 718.2(e) was applied to a racialized group other than Aboriginal peoples. It was overruled by a unanimous bench of the Ontario Court of Appeal. I examine the Court of Appeal’s contention that the trial judge erred in reducing the sentences for two black women charged with cocaine importation. In its attempt to curtail the use of section 718.2(e) beyond Aboriginal peoples, the court maintained that the history of colonization and slavery, which has resulted in systemic racism, is of no consequence in the sentencing hearing of two black women conscripted as drug couriers. I illustrate that the court distinguished black people from Aboriginal people by outlining competing claims to both historical disadvantage and systemic discrimination, such that Aboriginals are deemed deserving of the application of section 718.2(e) while black Canadians are understood to be outside of its possible application. This chapter examines the distinction made between systemic and cultural factors that render Aboriginal peoples deserving of the practice of restorative sentencing in contrast to other racialized communities and, importantly, the political rationalities that underpin these distinctions.

The book concludes with reflections concerning recent trends in case law and emphasizes the connections between multicultural nationalism, historical injustice, and the production of indigenous and racialized identities. What might linking considerations of historical injustice and criminal justice tell us about the justice-based aspirations of the multicultural nation? What might it tell us about the citizens and non-citizens that constitute the nation? I consider how section 718.2(e) helps us to consider our current historical moment, in which we wrestle with the past in legal considerations of the present. I conclude by suggesting how this analysis helps to advance a framework for understanding the contemporary production of indigenous and racialized identities in the context of projects concerned with reparative justice.

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