Governing Through Remorse: The Discursive Framing of Dangerous Offenders in Canada

Linda Mussell and Michael Orsini

Abstract

This article examines the emotional terrain and discursive frames that govern the constitution of those subject to the "dangerous offender" (DO) designation in Canada. Focusing on the emotion of remorse, we discuss four narratives involving individuals who went through the DO hearing process, gaining significant media attention. Asking what role Indigeneity and other factors play in how the media discuss the emotional comportment of DOs, we examine the persistence of particular discursive frames in these narratives, and the counter-frames that challenge or disrupt dominant understandings of what it is appropriate to feel. The expression of emotion, and its interpretation, can be critical to the outcome of cases, criminalized people/survivor stigmatization, and normalization of punishment and may also motivate community mobilization and prompt policy change. Yet, emotion, and how it may be performed and interpreted differently, is not well understood or discussed in these narratives.

Keywords: Emotion, Indigeneity, courts, media, discourse, criminalization, narratives

Résumé

Cet article examine les émotions et les cadres discursifs qui régissent la particularité des personnes assujetties à la désignation de « délinquant dangereux » (DD) au Canada. En nous concentrant sur l'émotion de remords, nous discutons de quatre récits impliquant des personnes qui sont passées par le processus d'audience DD et qui ont attiré l'attention des médias. En questionnant le rôle que jouent l'indigénéité et d'autres facteurs dans la manière dont les médias discutent du comportement émotionnel des DD, nous examinons la persistance de cadres discursifs particuliers dans ces récits ainsi que les contre-cadres qui remettent en question ou perturbent les compréhensions dominantes de ce qu'il

The authors would like to thank the journal's anonymous reviewers for comments, Tamara Metze for comments on an earlier version of the paper presented at the International Conference on Public Policy in Montreal (June 2019), and Cheryl Webster for her comments on our discussion of the Criminal Code. Michael Orsini acknowledges the support of the Social Sciences and Humanities Research Council through its Insight Grant Program (435-2013-0520).

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2021, Volume 36, no. 3, pp. 505–529. doi:10.1017/cls.2021.12

convient de ressentir émotionnellement parlant. L'expression de l'émotion et son interprétation peuvent être déterminantes pour l'issue des affaires sur la désignation DD, la stigmatisation des personnes criminalisées/survivantes et la normalisation des sanctions, et pourraient contribuer à la mobilisation de la communauté et provoquer un changement de politique. Pourtant, l'émotion, et la manière dont elle peut être exprimée et interprétée différemment ne semblent pas bien comprises ou discutées dans ces récits.

Mots clés: Émotion, indigénéité, tribunaux, médias, discours, criminalisation, récits

Introduction

Discrimination within the justice system has contributed to hyper-imprisonment of Indigenous people (Anthony and Blagg 2020; Law Reform Commission of Canada 1991; Royal Commission on Aboriginal Peoples 1996; Truth and Reconciliation Commission 2015; National Inquiry into Missing and Murdered Indigenous Women and Girls 2019). In this paper we explore how the performativity of emotion contributes to the hyper-imprisonment of Indigenous people[1] and their high designation as dangerous offenders (DOs). This article examines the emotional terrain and discursive frames that govern the constitution of people subject to this designation. Focusing on the overlooked emotion of remorse, and how it connects with trauma and pathologization, we draw on four cases involving individuals who went through the DO hearing process (Lance Blanchard, Leslie Black, Marlene Carter, and Tara Desousa).

This article begins with an overview of the DO designation, before turning to a brief discussion of the role of emotions in criminal justice policy, in particular remorse and refusal. It then draws upon the results of a media review and thematic analysis of four cases. The three key themes we identify are the following: experiences of trauma, remorse and refusal, and the (mis)construction of Indigeneity as pathology and risk. We discuss the role of racism and colonialism woven within these themes and conclude by exploring the construction of dangerousness and dehumanization of those branded as DOs, and how these constructions are embedded in the emotions that circulate around those labelled as "dangerous."

We are interested in how particular discursive frames persist, despite robust acknowledgement of the complex underpinnings of criminalization. Further, we suggest counter-frames that seek to challenge or disrupt dominant understandings of what it is appropriate to feel. We ask whether a seeming inability to express the "correct" emotions at the appropriate time might be better understood in the context of a politics of refusal to succumb to liberal-colonial forms of (in)justice that retraumatize Indigenous people (Ross 1999, 2009). The expression of emotion, and its interpretation by others (e.g., judges, the media), can be critical to the outcome of cases, criminalized people[2]/survivor stigmatization (see Savage et al.

[1] There are hundreds of distinct First Nations, Inuit, and Métis communities on the land now known as Canada.

[2] We avoid using the stigmatizing and institutional language of "offender" or "inmate" in this paper and instead use "criminalized person" and "imprisoned person."

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

2018) and normalization of punishment regimes and may also motivate community mobilization and prompt policy change. Yet less is known about how emotion may be expressed and interpreted differently according to identity (e.g., gender, Indigeneity) and ability (e.g., cognitive ability/mental illness). There appears to be a rush to judgment of what is perceived as authentic expressions of emotion versus apparently false displays of emotion. Moreover, there is slippage when the purported failure to properly express emotions such as remorse becomes folded into expert assessments of trauma, psychopathy, and other forms of mental illness/distress. The criminalized person is alternatively disabled, defined by a lack, absent any emotional capacity, and at other times a carefully calculated, cunning actor who understands the importance of how acting remorsefully is strategically superior to actually feeling remorseful.

An emphasis on some actors as "emotional" or lacking appropriate emotional expression reinforces the problematic assumption that only some actors behave in emotional ways, whereas others are seemingly able to behave rationally and successfully suppress their emotions. As Susan Bandes observes with respect to remorse (2016, 314): "Somewhat counter-intuitively, facial expression and body language, unlike testimony, are regarded as spontaneous, 'natural', and non-manipulable, and thus as transparent windows into true feelings of remorse." Emotions occupy a peculiar place in legal contexts as constituting both ephemeral and yet authoritative sources of evidence, and such evidence may be employed at the disadvantage of Indigenous criminalized people, including in DO hearings.

I. Dangerous Offender Designation: An Overview

While media coverage of crime is prone to hyperbole and arouses a range of emotions, the "dangerous" descriptor intensifies what is already a politically charged emotional landscape. We use the landscape metaphor here to describe an environment or terrain that groups actors and discourses on an ever-shifting ground. Feelings about criminality and about the risks people engender are not fixed or static. Ideas about criminality and about the appropriateness of attaching the "dangerous" designation are not benign processes; ideas about dangerousness that circulate in legal, political, and media discourses are structured by a set of assumptions about the emotional comportment of individuals so designated as the survivors and perpetrators of crime.

The media are a tool for amplifying (and sometimes distorting) community concerns and pressing for policy change (Petrunik, Murphy, and Fedoroff 2008; Waldram 2009; Wilson et al. 2007). Moreover, the media also play a key role in public perspectives and mental images generated about DOs, which can influence feelings of public punitiveness towards a criminalized person and empathy for a survivor (Roberts, Crutcher, and Verbrugge 2007; Unnever and Cullen 2009). Indigenous criminalized people, for instance, experience a paradox of restorative and punitive justice principles in the criminal justice system, they are structurally disadvantaged by risk markers, and their culturally inscribed behavior can be misinterpreted or misread by the courts (Balfour 2012; Martel, Brassard, and Jaccoud 2011; Prowse 2011). Comprising about five per cent of Canada's population (Statistics Canada,

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

2017), Indigenous people are highly represented[3] among the DO population (Public Safety Canada 2019; of the 967 imprisoned people designated as DOs since 1978,[4] more than one-third (35.5 %) of those currently under the responsibility of Correctional Service Canada (CSC) are Indigenous. In 2018/19, 31 percent of the federal prison population was Indigenous, and 42 percent of federally imprisoned women were Indigenous (Malakieh 2020). Regarding gender, imprisoned women specifically may be stigmatized both as criminals and as women breaking societal conventions, in addition to the paradox of punitive and restorative justice in the criminal justice system[5] (Collins 2016; Balfour 2012).

Stevens (2008) notes that the current DO regime was originally enacted in 1977, largely in response to the recommendations of the 1964 Ouimet Committee. The Ouimet Committee referred to different parts of the Criminal Code and suggested that indeterminate detention could only be justified in the case of DOs, as is currently set out in sections 752 to 761 Part XXIV of the Criminal Code (R.S.C., 1985, c. C-46). Petrunik, Murphy, and Fedoroff (2008) add that, over the past two decades, clinical models of dangerousness, emphasizing diagnosis and treatment of psychopathology, have been supplanted by approaches emphasizing actuarial risk assessment and risk management. In addition, concerns with fundamental justice issues, such as due process, proportionality, and privacy rights, have given way to community protection anxieties (Petrunik, Murphy, and Fedoroff 2008). The current emphasis on community protection emerged in the 1980s, following the highly mediatized Christopher Stephenson murder case and inquest (Petrunik, Murphy, and Fedoroff 2008).

According to the Criminal Code, the first requirement of a DO designation is that the criminalized person have been convicted—previous to the current offence—at least twice of a "designated offence"[6] and been sentenced to at least two years of imprisonment for each of those convictions. The third offence, which can trigger the DO process, must be a "serious personal injury offence." This offence must be either a sexual assault or an indictable offence punishable by more than ten years' imprisonment and must involve the use or attempted use of violence or endanger life, safety, or psychological well-being. Once the Crown has verified that the criminalized person meets the requirements, they must advise the Court of their intent to file a DO application. The Court then decides whether there are reasonable grounds to believe that the person might be found to be a DO under s. 753.1. The prerequisites of a DO application are evidence of: a) a pattern of repetitive behavior showing failure of self-restraint, b) a pattern of persistent aggressive behavior and indifference, or c) behavior associated with the offence that indicates an unlikelihood of being inhibited by normal standards of self-restraint. Section 753 of the Criminal Code

[3] We avoid using the word "overrepresented" because we do not assume there is an appropriate "representation" of Indigenous people designated as DOs.

[4] This number does not include the fourteen Dangerous Sexual Offenders and three Habitual Offenders also under the responsibility of CSC. These designations predated the 1978 Dangerous Offender designation.

[5] In other words, the system is punitive but, over time, has adopted restorative elements. Punitiveness and restoration do not complement each other.

[6] See section s. 752 (under definitions).

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

outlines the test to be used to determine if an individual is a DO. One form of the test applies when there is a conviction for a violent offence punishable by ten years or more, finding that the criminalized person constitutes a threat to the life, safety, or physical/mental wellbeing of others. The second stream of the test applies to sexual assault convictions, where the criminalized person's conduct shows both a failure to control sexual impulses and a likelihood they will cause injury to others. If either branch of the test is satisfied beyond a reasonable doubt, the judge may find the individual to be a DO and may choose to impose an indeterminate sentence.

In 2008, the federal Conservative government rewrote the country's DO law (Bill C-2),[7] changing how DO hearings are conducted and removing a judge's discretion at the "designation" phase of the process (Fine 2017; Petrunik, Murphy, and Fedoroff 2008). Such changes have made it easier for the Crown to obtain DO designations, and there was an increase in applications until 2014–2015 (Public Safety Canada 2020). The number of applications has decreased slightly since that time. While this decline coincides with the election in 2015 of a more centrist government under Prime Minister Justin Trudeau, there is nothing in this government's criminal justice portfolio to explain the drop. In December 2017, the Supreme Court of Canada (SCC) affirmed the constitutionality of Criminal Code provisions for declaring someone a DO who can be held indeterminately[8] (Bronskill 2017). The SCC found a sentencing judge must be convinced that a criminalized person's behavior is "intractable," meaning behavior that the person is "unable to surmount." The judge must also consider whether that criminalized person is treatable, and the judge maintains the ability to exercise their discretion at the designation phase (Byers 2018).

II. Situating Emotions

The study of emotions has penetrated the social sciences and humanities, including at the intersection of the study of law and emotions (Bandes and Blumenthal 2012; Bandes 2016; Kilty and Orsini 2019; Martel 2009; Million 2009, 2013; Spencer et al. 2012). One of the key concerns of scholars who study emotion consists in challenging the strict separation of emotion and reason. Refusing this artificial separation, scholars insist that rationality requires emotion: if we accept that rationality demands engagement with feelings and emotions, then there is no rationale for bracketing emotions from discussion (Damasio 2005). A number of emotions figure in the study of the intersection of law, politics, and policy, including remorse, hope, fear, rage, guilt, forgiveness, and compassion. Scholars interested in how emotions are discursively managed often refer to the influential notion of "feeling rules" (Hochschild 1979) that are shaped by and embedded in legal, social, and political environments.

While scholars have been slow to theorize the role of emotions in the political and legal realms, they have been making up for lost time. Admittedly, emotions can be messy additions to models of social science research; ignoring them entirely,

[7] Bill C-2 was an omnibus crime bill. The change was originally put forward as Bill C-27, which died on the order paper when Parliament was prorogued (Laplante, 2008).

[8] R *v.* Boutilier, 2017 SCC 64, [2017] 2 SCR 936.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

however, deprives us of the potential insights they might bring to the study of complex processes. The first step, however, is to define the term "emotions" for the purposes of our article. In much of the literature on the role of emotions and affect, there is considerable attention paid to distinguishing affect from emotion. Here we focus on centering the role of emotions, which we use "to describe what of affect—what of the potential of bodily intensities—gets actualized or concretized in the flow of living" (Gould 2009, 20). As Gould explains in her study of the role of emotions in AIDS activism, emotions can be understood as "one's personal expression of what one is feeling in a given moment, an expression that is structured by social convention, by culture" (Gould 2009, 20).

Thinking about the role of emotions in the legal context allows us to explore how different actors mobilize or appropriate particular emotions to attain specific objectives and how the ability to feel or to be seen as a feeling person may be governed by features of the legal environment that facilitate or constrain such opportunities (see Goodwin, Jasper, and Polletta 2004 for a discussion of "emotional jiu-jitsu" in the social movement context). By exploring how actors may challenge or reproduce "feeling rules" (Hochschild 1979), we seek to extend Hochschild's pioneering work to consider how the legal and media arenas might be structured by a set of feeling rules, as well.

Of a myriad of emotions, remorse figures centrally in Canada's social fabric and has an explicitly public dimension. Public occasions in which there is both communal interest in and communal reaction to a criminalized person's remorse or absence of remorse are significant events in the moral regulation of social life in Canada (Weisman 2009). Martel (2009) draws on Graham Burchell (1996) in her analysis of the trial of Robert Latimer in connection with the death of his disabled daughter.[9] From these works it is clear that acts and expressions of remorse are key to contemporary law because they evoke, "quite simply, [a] respect for the usual demand of truthfulness, and conformity to the procedures and criteria for doing evidential adequacy, conceptual and argumentative coherence, descriptive accuracy [and] consideration of testimony" (Burchell 1996, 32).

It is difficult, however, to isolate remorse from a range of emotions that populate the crowded affective terrain. Discussions of remorse invariably evoke feelings such as shame, guilt, or regret. Therefore, thinking seriously *about* and *with* remorse, often neglected until recently by scholars who study emotions, forces us to grapple with an affective terrain that is structured by emotions that ebb and flow.

Proeve and Tudor identify remorse as belonging to a class of "retractive emotions," such as guilt, shame, regret, and contrition (2010, 31). "Retractive" emotions involve a sense of rejection of a quality "which is otherwise seen as belonging to or associated with the self." For example, a person may wish they did not behave a certain way or did not do a certain thing. Retractive emotions can be studied in terms of how: the rejected action is understood; the self is understood vis-à-vis that action; and "feelings, desires and volitions" accompany these understandings (Proeve and Tudor 2010, 31).

[9] R *v.* Latimer, 2001 SCC 1, [2001] 1 SCR 3.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

Weisman (2009) complicates the picture of determining what constitutes remorse and who is the appropriately remorseful subject. He notes the paradox: "the process by which transgressors are characterized" is also the "most elusive and least articulated of all criteria." Remorse is not only determined through words, but largely through paralinguistic cues. Such cues are seen as "the true window to the person's essence." In other words, the court determines remorse through the feelings that are demonstrated, and not only through words of acceptance of responsibility or contrition (Weisman 2009, 56).

What is clear from the literature, as well as some of the empirical media analysis conducted for this article, is how remorse hinges on or is qualified by the act of "showing" or "performing" in the context of situations including trauma, health, and ability. Kilty and Crépault (2020) counsel that we use the term "performative" rather than "performance," as the latter evokes a sense of design to be seen by others and to improve one's public self-image. "Performance" makes remorse seem insincere. "Performative" instead suggests remorse as a way of being and becoming, signaling personal growth and change. It further allows portraying the transgression as temporary rather than permanent and repeating. In their work on sexual assault narratives in the courtroom, they argue that there are gendered, racialized, and class-based underpinnings that structure how and who is able to "frame one's actions as mistakes or temporary aberrations within an otherwise normal life narrative." And this "contributes to one's ability to sincerely convey a sense of felt remorsefulness" (Kilty and Crépault 2020, n.p.).

Despite the challenges associated with making such determinations, legal and media arenas continue to represent remorse (or lack of it) in less than nuanced terms. The legal subject constituted in the unfolding narrative of remorse embodies the morally reprehensible or stands outside of /apart from the act(s) committed. Weisman (2009, 50) argues the subjects split themselves "between the self that committed the offence and the self that joins with the aggrieved in agreeing that the offending act was morally unacceptable." The purpose of remorse or apology is to represent the subject as other than the act they are being judged for (Weisman 2009).

III. Methodology

In this paper we provide only a partial history of rich individual and community narratives that belong to criminalized people and survivors. Storytelling is an important practice that involves "discomfort, emotion, and unsettling" (Manley-Casimir 2013). Helping individuals to tell their own life stories can be transformative, allowing them to counter the constructed narratives imposed upon them. Researchers have used this as an applied tool with imprisoned people, including Gauthier (2017) through "restorying" circles with imprisoned Indigenous people. It is also tied to restorative justice, as an implication of telling stories in significant settings (Zehr 2015). Green (2017) describes restorying in the context of Canada's Truth and Reconciliation Commission (TRC 2015), with testimony carrying a political and decolonial effect.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

Such practice is especially important given the lack of reflexivity among the actors who construct narratives. Academics, the mainstream media, and the courts do not do enough to account for their own role in processes of stigmatization, retraumatization, pathologization, racism, and colonialism. In this article, we do not seek out stories directly from prisoners, survivors, and communities but rather seek to deconstruct the stories presented by the media and to pay specific attention to gaps in the recounting of contexts surrounding violence. There are limitations to this approach, not least being that we are limited to a "world of letters" (Menzies 2017) and cannot provide the story as fully or directly as we could through verbal narrative. This is especially important given that criminalized people are generally not afforded much voice in media reporting, with few words and a smaller range of emotions attributed to them.

A comprehensive literature search examined scholarly literature published over the past fifteen years. A preliminary search and review of approximately fifty articles was used to develop a list of search terms. A total of 222 scholarly articles were collected as part of the literature search, filtered to ensure that they discussed issues related to DO designation or offending more broadly, as well as identity and emotion. Key themes that emerged from this literature review include definitions of dangerousness, DO policy, DO designation, perceptions of risk and emotion (shame, guilt, remorse), media representations, public punitiveness, identity and resistance, Indigeneity, gender, age, brain injury, cognitive ability, and mental illness.

As white researchers, settlers to Canada, we also come to this work with varying personal and volunteer/advocacy contact with the criminal justice and corrections (carceral) systems. Emotions are not relegated to the cases we explore; they are embedded in our practices as researchers confronting difficult life histories. Gould (2015) describes how it can be unsettling to be moved by research, yet feelings are an inextricable part of analysis, something that can strengthen rather than compromise the work. As researchers, we are feeling actors who are writing about "cases" about which we know little beyond the texts we were able to analyze. Emotional responses form part of the restorying of these complex cases and need to be understood in the context of the narratability that is at the heart of lived experience. The ability to tell stories, to confront truths, to feel what you want to feel and have these emotions legitimized, is a necessary feature of ethical and respectful engagement. As we discuss later in the context of Indigenous scholarship, the power of refusal—to disavow Western conceptions of governance and justice—can be the starting place for a post-colonial politics.

1. Case Selection

The four DO cases we discuss here were selected among the 475 news articles collected as part of the comprehensive media review. The cases were chosen for noticeable presentation of the intersection of DO designation or process, factors of identity (Indigeneity, gender, physical/mental ability, physical/mental illness), and emotion. We focus primarily on the key criminalized people in each case, including two survivors (Angela Cardinal and Marlene Bird) who are also

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

criminalized as Indigenous women experiencing homelessness and trauma. The first case (Lance Blanchard) features a white criminalized man ascribed with mental illness and physical disability (hearing loss), and an Indigenous[10] woman who is cast as both a survivor and criminalized person (Angela Cardinal).[11] The second case (Leslie Black) features: an Indigenous[12] criminalized man ascribed with mental illness, disability (speech impediment), and possible FASD (Fetal Alcohol Spectrum Disorder), and an Indigenous woman survivor (Marlene Bird).[13] The third case (Marlene Carter)[14] involves an Indigenous criminalized woman described as having mental illness, cognitive damage, and physical disability (muscular atrophy), as well as facility staff and imprisoned survivors of unknown identity. The final case (Tara Desousa) features an Indigenous criminalized woman,[15] who is ascribed with mental illness, as well as a child survivor of unknown identity.

2. *Media Review*

For this media search,[16] a list of search terms[17] including "dangerous offender" and "Canada" were used for news articles published between 2013 and 2018 and available online.[18] A comprehensive media search of all Canadian newspapers available online was conducted, examining news articles published by these sources over the five-year period. The Google News search tool was found to provide the most expansive search to capture this range of newspapers. The search terms were refined after conducting the earlier literature review. Articles were then filtered to ensure that they discussed either a particular DO case or the issue more broadly in Canada. A total of 475 news articles were collected as part of the comprehensive search and then analyzed and coded in Microsoft Excel manually to ensure accuracy and close review of the material. Coding indicated salient areas to unpack: remorse, trauma, pathology. There are many more themes that could be explored in the future, including positive emotions, such as forgiveness and restoration.

[10] Cardinal is identified as Indigenous, but no further details are provided about the Nation(s) to which she belongs.

[11] The naming of survivors can be seen as an act of reclaiming power. Cardinal's family sought to remove the publication ban placed on the survivor's identity. Bird successfully lifted the publication ban on her own identity as a survivor.

[12] Black is mentioned once in media coverage as Indigenous (MacPherson, 2017), but no further details are provided.

[13] Bird has since passed away. She was a member of the Montreal Lake Cree Nation.

[14] Carter is a Cree woman from the Onion Lake First Nation in Saskatchewan.

[15] In her former online pen pal profile Desousa described herself as a French and Cree (Métis) transgender woman (Canadian Inmates Connect, 2018).

[16] Further research could include an analysis of new media (e.g., Twitter, blogs).

[17] Full list of search terms: ('dangerous offender' OR 'violent offender') AND ('emotion' OR 'remorse' OR 'guilt' OR 'feeling' OR 'response' OR 'regret' OR 'shame' OR 'forgiveness' OR 'fear' OR 'compassion' OR 'victim' OR 'disgust') AND ('Aboriginal' OR 'Indigenous' OR 'First Nation*' OR 'Metis' OR 'Inuit' OR 'Native' OR 'Canadian') AND ('mental health' OR 'illness' OR 'disorder' OR 'trauma' OR 'abuse' OR 'racism' OR 'islamophobia' OR 'foster care' OR 'group home' OR 'cognitive ability' OR 'FASD' OR 'HIV' OR 'intergenerational') AND Canada.

[18] Before the comprehensive media search, a preliminary number of 320 news articles were scanned, and a coding list was created.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

3. Summary: Media Review Findings

Of the 475 articles, almost one-quarter (110) were coded as reporting on an Indigenous individual. In sixty-nine of the 110 articles, Indigenous identity was not explicitly referenced but inferred on the basis of other media reporting in the sample.[19] For example, Leslie Black was identified as Indigenous only once in passing; Dr. Terry Nicholaichuk recommended Black serve his sentence in a British Columbia institution where he would be distanced from media coverage and have access to Indigenous cultural programming (MacPherson 2017). Of the articles reporting on an Indigenous person, fourteen report on Indigenous women (12.7% of the 110 articles), including two on trans women. Comparatively, of articles reporting on non-Indigenous criminalized people, nineteen discuss non-Indigenous women (5.2% of 365 articles), including three on trans women, four report on Black people (1.1%), five report on LGBTQ people (1.4%), and eleven report on immigrant people (3%). Of the Indigenous people described, forty-four articles described the criminalized person displaying emotion, representing 40% of media reporting on this population (110 articles). A total of nine articles (8.2%) explicitly described a lack of emotion, and five articles (4.5%) described both emotion and lack of emotion. This contrasts with non-Indigenous criminalized people (365 articles), who were described as expressing emotion in 115 articles, or 31.5% of media coverage on this population. A total of seventeen of these articles explicitly expressed a lack of emotion (4.7%), and five articles (1.4%) expressed both emotion and lack of emotion. In cases where a criminalized person is described as not expressing emotion, it was coded as such (lack of emotion). If articles did not mention emotion, then no coding was provided. In the sample of media articles, the criminalized person was explicitly described as either displaying emotion or emotionless/lacking emotion.

IV. Thematic Analysis

Theme 1: Experiences of Trauma

The seven generations principle, a value held by some Haudenosaunee peoples in Canada, refers to the need to consider how actions and decisions made today will impact the generations to come (Moran and Bussey 2007). Survivors of residential schools suffered racism, abuse, isolation from families, and disruption of culture, and these harms continue, including through the child removal crisis (Nagy and Sehdev 2013). Such challenges are an indication of the impact of colonization and cultural genocide (TRC 2015) on individuals, families, communities, and nations (Aguiar and Halseth 2015; Bombay, Matheson, and Anisman 2014). An important theme in Indigenous scholarship, which was not found in the DO literature, centers on historical trauma (see Brave Heart and DeBruyn 1998; Weaver and Brave Heart 1999; Ross 1999; Duran and Duran 1995; Duran et al. 1998). Historical trauma is defined as: "a collective complex trauma inflicted on a group of people who share a

[19] Indigeneity was not identified explicitly nor discussed as much as we had expected it would in the media sample. Nonetheless, emotion/non-emotion and health related issues were discussed slightly more frequently when they pertained to Indigenous people.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

specific group identity or affiliation, ethnicity, nationality, and religious affiliation. It is the legacy of numerous traumatic events a community experiences over generations and encompasses the psychological and social responses to such events" (Evans-Campbell 2008, 320).

Regarding emotion, the first generation whose parents are traumatized may be affected in several ways in the language of psychology, such as dissociation and affect regulation. For the second generation, the stress of living with trauma survivors can result in secondary traumatization. The third generation may experience tertiary traumatization and could be the first to hear original survivors share their experiences (O'Neill et al. 2018).

In terms of policy, under Bill C-41 in 1995, s. 718(2) of the Criminal Code requires courts to consider the "unique background and circumstances" of Indigenous peoples and alternatives to imprisonment during sentencing, which includes the tool of Gladue reporting (OCI 2018).[20] Prior to these reforms, information about a criminalized person's background and collective history were rarely considered. Gladue factors are used not only in courts but also in correctional decision-making in terms of security classification, penitentiary placement, institutional transfers, and administrative segregation (OCI 2018). In the Canadian literature, Maxwell (2014) notes the current discussion of historical trauma has roots in two discourses—the first is an older, Indigenous healing discourse, and the second is a professional discourse, which can pathologize Indigenous peoples and legitimize institutional interventions.

In the media data, the life histories of Indigenous criminalized people were discussed in thirty-six of the 110 articles (32.7%), with twenty articles (18.2%) detailing past physical or sexual abuse, three detailing past adoption/foster care/group home/institutionalized upbringing (2.7%), six describing a history of residential school (5.5%), eight describing a "tragic" or "terrible" childhood (7.3%), and ten detailing the murder/abuse of a criminalized person's parent when they were a child (9.1%). In only twelve articles, Gladue reports were referenced (10.9%), and in three articles (2.7%), concern was expressed that the court was not adequately accounting for Indigenous history. While special courts, such as Gladue Courts, exist in Canada to "locate individual criminal behaviours among Aboriginal peoples within histories of colonialism, race relations, and discrimination" (Maurutto and Hannah-Moffat 2016, 452), little coverage of these court practices emerged in our media research. Such a gap in mainstream media reporting is of interest, as the complexity which must be considered in court is not being translated to the forum of public consideration and understanding. The majority of reporting does not provide full details of the blurred lines between offending and victimhood, nor consideration of the toll of colonialism on Indigenous peoples and the connection to criminalization. Little

[20] R *v.* Gladue, [1999] 1 SCR 688 and later decisions (R. *v.* Kakekagamick (M.R.) (2006), 214 O.A.C. 127 (CA); R. *v.* Borde (Q.) (2003), 168 O.A.C. 317 (CA); R. *v.* Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433) task courts with situating a person's behaviour within histories of racial and systemic discrimination. Reforms following these decisions did little to alter imprisonment rates, but they did create opportunity for a new normative set of practices to reimagine Indigenous criminalized people.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

attention or space is given to criminalized people to speak for themselves or tell a fuller story of their lives, or for advocates to provide such context.

In all four case studies, criminalized people's histories are reported, but in ways that may pathologize or sensationalize, rather than paint a comprehensive account of them as complex, emotional beings. This section focuses on two criminalized people of the four cases, Leslie Black and Marlene Carter. As a first example, at an expungement hearing, Black described his childhood trauma. His earliest memory was witnessing, at the age of nine, his mother being murdered by her boyfriend, after which he was placed in foster care (Craig 2017). He was reported as sharing other moments in his life story, in his own words, yet these words were reported only partially. At the DO hearing, a psychiatrist instead was reported as filling in select moments of that history, and these words intermingle with Black's in media coverage. The psychiatrist claims Black being haunted by childhood trauma, including witnessing his mother's murder, as a factor of risk, and no other life history details are reported (CBC 2017). The hearing was also told about several of Black's mental health conditions (Global 2017) and a personality trait that causes him to struggle to identify and describe his emotions (CBC 2017). There is repeated reference (at least five articles) to witnessing his mother's murder; it is difficult to discern whether this information is included as a point of prurient interest for the reader or as a recognition of the deep trauma Black has experienced.

Similarly, regarding Carter's case, there is little discussion of her life story and trauma in mainstream media, with much attention devoted to her mental illness and self-injury. Media coverage goes into great detail about the violence she inflicts on herself, including referring to her head-banging sounding "like a watermelon hitting the concrete repeatedly" (Brosnahan 2014, n.p.). Further details evoking morbid interest in the reader include Carter being "strapped in a chair" and a reference to "a square patch of gauze covering her forehead. At one point, [she] used a free hand to remove the gauze. Beneath it there was a large red sore" (Brosnahan 2014, n.p.). A minority of articles provided context to her story, including Carter being a member of the Onion Lake First Nation, in Alberta (Brosnahan 2014), her mother and many of her family members having attended residential school (Jackson 2016), and her early life trauma (Jackson 2016; Rice 2016).[21] Journalists Jackson (2016) and Rice (2016) explain additional pieces of her story, including why she may be self-harming (trauma including the death of a sibling). In a departure from the other cases, some reporting notes that advocates, including Elders and the Elizabeth Fry Society, have sought to assist her (Brosnahan 2014; Jackson 2016; Paperny 2014; Rice 2016). Elder Albert Dumout, who worked with Carter in Brockville, said he wants officials to remember the "many, many, traumas that she experienced" (Rice 2016, n.p.). Overall, in addition to skewed consideration of trauma and life histories and stigmatizing accounts of "forensic" mental health, mainstream media reporting also shows little awareness of expectations regarding the appropriate expression of remorse.

[21] Kenneth Jackson reports for Aboriginal Peoples Television Network, and Waubgeshig Rice is an Anishinaabe writer and journalist originally from the Wasauksing First Nation, near Parry Sound, Ontario. Both journalists' work departs from what appears in dominant media coverage.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

Theme 2: Performativity of Remorse

For the sake of our empirical analysis of media and explicit (or implicit) discussions of remorse, we are limited to textual discussion; we do not have independent access to some of the affective dimensions underlined by Weisman and are therefore constrained by any written accounts that might provide a glimpse into these dimensions. Our quantitative analysis of the displays of remorse in the media coverage does not reveal large differences in cases involving Indigenous and non-Indigenous criminalized people. In our media sample, the emotion (40%) or lack of emotion (8.2%) of criminalized Indigenous people was discussed at slightly higher percentages than the emotion (31.5%) or lack of emotion (4.7%) of non-Indigenous criminalized people. Similar proportions of Indigenous and non-Indigenous criminalized people are reported expressing apology, remorse, shame, indifference, empathy, guilt, self-forgiveness, and motivation/willingness to change. When we turn to a qualitative analysis of the actual content of the articles, we see grounds for a richer, textured analysis, as we discuss shortly.

Regarding emotion specifically, there are cultural underpinnings to performativity of emotion, which may be misinterpreted or pathologized in the criminal justice and corrections systems and reported with little to no awareness in the media. Prowse (2011) examines how some Indigenous cultural ethics that evolved over time as a means of suppressing intra-group rivalry and conflict (while emphasizing conciliation and restoration) are negatively defined within the criminal justice system. For example, a criminalized person's display of volubility or taciturnity frequently leads to negative conclusions about prospects for rehabilitation, which may be interpreted during sentencing as lack of remorse for those actions (Prowse 2011). However, volubility/taciturnity as a behavior is culturally inscribed in some Indigenous communities during instances of uncertain divisions of power. There also is a tendency to conclude that those who do not maintain eye contact are exhibiting evasiveness (Prowse 2011). The suppression of overt emotional displays in the public sphere and in the courtroom can be erroneously interpreted as evidence of lack of remorse for one's actions, an observation that has implications for the sentencing process and potential eligibility for early forms of release from imprisonment (Prowse 2011). The interpretation of emotional behavior, then, is culturally subjective and may function to the disadvantage of Indigenous people. It is also important to stress here that the evidence vis-à-vis emotional displays (or lack thereof) in the courtroom is often communicated indirectly via media coverage and representations. Therefore, issues related to "showing remorse" must be understood within the context of media interlocutors and other legal actors who collectively produce the person who is presented as remorseful or lacking in remorse.

Multiple expectations of criminalized people's emotion are discussed in the literature, and all are associated with perceptions of risk. Weisman (2009) argues that attributions of remorse are used in legal discourse to distinguish those whose character is perceived as different from their wrongful act ("remorseful") from those whose character is perceived as consistent with their wrongful act ("remorseless"). The author argues that courts emphasize shows of remorse more strongly than offers of apology as the true measure of the person's character

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

(Weisman 2009). In their work on the case of Karla Homolka, Kilty and Frigon (2016) describe remorse as both a "materially felt emotion and identity performative." It might appear paradoxical to think of remorse as deeply felt given that lack of remorse is supposed to signal a cold, unfeeling character. As Kilty and Frigon explain, it is not surprising that the courts have been a key venue for the performativity of remorse: an ability to appear to be remorseful for one's actions "can mean the difference between life and death" (Kilty and Frigon 2016, 87).

Refusal

While there has been much discussion of the affective dimensions of apology in the wake of our colonial past and present policies of cultural genocide, less attention has turned to how emotional regulation is central to colonial violence and subjectification. Emotion management is never divorced from its political, cultural, and social underpinnings, so it should not be surprising that Western conceptions of what and when it is appropriate to feel might be one of the tools used to govern Indigenous people.

In the context of ongoing efforts of reconciliation, it is important, then, to ask how Canadian institutions (e.g., courts, the media) govern through emotion. And, relatedly, what would it mean to interpret the absence of remorse (or the failure to read Indigenous criminalized people's feelings and emotional displays) as evidence of a form of refusal, as an unwillingness to emote in the ways that courts compel people to do? Mohawk anthropologist Audra Simpson (2014) articulates an "ethnography of refusal" that is both collectively embodied and practiced, as well as articulated in individual acts of resistance that move in the everyday, in the mundane practices of life and citizenship.

Simpson speaks of the "'feeling side' of recognition, one that is not juridical, is homegrown, and dignified by local history and knowledge" (Simpson 2007, 78). When Indigenous people "refuse," she explains, "they tell us something about the way we cradle or embed our representations and notions of sovereignty and nationhood; and they critique and move us away from statist forms of recognition." Refusal in this sense is generative. It opens up space for thinking about the productive (and dangerous) potential of listening carefully, intently to conscious efforts to say no, to reject enfolding into spaces that constrict and confine. As Burman explains (2016, 363), echoing important interventions by Indigenous scholars such as Dene political scientist Glen Coulthard (2014), "Liberal moral outrage is not only nontransformative, it inoculates by making visibility the key factor, as do the politics of recognition. It is as though to air something out, to see it with others, is to accomplish something, when in effect the reiteration of the idea that dehumanizing violence is incompatible with liberal democracy only reinforces the values of such a system." Refusal is an antidote to the hollow politics of recognition.

Analysis

Performativity of remorse and refusal are evident in the case studies—particularly among victims who are subjected to trial by media, so to speak. Bird was a

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

residential school survivor and woman experiencing homelessness who convinced the court to lift the publication ban on her identity as the survivor of the attack on her (White-Crummey 2017). Speaking to the media, Bird said she hoped that Black would remain behind bars for decades and expressed anger and the need for an apology, yet she also spoke about her desire to forgive: "I'm doing my best, because my mom told me to forgive people that do wrong" (Global 2017). She broke from a familiar script—demand for retribution. Black read a statement to court in March 2017 apologizing for the attack and expressing remorse. He said if he could go back to the night he attacked Bird, he would have taken his father's advice and stayed home: "I apologize for what I did. I still can't forgive myself" (Regina Leader-Post 2017). Black pleaded guilty to attempted murder, yet recanted his guilty plea saying he would never have pleaded guilty had he known he could be in prison for the rest of his life. Here, remorse was expected to be performed in specific ways in court and was later recalled, in the form of a recanted guilty plea—an act of refusal of a system that seeks retribution rather than restoration, a system Black says he did not entirely understand.

In another case, Angela Cardinal, an Indigenous woman experiencing homelessness who was attacked by Lance Blanchard and later died in an unrelated shooting, spoke angrily about her re-victimization by the justice system following her sexual assault and vicious attack in a building stairwell and apartment. Cardinal was confined a total of five nights in the Edmonton Remand Centre during her testimony for the Crown and forced to travel in the same van as the accused to and from court. The official rationale was to ensure her testimony in court. "'I'm the victim and look at me, I'm in shackles,' she told provincial court Judge Raymond Bodnarek. 'Shackles,' she spat. 'Aren't you supposed to commit a crime to go to jail?'" (Johnston 2017).[22] As an Indigenous woman who was homeless, she experienced treatment as both a criminalized person and a survivor. She expressed refusal in the courtroom when expected to perform emotions such as meekness and demureness rather than expressions of anger or defiance.

The public and official focus on the inner life of criminalized people (and survivors) informs not just the wrong itself, but also how individuals should feel about their actions (Weisman 2009). Through the characterization of persons as remorseful or unremorseful, the larger community is instructed about when feelings of remorse are expected and when they are not, as well as what form these feelings *should* take (Weisman 2009). Such characterizations are apparent in the case examples and problematized through refusal. Weisman (2009, 51) adds that the very expression of "showing remorse" suggests that remorse is communicated through gestures, displays of affect, and other paralinguistic devices. The criminalized person is judged as credible or not depending on the feelings that are displayed (Weisman 2009). This is a key insight into the convincingness of criminalized people's remorse and links with the next theme of pathology and risk.

[22] While we speak mostly to the performativity of emotion among criminalized people, this performativity is true among survivors, as well.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

Theme 3: Indigeneity as Pathology and Risk

Indigenous communities disproportionately experience structural hardships (poverty, undereducation, and underemployment), which are cited by those who consider these communities as intrinsically criminogenic (Martel, Brassard, and Jaccoud 2011). Marginalized life circumstances tend to be funneled within a logic of risk management as factors that equate with higher risk-assessment scores for Indigenous criminalized people. This is especially the case for Indigenous women who may be pathologized as victims and criminalized due to biased risk assessment processes (Balfour 2012; Parkes 2016). Parkes (2016) argues that applying a "neutral" risk classification tool or DO regime to Indigenous women does not produce a just result, as life experiences and strategies of survival and resistance have been shaped by profound inequality and trauma flowing from colonial state policies and practices. Media reporting does not speak to this complicated reality in the court arena.

In terms of policy, a range of risk instruments and assessment tools have been evaluated by CSC, who ultimately defended their use (Farrell MacDonald et al. 2018; Gutierrez, Chadwick, and Wanamaker 2018; Stewart et al. 2017). In 2015, Jeffrey Ewert, a long-imprisoned Métis man, brought this issue before the Supreme Court of Canada (Harris 2018). In a seven–two decision in *Ewert v Canada* 2018 SCC 30 [*Ewert v Canada 2018*], the SCC held there is ample reason to doubt the cross-cultural validity of CSC risk tests to measure recidivism and psychopathy when applied to imprisoned Indigenous people. Shortly prior to the ruling, amendments to risk assessment tools were also recommended by the 2018 Report of the Standing Committee on Public Safety and National Security, *Indigenous People in the Federal Correctional System* (Canada, 2018).

In the media data, there is discussion of criminalized people's medical health, with particular emphasis on mental illness or "deviance." Among Indigenous criminalized people, fifty-six (50.9% of 110 articles) describe the health of the person, including 22 (20%) that mention substance abuse, eighteen (16.4%) alcoholism, seven (6.4%) cognitive disability, five (4.5%) FASD, thirty-three (30%) mental illness, eight (7.3%) psychopathy, and eight (7.3%) physical disability. Among non-Indigenous criminalized people, 148 articles (40.5% of 365 articles) discuss the health of the person, including fifty (13.7%) that mention substance abuse, forty (11%) alcoholism, twelve (3.3%) cognitive disability, five (1.4%) FASD, sixty-five mental illness (17.8%), thirty-eight (10.4%) psychopathy, eight (2.2%) physical disability, and six (1.6%) HIV/AIDS. A higher proportion of articles focus on the health (including mental health) of Indigenous criminalized people than is the case for non-Indigenous criminalized people. Psychiatrists and lawyers are the personnel who are reported as interpreting criminalized people's conduct and risk, ascribing labels to categorize people. Little attention is given to criminalized people, survivors, or advocates as interpreters of this information.

In the case studies, media reporting about mental health as risk is a major area of note. Regarding one of the four cases, Tara Desousa's gender was discussed in pathological language and used as a risk factor. Desousa participated in several

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

parole hearings during her time imprisoned, but only the 2010 hearing and the 2018 appeal are reported on by the media. At the 2010 parole hearing, the reported assessment said Desousa has exhibited "bizarre sexual behavior" and demonstrated lack of self-control, sexually and emotionally (CBC 2010, n.p.). The board noted, "Mutilation of your penis has also occurred, with you claiming [you] want to be female" (CBC 2010, n.p.). The hearing heard about Desousa's social history—including that she was raised in a dysfunctional family environment, abused, bullied, and teased at school because of "gender confusion," and that she experienced lack of acceptance by peers and poor social skills (CBC 2010, n.p.). A 2008 psychological report found that Desousa meets the criteria for psychopathy and severe borderline personality disorder (CBC 2010).

The parole board refused Desousa's release on the grounds of gender identity struggles, impulsive behavior, violence, and sexual deviance (Hunter 2018). Desousa's last application for parole was in November 2017, which she appealed on several grounds including bias on the part of the board (Canadian Press 2018). A decision from the appeal division dismissed claims that incomplete or erroneous information was used to reach a quick decision, stating that there was "no reasonable apprehension of bias" (Canadian Press 2018, n.p.). The appeal division noted that the board had factored in Desousa's Indigenous background, "The Board found that you have experienced negative intergenerational effects as a result, and acknowledged the linkage between your involvement in the criminal justice system and a number of elements in social and family history, including your substance abuse issues" (Canadian Press 2018, n.p.). It is not clear whether this history is also counted as a factor of risk, rather than an important mediating context. The appeal decision found that rejecting parole was reasonable (Canadian Press 2018). In subsequent reporting, there has been attention to Desousa's online pen pal profile and gender transition surgeries, claiming that readers were "infuriated" that Desousa received surgery with public money (Hunter 2018). The implications of media treatment, in Desousa's case and beyond, of trauma, performativity of emotion, and pathology/risk are multiple and important.

V. Discussion and Implications

The media are important interlocutors in policy and public discourses related to criminality and participate (directly and indirectly) in the production of the subjectivities that surround notions of crime, punishment, and deviance. The role of the media is particularly heightened in cases pertaining to DOs, in which a harsh light is cast on the darker corners of life. The realization of crimes in communities can turn on two explanations: the criminalized person is either a character in a familiar narrative that often reinforces criminal actions as a natural by-product of a lifetime of disadvantage, abuse, pathology; alternatively, criminal actions that rise to the level of public outrage can also challenge this—the story literally comes out of nowhere, defying common expectations regarding who commits these sorts of crimes. This has important implications for the kinds of emotions and affects that attach to these criminal cases. Individuals who have no prior history dealing with

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

the criminal justice system seem out of place—they do not belong there—and are better versed in the feeling rules that resonate in these contexts and can emote accordingly. But what happens when one refuses to feel in a particular way, when one rejects the rules that are supposed to govern emotional exchanges? Expert labels of psychopathy and anti-social behavior are commonly (and problematically) expressed and summoned in legal arenas to attempt to "explain" behavior. These are not benign descriptors; they are especially challenging when attached to Indigenous criminalized people and survivors who are routinely pathologized and/or classified as risks. The legal system/justice system has been structured to privilege white settlers and criminalize Indigenous people. Racism is an important and silenced piece of the courtroom. Such racism has a long history; contact with non-Indigenous people has been marked by efforts to eradicate Indigeneity, to reconfigure acceptable identity and behavior. And, importantly, Indigenous people who have been victimized by non-Indigenous persons can be "read" as always-already offenders because of the history of dealing with Indigenous people as possible offenders, rather than survivors. In two of the cases presented in this paper—survivors Angela Cardinal (pseudonym) and Marlene Bird—it is clear that the capacity to be understood as a feeling actor requires active resistance and refusal.

In terms of the implications of interpretations of behavior in the public sphere, various groups concerned with survivors' rights and the protection of the community from sexual violence have used the media effectively to influence governments in enacting a range of special controls specifically designed for sex offenders (Petrunik, Murphy, and Fedoroff 2008). Sexual offenders, above other DOs, are identified as societal pariahs. As one imprisoned man states, "It's just you and Satan, hanging out at a preschool," summing up what he saw as the public perception of him and fellow imprisoned men (Waldram 2009, 220). The media devote immense attention to sexual offenders, priming the public to label sexual offenders as essentially "inhuman" (Waldram 2009, 231). The prime example that typifies this dynamic is the 1988 Stephenson case, in which an individual on community supervision, Joseph Fredericks, assaulted and murdered a young boy. Public mobilization around this case precipitated the rise of a community protection model (Petrunik, Murphy, and Fedoroff 2008). The Paul Bernardo/Karla Homolka case also gripped the Canadian and international media (see Kilty and Frigon 2016).

Several studies have examined public perspectives of DOs and opinions regarding treatment, punishment, and management. Unnever and Cullen (2009) found that people construct images of criminalized people that reflect those disseminated by the media, elites, and popular culture. These images vary by types of crime and change over time and carry details such as demographic characteristics of the criminalized person (e.g., their age, gender, and race) and their affective state (e.g., remorsefulness) (Unnever and Cullen 2009). The authors also contend that a key component in explaining individual differences in punitiveness is the person's ability to empathetically identify with the criminalized person (Unnever and Cullen 2009). Empathy is related to believing that the person is remorseful for

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

his or her behavior, and it facilitates the willingness to accept acts of contrition (Unnever and Cullen 2009).

Conclusion

Thinking about the role of emotions in the criminal justice system, as expressed through media and legal discourses, presents its own set of challenges. First, emotions occupy a liminal space in an arena dominated by concerns with "facts" and "evidence," setting aside the "fact" that the facts expressed in and through these contexts are always value laden. Yet there is ample justification to ask how legal and media landscapes reflect and co-produce the emotional contours of debates about criminality. Nowhere is this more apparent than in the highly charged discourse regarding DOs in Canada; these cases are almost natural candidates for studying emotion, given the visceral and often polarizing responses they elicit; the descriptor "dangerous" alone evokes fear, anxiety, and dread. Even if judges are clear that the dangerous designation is designed to "protect" communities from recidivism, this designation intermingles with already existing tropes about who is really dangerous, and so this descriptor is invariably attached to marginalized others, be they Indigenous, racialized, disabled, or multiply defined by these intersecting identities.

Our review of select cases involving Indigenous criminalized people and survivors reinforces claims that Indigenous criminalized people experience significant disadvantage in the criminal justice system due to performativity of emotion (Prowse 2011), media interpretations that reinforce stigma, powerlessness, and pathology (Petrunik, Murphy, and Fedoroff 2008), and public appetite for punitiveness (Unnever and Cullen 2009). In the case of remorse, the latter is significant, as there are many instances in which expressions of remorse are met with public frustration about the veracity of such pronouncements. This paper has sought to sketch a more complex picture of our ability to assess, evaluate, and, ultimately, judge the kinds of feelings associated with dangerous offenders as well as survivors.

The importance of media and courtrooms in constructing "dangerous" people, and communities in reinforcing or amplifying constructions and punitive solutions, leads us to suggest some applied pathways forward. Such pathways could include court/media training on the interpretation of emotion/behavior, public education to slowly shift attitudes away from punitiveness, improving training/resources around Gladue reporting, sensitivity training for media ethics boards, dismantling risk management tools that do not account for diverse cultures and understandings, providing greater justice resources and control to Indigenous communities, and transitioning towards transformative justice configurations.

These cases reveal a troubling pattern of media engagement that centers on the spectacle and the prurient details of these cases in ways that ultimately dehumanize the individuals who experienced trauma and pain. A movement towards decolonization and transformative justice means not only focusing on the need for reform in the courtroom but in all other aspects of society that are part of the structural underpinnings of criminalization.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

References

Aguiar, William, and Regine Halseth. 2015. *Aboriginal Peoples and Historical Trauma: The Processes of Intergenerational Transmission*. National Collaborating Centre for Aboriginal Health (NCCAH). https://www.ccnsa-nccah.ca/docs/context/RPT-HistoricTrauma-IntergenTransmission-Aguiar-Halseth-EN.pdf.

Anthony, Thalia, and Harry Blagg. 2020. Hyperincarceration and Indigeneity. In *Oxford Research Encyclopedia, Criminology and Criminal Justice*, ed. N. Hahn Rafter and M. Brown, https://doi.org/10.1093/acrefore/9780190264079.013.656. Oxford University Press.

Balfour, Gillian. 2012. Do law reforms matter? Exploring the victimization-criminalization continuum in the sentencing of Aboriginal women in Canada. *International Review of Victimology* 19 (1): 85–102.

Bandes, Susan, and Jeremy Blumenthal. 2012. Emotion and the law. *Annual Review of Law and Social Science* 8:161–81.

Bandes, Susan. 2016. Remorse and demeanor in the courtroom: Cognitive science and the evaluation of contrition. In *The Integrity of the Criminal Process*, ed. Jill Hunter, Paul Roberts, Simon N. M. Young, and David Dixon, 309–326. Oxford: Hart Publishing.

Brave Heart, Maria Yellow Horse, and Lemyra M DeBruyn. 1998. The American Indian holocaust: Healing historical unresolved grief. *American Indian and Alaska Native Mental Health Research* 8:56–78.

Bombay, Amy, Kimberly Matheson, and Hymie Anisman. 2014. The intergenerational effects of Indian Residential Schools: Implications for the concept of historical trauma. *Transcultural Psychiatry* 51 (3): 320–38.

Bronskill, Jim. 2017. Top court upholds dangerous offender provision. *iPolitics*, 17 Dec. https://ipolitics.ca/2017/12/21/top-court-upholds-dangerous-offender-provision/.

Brosnahan, Maureen. 2014. Marlene Carter not a dangerous offender, judge rules. *CBC*, 23 Jul. https://www.cbc.ca/news/canada/saskatchewan/marlene-carter-not-a-dangerous-offender-judge-rules-1.2716254.

Burchell, Graham. 1996. Liberal government and techniques of the self. In *Foucault and political reason: Liberalism, neo-liberalism and rationalities of government*, ed. Andrew Barry, Thomas Osborne, and Nikolas Rose, 19–36. Routledge.

Burman, Jenny. 2016. Multicultural feeling, feminist rage, Indigenous refusal. *Cultural Studies ↔ Critical Methodologies* 16 (4): 361–72.

Byers, Alexandra. 2018. Supreme Court decision will mean fewer dangerous offender applications, says Yukon legal aid society. *CBC*, 11 Jan. https://www.cbc.ca/news/canada/north/yukon-law-society-charter-challenge-1.4482499

Canada. 2018. *Parliament. House of Commons. Standing Committee on Public Safety and National Security (Indigenous People in the Federal Correctional System)*. Report, June 18, Chair: John McKay. 42nd Parliament, 1st Session. (Online). https://www.ourcommons.ca/DocumentViewer/en/42-1/SECU/report-22/.

Canadian Inmates Connect. 2018. Female Inmates. https://web.archive.org/web/20180714085431/http://www.canadianinmatesconnect.com/female_inmates_1.html.

Canadian Press. 2018. Dangerous offender in B.C. loses appeal for day or full parole. *The Star,* 24 Apr. https://www.thestar.com/news/canada/2018/04/24/dangerous-offender-in-bc-loses-appeal-for-day-or-full-parole.html.

CBC. 2010. "Bizarre" dangerous offender denied parole. *CBC*, 16 Dec. https://www.cbc.ca/news/canada/british-columbia/bizarre-dangerous-offender-denied-parole-1.878162.

CBC. 2017. Leslie Black affected by childhood trauma, capable of extreme violence, psychiatrist tells hearing. *CBC*, 15 Mar. https://www.cbc.ca/news/canada/saskatchewan/leslie-black-hearing-psychiatrist-1.4027007.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

Collins, Rachael. 2016. "Beauty and bullets": A content analysis of female offenders and victims in four Canadian newspapers. *Journal of Sociology*, 52 (2): 296-310.

Coulthard, Glen. 2014. *Red skin, white masks: Rejecting the colonial politics of recognition*. Minneapolis: University of Minnesota Press.

Craig, Meaghan. 2017. "It used to be for the worst of the worst": dangerous offender designation. *Global*, 15 Mar. https://globalnews.ca/news/3313040/it-used-to-be-for-the-worst-of-the-worst-dangerous-offender-designation/.

Damasio, Antonio. 2005. *Descartes' error: Emotion, reason, and the human brain*. Penguin Books.

Duran, Eduardo, and Bonnie Duran. 1995. *Native American postcolonial psychology*. New York: State University of New York Press.

Duran, Eduardo, Bonnie Duran, Maria Yellow Horse Brave Heart, and Susan Yellow Horse-Davis. 1998. Healing the American Indian soul wound. In *The Plenum series on stress and coping. International handbook of multigenerational legacies of trauma*, ed. Yael Danieli, 341–54. New York, NY: Plenum Press.

Evans-Campbell, Teresa. 2008. Historical trauma in American Indian/Native Alaska communities: a multilevel framework for exploring impacts on individuals, families, and communities. *Journal of Interpersonal Violence* 23 (3): 316–38.

Farrell Macdonald, S., T. Beauchamp, C. Conley, L. Conciu, and T. Scott. 2018. *Revalidation of the Security Reclassification Scale (SRS) (Research Report R-414).* Ottawa, Ontario: Correctional Service of Canada. https://www.csc-scc.gc.ca/research/r-414-en.shtml.

Fine, Sean. 2017. Top court upholds Harper-era law on dangerous offenders. *CBC*, 21 Dec. https://www.theglobeandmail.com/news/national/top-court-upholds-harper-era-law-on-dangerous-offenders/article37401659/.

Gauthier, Michael. 2017. *Restorying the lives of Aboriginal people connected with the criminal justice system*. Queen's University, Dissertation. https://qspace.library.queensu.ca/handle/1974/22610.

Global. 2017. Saskatchewan man who attacked homeless woman, set her on fire gets 16 years." *Global*, 22 Sept. https://globalnews.ca/news/3762921/saskatchewan-homeless-woman-marlene-bird-leslie-black-prince-albert/.

Goodwin, Jeff, James Jasper, and Francesca Polletta. 2004. The emotional dimensions of social movements. In *The Blackwell Companion to Social Movements*, ed. David A. Snow, Sarah A. Soule, and Hanspeter Kriesi, 413–32. London: Blackwell Publishing.

Gould, Deborah. 2009. *Moving Politics: Emotion and ACT UP's Fight Against AIDS*. Chicago: University of Chicago Press.

Gould, Deborah. 2015. When your data make you cry. In *Methods for exploring emotion*, ed. Helena Flam and Jochen Kleres. London and New York: Routledge.

Green, Robyn. 2017. Loving to reconcile: Love as a political emotion at the Truth and Reconciliation Commission. In *Power through Testimony*, ed. Brieg Capitaine and Karine Vanthuyne. Vancouver: UBC Press.

Gutierrez Leticia, Nick Chadwick, and Kayla A Wanamaker. 2018. Culturally relevant programming versus the status quo: A meta-analytic review of the effectiveness of treatment of indigenous offenders. *Canadian Journal of Criminology and Criminal Justice* 60:321–53.

Harris, Kathleen. 2018. Prison system failed to ensure security tests aren't racially biased against Indigenous inmates. *CBC*, 13 Jun. https://www.cbc.ca/news/politics/ewert-supreme-court-indigenous-bias-1.4703884

Hochschild, Arlie. 1979. Emotion work, feeling rules, and social structure. *American Journal of Sociology* 85 (3): 551–75.

Hunter, Brad. 2018. Youngest dangerous offender gets DD breast implants. *Toronto Sun*, 15 Apr. https://torontosun.com/news/national/youngest-dangerous-offender-gets-dd-breast-implants

Jackson, Kenneth. 2016. Cree woman serving a death sentence unless Trudeau government steps in. *APTN*, 25 Apr. http://aptnnews.ca/2016/04/25/cree-woman-serving-a-death-sentence-unless-trudeau-government-steps-in/.

Johnston, Janice. 2017. "I'm the victim and I'm in shackles": Edmonton woman jailed while testifying against her attacker. *CBC*, 5 Jun. https://www.cbc.ca/news/canada/edmonton/sex-assault-victim-jailed-judge-edmonton-1.414053.

Kilty, Jennifer, and Sylvie Frigon. 2016. *The enigma of a violent woman: A critical examination of the case of Karla Homolka*. London: Routledge.

Kilty, Jennifer, and Michael Orsini. 2019. Counteracting shame, recognizing desire: Managing the emotional reverberations of criminalizing HIV nondisclosure in Canada. *The Sociological Review* 67 (6): 1265–81.

Kilty, Jennifer, and Charissa Crépault. 2020. Regrets, foolish mistakes, and outright villains: Narratives of remorse in sexual assault trials. In *Remorse and criminal justice: Multi--disciplinary perspectives*, ed. Steven Tudor, Richard Weisman, Michael Proeve, and Kate Rossmanith. London, UK: Routledge.

Laplante, Jaysen. 2008. Playing hardball with repeat offenders: Some thoughts on the "three-strikes" reverse onus dangerous offender law. *Manitoba Law Journal* 31 (2): 65–112.

Law Reform Commission of Canada. 1991. *Report on Aboriginal Peoples and criminal justice: Equality, respect and the search for justice as requested by the Minister of Justice under Subsection 12(2) of the "Law Reform Commission Act."* Ottawa, ON: The Commission. https://archive.org/details/reportonaborigin00lawr.

MacPherson, Taylor. 2017. Leslie Black troubled but not sociopathic: psychologist. *Prince Albert Now*, Mar 20. https://panow.com/2017/03/20/leslie-black-troubled-but-not-sociopathic-psychologist/.

Malakieh, Jamil. 2020. Adult and youth correctional statistics in Canada, 2018/2019. Statistics Canada. https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.htm.

Manley-Casimir, Kirsten. 2013. Creating space for Indigenous storytelling in courts. *Canadian Journal of Law and Society*, 27 (2): 231–47.

Martel, Joane. 2009. Remorse and the production of truth. *Punishment and Society* 12 (4): 414–37.

Martel, Joane, Renée Brassard, and Mylène Jaccoud. 2011. When two worlds collide: Aboriginal risk management in Canadian corrections. *British Journal of Criminology* 51:235–55.

Maurutto, Paula, and Kelly Hannah-Moffat. 2016. Aboriginal knowledges in specialized courts: Emerging practices in Gladue courts. *Canadian Journal of Law and Society* 31 (3): 451–71.

Maxwell, Krista. 2014. Historicizing historical trauma theory: Troubling the trans-generational transmission paradigm. *Transcultural Psychiatry* 51 (3): 407–35.

Menzies, Charles. 2017. Epilogue. In *Power Through Testimony*, ed. B. Capitaine and K. Vanthuyne. Vancouver: UBC Press.

Million, Dian. 2009. Felt theory: An Indigenous feminist approach to affect and history. *Wicazo Sa Review*, 24 (90): 53–76.

Million, Dian. 2013. *Therapeutic nations: Healing in an age of Indigenous human rights*. Tucson: University of Arizona Press.

Moran, James, and Marian Bussey. 2007. Results of an alcohol prevention program with urban American Indian youth. *Child & Adolescent Social Work Journal* 24 (1): 1–21.

Nagy, Rosemary, and Robinder Sehdev. 2013. Introduction: Residential schools and decolonization. *Canadian Journal of Law and Society* 27 (1): 67–73.

National Inquiry into Missing and Murdered Indigenous Women and Girls. 2019. Reclaiming power and place, *Vol* 1a. https://www.mmiwg-ffada.ca/final-report/.

OCI [Office of the Correctional Investigator]. 2018. *Annual Report of the Office of the Correctional Investigator 2017–2018*. https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20172018-eng.pdf.

O'Neill, Linda, Tina Fraser, Andrew Kitchenham, and Verna McDonald. 2018. Hidden burdens: A review of intergenerational, historical and complex trauma, implications for Indigenous families." *Journal of Child and Adolescent Trauma* 11:173–86.

Paperny, Anna. 2014. Crown fights to designate mentally ill, suicidal inmate dangerous offender. *Global*, 6 Oct. https://globalnews.ca/news/1600745/crown-fights-to-designate-mentally-ill-suicidal-inmate-dangerous-offender/.

Parkes, Debra. 2016. Women in prison: Liberty, equality, and thinking outside the bars. *Journal of Law and Equality* 12:127–56.

Petrunik, Michael, Lisa Murphy, and J. Paul Fedoroff. 2008. American and Canadian approaches to sex offenders: A study of the politics of dangerousness. *Federal Sentencing Reporter* 21 (2): 111–23.

Proeve, Michael, and Steven Tudor. 2010. *Remorse: Psychological and jurisprudential perspectives*. Aldershot, UK: Ashgate.

Prowse, Cathy. 2011. "Native ethics and rules of behaviour" in the criminal justice domain: A Career in retrospect. *International Journal of Humanities and Social Science* 1 (5): 251–57.

Public Safety Canada. 2019. *Corrections and conditional release statistical overview 2018 annual report*. https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2019/index-en.aspx#e1.

Regina Leader-Post. 2017. Man who raped, beat and burned woman speaks at dangerous offender hearing. *Regina Leader-Post*, 21 Mar. https://leaderpost.com/news/saskatchewan/man-who-raped-beat-and-burned-woman-speaks-at-dangerous-offender-hearing.

Rice, Waubgeshig. 2016. Mentally ill Cree woman can go home to Saskatchewan, board says. *CBC*, 21 Jan. https://www.cbc.ca/news/canada/ottawa/marlene-carter-brockville-saskatchewan-mental-health-1.3412228.

Roberts, Julian, Nicole Crutcher, and Paul Verbrugge. 2007. Public attitudes to sentencing in Canada: Exploring recent findings. *Canadian Journal of Criminology and Criminal Justice* (Jan): 75–107.

Ross, Luana. 1999. *Inventing the savage: The social construction of Native American criminality*. Austin: University of Texas Press.

Ross, Rupert. 2009. *Heartsong: Exploring emotional suppression and disconnection in Aboriginal Canada*. Discussion Paper. www.support4northernkids.ca/uploaded/Heartsong%20Final.pdf

Royal Commission on Aboriginal Peoples. 1996. *Bridging the cultural divide. A report on Aboriginal people and criminal justice in Canada*. Ottawa, ON: Minister of Supply and Services Canada.

Savage, Meaghan, Kimberley Clow, Regina Schuller, and Rosemary Ricciardelli. 2018. After exoneration: Attributions of responsibility impact perceptions. *Canadian Journal of Law and Society* 33 (1): 85–103.

Simpson, Audra. 2014. *Mohawk interruptus: Political life across the borders of settler states*. Durham: Duke University Press.

Simpson, Audra. 2007. On ethnographic refusal: Indigeneity, "voice" and colonial citizenship. *Junctures* 9:67–80.

Spencer, Dale, Kevin Walby, and Alan Hunt, eds. 2012. *Emotions matter: A relational approach to emotions*. Toronto: University of Toronto Press.

Statistics Canada. 2017. Aboriginal peoples in Canada: Key results from the 2016 Census. https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm?indid=14430-1&indgeo=0.

Stevens, P. 2008. Where two oceans meet: Reflections on the interaction between law and psychiatry in the prediction of future dangerousness in dangerous criminals. *De Jure*: 332–51.

Stewart, L. A., K. Wardrop, G. Wilton, J. Thompson, D. Derkzen, and L. Motiuk. 2017. *Indigenous offenders: Major findings from the DFIA-R research studies*. CSC. https://www.csc-scc.gc.ca/research/r-395_i-en.shtml.

Truth and Reconciliation Commission (TRC). 2015. *Honouring the truth, reconciling for the future*. http://nctr.ca/reports.php.

Unnever, James, and Francis Cullen. 2009. Empathetic identification and punitiveness. *Theoretical Criminology* 13 (3): 283–312.

Waldram, James. 2009. "It's just you and Satan, hanging out at a pre-school:" Notes of evil and the rehabilitation of sexual offenders. *Anthropology and Humanism*, 34 (2): 219–34.

Weaver, Hilary, and Maria Yellow Horse Brave Heart. 1999. Examining two facets of American Indian identity: Exposure to other cultures and the influence of historical trauma. *Journal of Human Behaviour in the Social Environment* 2 (1–2): 19–33.

Weisman, Richard. 2009. Being and doing: The judicial use of remorse to construct character and community. *Social and Legal Studies* 18 (1): 47–69.

White-Crummey, Arthur. 2017. Marlene Bird confronts her attacker at Prince Albert dangerous offender hearing. *Saskatchewan StarPhoenix*, 13 Mar. https://thestarphoenix.com/news/local-news/marlene-bird-confronts-her-attacker-at-prince-albert-dangerous-offender-hearing.

Wilson, Robin, Andrew McWhinnie, Janice Picheca, Michelle Prinzo, and Franca Cortoni. 2007. Circles of support and accountability: Engaging community volunteers in the management of high-risk sexual offenders. *The Howard Journal* 46 (1): 1–15.

Zehr, Howard. 2015. *The little book of restorative justice: Revised and updated*. Delaware: Good Books.

Cases cited

Ewert *v.* Canada, 2018 SCC 30, [2018] 2 S.C.R. 165

R. *v.* Borde (Q.) (2003), 168 O.A.C. 317 (CA).

R. *v.* Boutilier, 2017 SCC 64, [2017] 2 S.C.R. 936.

R *v.* Gladue, [1999] 1 SCR 688.

R. *v.* Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433.

R. *v.* Latimer, [2001] 1 S.C.R. 3, 2001 SCC 1.

R. *v.* Kakekagamick (M.R.) (2006), 214 O.A.C. 127 (CA)

Legislation cited

Bill C-2, 39th Parliament, 2nd Session, 2008, Tackling Violent Crime Act. https://openparliament.ca/bills/39-2/C-2/.

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press

Bill C-41, 35th Parliament, 1st Session, 1995, An Act to amend the Criminal Code (sentencing) and other acts in consequence thereof. https://www.parl.ca/DocumentViewer/en/35-1/bill/C-41/royal-assent.
Criminal Code (R.S.C., 1985, c. C-46).

Linda Mussell
Political Studies, Queen's University, Kingston, Ontario
linda.mussell@queensu.ca

Michael Orsini
Feminist and Gender Studies | Political Studies, University of Ottawa, Ottawa, Ontario

https://doi.org/10.1017/cls.2021.12 Published online by Cambridge University Press