

Fetal Alcohol Spectrum Disorder and the Fear of Indigenous (dis)Order: New Medico-Legal
Alliances for Capturing and Managing Indigenous Life in Canada

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Abstract

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While accounting for less than 5 percent of the Canadian population, Indigenous peoples represent more than 30 percent of the federal prison population of Canada. In a prairie province like Manitoba the numbers are even more extreme, with over three-quarters of the prison population being Indigenous. This contemporary “Indian Problem” has been theorized in recent decades as an outcome of the colonial history of Canada. Indigenous Studies scholarship has critiqued the temporal political imaginary of the subsequent reconciliation discourse that locates colonial violence, and, thus, culpability and responsibility of the Canadian state, to an ‘event’ of history. Such national stories not only diminish the interrogation of ongoing structures of colonial violence but relegate any meaningful political processes of accountability and justice to the dustbin of history. This ‘legacy’ framework of historicizing colonial violence has created fecund conditions for (re)apprehending Indigenous bodies at the junctures of legal and medical reasoning, where questions of punishment, containment and rehabilitation for criminal actions become uneasily blurred with questions of healing and repair of damaged bodies and minds.

The uptake of ‘Fetal Alcohol Spectrum Disorder’ (FASD) in the Canadian justice system in recent decades operates precisely at this juncture of treating Indigenous peoples as uniquely medicalized, or disabled, criminals, and has created further capacities for deepening this ‘legacy’ framework for apprehending and containing Indigenous peoples as offenders, or even as *potential* offenders of a social and legal order. FASD is an umbrella term describing the range of

lifelong physical, mental, behavioral and learning disabilities that can occur in an individual who was exposed to alcohol while in utero. It is typically thought of as a neurocognitive disability that affects memory, executive reasoning, and the ability to learn from or think consequentially about one's actions. As such, it has become a broad institutional discourse for predicting criminal behaviors through a medicalized conception of risk of violence. FASD is typically raised as an ethical problem in the criminal justice system, provoking important questions as to whether we punish crimes (for which one is culpable) or disabilities (for which one is not). In addition, if FASD represents a permanent neurocognitive disability without any hope of cure, how should the rehabilitative and reintegrative tenets of the criminal code be imagined and implemented? These problems are compounded further by the regular speculation that Canada is in the midst of a hitherto unknown epidemic of this "invisible disorder" of FASD. Important as these ethical and political problems are, the dissertation argues that the specific institutional urgency surrounding the medicalization of criminal offenders with FASD has been enabled by diagnostic logics of deferral and certainty that pertains to the "Indian Problem." These logics allow FASD to relocate and bury questions of colonial responsibility within the Indigenous body itself which is tragically doomed to permanent brain damage and cognitive disorder and an incorrigible lifestyle of dysfunction and crime. The 'colonial legacy' predicates a foreclosure on Indigenous futurity.

This dissertation is based on 24 months of fieldwork in a non-profit community outreach program for justice-involved individuals with FASD in Winnipeg, Manitoba. As an FASD community outreach worker, my job was to assist individuals to navigate the complexities of criminal justice and social welfare systems that might pose challenges to those with cognitive disabilities associated with FASD. I learned very quickly, however, that actors as diverse as lawyers, probation officers, doctors, social workers, FASD researchers and even my community

outreach colleagues and supervisors, operated within a diagnostic imaginary that quite often *assumed without proof* the presence of an FASD diagnosis for our almost exclusively Indigenous clientele. The dissertation analyzes the everyday procedures of FASD knowledge formation and circulation beginning with a basic ethnographic question: how does one know that another has FASD? This line of questioning was situated within the broad institutional apparatus of the criminal justice system in Canada, which I examine thematically and temporally as four separate stages of encounter: 1) the initial crime and related discourses of accusation; 2) the trial setting; 3) the sentencing trial; and, finally, 4) the post-carceral release phase. This temporal framework emerged naturally out of my experience of ethnographic work as a community outreach worker and innumerable casual and professional encounters with social workers, slum landlords, and my many hours spent in courts, probation offices, and jail visitations. In addition, I had a four-month placement with an assessment team at an FASD diagnostic clinic and did extensive work in the archive of legal cases and decisions pertaining to Indigenous offenders and the unique problematic of FASD in the legal system. Breaking down the minute social and legal details that attend to determinations of FASD at these various stages unmask the ways in which FASD comes to explain Indigenous criminality as a congenital condition that is an expression of biological and cultural dysfunction, while strategically ignoring any examination of ongoing structures of colonial violence.

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Thank you, Creator, for the land, water, air and fire, and their corresponding directions. Thank you to my ceremony families for helping me to learn more about these gifts of the Creator, and to learn how to be a better person and how to give back to my community. In

particular, thank you Billy Dubery for asking me to be your friend, and for sharing your knowledge with me and so many others. You are an endless source of strength and knowledge for our community. Thank you to Shane for giving us the teachings of the old ones. Thank you, Erin and Jen, for showing us how to respect water, and for being humble in your own learning process. Thank you, Art, for your inspiring stories, for your care and humility, and for the humor that you bring into our lodges. Thank you, Rob, for being so meticulous and hardworking around the fireplace. Thank you, Mike, for welcoming me into your arbor.

The person that I owe the most to is my partner in life, Karrie Noelle, our Flying Feather Woman, *Noodin Miigwan Ikwe*. You have been such an enormous influence on me, it is hard to express in words. You were a guiding star in so much of my thinking in this dissertation, and your ethical and political instincts have always helped me in my journey of becoming a better scholar, community member, and, in general, a better man and father. Thank you for bringing into the world our Little Lime, our Springtime Sky, *Ziigwan Giizhigo*, our beautiful daughter, Louella. I am so honored to be walking alongside you in this wild journey of parenthood. And I would be remiss if I didn't acknowledge your wonderful cooking! I will always cherish the memories of those first dates when you lent me so much patience and tried to teach me how to cook too. You have been keeping me nourished ever since in so many more ways than one. I love you Little Potato.

Finally, to my sweet Louella. Thank you so much for your powerful presence, your fiery soul, and your thoughtful ways. The moment you were born I heard a whisper in my ear. And though I could not make out the meaning, I knew it was powerful and beautiful and that it was intricately connected with you and with something beyond. You've been teaching me since these first moments that it is ok to not be able to put these things into words. You truly teach me the

power of reverence, awe, thankfulness and love, and I hope I can always honor these teachings with you. This dissertation started before you were born, but it could not have been completed without you. The feelings and motivations that went into it are just as much for you as they are for all the other young generations out there. I work and pray for a world where we can hear all of their whispers someday. I love you Little Lime. Your ever adoring pep pep.

From the doorway in, to the doorway out. Thank you all! Aho!

Les

July 2021

For every child who was not seen for who they were.

For every child who will be - may we have the wisdom and courage to see you.

For my Louella, who shows me the power of miracle.

For Tina and Brian, whose voices guide me.

And for Irvine, who needs our prayers too.

Prelude: Dream Images of Winnipeg

*...it becomes crucial for us to dissolve
the difference between dreaming
and what it is to be held captive by an image.¹*

After a long day I was finally driving home, happily that I was going to make it before the sun went down. As I was turning off of Broadway, I noticed a young Native girl in a red hoodie standing in a very narrow alleyway, staring intently at me. As I made the turn, I lost her gaze and heard a bloodcurdling scream of a man. It had an eerie familiarity to it. The emotional sound registered in my mind as an image of Curtis getting stabbed in his stomach. I had rehearsed this image in my mind weeks before as I tried to piece together the convoluted story that he told me. *Who stabbed you? Why? Where?*

My body was electrified, and I began to sweat. I felt like vomiting. I slammed on the brakes and pulled over, simultaneously looking in the rearview mirror to find the woman, but she was gone. I tried to catch my breath. I looked around frantically. No woman. No signs of violence. People in suits walking by, crossing the street, on their way home after a long week and eager for the weekend. Their casual presence was unsettling. *Did they not hear what I heard?* I turned my car around and crossed Broadway and down the side street to get behind the building and alleyway where I initially saw the woman. No one was there. No signs of anything. The scream echoed distantly in my head, a perfect reproduction every time. No one was there. Then a young man rode by on his bike. He looked like Darryl, who I hadn't seen all week. He usually calls, so I was worried about him. I called, "Darryl!" But the young man did not turn around. *Was that Darryl?* I asked myself. *Did any of this really happen?*

¹ Lisa Stevenson, *Life Beside Itself: Imagining Care in the Canadian Arctic* (Oakland, California: University of California Press, 2014), 45.

Introduction

The seed of this project was born a decade ago while I was working at an Indigenous gang-intervention program in Winnipeg's inner city. In fact, it was born on my first day as I clumsily walked into the townhouse that had become the office and programming space for the program. Not knowing anyone, I tried to introduce myself to the first youth I saw. He was in a hurry and paid me no attention as he frantically searched for an electrical outlet to charge the court-ordered tracking device that was beeping at his ankles. He sighed with relief once he plugged it in, and then began pacing in a ten-foot radius that was enabled by the electrical cord, swearing up and down about how he couldn't go more than an hour without having to house himself to an outlet like this. He quickly calmed down and then seemed to remember me, the awkward presence who was probably still standing there with my hand out in a failed introduction. With charm, he introduced himself as Evan¹ and began telling me the story of how he got this anchor on his ankle. It was an exciting tail of a fast stolen car and the chaos of trying to outrun a group of police cruisers who eventually rammed him into submission. He spoke with pride even as he was clearly disappointed in himself for getting caught. "Next time" would be different, he said. He would not fail.

Evan was interrupted by a middle-aged woman who I came to know as Michelle, one of the house supervisors at the program. She very sharply told Evan not to be so dumb and barked some orders about how he needed to start getting his life in order, especially now that he had a baby. After yelling for a couple of minutes, she introduced herself to me and took me upstairs to debrief me about my new job, though it was more of a continuation of her yelling session which

¹ Names have been changed to ensure anonymity.

now became a venting session. She complained about Evan and “the rest of them” youth who all shared a similar romantic notion about gangs, drugs, and high-risk criminal lifestyles and how they all seemed dead set on getting themselves arrested or killed. One after one, she gave me a layout of the boys, warning me about their particular attitudes and demeanours. Most notably, her accounts of various criminal records blended seamlessly into psychological claims, and particularly how many, if not most, of these youth were certainly suffering some form of learning disability, if not brain disorder. Specifically, several of the boys were noted to have confirmed diagnoses of FAS (fetal alcohol syndrome), while she suspected that many others “probably had some kind of FAS.” Fetal Alcohol Syndrome is a diagnosis that emerged in North America in the early 1970s to describe what was then referred to as a typical set of birth defects, including a “characteristic” dysmorphic facial physiognomy, severe growth restriction, intellectual disabilities, and lifelong deficits in several “domains” of brain function. Today, there are a host of other diagnoses that account for alcohol-related neurodevelopmental disorders that do not typically involve facial or other physiological features of impairment, which are all encompassed by the term Fetal Alcohol Spectrum Disorder.² Today it is increasingly common to associate the characteristic or typical cognitive problems of FASD – such as struggles with self-regulation, memory, and consequential thinking – as naturally leading to expressions of criminal behavior.³ Much, if not most, of this research also foregrounds Indigenous peoples as the primary

² These include, Fetal Alcohol Effects (FAE), partial Fetal Alcohol Syndrome (pFAS), Alcohol-Related Neurodevelopmental Disorder (ARND), Alcohol Related Brain Damage (ARBD)

³ Natalie Novick Brown, Paul D. Connor, and Richard S. Adler, “Conduct-Disordered Adolescents With Fetal Alcohol Spectrum Disorder: Intervention in Secure Treatment Settings,” *Criminal Justice and Behavior* 39, no. 6 (June 1, 2012): 770–93; David Boulding, “A Lawyer’s Brief on Fetal Alcohol Spectrum Disorders” (Port Coquitlam), accessed December 12, 2019, http://www.davidboulding.com/uploads/2/4/1/4/24146766/a_lawyer%E2%80%99s_brief_on_fetal_alcohol_spectrum_disorders-_feb_12_2016.pdf; Nathan Hughes, “Disabled Inside: Neurodevelopmental Impairments among Young People in Custody,” *Prison Service Journal*, no. 226 (July 2016): 14–21; A.P. Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects

demographic element that is “at risk” of such criminal expression, and it is often referred to as a “link” for explaining the alleged “epidemic” of gang violence of Aboriginal youth in Canada.⁴

I never was able to confirm any of Michelle’s declarations of “confirmed” or otherwise, but it was a curious and slippery feature that I would come to learn was at the heart of most public and private dialogues about FASD. Michelle’s way of parsing the youth as either diagnostically “confirmed” or “suspected” reveals a common and productive gap in the field of FASD research and advocacy, where scientific and legal regimes of evidence are susceptible to social dynamics of presumption and prejudice, terrains where associations between FASD and Crime and Indigeneity are commonly forged. Michelle was inevitably let go from the program under circumstances that are beyond my knowledge, though I can’t help but assume that it had to do with the fact that not a single one of the youth there liked her and that her attitude of always focusing on, and complaining about, the weaknesses of the youth was not a good match for the “strengths-based” design of the program.⁵ While I can say that her negative attitude was an

(FAE),” Final Report to the Centers for Disease Control and Prevention (Seattle: University of Washington, Fetal Alcohol and Drug Unit, Tech., 1996).

⁴ Mark Totten, “Investigating the Linkages between FASD, Gangs, Sexual Exploitation and Women Abuse in the Canadian Aboriginal Population: A Preliminary Study” (Native Women’s Association of Canada, 2009); The Honourable Judge C. Cunliffe Barnett, “A Judicial Perspective on FAS: Memories of the Making of Nanook of the North,” in *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities*, ed. Ann Streissguth and Jonathan Kanter (Seattle: University of Washington Press, 1997), 134–45; Erika Y. Rojas and Heather M. Gretton, “Background, Offence Characteristics, and Criminal Outcomes of Aboriginal Youth Who Sexually Offend: A Closer Look at Aboriginal Youth Intervention Needs,” *Sexual Abuse: A Journal of Research and Treatment* 19, no. 3 (September 2007): 257–83.

⁵ This gang intervention program was funded by the Youth Gang Prevention Fund of Canada, which sought to “invest in communities where gangs are an existing or emerging threat” and to “target” those youth who were in gangs or where “at greatest risk of joining gangs.” This research and funding model is presented as an “investment in communities,” by way of identifying risk and protective factors associated to youth violence, and building capacities to provide alternative healthy community models that could help youth develop “pro-social competencies.” It is geared around central ideas of supporting and developing the knowledge and skills of the youth and their community, often waxed as “resiliency.” See “Final Report: Circle of Courage. Winnipeg Youth Gang Prevention Fund Projects,” Prepared For: Ka Ni Kanichihk Inc. (Winnipeg: Proactive Information Services Inc., June 2011). The gang intervention model of this program was based upon the work of Lakota teachings in which Indigenous youth are given space to belong, be independent, master skills, and learn how to contribute to their communities with humility and generosity. For more on this model, see Larry K Brendtro, Steve Vanbockern, and Martin Brokenleg, *Reclaiming Youth at Risk: Our Hope for the Future* (Bloomington, Indiana: National Educational Service, 1990).

anomaly to the program, which to my mind had very good leadership and staff and was ethically grounded and genuinely motivated to helping these youth succeed and thrive in conditions of poverty and routinized violence, her psychological assumptions, and the ways they seemed to make sense of the particular behaviors of these boys, were far more common just beyond the program's walls. Any time I mentioned to someone that I worked with Indigenous youth in a gang intervention program, it was only a sentence or two from one making assumptions about the criminal behaviors of these boys as a reflection of their mental and/or cerebral constitutions. More often than not, people would simply insert the uninvited topic of FASD into our conversation as an implicit interloper, a startling and pervasive reminder of the general public's understanding of Aboriginal youth and the particular "problem" of gangs and violence. For the past ten years, my response to such assumptions or questions of FASD has been steadfastly consistent: *how do you know that these youth have FASD?* In many ways, this dissertation is an attempt to answer this very basic question.

In this dissertation I argue that FASD marks a *medico-legal alliance* of colonial and racial regimes that are active in the management of Indigenous life in the settler colony of Canada. I borrow this conceptual terrain of the medico-legal alliance from Sherene Razack, who has deployed it to understand how Indigenous deaths in police custody are regularly supported by medical regimes of knowledge that explain Indigenous death as a result of a frail and pathological "race for whom death is always imminent," while simultaneously ignoring and thus abetting the brutally violent force of police officers in the ritualistic expulsion of Indigenous bodies from settler space.⁶ Similarly, this alliance can be expressed as a generalized indifference in which care for or towards Indigenous bodies is seen as a waste on life forms that "no one can

⁶ Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015), 139.

really harm or repair” anyways.⁷ At bottom, this is more than simply a set of attitudes or perceptions of police or other figures, however, but a complex ritual in which Indigeneity is regularly encountered and (compulsively) repressed by a settler society that cannot integrate into its social and political constitution the basic fact of a “before” that Indigeneity represents and which is constantly interrupting “what is received, what is ordered, what is supposed to be settled.”⁸ The constant production of innate difference of Indigeneity as dysfunctional and disabled in thought, belief, and constitutional form is not only useful, but necessary, for settler society. Drawing upon the literary critique of Renée Bergland, who observes how Indians are so often depicted as ghosts in American national literature, which is a technique of removal (from lands to the American imagination), Razack defines the inquest as an event and a place where Indigeneity is staged as dysfunction and where the colonial condition is transformed into a medical one.⁹ The cunning trick is that it legitimizes the brute force of colonial violence by disavowing it and even making it a form of “help” that covers for the ways that settler publics encounter and demarcate Indigenous peoples as less than human. Just as Razack examines inquests as sites of producing such indifference, I look at how FASD permits a similarly insidious set of possibilities for the increased apprehension of Indigenous life through medicalized diagnostic procedures that are made available to ongoing criminological processes for literally apprehending Indigenous peoples in Canada’s jails or circumscribing and otherwise containing Indigenous life through a variety of ancillary social systems, like “community programs” that can be based in good intentions while also serving as surveillance technologies of Indigenous youth. As this alliance moves and translates between diverse institutional settings it

⁷ Razack, 113.

⁸ Audra Simpson, “Settlement’s Secret,” *Cultural Anthropology* 26, no. 2 (May 2011): 205–17.

⁹ Razack, *Dying from Improvement*, 135.

also inevitably becomes integrated into broader social acts of meaning-making. I thus also look at how the tactics of this medico-legal alliance are made available to the general public who are invited to become experts in diagnosing the conditions of Indigenous dysfunction and disability through the cerebral imaginary of a settler nation terrified by indigenous crime and violence. Gaps like that between the “confirmed” and the “suspected” diagnosis mark fecund intersections of social and institutional knowledges that enable the authority of medical and scientific diagnosis to resonate within social conditions of suspicion and blame as well as demands for certainty. Youth like Evan challenge everyday reason and moral sensibilities precisely because of their affront to legal and social norms. Their status as a repetitive criminal offender and perpetual “suspect” becomes easily interchangeable with a suspected diagnosis of FASD for individuals like Michelle and so many others who find the conditions of these youth’s lives and the shape of their desires utterly unfathomable.

This is a study of the combined logics and efforts of medicalizing and criminalizing Indigenous life. My focus is specifically how FASD enables new configurations of knowledge regimes, sensations, and fantasies of the bio-cultural constitution of Indigeneity as criminally dysfunctional and disabled. This, I argue, is an accumulation of diagnostic and interpretive infrastructures that are necessary for processing Indigenous peoples through the criminal justice system. While in many ways this dissertation attempts to systematically break down the architecture of sense-making required in this system of rendering Indigenous life, it is equally important to stay focused on the logistical demands at the heart of this processing regime. My fieldwork site (and home), of Winnipeg, Manitoba is the urban space with the highest population of Indigenous peoples in all of Canada.¹⁰ This makes it an important place for understanding

¹⁰ The 2016 census suggests that there were 92,810 Indigenous peoples (First Nation, Inuit, or Metis) in Winnipeg, which accounts for about 12.2 % of the population. Edmonton had the second highest Indigenous population, with

Canada's ongoing attempts to deal with the "Indian problem." Articulated in various ways throughout settler history, the construal of Indigeneity as a "Problem" has always informed the project of elimination by manufacturing a reason to be tended to. As a problem, they must be tended to. And this has meant at various times, destroying their political institutions, their language, and their cultures. Tending to this problem has made "assimilation" seem necessary as an antidote to the "troublesome behaviors" and backward ways of Indigenous peoples.¹¹

In the latter half of the 20th century the Indian problem was one marked largely by population concerns in urban centers as Indigenous peoples in Canada began leaving reserves and flocking to the urban centres in unprecedented volumes. This radical population shift created a logistical *and* moral crisis for federal departments like the Department of Indian Affairs in the 1960s, who found themselves in jurisdictional quagmires with provincial governments on who was and should be responsible for Indian peoples' welfare, housing, education, and healthcare.¹² The challenge, and fear, that this population crisis represented to governments and the status quo of logistical and jurisdictional management of Indigenous life is still recalled today in official parliamentary debates and studies dedicated to the specific problem of "urban Aboriginal youth," who are thought to present a unique challenge to the nation as the fastest growing, least educated, and most impoverished population in all of Canada.¹³ Urban Aboriginal youth are seen today as a

72, 205 people, and Vancouver the third highest, with 61, 460 peoples. See Thomas Anderson, "Results from the 2016 Census: Housing, Income and Residential Dissimilarity among Indigenous People in Canadian Cities" (Ottawa: Statistics Canada, December 10, 2019), 3. Within the province as a whole, Indigenous peoples account for over 18 % of the population. Statistics Canada. 2017. *Focus on Geography Series, 2016 Census*. Statistics Canada Catalogue no. 98-404-X2016001. Ottawa, Ontario. Data products, 2016 Census. <https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-PR-Eng.cfm?TOPIC=9&LANG=Eng&GK=PR&GC=46>

¹¹ Canada, Royal Commission on Aboriginal Peoples, *Final Report of the Royal Commission on Aboriginal Peoples (Online Copy)*, vol. 1, Looking Forward Looking Back (Ottawa: Canada Communication Group, 1996), 12, <http://data2.archives.ca/e/e448/e011188230-01.pdf>.

¹² Edgar J. Dosman, *Indians: The Urban Dilemma* (Toronto: McClelland and Stewart, 1972), 26. Today, more than half of all Indigenous peoples in Canada live in urban centers. See Anderson, "Results from the 2016 Census."

¹³ For example, in its 1960 submission to the Joint Committee of the Senate and House of Commons on Indian Affairs, the government of Saskatchewan warned its legislative members that "the day is not distant when the

source of social turmoil, as a demographic that is trapped between cultural milieus of their traditional lifestyle and the mainstream Canadian culture, whose identity issues are thought to make ripe conditions for gang cultures and economies.¹⁴ Aboriginal youth gangs are seen as one of fastest growing organized crime demographics in Canada today, but are characterized as having “low-level criminal capabilities” with a high “propensity for violence” that makes them a particularly concerning element for law enforcement.¹⁵

Given these trends and Winnipeg’s particular Indigenous make-up, the city has been a ground zero in recent decades of a new form of coalition between academic researchers and community organizations, facilitated by federal research dollars, where community programs for “at risk” Indigenous youth can be created and studied for their efficacy.¹⁶ Simply put, Winnipeg

burgeoning Indian population, now largely confined to reservations, will explode into white communities and present a serious problem indeed.” Such warnings continue to be cited by government committees, and thus inform the urgency of the “urban Aboriginal youth” problem. See “Urban Aboriginal Youth: An Action Plan for Change. Final Report. Standing Senate Committee on Aboriginal Peoples,” (Committee Business – Senate – Recent Reports) 37th Parliament – 2nd Session, October 2003, 3,

https://sencanada.ca/content/sen/committee/372/abor/rep/repfinoct03-e.htm#_ftn7.

¹⁴ Yale Deron Belanger et al., *Urban Aboriginal Youth in Winnipeg: Culture and Identity Formation in Cities* (Winnipeg, Manitoba: Canadian Heritage, 2003); Kathleen Buddle, “Urban Aboriginal Gangs and Street Sociality in the Canadian West: Places, Performances, and Predicaments of Transition,” in *Aboriginal Peoples in Canadian Cities: Transformations and Continuities*, ed. Heather Howard-Bobiwash and Craig Proulx (Waterloo: Wilfrid Laurier University Press, 2011), 171–202.

¹⁵ Aboriginal gangs are also differentiated from other “organized” criminal enterprises like the Hells Angels biker gang, and are thought of as an exploited, but extremely volatile, labor force for these gangs. Canadian Security Intelligence Service, “2004 Annual Report on Organized Crime in Canada” (Ottawa: Canadian Security Intelligence Service, Government of Canada, 2004), 20–21,

http://www.cisc.gc.ca/annual_reports/annual_report_2004/aboriginal_2004_e.html.

¹⁶ Larry Bremner, “Building the Evidence — Evaluation Summaries. Winnipeg Youth Gang Prevention Fund” (Ottawa: National Crime Prevention Centre, Public Safety Canada, 2012); Donna Smith-Moncrieffe, “Youth Gang Prevention Fund Projects : What Did We Learn About What Works in Preventing Gang Involvement?” (Ottawa: National Crime Prevention Centre, Public Safety Canada, March 4, 2014),

<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/yth-gng-prvntn-fnd/index-eng.aspx>; Public Safety Canada, “Final Report 2010-2011 Evaluation of the Youth Gang Prevention Fund Program,” May 14, 2015,

<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/vltn-yth-gng-prvntn-2010-11/index-eng.aspx>. Indeed, my experience at the gang intervention program was made possible by the national Youth Gang Prevention Fund, and one of my stated purposes there was as a “gang researcher.” For an example of the kinds of research done on similar gang intervention programs in the YGPF, see Canada. For an account of some of my own research at this time, see Les Sabiston, “Native Youth and the City: Storytelling and the Space(s) of Indigenous Identity in Winnipeg” (MA Thesis, Winnipeg, University of Manitoba, 2013), <http://mspace.lib.umanitoba.ca/jspui/handle/1993/22257>. The conceptual focus of “culture” and “identity” in this study are less representative of my current views on or approaches to urban Indigenous conditions of life – for instance, I am far more weary of the usage of “gangs” today and the mobilizations it makes possible in government, academic, and community organizational resource

is a place where the “Indian problem” of Indigenous presence cannot be avoided and is more often than not translated in hysterical terms of an “epidemic” of crime and social disorder.¹⁷

The Aboriginal youth “gang problem” of cities like Winnipeg is matched, if not muddled, by a related problem of the gross incarceration rates of Indigenous peoples in Canada.

Accounting for less than five percent of the Canadian population, Indigenous inmates account for over thirty percent of the federal prison population. The provincial jail population of Manitoba is even more extreme, with over three quarters of inmates being Indigenous. This equates to an incarceration rate of 1377.6/100,000 for Indigenous peoples, compared to the non-Indigenous rate of 114/100,000.¹⁸ This gross “problem” is often represented in precisely such statistical terms and concepts as the “overrepresentation” of Indigenous peoples in this system, and has been well documented since at least 1967 by the Canadian Corrections Association.¹⁹ In 1989, the Canadian Bar Association declared that prisons had become for young Native people a “contemporary equivalent of what the Indian Residential Schools represented for their parents.”²⁰

In other words, where Residential Schools sought to regulate Indigenous peoples by abducting

allocation. Nevertheless, I see this former research as a documentation of how my own intellectual development was shaped by a complex of government funded academic research and community coalitions.

¹⁷ Mark Totten, “Aboriginal Youth and Violent Gang Involvement in Canada: Quality Prevention Strategies,” *IPC Review* 3 (March 2009): 135–56.

¹⁸ Akwasi Owusu-Bempah et al., “Years of Life Lost to Incarceration: Inequities between Aboriginal and Non-Aboriginal Canadians,” *BMC Public Health* 14 (2014). The numbers are even more drastic for Indigenous women, who account for 42% of the federal inmate population and whose population has increased at a rate of 60.7% over the past ten years even as overall crime rates have decreased by 36.3%. See Public Safety Canada, “Corrections and Conditional Release Statistical Overview 2018” (Ottawa, 2019), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ccrso-2018/ccrso-2018-en.pdf>.

¹⁹ Royal Commission on Aboriginal Peoples Canada, René Dussault, and Georges Erasmus, “Bridging the Cultural Divide : A Report on Aboriginal Peoples and Criminal Justice in Canada” (Ottawa: Royal Commission on Aboriginal Peoples, 1996), 28, <http://trove.nla.gov.au/version/45900434>. See also the historic *Aboriginal Justice Inquiry* for a systematic documentation of how Indigenous peoples were overrepresented in the criminal justice system, and particularly within Manitoba. C.A. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*. (Winnipeg, MB: Public Inquiry into the Administration of Justice and Aboriginal People, 1991).

²⁰ Michael Jackson, “Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release,” *U.B.C. Law Review* 23, no. 2 (1989): 215. For an account of how Residential Schools enacted a specific arm of the broader displacement and assimilation strategy of Canada’s relationship to Indigenous peoples, see chapter 6 of Canada, Royal Commission on Aboriginal Peoples, *Final Report*.

their children and placing them in re-education camps that were intended to eliminate their Indianness, prisons have refigured this project to one of managing and housing Indigenous bodies through infrastructures of crime and public safety.

Ironically, this discourse of Indigenous crime and incarceration is often spoken of as a direct, if unfortunate, outcome of those Residential Schools days. For, where the “troublesome” aspects of Indians were once grounded in theological understandings of savage souls that needed saving, the governance paradigm today is to view subsequent generations of Indigenous peoples as having been made psychologically “sick” by the unimaginable horrors that happened in these places of reform and education.²¹ This conceptual transition from salvaging souls to treating sick Indians has been thoroughly critiqued for the ways it is part of an active propaganda machine of Canada to “kill the past” as a means of protecting the “civilized” machinery that drove this historical and contemporary violence.²² Glen Coulthard has noted that the so-called era of *reconciliation* that we are currently living through is a conceptual revisionist trick to apply transitional justice mechanisms to non-transitional circumstances.²³ In other words, Canada will only entertain the idea of overcoming the *legacy* of past abuse while systematically disavowing the abusive colonial structure itself. Worst yet, this discursive era creates conditions in which the political struggles of Indigenous peoples are made to speak, or are only intelligible, through the language of trauma and victimhood. As Athabaskan scholar, Dian Million, so eloquently argues, the rise of a discourse of trauma in the 1980s and 1990s and the affective discursive space that it afforded to conversations and articulations of the damages wrought by colonialism were by no

²¹ John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999), 302.

²² Milloy, 302.

²³ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University Of Minnesota Press, 2014), 108.

means obvious, but they were available and gave weight to a conversation that could be held as a public truth by the broader Canadian public.²⁴ In this new discursive terrain the collective political problems of justice for Indigenous peoples became articulated and authorized through individualized frameworks of self-examination, psychological evaluation, and legal terminologies of victimology, a discursive space that empowered just as it made Indigenous peoples a subject of trauma.²⁵

It is this historical-genealogical analysis of the subtle and cunning shift in focus from issues of Indigenous justice to Indigenous health²⁶ in which I recognize the eerily similar timeline of the rise of FASD in Canada just as conversations of Residential Schools were building speed.²⁷ As the RCAP put it in volume 3 of its final report in 1996, under the section of “Health and Healing,” “FAS causes particularly acute pain among Aboriginal peoples — the pain of accepting responsibility for having caused harm. This is the dilemma facing a woman whose drinking has damaged her children and the community that allowed it to happen.”²⁸ In this section, FAS is part of a long chain of associations in which colonial conditions of trauma have led to alcoholism and other addictions in Indigenous communities. These were the early days of FAS research, and there was no way of knowing how much FAS or FAE might have been affecting Aboriginal communities then – for reasons of biased research and discrepancies in the science at the time that disputed the sole causative agent of alcohol in birth defects – but the

²⁴ Dian Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (Tucson: The University of Arizona Press, 2013), 93.

²⁵ Million, 94.

²⁶ Million, 78.

²⁷ The historic First National Conference on Residential Schools was held in Vancouver in June 1991. The pathbreaking standing committee report on FASD was presented to the House of Commons in June 1992. See House of Commons, “Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, Foetal Alcohol Syndrome: A Preventable Tragedy” (Ottawa, June 1992).

²⁸ Canada, Royal Commission on Aboriginal Peoples, *Final Report of the Royal Commission on Aboriginal Peoples (Online Copy)*, vol. 3, Gathering Strength (Ottawa: Canada Communication Group, 1996), 122, <http://data2.archives.ca/e/e448/e011188230-03.pdf>.

RCAP cited FAS as a *possible* issue for Aboriginal communities because of high rates of alcoholism that were tied to the traumas of Residential Schools, and thus warranted that FAS was a *likely* problem in Aboriginal communities.²⁹ Despite the lack of knowledge, the RCAP insisted that this health issue was central to Aboriginal self-determination. Indeed, the RCAP criticized the Canadian government because they “rejected the recommendations of a House of Commons standing committee for “aggressive public information campaigns” among Aboriginal people and “more effective and appropriate community-based ways of dealing with learning disabilities, of which FAS is the major portion of demand” in Aboriginal communities.”³⁰ Where the minister who rejected this did so on grounds that it risked stigmatizing Aboriginal communities, the RCAP saw this as an opportunity for Aboriginal communities to “set their own priorities.”

Fast forward nearly two decades later, and research on FASD had allegedly advanced to such a stage that the *Truth and Reconciliation Commission of Canada* could speak of the disorder as an explicit factor of inequality for Indigenous peoples, calling on all levels of government “to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder (FASD), and to develop, in collaboration with Aboriginal people, FASD preventive programs that can be delivered in a culturally appropriate manner.”³¹ Located in volume 5 of the TRC, titled “Canada’s Residential Schools: The Legacy,” the analysis of FASD was explicitly referred to within the grammar of historical trauma and one more inherited pathology from colonial history. As the Commission described the intergenerational character of this trauma:

It should not be surprising that those who were sexually abused in the schools as children sometimes perpetuated sexual violence later in their lives. It should not be surprising that

²⁹ Canada, Royal Commission on Aboriginal Peoples, 3, Gathering Strength: 122.

³⁰ Canada, Royal Commission on Aboriginal Peoples, 3, Gathering Strength: 122.

³¹ “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015), 175.

those who were taken from their parents and exposed to harsh and regimented discipline in the schools and disparagement of their culture and families often became poor and sometimes violent parents later in their lives. It should not be surprising that those who were exposed to poor education and to spiritual and cultural abuse in the schools later turned to alcohol and drugs as a means to cope and try to forget. The consequences for many students and their families were tragic.³²

Crucially, this legacy narrative of FASD in the TRC went beyond the earlier RCAP claims of the disorder as only being a problem of health. Now the TRC was explicitly linking FASD to issues of overincarceration of Indigenous peoples. By reductively citing a complex argument made by the Metis anthropologist Caroline Tait, the TRC concluded that there are “links among the intergenerational trauma of residential schools, alcohol addictions, and FASD.”³³ And borrowing a claim from another study, which was much more problematic in its conceptual and methodological design, the TRC also concluded that “offenders with FASD had much higher rates of criminal involvement than those without FASD.”³⁴ Based on these divergent claims, the

³² “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” 171–72.

³³ TRC Summary, 174. While Tait has made this connection between FASD and intergenerational trauma of Residential Schools, Tait’s analysis of FASD as a health issue has always been grounded in collective politics of Indigenous reproductive health, and her analysis has always been keenly aware of how the deployment of FASD is generally used to articulate narratives of “white man’s burden” and repackage the “Indian problem” within biological imaginaries of damaged and threatening populations of Indigenous peoples. See Caroline L. Tait, *Fetal Alcohol Syndrome among Aboriginal People in Canada: Review and Analysis of the Intergenerational Links to Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2003); Caroline L. Tait, “Aboriginal Identity and the Construction of Fetal Alcohol Syndrome,” in *The Mental Health of Indigenous Peoples: Proceedings of the Advanced Study Institute*, ed. Laurence J. Kirmayer, Mary Ellen Macdonald, and Gregory M. Brass (Montréal, Québec: Institute of Community and Family Psychiatry, 2000), 95–111; Caroline L. Tait, “Simmering Outrage During an ‘Epidemic’ of Fetal Alcohol Syndrome,” *Canadian Woman Studies* 26, no. 3/4 (Winter/Spring 2008): 69–76.

³⁴ “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” 174. The problematic study in reference here is by MacPherson et al. (2011), which is discussed at length in chapter 5. For now, it is sufficient to note that this study was not a prevalence study, but a study to create a screening tool that could be used for determining prevalence of FASD in prison populations. The authors explicitly warned against extrapolating this finding to other prison contexts or making general claims about the relation of FASD and crime based on its findings. One reason for this was that all of the inmates found to have FASD were also Indigenous, which would lead to some troubling and unfounded conclusions, particularly because this prison is also overrepresented by Indigenous inmates. Furthermore, so say that this study concluded that FASD leads to higher criminal involvement is spurious at best as there is no consensus on what kind of prevalence rate there is for the general population of Canada, namely because there are to date no “Canada FASD prevalence rate” studies. It is thus impossible to make such claims because an adequate comparison of populations cannot be made. Finally, this study’s claim of “higher criminal involvement” is based on *predictive* calculations of a prisoner’s

TRC shifted the parameters of FASD dramatically, making it less of a citation of Indigenous inequities in health and more of a compounding factor of Indigenous inequality in the criminal justice system. It's Calls to Action on this topic make this reifying transition from an issue of health to an issue of crime and incarceration even more troubling. Namely, the TRCs proposed solution for addressing the issue of FASD involved a call on government to make it more efficient to diagnose FASD in the courts, to grant more powers for judges to take FASD into consideration and bypass mandatory minimum sentences, and an increase in investment in community, correctional, and parole resources to help individuals with FASD to "live in the community."³⁵ As Coulthard reminds us, reconciliation today is a system of implementing transitional justice mechanisms to nontransitional circumstances. FASD is simply presented here as if it is a phenomenon of Indigenous life and central to the rectification of relations with Indigenous peoples. It makes it seem as though FASD is the reason for the overincarceration of Indigenous peoples because they just commit more crimes because they are disabled. This dissertation argues that the discourse of FASD is captured by colonial logics of elimination and containment of the Indigenous problem, and such reformist calls for action only thicken the abilities of this violent apparatus to capture Indians.

Similarly, in its Call to Action #34 where it addresses FASD, Indigeneity, and the criminal justice system, the TRC also called on government to to create "more appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community

likelihood of recidivism, not on actual data of their offenses! These calculations were made by using the actuarial tools used by the prison itself, which have been widely criticized by critical criminologists for the ways they become inherently biased against conditions of racism and Indigeneity Bernard E. Harcourt, "Risk as a Proxy for Race: The Dangers of Risk Assessment Commentaries," *Federal Sentencing Reporter* 27 (2015): 237–43.. Such tools have also been recently challenged by a Supreme Court case for being inherently discriminatory to Indigenous offenders *Ewert v. Canada*, No. 37233 (Supreme Court of Canada June 13, 2018)..

³⁵ TRC, 175.

safety.”³⁶ This demand strikes one as odd precisely because one would expect there to already be robust studies and models to show how such measures of implementing FASD reforms in the criminal justice system were leading to better outcomes for offenders and prisoners with FASD. In such cases where there is a call for the proof of effectiveness of such FASD reforms even as reforms are being made based on the assumption of effectiveness, we see a commonly repeated slip in logic in which FASD is regularly attached to the Indigenous body as a natural medico-legal organ - it simply makes sense. In the world of FASD advocacy and reform one often finds chains of confluences of problematic research findings that link FASD and Indigeneity and crime, which are often held together by deployments of concepts like “historical trauma” that make it seem obvious that Indigenous peoples would have FASD. Such rhetoric is increasingly at the core of confluences made about Indigenous offenders, who are thought of as obviously having FASD, which makes their crime seem obvious. As a lawyer in Calgary put it while defending two Cree brothers who had been convicted of abduction and rape of a young woman, “they didn’t stand a chance” *because* they had FASD.³⁷ The progressive discourse of reconciliation enables us to focus on how Indigenous peoples suffered colonial violence as a means of condemning them as irredeemable offenders.

Below, or above, this intellectual apparatus of associations, however, it is more common that this chain of associations is made via subtle sensual and impressionistic processes in which one *feels* or *senses* that an Indigenous person has FASD. One’s use of language, the way one moves one’s body, or the troubles a child seems to be having in school compound with an

³⁶ “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” 175.

³⁷ Kevin Martin, “‘They Didn’t Stand a Chance’: Brothers Who Raped Teen Suffered from Fetal Alcohol Syndrome, Says Lawyer,” *Calgary Herald*, October 5, 2017, <https://calgaryherald.com/news/crime/they-didnt-stand-a-chance-brothers-who-raped-teen-suffered-from-fetal-alcohol-syndrome-says-lawyer>.

already systemic set of circumstances in which such vigilance is uniquely applied to the Indigenous body by networks of social workers, doctors, teachers, and probation officers. This terrain of common sense is equally related to the ways that FASD is today housed within a discourse of reconciliation and is imagined as a means of rethinking “how justice is done in Canada” by “demonstrat[ing] that person-centred and proactive supports can help achieve better justice outcomes for Indigenous individuals in the justice system with FASD.”³⁸ I don’t completely disagree with this statement; integrating knowledge of FASD into the justice system *is* a new way of doing justice in Canada. But it is the slip here that catches my attention, where “person-centred and pro-active supports” are imagined as uniquely beneficial to incarcerated Indigenous peoples, and particularly those who have FASD. It does nothing to help us understand why Indigenous peoples are so grossly overrepresented in the justice system except to imply that it is because they are brain damaged, a claim that I fundamentally reject.³⁹ Neglecting such analyses only ensures that FASD will continue to show how injustice is done in Canada by lending it newly packaged versions of old tropes about Indigenous dysfunction that permit new modes of surveillance, apprehension, and containment. Ultimately, this dissertation argues that FASD is a hegemonic force for apprehending Indigenous life, particularly in the criminal justice system.

³⁸ Michelle Stewart, quoted in Krista Baliko, “U of R Project Responds to TRC Call to Action to Address Needs of Offenders with FASD | Communications and Marketing, University of Regina,” University of Regina, September 6, 2019, <https://www.uregina.ca/external/communications/feature-stories/current/2019/09-06.html>. See also Michelle Stewart and K Glowatski, “Truth and Reconciliation Call to Action #34: A Framework for Action” (Canada FASD Research Network, 2018).

³⁹ Even if one has a “confirmed” diagnosis of FASD, I still do not believe this is the *reason* they are in jail. There is no causal relationship between FASD and crime.

Chapter outline

The chapters that follow are an attempt to enliven this account of how FASD has become a hegemonic discourse that enables new modalities of apprehending Indigenous life in the criminal justice and ancillary systems of social welfare and community programming that are at an arm's length from the justice system. This is based off of nearly eight years of ethnographic work, beginning with my work at the gang intervention program in 2011, but most of which derives from two years of intensive fieldwork in the years 2016-2018. During this time, I worked as a community outreach/support worker in an FASD program called *Fresh Start* that was one of several other programs offered at a not-for-profit restorative justice organization.⁴⁰ My job was to work with individuals, whom we called “participants,” to provide community outreach services with an “FASD-centred” approach.⁴¹ For the most part, I helped participants to navigate the intense demands of daily life at the intersection of multiple bureaucracies and government systems and programming. This included helping them get to probation officer meetings, helping them to find housing while living on an extremely limited welfare allowance (which also included daily interpersonal relations with slumlords and welfare workers), visiting their children who were in the care of Child and Family Services (CFS), helping them stay on top of meetings with lawyers and appointments with the courts, finding creative ways for them to implement their court orders, such as seeking addictions treatment, going grocery shopping (again, with an unlivable wage), or occasionally visiting them in jail. All of my “participants” were Indigenous, despite the fact that our program was not explicitly made to cater to Indigenous peoples. And our program was not alone. My position as an outreach worker enabled me to meet many other social workers and executive directors of other similar programs, as well as a host of probation officers,

⁴⁰ Fresh start is a pseudonym, but one that captures the sensibility of this program.

⁴¹ At Fresh Start we called all of the individuals we served “participants” rather than “clients” to impart a slightly different lens on a rather rigid structural relationship that was understood to be alienating.

researchers, advocates who worked in this field, most of whom related to FASD and FASD programming as an Indigenous issue in spirit if not in name for the simple reason that most, if not all, of their clients were Indigenous.⁴² This dissertation is the outcome of some of my efforts to try and understand this racialized and psychologized phenomenon of exception, and how it was always tied to a logic of law and order. As such, even though my academic work and beyond is steeped in Indigenous worlds, my goal has never been to write an ethnography *about* Indigenous peoples but to study the hegemony of systems by which we become known.

For the most part, our program and the participants we served primarily received funding from two provincial disability social service programs that were funded by a mix of dollars from the ministries of Justice and Families, a significant instance of how governance of FASD is regulated by a mix of models that combine public safety with domestic models of care. Certain participants received funding through the provincial program that was more explicitly run by the Ministry of Families, and presented as a community disability program, as long as they had an IQ that was under 70. Those who were not eligible for this programming because their IQ was higher were funneled through a program that was under the auspice of the ministry of Justice. Its mandate was to provide services to people with “a mental disorder or disability who pose a high risk to themselves or others,” helping them to “live successfully in the community, while striving to ensure public and personal safety.” These two provincial programs basically contracted out individuals with FASD on their caseloads to *Fresh Start* and other similar FASD programs to do “community programming” or conduct daily “support and resource development” with these participants in order to manage the “risk” these individuals posed to society based on their cognitive disability.

⁴² There was one Indigenous-specific FASD program in Winnipeg during my research.

Over the course of two years as a “community outreach worker,” I came to be very familiar with the many aspects of the criminal justice system and how FASD was operationalized by it through these overlapping concerns of implementing care and managing law and order. To explore this complex system, I have organized the following chapters according to a linear narrative that is meant to carry the reader through the typical machinations of an encounter with the criminal justice system, beginning with the occurrence of a crime and arrest, and moving through the trial, sentencing, and post-carceral phases. Along the way I unpack the various means by which Indigeneity and FASD are uniquely entangled at these different stages of the criminal justice process. To further anchor this linear narrative, I follow the events of a particular case that occurred in Winnipeg in 2017, which involved the killing of a Winnipeg Transit operator by a young Cree man in his early twenties named Brian Kyle Thomas. This case occurred in the middle of my fieldwork in Winnipeg and gripped the hearts and minds of the public for several years. It is sensational, but it is not exceptional. And some of the dramatic qualities of this case help to elucidate complex socio-legal and political conditions in which Indigenous peoples are perceived and processed by a society that is fundamentally anti-Indigenous. I came to see this case as an exemplary site in which Indigenous peoples are central to the construction and rehearsal of discourses of law and social order. It is by focusing on such cases and how they produce and sustain public sentiment that we see how FASD permits the grand illusionist trick of disavowing the violent conditions imposed on Indigenous life largely through an amplification of perceived threat that Indigenous peoples present to Canadians. FASD accentuates this even further as it lends a certain natural or logical equation to their unpredictable and violent dysfunction. In addition to providing us with a sustained look into how public sentiment is constructed around FASD and social processes of defining the meaning of

law and order, the case also provides an organizing element in which to dig deeper into the various laws and legal procedures that are used to process Indigenous peoples through the courts as well as a sustained look into existing and emergent policies, funding networks, and research designs in which the Indigenous offender is increasingly known as disabled by FASD.

Chapter one begins with the immediate aftermath of the crime in which Thomas was accused by public opinion. Particularly notable in this chapter is how Thomas was immediately identified as Indigenous and with the neurodevelopmental disorder of FASD, and how these factors came to explain his violent actions and account for the meaning of his “senseless crime.” The chapter walks through media reports to examine how these identities were produced largely through genealogical accounting of Thomas – of his deplorable childhood, his alcoholic mother, his FASD, his 73 placements in different foster care homes over his lifetime – that gave meaningful contours to the act of his crime within a discursive register of what Elizabeth Povinelli calls the *genealogical society*, which essentially traps Indigenous subjects in the past where they are held down by backward and primitive obligations, and is thus distinguished from the *autological subject* who is assumed to have real estate in the future.⁴³ The chapter traces a shift in this genealogical analysis of Indigeneity and FASD, which moves from being centrally focused on Indigenous women and mothers to a generalized fear and anxiety of Indigenous youth in the latter 1990s. How FASD becomes meaningful in this discourse of inheritance and futurity is important for understanding how Indigenous peoples are placed within an in-between space in society through a criminological imagination. Despite the fact that Thomas’s Indigeneity and FASD were deployed through a variety of tonal registers, including sympathetic concern for the plight of such poor Indigenous peoples who “never stood a chance,” as well as an ultra-

⁴³ Elizabeth A. Povinelli, *The Empire of Love: Toward a Theory of Intimacy, Genealogy, and Carnality* (Durham: Duke University Press, 2006).

conservative condemnation of Indigenous peoples who have criminologically coded souls, an interesting, if disturbing, point of contact between these divergent registers is revealed as they both conclude, one way or another, that such Indigenous peoples are irredeemable, bio-psychologically, socially, and theologically. The “senselessness” of Thomas’s crime, and the way that FASD is attached to him as a means of explaining this crime, are both explored as reifications of a deeper contradiction in which Indigeneity poses a deeper legal and political challenge to the settler state.

Chapter two marks a slight detour from the overall linear trajectory of the five chapters as I pause and dwell on a specific analytic of sex to think through the ways that Thomas’s image and his genealogical profile, and that of his victim, Irvine Fraser, were differently interrogated. Such a difference permits us a moment to explore the particular history of FASD and how it emerged as a medical diagnosis of concern largely through settler infrastructures of domestic care and libidinal economies of familial love. This becomes crucial to understand as FASD is made meaningful and intelligible at the site of the mass abduction of Indigenous children and placement into White families across North America beginning in the 1960s. As these adoption placements began to break down in the 1980s and 90s, FASD provided a ready conceptual apparatus to explain these disrupted domestic spheres, centering the crushed dreams of White families while deflecting blame into the child’s origins, which includes an imaginary of her dysfunctional cerebral make-up and the biological and cultural milieu in which it was made, specifically, by the Indigenous mother and “the community that allowed it to happen,” as the RCAP put it.⁴⁴ If chapter one demonstrated the shifting coordinates of criminal responsibility from the womb of the Indigenous mother to the cerebrally deficient Indigenous child, this

⁴⁴ Canada, Royal Commission on Aboriginal Peoples, *Final Report of the Royal Commission on Aboriginal Peoples (Online Copy)*, 3, Gathering Strength:122.

chapter explores how this generational dysfunction has been interpreted by a non-Indigenous and surrogate population that has sought to adopt Indigenous children into their settler-normative domestic fantasies of family. Simultaneously, if this discourse of inheritance is central to the production of the dysfunctional Indigenous child, it is remarkable how the concept of sex is so often left out of the picture. By analyzing how Thomas's past was so meticulously combed over, it is remarkable to me and some of my interlocutors how the specific discourse of sexual abuse of his life is left out of the story. This is relevant not only because child sexual abuse has been central to making Indigenous issues matter in Canada,⁴⁵ but because of how it simultaneously accentuated the silence on the background of Irvine Fraser, who had been facing historical charges of child sexual abuse at the time of his death. This absence reveals how Thomas and Fraser were constructed within a fragile and limited framework of perpetrator and victim, but it also touches on a much larger issue of settler desire and the unspeakable libidinal contours in which the Indigenous other is encountered.

As we move to chapter three, we continue with the trial of Thomas two years after he was alleged to have killed Irvine Fraser. By walking through an extensive analysis of the court proceedings this chapter examines the various ways in which the meaning of guilt is produced and operationalized within a setting of highly ritualized legal procedure. Notably, however, this chapter examines how the reference of Thomas's Indigeneity and his cerebral makeup, so important to the previous two years in the court of public opinion, were utterly unspeakable during his trial and not once used in order to build a robust case of Thomas's self-defense. In fact, it is almost as if there is a complete abdication of responsibility for truly examining Thomas's character and his behavioral motivations in this event, even by his own lawyer. This is

⁴⁵ Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights*; Milloy, *A National Crime*.

remarkable in the face of surveillance footage that emerged during the trial and became one of the main pieces of evidence for trying this case, and which was highly suggestive of dark and violent motivations by the bus driver that precipitated the violence between Fraser and Thomas. This chapter invites us to ponder the meaning and use of the reformist drive of incorporating FASD into the justice system by refocusing our attention on the deep contradictions of the justice system that precede it. By systematically unpacking the ideological blind spots by which Thomas's life simply could not be recognized by the courts or press, to the point that the brutal violence perpetrated by Fraser against Thomas simply cannot be *seen* in plain sight, this chapter notes how the absence of Thomas's Indigeneity and FASD demonstrate a harmonization with the contradiction of Indigeneity in the legal system. In short, this invisibility is precisely an iteration of how Indigeneity is eliminated and how the medico-legal alliance can also work as a conspiring and strategic silence.

In chapter four we move to Thomas's sentencing hearing some seven months after he was found guilty of second-degree manslaughter. This chapter analyzes the surprising and remarkable return and, indeed, amplification, of Thomas's characterization as a cerebrally impaired Indigenous man in the courts as they become central in the decision-making process of deciding Thomas's punishment and carceral fate. This sudden return to Thomas's dysfunction is made possible by a pre-existing infrastructure of the courts, particularly the mechanism known as *Gladue Reports*, which are judicial mechanisms that have been built in order to try and ameliorate the gross overrepresentation of Indigenous peoples in Canada's jails and prisons. Through a sustained analysis and critique of *Gladue reports*, this chapter shows how such reforms to the judicial and carceral system depend on the idiom of historical trauma to account for this overrepresentation, explaining Indigenous crimes as a sort of deficiency that was *caused*

by historical colonial violence. This chapter argues that such temporal and causal notion of historical trauma inevitably affirms beliefs of Indigenous dysfunction within the justice system. Rather than a reform to address conditions of overrepresentation, mechanisms like *Gladue* become a means of facilitating new procedures for processing and containing Indigenous bodies in the carceral system. It is no coincidence that it is generally through *Gladue reports* that an Indigenous inmates FASD becomes known and relevant to the courts.

Even if a *Gladue report* enables an Indigenous offender to receive a lesser sentence by translating colonial violence into historical trauma literally as a “mediating factor” of an Indigenous person’s crime, it also creates new conditions for their surveillance and apprehension beyond the walls of the courts and prisons, which is the subject of chapter five. Moving into an analytic of the post-carceral space, this chapter requires me to leave behind the story of Thomas, some what, if only because he is currently serving a life sentence for second degree murder and will not be eligible for parole until 2031. Yet, Thomas has been in this time and place of the post-carceral before, and I have come to think of this temporal moment of the criminal justice encounter less as a “post” and more within cyclical terms of an *in between* phase. This is where so many Indigenous and other racialized groups are held in a purgatorial-like condition of existence, trapped as carceral beings. As we will see presently in the next section, one of the main ways that FASD becomes animated as a medico-legal concern is precisely as a condition that can explain the “catch and release” game that is so often used to describe Indigenous offenders, typically youth, who are repeatedly caught for criminal acts, charged, sentenced, released... and then the cycle is repeated. FASD emerges in this frustrated space to account for the incorrigibility of Indigenous offenders by speaking to their cognitive deficiencies and incapacities. This discourse is extremely loud and celebrates itself as a progressive alternative

and reformist option for a criminal justice system that it presents as operating under backward and draconian principles, particularly ones that are cruelly punishing those people in society who cannot abide by the “normative” principles of the legal system. Quite simply, it argues that if one cannot learn from their mistakes because of cognitive brain damage, the system needs to account for this limitation in other ways than simply mass incarceration. This is normally presented as a model for creating diversionary sentencing options for offenders with FASD and creating supports and programming opportunities outside of the courts and prisons for such individuals. My work as an outreach worker for individuals with FASD more or less mirrored this ideal community support role, as someone trained in FASD-sensitivity and who brought a “culturally appropriate” mandate as a Metis person who respects and is part of “traditional” and ceremonial community. This chapter speaks to the fetishism of this intersection of the culturally- and neurodevelopmentally-“appropriate” approach to Indigenous offenders by examining the structural conditions and affective landscapes that continue to apprehend and contain the lives of the young Indigenous men I have worked with regardless, and in spite of, these alternative outcomes being pursued for disabled Indigenous offenders. This chapter invites a reckoning with the anti-Indigenous carceral structures of society and how FASD advocates often miss it or implicitly become party to it by rendering conditions of crime and incarceration as cultural and biological conditions of Indigenous life.

Stealing Cars on Stolen Land

The remainder of this introduction is a return to Evan and the gang intervention program, where my journey in the exploration of the trifecta of Indigeneity, Crime and FASD began. It is a partial genealogical account of how central the particular Indian Problem of Indigenous youth

gangs have been to this discourse, and how it has enabled new accumulations and mobilizations of powers for the apprehension of Indigenous life by the criminal justice system and beyond. It will prepare us for analytical engagement with the chapters to come by centering the question: *How does someone like Michelle come to know that Indigenous youth have FASD?* This question will be explored and framed within an even more directly empirical question of *what exactly does an FASD diagnosis accomplish and achieve for the criminal justice system and for the Indigenous peoples it targets?*

In the mid 2000s the prairie city of Winnipeg became known as the “capital of car theft” of North America.⁴⁶ As many crime ratings go, this statistical marking was more than a simple index of a non-violent crime rate. Rather than an unfortunate nuisance to citizens, the explosion of car thefts quickly became associated with a common fear for one’s safety by an unknown and threatening force. Several pedestrians and unsuspecting drivers were killed by stolen cars as they sped down city streets, often being pursued by a fleet of police cruisers.⁴⁷ Most disturbing were the police allegations that these car thieves were enacting their own Grand Theft Auto universe and deliberately targeting jogging pedestrians in certain neighbourhoods, one of which was, notably, the richest and whitest neighbourhood of Winnipeg.⁴⁸ Very quickly, the emphasis of reporting and public speculation was on determining who “they” were, and a social-psychological profile was quickly described by the Winnipeg Police. At the height of the chaos,

⁴⁶ Cite Linden, WATSS. “Between 2003 and 2007 it was highest in North America. It cost roughly 40 million/year. See also Jeff Anderson and Rick Linden, “Why Steal Cars? A Study of Young Offenders Involved in Auto Theft,” *Canadian Journal of Criminology and Criminal Justice* 56, no. 2 (2014): 241–60.

⁴⁷ “Winnipeg Cyclist Killed by Stolen Vehicle,” *CBC News*, July 25, 2007, <http://www.cbc.ca/m/touch/canada/manitoba/story/1.692346>; Mike McIntyre, “Drunk Who Killed Mom of Three Gets Six Years,” *Winnipeg Free Press*, June 27, 2009, <http://www.winnipegfreepress.com/local/drunk-who-killed-mom-of-three-gets-six-years-49334477.html?path=/local&id=49334477&sortBy=oldest&viewAllComments=y>; James Turner, “Teenager Charged with Manslaughter in Fatal SUV Collision with Taxi,” *Winnipeg Free Press*, October 4, 2008, sec. A4.

⁴⁸ “Teens Targeted Joggers, Winnipeg Police Say,” *The Star*, March 13, 2007, http://www.thestar.com/news/2007/03/13/teens_targeted_joggers_winnipeg_police_say.html.

in a press conference in March of 2007, Sgt. Doug Safioles revealed to the public that

A lot of these kids suffer from intellectual disabilities... What they lack is a little voice in the back of their head that tells the rest of us at some point that 'this is too dangerous and we should stop.' When they see the red (police) lights behind them, they are so excited that it takes them hours to come down from that... That's a very difficult thing to defeat.⁴⁹

Even more concerning than this psychological profile of an intellectually disabled and amoral group of kids was a claim that these youth were possessed, or *driven*, by some mysterious force.

A week after Sgt. Safioles's press briefing, his colleague, Sgt. Dennison warned the press that the Winnipeg police would no longer be publicizing the extreme incidents related to car theft, particularly the deliberate targeting of pedestrian joggers, for the simple reason that it only made the violence worse. He reminded the public of an explosion of gang shootings several summers prior, and how key to quelling that violence was to avoid publicizing it, making a direct connection between these prior gang shootings and the current problem of car thieves, both of whom were equally driven by a thrill of publicity and "seeing themselves in news reports."⁵⁰

Such references to gangs implicitly linked the problem to Aboriginal youth for a public who had been fed a steady diet of urgent and dire warnings about the "epidemic" of Aboriginal gangs in Western Canada, where Winnipeg has always been ground zero.⁵¹ Indeed, my job at the gang intervention program was in fact tied to this particular discursive economy of tackling the

⁴⁹ Sgt. Doug Safioles, quoted in "Teens Targeted Joggers, Winnipeg Police Say."

⁵⁰ "Another Pedestrian Targeted by Car Thief, Say Police," *CBC News*, March 19, 2007, <http://www.cbc.ca/news/canada/manitoba/another-pedestrian-targeted-by-car-thief-say-police-1.639338>.

⁵¹ Mark Totten, "Preventing Aboriginal Youth Gang Involvement in Canada: A Gendered Approach," *Aboriginal Policy Research Consortium International (APRCi)* 55 (2010). For other studies that were thinking through the problem of Aboriginal youth through sociological and ethnographic accounts of identity and belonging, particularly in the urban setting, see Yale Deron Belanger et al., *Urban Aboriginal Youth in Winnipeg: Culture and Identity Formation in Cities* (Winnipeg, Manitoba: Canadian Heritage, 2003). For a critical perspective in this line of investigation, see Kathleen Buddle, "Urban Aboriginal Gangs and Street Sociality in the Canadian West: Places, Performances, and Predicaments of Transition," in *Aboriginal Peoples in Canadian Cities: Transformations and Continuities*, ed. Heather Howard-Bobiwash and Craig Proulx (Waterloo: Wilfrid Laurier University Press, 2011), 171–202.

problem of Aboriginal youth gangs that had been increasingly funded by federal dollars to facilitate alliances between academics and community organizations to simultaneously build and evaluate the evidence for gang intervention programs and strategies.⁵² Curiously, Sgt. Dennison's implicit evocation of Aboriginal youth gangs also focused on representations of violence as if they could possess the youth and spread like a contagion, which made Sgt. Dennison sound like more of an informant in a classical anthropological account of witchcraft accusations than a police officer.⁵³ Such descriptions help us to recount the way that the fear of these Aboriginal youth was located and targeted. In any case, this policy did not last very long, particularly once police officers began getting regularly run over. This marked the last straw for an exasperated police Chief Kieth McCaskill, who told the public in an emotional address that "police officers are threatened with a lot of dangerous situations in the city.... This is a step that has gone beyond what any society should accept... It can't be tolerated... It's dangerous, it's wrong, and it's something we'll have to put our resources toward."⁵⁴

⁵² I would only emphasize here that acceptance of funding from such federal program dollars cannot be immediately taken as a sign of some kind of cooptation or of an uncritical acceptance of federal paradigms of gang intervention or even the meaning of "gangs" by local indigenous community centres like the Indigenous-led community centre that ran the gang intervention program I worked at. Instead, these funding arrangements are always already located in complex strategic negotiation of supporting a community with the limited resources available. For a selection of some of the federal programming that emerged from the Youth Gang Prevention Fund and its reviews, see Larry Bremner, "Building the Evidence — Evaluation Summaries. Winnipeg Youth Gang Prevention Fund" (Ottawa: National Crime Prevention Centre, Public Safety Canada, 2012); Public Safety Canada, "Final Report 2010-2011 Evaluation of the Youth Gang Prevention Fund Program," May 14, 2015; Mark Nafekh, "An Examination of Youth and Gang Affiliation Within the Federally Sentenced Aboriginal Population" (Ottawa: Research Branch, Correctional Service of Canada., July 1, 2002); Donna Smith-Moncrieffe, "Youth Gang Prevention Fund Projects : What Did We Learn About What Works in Preventing Gang Involvement?" (Ottawa: National Crime Prevention Centre, Public Safety Canada, March 4, 2014).

⁵³ That these youth seemed to be possessed by a dark and contagious force that was mediated by representations of spectacle reminds me of the famous account by Matilda Coxe Stevenson of a Zuni boy who she describes as both resisting and then embracing the accusations of his sorcery, particularly as he saw how it enthralled his accusative audience. In James Siegel's reading, this boy's fascination with his own story and the act of embracing the accusations of sorcery made of him had everything to do with the seduction of power. See Matilda Coxe Stevenson, "The Zuni Indians: Their Mythology, Esoteric Fraternities, and Ceremonies" (Washington, D.C.: Government Printing Office, 1904), 392–407; James Siegel, *Naming the Witch* (Stanford: Stanford University Press, 2006), 29–52.

⁵⁴ Meghan Hurley and James Turner, "Stolen Car Plows into Police Officer," *Winnipeg Free Press*, April 29, 2008.

In fact, the city was in the midst of a massive investment in a project called the Winnipeg Auto Theft Suppression Strategy (WATSS) that created an “intensive community supervision” program for “high-risk youth,” a compulsory insurance program that required Manitobans to install vehicle immobilizers, and a robust network of “youth programming” to address the “root causes of vehicle theft.”⁵⁵ WATSS essentially coordinated the efforts of the Winnipeg Police Service (WPS) and the interests of the Manitoba Public Insurance Crown corporation (MPI)⁵⁶, with the resources of the ministry of Manitoba Justice - including the funding of extra police, youth correctional officers, and Crown prosecutors to prosecute and manage (“supervise”) these youth – all under the criminological theories of a professor from the University of Winnipeg, Rick Linden. WATSS was the outcome of Linden’s theories on replacing “punishment models of severity” – which uniformly equate severity of crime to severity of sentence, but whose goals of “deterrence” are usually meaningless and ineffective – with “punishment models of certainty” –

⁵⁵ Rick Linden, “The Winnipeg Auto Theft Suppression Strategy,” Submission to the IACP/ Motorola Webber Seavey Award for Quality in Law Enforcement, 2010, 3. WATSS was in fact a revamping of an earlier iteration known as the Manitoba Auto Theft Task Force. Even with Manitoba Public Insurance (MPI) providing the WPS with over \$600,000/year to fund a special auto-theft investigative unit, and funding the courts with over \$100,000/year to have dedicated prosecutors to process car thieves and ensure they met justice, car thefts were still increasing. The MATTF strategy consisted of “using bait cars; fingerprinting all recovered stolen vehicles, restricting licensing for drivers convicted of vehicle theft; encouraging the police and other justice system personnel to treat vehicle theft more seriously; school programs for at risk youth; enrolment of vehicle theft offenders under the age of 12 in special programming; and taking our actions to recover damages from offenderssee. See “Auto-Theft Challenges,” *Manitoba Public Insurance*, accessed March 15, 2014, <http://www.mpi.mb.ca/en/Reg-and-Ins/Insurance/Auto-Theft/MB/Pages/atchallenges.aspx>. For more information on strategy of “Bait cars,” which are cars that are stationed and monitored in high-risk areas as a means of attracting and then arresting those who attempt to steal them, see “Crime Prevention: Auto Theft Prevention,” Winnipeg Police Service, *Winnipeg Auto Theft Suppression Strategy (WATSS)*, (April 9, 2010), 4, <http://www.winnipeg.ca/police/TakeAction/WATSS.stm>.

⁵⁶ MPI is the only car insurance option for Manitobans. When in 2004 auto-thefts averaged 24 cars per day, MPI estimated the costs to be \$43 million/year, which translated in to a 5% increase in the rates of customers. With a direct connection to the government as an “arms length” Crown corporation (which means that it is semi-autonomous and runs like a for-profit corporation, with very limited government overreach), MPI has been able to invest money into the creation of WATSS and its successor program (see note below), and has significant leverage in governance decisions as a powerful lobby, particularly in pushing for legislative changes to the Criminal Code of Canada and the Youth Criminal Justice Act (YJCA). They have been especially energetic in their efforts to make changes to the YJCA to make youth are made responsible for their acts of theft and to force them to pay back damages caused by their crimes and withholding licensing for convicted criminals of car theft. See *2010 Annual Report, Strengthening Partnerships For You* (Winnipeg: Manitoba Public Insurance, 2010), 24. See also “Auto-Theft Challenges,” *Manitoba Public Insurance*, accessed March 15, 2014, <http://www.mpi.mb.ca/en/Reg-and-Ins/Insurance/Auto-Theft/MB/Pages/atchallenges.aspx>.

which deploy a tactic of “targeted deterrence.”⁵⁷ This model is smarter, argues Linden, because it uses criminological data and analysis to identify characteristics and traits of “high-rate offenders” and then applies tactics that put “special attention” on these offenders, usually in the form of regular and random curfew checks or ankle monitors like the one Evan carried around for a year. In profiling forty three incarcerated youth who had been convicted of auto theft, Linden and his colleague, Jeff Anderson, found that most of them were psychologically impulsive, lacked appreciation of the consequences of their actions, and were particularly susceptible to peer pressure.⁵⁸ This pseudo-psychological assessment of wild impulsivity made another finding of their study – the fact that most of these youth were stealing cars while already on probation – even more relevant to their proposed model, which called for increased and randomized curfew checks as a means of imposing direct and immediate consequences for these youth who struggled to grasp the effects of their actions.

WATSS was lauded as a huge success and a win for more progressive and efficient policing, in that it reduced the car theft rate to effectively zero over the span of five years and efficiently directed services between police, corrections, the courts, and community organizations.⁵⁹ While there were reductions in car theft, however, an independent audit and

⁵⁷ Linden talks about this theory in several popular publications. Rick Linden, “Reducing Both Crime and Imprisonment,” *The Star*, December 14, 2011, http://www.thestar.com/opinion/editorialopinion/2011/12/14/reducing_both_crime_and_imprisonment.html#; Rick Linden, “How Winnipeg Slashed Its Auto Theft Rate and What the Rest of Canada Can Learn,” *IPolitics* (blog), December 19, 2011, <http://www.ipolitics.ca/2011/12/19/how-winnipeg-dropped-its-auto-theft-rate-by-83-and-why-the-rest-of-canada-should-pay-attention/>; Rick Linden, “Police Alone Can’t Cut Crime Rate,” *Winnipeg Free Press*, November 25, 2013, <http://www.winnipegfreepress.com/opinion/analysis/police-alone-cant-cut-crime-rate-233270091.html>. See also Rick Linden, “An Evidence-Based Approach to Community Safety,” *International Journal of Child, Youth and Family Studies* 1, no. 1 (2010): 53–77; Rick Linden and Renuka Chaturvedi, “The Need for Comprehensive Crime Prevention Planning: The Case of Motor Vehicle Theft,” *Canadian Journal of Criminology and Criminal Justice/La Revue Canadienne de Criminologie et de Justice Pénale* 47, no. 2 (April 1, 2005): 251–70.

⁵⁸ Jeff Anderson and Rick Linden, “Why Steal Cars? A Study of Young Offenders Involved in Auto Theft,” *Canadian Journal of Criminology and Criminal Justice* 56, no. 2 (2014): 241–60.

⁵⁹ “The augmented strategy has been very successful. Thefts declined by 29 percent in 2007, 42 percent in 2008, and 34 percent in the first 4 months of 2009. Rates as of April 30, 2009 were 76 percent lower than in 2004. Savings are

review of WATSS and its successor program, Empowering Justice Program (EJP), showed that while charges of car theft dropped amongst Winnipeg's top car thieves, the overall criminal activity of these same youth continued apace.⁶⁰ Moreover, it was revealed by the review of the program that the high-profile car thieves identified and contained were almost exclusively Aboriginal youths who could not benefit from the educational programming offered to them because they were "too disabled, as well as too heavily gang and criminally-involved" to "succeed" in the educational settings of these community programs.⁶¹ WATSS can be considered a success in the narrow view that it made car theft more difficult and incarceration of youths who attempted it more certain, but it certainly did not succeed in addressing the root causes of car theft. Furthermore, while it deployed the theoretically attractive criminological notion of a "risk-need-responsivity" model, which seeks to maximize an offenders ability to learn from rehabilitative interventions, this aspect of the program was noted to have failed, making the most prominent outcome of WATSS, if not its biggest success, the systematic identification, surveillance, and containment of a particular demographic of Indigenous youth.⁶² Most concerning, however, is how this identification of Aboriginal youth led to the typically tokenizing language of constructing more "culturally appropriate" programming for criminally involved youth, which for some criminologists, including those who sponsor the "risk-need-

estimated to be at least \$30 million/year." "Crime Prevention: Auto Theft Prevention," Winnipeg Police Service, *Winnipeg Auto Theft Suppression Strategy (WATSS)* (blog), September 4, 2010, <http://www.winnipeg.ca/police/TakeAction/WATSS.stm>. WATSS also won two international policing awards. One was from the International Association of Chiefs of Police and the other was the Webber Seavey Award for Quality in Law Enforcement, which specifically recognizes the "efforts made by law enforcement agencies to improve the quality of life in local communities." See "Winnipeg Auto Theft Strategy Nets Awards," *CBC News*, November 30, 2010, <http://www.cbc.ca/news/canada/manitoba/winnipeg-auto-theft-strategy-nets-awards-1.869629>. 7/14/2021 3:25:00 AM

⁶⁰ Natalie Baydack, "Evaluation of the Empowering Justice Project: Final Report" (Winnipeg: PRA Inc. Research & Consulting, October 13, 2010), 54.

⁶¹ Baydack, 30.

⁶² James Bonta and D.A. Andrews, "Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation" (Ottawa: Department of Public Safety, 2007).

responsivity” model, often veers into considerations of “bio-social characteristics such as race” that need to be “taken into account in cognitive behavioral intervention.”⁶³ The outcome of the profiling efforts of WATSS and EJP was to fully racialize Aboriginality within cultural and biological notions of cognitive disability.

The efforts of Linden and his colleagues to profile auto theft criminals demographically and with various bio-psychological and social traits was conveyed as a means of decoding a specific Aboriginal “youth culture” or “subculture” of Winnipeg that was defined by intellectual disability and asocial tendencies. The police began openly deploying this language within disturbing militarized language of counterinsurgent tactics in which they would target known “associates” and “accomplices” of car thieves as part of the “car-theft family” of Winnipeg.⁶⁴ And the press became equally comfortable with this genealogical approach to understand Winnipeg’s Indigenous youth “subculture,” which found compatibility among the much longer and well-established genre of the crime beat reporters who were used to explaining crime within the hegemonic conceptual apparatus of a “culture of poverty” that has been a shameful contribution of anthropology to public thinking on minority populations who are thought of as “in need of study.”⁶⁵ The title of a famous 2009 “perspective” piece in the *Winnipeg Free Press* – “Chill. Thrill. Kill: A night in the life of Winnipeg's car-stealing subculture” – elucidates this quite well, where accounts of crack and alcohol addicted mothers, incarcerated fathers and uncles, bouts of child welfare, and, not least of all, several claims of FASD, are combined to

⁶³ For an account of this, see Baydack, Final Report, Literature Review, 5.

⁶⁴ Mike McIntyre, “Police Target Car-Theft Family: Hunting for Accomplices in Hummer Tragedy,” *Winnipeg Free Press*, December 17, 2009.

⁶⁵ Oscar Lewis, *LA Vida: A Puerto Rican Family in the Culture of Poverty--San Juan and New York*. (New York: Random House, 1966); For an account of how this anthropological concept has become hegemonic, see Gilberto Rosas, *Barrio Libre: Criminalizing States and Delinquent Refusals of the New Frontier* (Durham, NC: Duke University Press, 2012), 121.

explain this subculture of terrorizing youth.⁶⁶

Three years after the police officer was run down by fleeing car thieves, *Winnipeg Free Press* reporter Mary Agnes Welch, penned one of these classic genealogical crime stories about the teen, now adult, who ran over that officer, called “It need not be a life sentence.”⁶⁷ The title itself contained a double meaning that foregrounds the equation of how FASD is intimately related to crime, with “sentence” referring both to the carceral and legal consequences of his crime and the permanence of his alleged brain disorder that makes him and so many other “kids particularly prone to crime.” Welch elucidates the common wisdom of FASD and particularly the colloquial “hallmarks” that make this association between FASD and crime possible: “They [individuals with FASD] have trouble thinking ahead and imagining the consequences of their actions, such as ending up back at the Manitoba Youth Centre, or worse, hurting someone or themselves.” In addition, “people with FASD are easily led. They tend to be vulnerable to dumb ideas and take the blame when things go bad, “and are thus susceptible to “get[ting] sucked into street life.” Without exception, such generalizations reveal a particular paradox or contradiction at the heart of this social thinking: “Winnipeg judges have marvelled at how some young criminals can hot-wire an Escalade in 30 seconds flat but can’t tell time.” Individuals are both highly disabled and highly skilled. But this is only one minor contradiction amongst a sea of paradox, the biggest being, how does anyone know that this youth or any others have FASD to begin with?

For one, his participation in the “special programming” for car thieves that was funded through the WATSS program made him a candidate through a set of convoluted social

⁶⁶ Mike McIntyre, James Turner, and Bruce Owen, “Perspective: Chill. Thrill. Kill: A Night in the Life of Winnipeg’s Car-Stealing Subculture,” *Winnipeg Free Press*, March 29, 2009.

⁶⁷ Mary Agnes Welch, “It Need Not Be a Life Sentence,” *Winnipeg Free Press*, February 26, 2011.

suspicious unique to this criminological-bureaucratic structure. As Welch recounts, the program manager of the car theft educational program that this young man attended “estimates about 40 percent of the high-level car thieves she sees have some form of fetal alcohol effects—from severe cognitive impairments to less serious behavioural problems.” No evidence is cited to back up this claim, but the figures “should be no surprise,” argues reporter Welch; it makes perfect sense given the “hallmarks” of how FASD makes one struggle with thinking ahead and imagining consequences, which, we recall, were the same traits that were highlighted by the research of Linden and Anderson and which came to buttress the project of WATSS.⁶⁸ But where did this “estimate” come from? What figures and data was this program manager drawing from? As conveyed by the independent review of WATSS, all FASD diagnoses were determined by “key informants” at these educational programs, like the program director or her staff of social workers, who “observed” that “there was a high prevalence of diagnosed or suspected FASD and other cognitive impairments among these youth, as well as a high prevalence of mental health or emotional issues such as adolescent depression and anger management issues.”⁶⁹ The proof that emerges from such systematic projects and research is not official diagnosis of FASD but a series of steps in which FASD comes to be taken *as if* it is “official” and true. Part of this lends to the very medical discourse of FASD itself, which lends a natural air of authorial medical truth. But sadly, such unofficial and non-clinical “observations” are far too common in the mediation of FASD as a medical and criminal disorder.

⁶⁸ “Crime Prevention: Auto Theft Prevention”; Anderson and Linden, “Why Steal Cars?”

⁶⁹ Baydack, “Evaluation of the Empowering Justice Project: Final Report,” 42.

The Manitoba FASD Youth Justice Project

Still, if many of the diagnoses of the youth who passed through the WATSS program were fabricated through reifying procedures of judgment and bureaucratic documentation, it is also true that *at least some* of them were receiving official diagnoses. The young man addressed above was not only subjected lay-diagnostic procedures of non-clinical “observations” of social worker staff. Apparently, he had also received his *official diagnosis* while in jail the Manitoba Youth Centre under a program known as the Manitoba FASD Youth Justice Project (MBFASDYJP). MBFASDYJP was initially a pilot project launched in September of 2003, just one year prior to the launch of WATSS, with the goal of enabling the courts to assess youth in the justice system who may be FASD affected, provide recommendations to the court that align such FASD diagnoses with appropriate sentencing dispositions, build capacity within the family and community to enhance FASD supports and services, and implement meaningful multidisciplinary interventions and reintegration plans with supports for youth with FASD.⁷⁰ Courts could thus work closely with a team of FASD clinicians, social workers, and probation officers to design customized sentencing protocols for youth, connect them with community workers for when they got out of custody to ensure that they were attending various programs and getting access to necessary services (such as psychological assessments and treatment, social worker and probation officer appointments, etc.) as well as put them in educational programs that adhered to their strengths and limitations. A much-celebrated initiative to emerge out of the MBFASDYJP was the project titled, “This is Me – A Tool for Learning About and Working with People Affected by FASD.” Originally created as a tool for informing those in the justice system to “better understand, work with, and communicate with those people affected by FASD,” it has evolved into a teaching tool for “youth themselves in better understanding their

⁷⁰ Harvie, Longstaffe, and Chudley, 220.

own deficits and strengths.”⁷¹ I once attended a training session on how to utilize a “This is Me” workbook and was curious to find a booklet that looked like it was from an elementary classroom, full of stylized childish figures asking extremely pointed questions that were meant to help a youth think through their muddled thoughts and get in touch with their emotions, such as “How do you like to learn or how do you learn best?” or “What makes you feel... anxious/nervous, upset, frustrated, angry, sad, good, happy, safe, wanted, excited, fears [sic].” These allegedly basic questions were meant to teach youth and corrections employees alike on how to communicate more effectively with the youth who were assumed to have struggles with their executive reasoning, memory, and other academic “brain domains” that are inherently associated with FASD. For example, one encounters in the book complex diagrams of the “Ten Brain Domains (Functions) Impacted by FASD” that have bubbles with domains like “Academic achievement” or “motor skills” or “executive functioning” with lines pointing to an image of a brain. There are then accompanying figures in which text boxes elaborate ever so slightly on what impairment of these domains looks like. For example, under “Executive Functioning,” it states:

Higher-level skills involved in organizing and controlling one’s own thoughts and behaviours in order to meet long term goals. Defined as impairments in: working memory; Inhibition/impulse control; Hyperactivity; Planning and problem solving or shifting; Cognitive flexibility; Emotion regulation.

Another page provides suggested “Strategies and Interventions” for accommodating these impairments. For “Executive Functioning” it is:

Prioritize issues and work on most pressing; Consider verbal and memory limitations when discussing expectations or consequences; Use pictures or role play when teaching cause and effect; Anticipate and prevent problems – provide the distraction to allow the

⁷¹ Mary Kate Harvie, Sally E. A. Longstaffe, and Albert E. Chudley, “The Manitoba FASD Youth Justice Program: Addressing Criminal Justice Issues,” in *Fetal Alcohol Spectrum Disorder* (Weinheim, Germany: John Wiley & Sons, Ltd, 2011), 227.

person to shift; Avoid insight based interventions; Focus on concrete reminders and cueing; Start fresh after outbursts, meltdowns and other dysregulated states.

Nine Brain Domains (Functions) Affected by FASD

There are nine brain domains* that are potentially affected by alcohol use during pregnancy that can lead to a diagnosis within the FASD spectrum. They are:

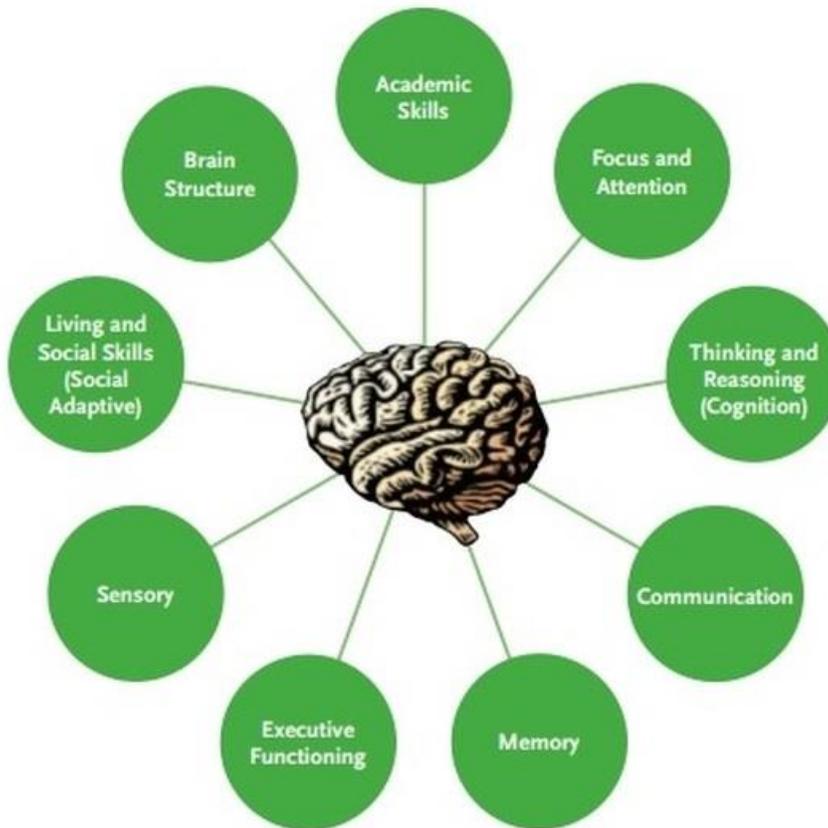


Figure 1 - Brain Domains. Image accessed from the pamphlet, *The Hidden Disability: Fetal Alcohol Spectrum Disorder*, developed by the FASD Family Support, Education and Counselling Program of the non-profit community-based organization New Directions for Children, Youth, Adults and Families Inc. in Winnipeg, Manitoba. Note that this is an older image from an older edition of *Hidden Disability*. New versions contain ten brain domains. See <https://newdirections.mb.ca/wp-content/uploads/2017/05/3.-FASD-Hidden-Disability-Brochure-March-2017.pdf>

One of the central ideas at the heart of This is Me is that individuals with FASD have basic language and communication deficits, and that they are therefore misunderstood and potentially receiving unequal treatment. Communication is only one ‘brain domain’ that must be measured

by a diagnostic team out of eight others.⁷² Researchers have begun to find flaw in this schematic model, however, as it struggles to capture the dynamic and interactive nature of human communication, particularly between the various brain domains. Thus, many now turn towards a “framework of social communication” that emphasizes how FASD deficits are expressed at the social juncture where mutually held understandings of the world are required to effectively communicate.⁷³ An increasing number of speech pathologists and speech language therapists are today working in the world of FASD to analyze how the lack of “higher level language skills” leads to adverse experiences of individuals with FASD in the justice system.⁷⁴ If language is about “influencing people and interpreting events,” as many of these speech specialists argue, then FASD prevents the “mutual understanding” of social encounters and contexts and with predictably troubling outcomes:

...representative(s) of the majority (typical person, normal language user) assumes the other actually does understand the same things they do, and therefore inaccurately attributes their behaviours as deliberate violations of these mutual expectations. These actions are assumed to arise by choice or from defects of character or behaviour. The other person is felt to be “aggressive”, “uncooperative”, “arrogant”, and/or “criminal”, and hence deserved everything that happened to them.⁷⁵

⁷² Albert E. Chudley et al., “Fetal Alcohol Spectrum Disorder: Canadian Guidelines for Diagnosis,” *CMAJ: Canadian Medical Association Journal* 172, no. 5 Suppl (March 1, 2005): 9. Note that several of the ‘domains’ have shifted in recent years, primarily with the eliminatin of “sensory” and “focus and attention” and the addition of “motor skills” and “affect regulation.” Also, interestingly, ‘communication’ has been replaced with the more explicit focus on “language (expressive and receptive).” See the revised Canadian Guidelines: Jocelynn L. Cook et al., “Fetal Alcohol Spectrum Disorder: A Guideline for Diagnosis across the Lifespan,” *Canadian Medical Association Journal*, December 14, 2015, cmaj.141593, <https://doi.org/10.1503/cmaj.141593>.

⁷³ Truman E. Coggins, GERALYN R. Timler, and Lesley B. Olswang, “A State of Double Jeopardy: Impact of Prenatal Alcohol Exposure and Adverse Environments on the Social Communicative Abilities of School-Age Children with Fetal Alcohol Spectrum Disorder,” *Language, Speech, and Hearing Services in Schools* 38, no. 2 (April 2007): 117–27.

⁷⁴ Linda Hand et al., “Oral Language and Communication Factors to Consider When Supporting People with FASD Involved with the Legal System,” in *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives: An Overview on FASD for Professionals*, ed. Monty Nelson and Marguerite Trussler, International Library of Ethics, Law, and the New Medicine (New York: Springer International Publishing, 2016), 139–47.

⁷⁵ Hand et al., 140–41.

By implementing such programming as *This is Me*, it is thought that the justice system can be more equitable to individuals with FASD who often misunderstand how their actions are problematic or are unable to effectively understand those people in positions of authority, as well as addressing how these authorities typically misunderstand individuals with FASD.

What is important to note here is how understandings of language social communication, and particularly the failures that so commonly ensue, are boiled down to concepts and frameworks of damaged “brain domains” in the discourse of FASD. Caleigh Inman has pointed out how FASD, like Autism Spectrum Disorder, is mostly operationalized in the colloquial everyday as a “relational disorder” of behavior that identifies social abnormalities in individuals and interprets them as marks of an embodied, and thus biological, disorder.⁷⁶ This is something that is evident when I read through the *This is Me* workbook, with its graphs of brains and descriptions of its “domains,” next to questions like “what makes you feel...” I am always struck by how they are missing the mark, presenting themselves as “basic” or “simplified” questions for an allegedly neurodivergent youth, when in fact they seem to be long-term goals that one can work towards. Indeed, I would love to someday understand the conditions in which I “learn best” or why I sometimes feel anxious or sad for no obvious reason at all.⁷⁷ What is even more concerning about how these reductive theorizations of language and communication seem to be accounting for social difference is how it so easily becomes reified into the material and discursive practices of the law.

⁷⁶ Caleigh Estelle Inman, “Absence and Epidemic: Autism and Fetal Alcohol Spectrum Disorder in Indigenous Populations in Canada,” *Canadian Journal of Disability Studies* 8, no. 4 (July 1, 2019): 227–61.

⁷⁷ Interestingly, I have occasionally found myself encountering such workbooks or similar framings that implicitly story a relationship between “simple questions” and brain damage by wondering if my own inability to immediately answer such questions is in any way related to the several “benders” my mom went on before realizing that she was pregnant of me. While completely anecdotal, and admittedly silly, such personal stories demonstrate, I think, how compelling and contagious the diagnostic apparatus of FASD really is, where one’s inability to locate themselves immediately within social parameters of communication or meaning are taken to be individual failures.

The MBFASDYJP was made possible by recent amendments to the Criminal Code regarding youth, when in 2003 the former *Young Offenders Act* was replaced by the *Youth Criminal Justice Act*. For the architects of MBFASDYJP, this marked a “new regime for youth justice” because of how it focused on rehabilitative principles in the justice system, while simultaneously dampening, or technically eliminating, punitive principles like *deterrence*, which have largely been recognized by law makers as backwards and draconian holdovers from a prior historical period that no longer reflect Canadian values.⁷⁸ Importantly, however, it did carry over much of the infrastructure that had been created by the *YOA*, specifically the ability for courts to order medical and psychological assessments of youth. Where the *YOA* used this for purposes of punishment, and determining if youth could be tried as adults, the *YCJA*, and the MBFASDYJP, framed it as a means of addressing “circumstances underlying a young person’s offending behaviour” and generating more meaningful forms of accountability. For the MBFASDYJP, the goal of getting to the “root” of the problem was framed in terms of an individual and psychological issue.

It is important to note the similar qualities of the MBFASDYJP and WATSS. Not only was the latter an iteration of a criminological framework that attempted to get to the “roots” of crime by way of psychological profiling, but both of these projects marked a distinct shift in the will of governance at the turn of the century when government was making big infrastructural moves regarding youth crime. Like WATSS, the MBFASDYJP marked a momentous

⁷⁸ Harvie, Longstaffe, and Chudley, “The Manitoba FASD Youth Justice Program,” 217. For an overview of debates about deterrence as an ineffective and counterproductive principle within the judicial responsibility of sentencing convicted criminals, and how it was part of a larger debate in Canadian parliament and the courts and a framework of imagining Canada as a progressive and Western democracy, see the 1999 Supreme Court case, *R. v. Gladue* (Supreme Court of Canada April 23, 1999), paras 49-57. Notably, in a moment when Canada was addressing its overincarceration problem, the emphasis was quickly shifted to the “particular” problem of Aboriginal representation in jails. This intersection of shifting principles of criminal justice and Aboriginal prison populations is considered in-depth in chapter four.

collaboration between the Provincial Court of Manitoba, crown attorneys and defence counsels, probation and corrections officials, members of the court administration and the Winnipeg Police Service. In 2005, it was made into a fully funded program by the Justice Department that now coordinates collaborative services between the Manitoba FASD Centre, the Manitoba Adolescent Treatment Centre, and Manitoba Corrections, which provide, respectively, clinical resources such as psychologists and paediatricians, social workers and speech pathologists, corrections officers, and, especially, a combination of jail and clinical space in which to systematically identify, refer, assess and diagnose youth who are ‘suspected’ of having FASD. Where WATSS utilized general pseudo-psychological assessments to profile and thus specifically target criminals, which inevitably created conditions of assumption between the relationship of Indigeneity, crime, and FASD, there is a striking similarity in the way that such “official” approaches to diagnosing FASD in the criminal justice system were born of equally speculative conditions for the architects of the MBFASDYJP, in which criminal behavior was correlated with FASD and, ultimately, Indigeneity.

The grounding and motivating question asked by the architects of the MBFASDYJP was: “...what happens if it turns out that a group of individuals, suffering from organic brain damage, are challenged or even unable to learn from their own mistakes or from the mistakes of others? How should the Court apply these basic sentencing principles to these offenders, recognizing the need to address public safety, to maintain public confidence in the criminal justice system and to attempt to prevent offending behavior in these and other offenders?”⁷⁹ Importantly, they had no way of knowing “the actual prevalence of individuals with FASD within the criminal justice system” because these statistics simply did not exist, in Manitoba or in Canada more broadly.⁸⁰

⁷⁹ Harvie, Longstaffe, and Chudley, “The Manitoba FASD Youth Justice Program,” 215.

⁸⁰ Harvie, Longstaffe, and Chudley, 218.

From where did these worries emerge? And what was the “evidence” they drew on to “suggest a disproportionately high representation” of FASD affected individuals in the Manitoba corrections system?⁸¹ (Ibid., 218).?

“Information Gaps” and the urstudies

At the heart of the claims made by the architects of the MBFASDYJP was an “information gap,” between the unknown rates of FASD and the *suspected* rates of FASD, which were thought to be wreaking havoc. *What if*, the authors asked? But where did this “evidence” come from to suggest that there could be a “disproportionately high representation” of individuals with FASD in Manitoba? Where this is presented as a hypothesis (the MBFASDYJP started as a ‘pilot’ program, after all) I argue it is better to view it as an *a priori* judgment that was made possible by the pathbreaking, and problematic, research of Ann Streissguth and her colleagues in 1996 that has become the *urtext* for almost all research, advocacy, and policy design on FASD as it relates to the criminal justice system.⁸² In 1996, Streissguth et al. came up with an idea of the “secondary disabilities” of FASD with a research report for the Centers for Disease Control in the U.S. titled, “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects.”⁸³ Basically, primary

⁸¹ Harvie, Longstaffe, and Chudley, 218.

⁸² Streissguth is a clinical psychologist and one of the most influential voices in the world of FASD research and advocacy. She was part of the original cohort of researchers in the 1970s who broke the case on FASD. See K. L. Jones et al., “Pattern of Malformation in Offspring of Chronic Alcoholic Mothers,” *Lancet* 1, no. 7815 (June 9, 1973): 1267–71.

⁸³ Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE).” This was the culmination of a longer set of research and observations of Streissguth’s work whereby she began noticing in long-term follow up research that previous clients were dying, dropping out of school, which led her to become more interested in understanding how FASD affected broader domains of living skills, socialization skills, and communication skills. For a comprehensive overview of this historical trajectory of research that culminated in “secondary disabilities,” see Inger Thorman, “Minimizing Secondary Disabilities,” in *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives: An Overview on FASD for Professionals*, ed. Monty Nelson and Marguerite Trussler (New York: Springer International Publishing, 2016).

disabilities are those that “reflect the CNS (Central Nervous System) dysfunctions inherent in the FAS or FAE diagnosis,” which they measure based on IQ, and secondary disabilities are those that a client is not born with but which are expressed based on the relationship of the individuals primary disability and other social and environmental factors. They categorize and measure the secondary disabilities of Mental Health Problems (MHP), Disrupted School Experience (DSE), Trouble With the Law(TWL), Confinement (CNF), Inappropriate Sexual Behavior (ISB), Alcohol/Drug Problems (ADP).⁸⁴ So attractive to the architects of the MBFASDYJP and many others is the clear statistics presented by Streissguth et al., where they found that 60% of individuals twelve or older who had FASD had some kind of TWL (Trouble With the Law), or, similarly, that 60% of these individuals had experiences of confinement (defined as inpatient treatment for mental health, alcohol/drug problems, or incarceration for crime); another 45% demonstrated inappropriate sexual behavior; 30% experience alcohol/drug problems; and 43% of these individuals have had disrupted school experiences (suspension, expulsion, or drop out).⁸⁵ The correlations are there to assume that anyone with FAS has an extremely good chance of becoming in “Trouble with the Law,” and if they have FAE, which falls into the “hidden disability” because it often does not have the physiological features of FASD, the rates are even higher for youths aged 12-20, 78% of whom had TWL.⁸⁶ But what are the intellectual steps taken by Streissguth et al. to make such concerning claims?

⁸⁴ Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE),” 4.

⁸⁵ Harvie, Longstaffe, and Chudley, “The Manitoba FASD Youth Justice Program,” 218.

⁸⁶ Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE),” 42. The definition of TWL ranges from having simply been “in trouble with authorities” or having been “arrested for, or charged with, or convicted of” crimes that range from shoplifting, which carried the overwhelming majority of crimes, to property crimes, sexual assault, status offences, and vehicular offences. *Ibid.*, 43.

The first thing one notices about this study is that it notes secondary disabilities within a paradigm of statistical probabilities that are based on measurements of “extrinsic factors,” like whether one grew up in a violent and abusive household with drugs and alcohol, and “intrinsic factors,” like having an alcohol-related diagnosis, one’s IQ, and one’s sex. This is key because most of the things that either make one “at risk” of developing or which is “protective” from developing or expressing a secondary disability are entirely these extrinsic factors, which are largely social. So, for example, Streissguth et al. measure how a “stable and nurturant” household makes one about 50% less likely to express secondary disabilities. Or, if the “quality of home” is of “good quality” until they are at least 12 years old, they are 65% less likely to express secondary disabilities. Similarly, they measure risk of developing secondary disabilities with factors such as living in a household with alcohol or drug abusers, which makes them 49% more likely to experience secondary disabilities; or if they experience domestic violence they are 72% more likely; or, if their ‘basic needs’ are not met, they are 51% more likely.⁸⁷

There is an obviousness to all of this, and the researchers acknowledge that most of the correlations they make come down to what they call “universal protective factors” that are necessary for all humans to flourish, not just ones with an FASD (Ibid., 6). Importantly, though, they do not measure their findings against any other study sample or set of variables, such as the ACE Exams that have long shown how childhood traumas of abuse and neglect lead to higher likelihoods that children will express all sorts of adverse outcomes, such as struggles with mental health, and a host of “high-risk behaviors” that make them more likely to be victims and perpetrators of violence.⁸⁸ Even more troubling, however, is how they acknowledge that their

⁸⁷ Streissguth et al., 25–26.

⁸⁸ Bessel Van Der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, 1 edition (New York, NY: Viking, 2014), 146–49. The point is not to simply replace the neurodevelopmental model of FASD with one of an account of adverse childhood experiences that centers theories of PTSD, which are equally neuro-

findings of “correlations... may or may not be causative.”⁸⁹ Yet it appears that they make implicit determinations about this based on their differentiations of “intrinsic” and “extrinsic factors.” Thus, as they reported to the *Centers for Disease Control* in 1996, “subjects with FAE were somewhat more likely than those with FAS to commit crimes—possibly because more severely affected individuals receive more care and supervision.”⁹⁰ The implication is that, because FAS is typically more obvious to see and thus diagnose, people with this diagnosis will receive the appropriate care that they need, whereas those with FAE or ARND who do not express with the physiological symptoms (which includes the overwhelming majority of FASD diagnoses today) will slip under the radar and thus not receive the care they need. They emphasize the need for social care, yet it only accounts for a fraction of a difference. If one has an FASD, the lesson is that they are prone to criminal behavior. Thus, the “extrinsic factors,” which are exclusively social conditions, are maintained at a scientifically mandated distance of skeptical caution while implicitly the study favors a congenital and biological concept of criminal causality as based in “intrinsic” factors.

In the final analysis, Streissguth and her colleagues have created the intellectual and conceptual premise that, in my opinion, inappropriately and unethically correlates FASD to criminality (and other negative “secondary disabilities”) as an “intrinsic” and biological

based, but only to show that there are other models out there that are not premised on conceptions of damaged brains and which are susceptible to complex social prejudices and associations, like racist understandings of alcoholism. In fact, in the work of Van Der Kolk and others, there is an emphasis on the ‘elasticity’ of the brain and its ability to heal. For an exemplary account, see Gabor Maté, *Scattered Minds: The Origins and Healing of Attention Deficit Disorder* (Toronto: Vintage Canada, 1999), 143–44.

⁸⁹ Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE),” 6.

⁹⁰ Quote taken from Larry Chartrand and Ella Forbes-Chilibeck, “The Sentencing of Offenders with Fetal Alcohol Syndrome,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2003), 39. Specifically, one has a 43% risk of exhibiting secondary disabilities in their lifetime with FAS, while one with FAE or partialFAE or ARND (Alcohol Related Neurodevelopmental Disorder) has a 57% risk of expressing secondary disabilities. Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE),” 25.

relationship. Similarly, they implicitly disavow the other blatant and obvious correlations between “universal” factors of care, stability, and equality that are overwhelmingly present in this same analysis of crime and FASD. When authors like those of the MBFASDYJP get ahold of such statistics and the kind of argument in which they are figured, it becomes quite easy to emphasize this “intrinsic” relationship over any other, perhaps broader, correlative factors. They note, for instance, that an overwhelming majority of the children and youth in their study have lived a majority of their lives in unstable living arrangements, much of which is related to bouts of foster and group home care. Their emphasis is on how to create more stable conditions for youth with FASD in such settings who are in particular need of stability, rather than connecting dots that there might be a problem with how the state is ‘caring’ for children.⁹¹ Similarly, assumptions that guide our lawmakers and the creative law enforcement officials and academics that design our criminal justice infrastructures are guided by *a priori* judgments in which FASD simply *must be* the problem; there must be a large amount of criminals, and thus prisoners, with FASD.

What does FASD get us?

If FASD permits the criminal justice system to concretely identify this problem in empirical terms, what does FASD enable the system to do by way of *solving* the problem of disabled Indigenous youth gangs terrorizing the streets and filling our jails?

⁹¹ Even subsequent studies that explicitly engage the question of child welfare do it in a way that centres FASD as the place to analyze problems. See Nazeem Muhajarine et al., “Phase One Evaluation: Improving Outcomes for Children with FASD in Foster Care: Final Report,” Prepared by The FASD Support Network by the Community-University Institute for Social Research and Saskatchewan Population Health and Evaluation Research Unit (Saskatoon: University of Saskatchewan, 2013); Linda Burnside and Don Fuchs, “Bound by the Clock: The Experiences of Youth with FASD Transitioning to Adulthood from Child Welfare Care,” *First Peoples Child & Family Review* 8, no. 1 (2013): 40–61.

For many years major government departments and institutions, like Correction Service Canada, have been raising the alarm about the unique “challenge” posed by inmates with FASD because of how they allegedly lack the “ability to form intentions and to understand and predict the consequences of his or her behaviour.” And, furthermore, they directly associate this challenge as one that “particularly” effects the “Aboriginal population.”⁹² Despite this push for more funding for FASD treatment in jails and prisons, it has been noted in official Public Safety Canada reviews of the corrections system that while there is next to nothing that is actually being committed by way of resources or funding to train corrections staff or provide “specific programming... for persons with FASD.,” any “progress” that is made in making the prison system more FASD “appropriate” is exclusively by way of increasing *more capacity* for assessing and diagnosing prisoners.⁹³ And even this increased capacity for diagnosis becomes questionable when Correction Service Canada (CSC) reveals that it doesn’t coordinate this increased capacity in any meaningful way. In a 2017 interview with a reporter of the CBC, Corrections representative Stephanie Stevenson suggested that while they conduct “health screenings” of prisoners at intake in order to identify any needed mental health services and to customize programming for inmates, she also noted that they do “not track the number of offenders entering federal correctional facilities who live with FASD.”⁹⁴ How do they coordinate programming for prisoners with FASD if they do not have a way of keeping track of prisoners with FASD? Only contributing to this deep confusion, she added this:

We have adopted a multi-pronged approach to strengthening the provision of correctional services to offenders with mental health needs... This includes: providing

⁹² Correctional Service of Canada Review Panel, ed., *A Roadmap to Strengthening Public Safety: Report of the Correctional Service of Canada Review Panel* (Ottawa: Correctional Service of Canada Review Panel, 2007), 90, 102, 105.

⁹³ Stan Wesley, “Marginalized: The Aboriginal Women’s Experience in Federal Corrections” (Ottawa: Public Safety Canada: Aboriginal Corrections Policy Unit, 2012), 37.

⁹⁴ Kelly Malone, “‘Very Little Is Actually Being Done’: Corrections Canada Funded Just 7 FASD Assessments Last Year,” *CBC News*, October 28, 2017, <http://www.cbc.ca/news/canada/manitoba/csc-fasd-7-tests-1.4374337>.

resources to our staff; ensuring our programs assist offenders with cognitive deficits, including those demonstrated within the FASD continuum; adapting correctional programs to maximize the learning of individual offenders, including those with FASD; offering additional individualized supports; and ensuring offenders undergo education assessments upon admission to maximize their potential to benefit from our programs.⁹⁵

It would appear that, rather than tending to FASD, such inmates with the diagnosis are simply crammed in with all the other prisoners with “mental health needs,” which raises even more troubling questions about how the prison makes clear distinctions of what “mental needs” are and how it subsequently coordinates its staff and resources with this unsystematic knowledge. What programs would be offered to a prisoner suffering from psychiatric diagnoses of depression, or Bi-Polar disorder, for example, and how would mental health diagnoses differ from approaches for the neurodevelopmental condition of FASD? It seems that, rather than a “multi-pronged approach,” FASD is conflated with all other mental health needs of prisoners, demonstrating how capacious, and dangerous, the paradigm of pathologizing crime as a distinctly psychological/intellectual disorder truly is. More concerning yet is how by emphasizing the importance of FASD in prison programming, yet having no systematized method of managing it within the system, it raises an opening for FASD and other mental health issues to be left to the cultural hermeneutics of prison guards. Based on other research on the mobilization of FASD by other frontline law enforcement officials, this should trouble us greatly.⁹⁶ Most importantly, however, is that all of this emphasis on diagnosing prisoners, and “particularly Aboriginal inmates,” begs the question of what purpose identifying inmates with

⁹⁵ Malone.

⁹⁶ For instance, Michelle Stewart shows how police officers often have a deep understanding and appreciation of the medical knowledge of FASD yet operationalize this knowledge within prejudicial frameworks of punishment and oppressive structures of policing more generally. An account of this research is covered in chapter 5. Michelle Stewart, “FASD & Justice: The Ethical Case for Effective Training and Knowledge Mobilization Practices for Frontline Justice Professionals in Canada,” in *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives: An Overview on FASD for Professionals*, ed. Monty Nelson and Marguerite Trussler, International Library of Ethics, Law, and the New Medicine (New York: Springer International Publishing, 2016), 191–206.

FASD accomplishes in the first place, especially if there are no real or systematized efforts to actually implementing “appropriate” programming and staff training when dealing with inmates with FASD. What does making Aboriginal offenders specifically intelligible as a distinct class of disabled criminals achieve?

In the youth correctional system, things are slightly different, particularly in Manitoba where the MBFASDYJP program has been running for nearly two decades to specifically address youths with FASD in the criminal justice system. Yet, despite achieving institutional success by being enshrined as a fully funded program by the Justice Department, the outcomes of the program are rather unconvincing. And it is surprising that such a rigorously criminological justice program has next to no quantitative valuation. One of the only statistical figures that can be found on the program comes from a 2009 Department of Justice report that was based on a three-year review of the “This is Me” pilot program, which the architects cite as demonstrative proof of the positive outcomes of the MBFASDYJP.⁹⁷ After three years of studying 27 youth in the This is Me program, the review found that there was a 17% decrease in charges followed by the developing of a “strength-based portfolio.” Additionally, it was found that “Institutional behavior incidents” decreased by 26%, which, the architects of the MBFASDYJP suggest, “reflects the youth and others working with them having a better understanding of the youths’ neurodevelopmental profile, improved self-concept, and necessary accommodations to manage behavior.”⁹⁸ Bracketing the nitpicky detail that these figures do not exactly scream efficacy, they are revealing in the sense of the disciplinary promises they make, particularly as the program is more effective in reducing “institutional behavior incidents” more than it is in reducing crime

⁹⁷ This data is presented in a review of the MBFASDYJP program by several of its founding members. See S. Longstaffe et al., “The Manitoba Youth Justice Program: Empowering and Supporting Youth with FASD in Conflict with the Law,” *Biochemistry & Cell Biology* 96, no. 2 (April 2018): 260–66.

⁹⁸ Longstaffe et al., 265.

itself. This is further suggestive of how FASD is seen as a “behavioral” disorder and pushes us to think of it in “relational” terms as a diagnostic of how social difference is reified as a medical and psychological condition projected onto bodies.⁹⁹ In fact, when one visits the This is Me website to explore this unique FASD educational program for youth inmates, one begins to realize how the underlying focus seems more on educating youth how to recognize that they are socially disruptive individuals, and to accept that this delinquency is due to their neurocognitive brain damage.

On the This is Me website, under a section titled “challenges,” youth and their mentors are invited to watch a series of videos together to learn about things like what it means for an individual with FASD to be ‘easily distracted’ in social settings like the classroom. In one 45 second clip a student, who is called “Me,” is sitting at a classroom desk between two other students who are concentrating and hard at work. Me keeps looking around and is distracted by other students looking in the window, or random noises like the ticking of a clock. His distraction very quickly spreads to the other diligent students and this is experienced as a great nuisance to them and the teacher. His teacher eventually intervenes and reprimands him by expelling him from the classroom. After completing this video, youth and their mentors/tutors are then prompted by the website to ask themselves general questions to test what they apprehended from the clip and how they can learn to better discern the cues of social communication.¹⁰⁰ Mentors are also encouraged to ask themselves guided questions at the end of this video to better understand what is happening for Me while learning to develop better “accommodations or strategies” that could create a “better fit” for Me. So, for instance, the

⁹⁹ Inman, “Absence and Epidemic: Autism and Fetal Alcohol Spectrum Disorder in Indigenous Populations in Canada.”

¹⁰⁰ The clip is summarized that “Me has difficulty screening out distractions.” See <https://mefasd.com/watch-me/challenges/easily-distracted/>.

mentor/educator is asked “what is expected of Me?” and is encouraged to locate these struggles in the brain by being asked specifically “which brain domains/functions are experiencing [the]challenge?” Some suggestions of accommodation are offered, such as giving Me regular breaks and an opportunity to get up and walk about the class when he is distracted. But why, one might ask, would Me walking around the classroom be any *less* distracting to the other students? Such contradictions raise a troubling possibility that it is because the teacher mandates this act, and not Me who initiates it of his own will, that makes the difference meaningful. The theme of authority and punishment seems to be implicit in this video that depicts a child with neurocognitive disability who is actively punished for his disability in a cruel way.

Similar content is littered throughout many of the other short videos, with cruel forms of punishment - typically involving the separation and isolation of Me from his peers, as well as yelling and chastising by his teachers. The purpose of these videos is to create more understanding and develop better approaches to youth with FASD, yet such glaringly cruel scenarios are never criticized, nor is it explained how they might be unhelpful or counterproductive. Even if educators/mentors are prompted to consider how Me is being misunderstood, there is no emphasis on how his punishment comes from a cultural normative milieu and how mentors and other authority figures could unlearn their own behaviors which are made implicit in the videos and thus normalized. The videos are focused on developing better “accommodations and strategies” for the youth, but it seems clear that the accommodation sought is one of avoiding social disruption and nuisance. Put differently, the accommodation is to the social norm, not to individual neuro-difference. Quite tragically, such videos seem to reinforce social norms by teaching figures like Me – and the youth who are meant to identify with this “Me” – that they are social nuisances and that the source of their disruptive behaviors is

neuro-biologically located as a disability deep inside, and that their neuro-biological makeup is the reason for their punishment and regulation.

While the quantitative reviews of the MBFASDYJP seem to point towards normative dogmas of discipline and punishment at the heart of this infrastructure of diagnosing FASD in the criminal justice system, it is curious to see how some of the qualitative reviews of this program represent another deeply problematic issue at the heart of these operations. Namely, the architects of the MBFASDYJP see the program within a tautological position that it seeks to be helpful to individuals with FASD so it simply must be good. The heart of such praise is rooted in the Icons Project at the heart of the MBFASDYJP. Based on understandings of the language-based deficits of FASD, the Icons project had graphic arts specialists design a series of ‘icons’ in place of written words that could be used by justice officials when reviewing court-ordered conditions with FASD affected youth. The assumption is that the highly technical language of the courts is simply too much for individuals with FASD to comprehend. It is the same reason that all of the characters in the This is Me program are highly stylized cartoon figures who are meant to be stripped of all social contextual markings – like gender or race – and are even stripped of language signifiers and whose communication is expressed in grunts, mumbles and other such punctuating gestures, but who then come to resemble animated teeth that one might see on a dental commercial.¹⁰¹

¹⁰¹ Furthermore, while de-contextualization is the goal, in order to make things more “simple” for the youth and to prevent them from getting lost in unnecessary details, it is simply untrue that these dental figures accomplish this goal. Voice tenor, hairstyles and forms of dress particularly denote gendered normative characters. And I am explicitly opening the question here as to whether the modalities of punishment exhibited by these dental figure teachers is a way of indexing a particular form of punishment in which Indigenous children and youth are regularly exposed to in educational settings, as well as across a wide set of other systems.

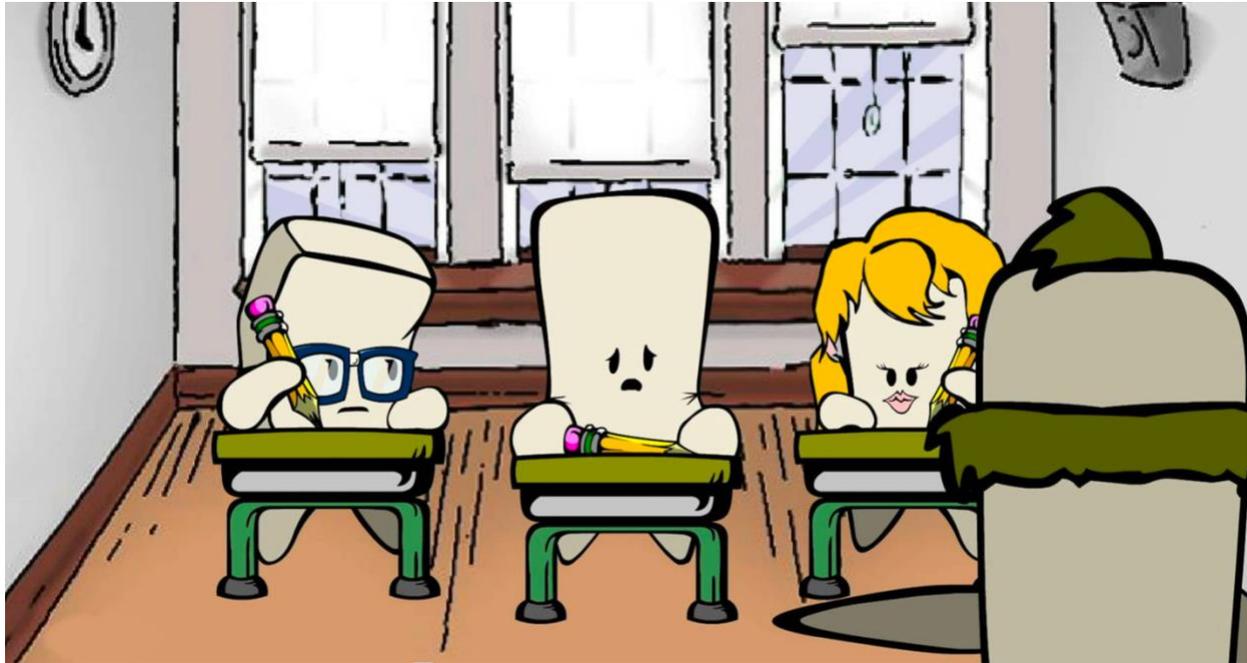


Figure 2 - A frame from the “This is Me” video titled, “Challenges. Focus and Attention: Easily Distracted.” The teacher is here telling Me to leave the classroom because it is distracting the other students. Accessed at <https://mefasd.com/watch-me/challenges/easily-distracted/>

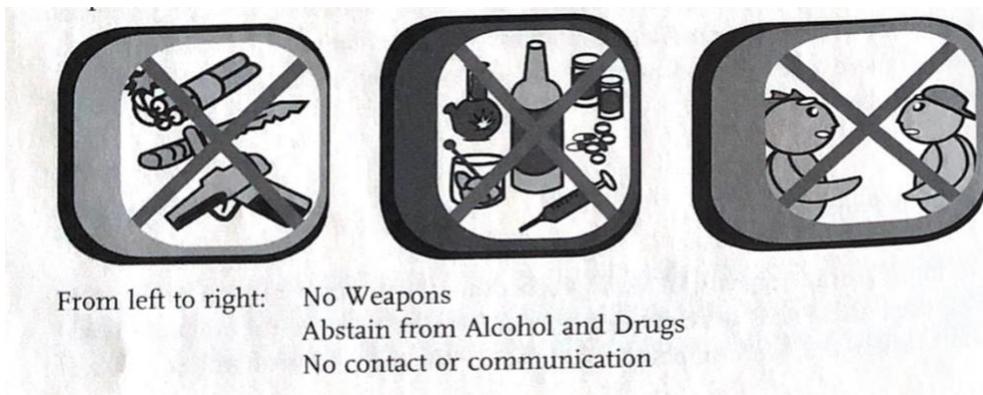


Figure 3 - Icons Project. Image accessed from Harvie, Longstaffe, and Chudley, “The Manitoba FASD Youth Justice Program,” 228.

I have had conversations with language specialists who work in FASD who have conceded to me that the highly specialized and technical language of the courts and of court orders presents difficulties for most people, and not simply those with FASD. Indeed, on more than one occasion, a well-known speech language therapist in the FASD world has joked with me how

everyone going through the courts should have assistance in navigating the byzantine form of legal space and documents, and that maybe we all need pictorial representations of what is going on. Jokes aside, there is a fetishistic-like adherence to the idea of such Icons projects, with assumptions that pictures are inherently less abstract and more straight forward than written or spoken words. And it always struck me as a redundant project as highly stylized images of court orders still have to be communicated via speech anyways. For instance, an image of two highly-stylized figures facing one another with a big “x” drawn over them [see figure 3], indicating that one must not speak to another person, still requires the probation officer to elaborate that this image has the meaning of a “No contact or communication” order.¹⁰² What is even more important about these semiotic ponderings of the principles of communication and the centrality of meaning-making to criminological thinking on rehabilitation is how they are cemented as truth through problematic social exchanges.

For example, the architects of MBFASDYJP celebrate the efficacy of the Icons Project by citing an email exchange they had with a probation officer who described how one of his clients benefited from it. Specifically, he says that the youth claimed that the Icons permitted him to “understand my conditions for the first time.”¹⁰³ This same officer readily admits, however, that the youth in reference does not have an FASD diagnosis. However, he assures his colleagues that it is likely that the youth has FASD given that he is “cognitively impaired,” which the PO determines based off of the youth’s struggle with reading and writing, and that he has “serious difficulties remembering,” the proof of which is the fact that the youth repeatedly misses his

¹⁰² Such an image for a “no contact order,” which is a very common court-ordered condition, would further require an elaboration for who it is that one is not able to contact, and it is unclear to me why the highly metaphorical and metonymic operations required in such ‘icons’ are any less rooted in “language” even in its most basic definition of ‘verbal’ communication.

¹⁰³ Harvie, Longstaffe, and Chudley, “The Manitoba FASD Youth Justice Program,” 228.

probation appointments.¹⁰⁴ Furthermore, the PO offers, this youth's mother "admitted on the record she drank during the first month of her pregnancy."¹⁰⁵ It is stunning that a program that revolves mostly around assessment, and which built itself on the premise that the courts need more adequate means of assessing inmates with FASD, uses an example in which a youth does not even have an FASD diagnosis in order to demonstrate the benefit of a program for youth inmates with FASD. This mundane example hits many of the indicators in which FASD is a social and political diagnosis. Namely, how it presumes without direct evidence, and usually with highly circumstantial or assumed bits of evidence, such as those psychological details acquired by the non-clinical expertise of a probations officer, and the figure of the mother, whose testimony can be given exceptional value, either in its positive formulation (here, the PO claims the mother "admitted on the record she drank during the first month of her pregnancy") or through its negation, as in the case with Dylan, who *Winnipeg Free Press* reporters judged to have FASD largely through the fact that his mother would *not admit* her consumption of alcohol during pregnancy.¹⁰⁶ And the central figure of alcohol in this criminological setting makes all of this tautological logic seem naturally as *if* it is an Indigenous problem within the clumsy but socially effective syllogism where the Indigenous problem is one of crime, and where crime is a problem of FASD, and where FASD is an Aboriginal problem. Though FASD, crime, and Indigeneity are manufactured by such enormous infrastructural projects as WATSS and the

¹⁰⁴ These are common anecdotal examples that are used in a variety of criminological research on the particular problem of FASD in the criminal justice system. Whenever I hear such examples, I think about the many times I have walked out of a probations meeting with a participant of mine and the little blue card with the next appointment is promptly thrown into the air with anger and defiance. It seems to me this is a purposeful "forgetting," if it can be called that at all. Yet it regularly is cited as proof of a poor memory and a brain impairment.

¹⁰⁵ Harvie, Longstaffe, and Chudley, "The Manitoba FASD Youth Justice Program," 228.

¹⁰⁶ McIntyre, Turner, and Owen, "Perspective: Chill. Thrill. Kill: A Night in the Life of Winnipeg's Car-Stealing Subculture."

MBFASDYJP, this identity is regularly manufactured in mundane simple exchanges like an email in which one recounts their impressions.

In the end, the “statistical outcomes” that demonstrated the success of the MBFASDYJP were statistics that had nothing to do with improvements in the lives of the youth who were being recruited into this mass diagnosis procedure, or even in demonstrations of reduced recidivism rates. Instead, they had everything to do with “confirming the initial concerns which gave rise to the program.” In short, because the program feared a “gap in knowledge” about the unknown amount of FASD diagnoses in the youth corrections system, this was confirmed when 73 of its 385 referrals (as of 2011) were diagnosed with an FASD (nine with pFAS and 64 with ARND).¹⁰⁷

In September of 2020, Manitoba began a similar pilot program for young adults, aged 18-25, citing that it was being developed in the spirit and success of the MBFASDYJP. Interestingly, in the provincial news release and coverage on this program, there were no relevant statistics or data cited to prove that the MBFASDYJP had been successful, only vague statements about how “youth with prenatal alcohol exposure have shown significant improvements in their functioning and self-awareness, and their families and community support workers are in a better position to offer appropriate accommodations to meet their complex needs.”¹⁰⁸ Manitoba had also been running a unique “FASD court” for adults since 2019, in

¹⁰⁷ Harvie, Longstaffe, and Chudley, “The Manitoba FASD Youth Justice Program,” 225. In a more recent accounting of the numbers, in 2018, it was noted that the program had accumulated, to date, a total of 1048 referrals, with 234 diagnoses and another 94 youth on the waitlist for assessment. It is notable that of the 1048 referrals, only 332 were assessed. 417 youth referred were removed from the waitlist because they were either found to have a prior diagnosis of FASD, refused the assessment, or because they turned 18 and were thus ineligible for further assessment under the conditions of Youth Justice legislation. Another 205 youth were found to have no prenatal alcohol exposure, and so did not proceed with assessment. See Longstaffe et al., “The Manitoba Youth Justice Program,” 264.

¹⁰⁸ “MANITOBA LAUNCHES NEW FASD PILOT PROJECT FOR YOUNG ADULTS INVOLVED IN THE JUSTICE SYSTEM” (Manitoba Government, September 30, 2020), <https://news.gov.mb.ca/news/index.html?item=49323&posted=2020-09-30>.

which individuals with FASD are assisted with specialists to navigate the court system, yet no data could be mustered to explain how these projects were helping, except to say that they were improving the “functioning” of people with FASD and expanding capacity into the community to “meet their complex needs.”

Basically, it seems that all the MBFASDYJP provides is a claim to focus on rehabilitating and assisting youth in more humane and progressively just ways, a “new regime of justice” that was launched with the *Youth Criminal Justice Act* in 2003, but which amounts to sheep’s clothing for the older draconian forms of invasive assessments inherited by the former *Young Offenders Act*. Even if the *YOA* was seen as draconian, the *YCJA* and projects like the MBFASDYJP or WATSS still have to deal with the very practical and legal conundrums of what is to be done with these incorrigible youth? While sarcastically celebrating the emphasis of rehabilitation and never treating youth as hopeless causes, the *Winnipeg Free Press* reporters who wrote an exposé on Winnipeg subculture of car thieves quipped that “the framers of the law have never met 16-year-old Dylan Parker... [who has] the symptoms – though not the diagnosis - of FASD.”¹⁰⁹ Furthermore, he is also a “ward of Child and Family Services (CFS),” who had for months been “warehousing him in a hotel without adequate treatment or service.” This practice of “warehousing” Indigenous youth in care at dingy hotels in downtown Winnipeg has for a long time been a source of shame and outrage for the province of Manitoba and its Department of Families. In 2014 it was revealed that the murdered Anishinaabe teen, Tina Fontaine, was similarly being warehoused right before she went missing.¹¹⁰ As of June 1, 2015 the province subsequently altered its policies to ban this form of “care,” yet the current

¹⁰⁹ McIntyre, Turner, and Owen, “Perspective: Chill. Thrill. Kill: A Night in the Life of Winnipeg’s Car-Stealing Subculture.”

¹¹⁰ “A Place Where It Feels Like Home: The Story of Tina Fontaine” (Winnipeg, MB: Manitoba Advocate for Children and Youth, 2019).

Progressive Conservative government has stopped tracking the practice because they say it is not permitted, a claim that has been criticized as false and cynical by First Nation child advocate leaders.¹¹¹ What is clear is that the same conditions of apprehending Indigenous children has continued apace, and Tina's tragic death is a testament to the violent machinations of a system that has been stealing our children for over a hundred years under the pretense of care while dumping their bodies in inhospitable living conditions.¹¹² Even the work of Streissguth et al. argued that the main (if obvious) "protective factor" for keeping youth with FASD (and perhaps all youth, regardless of their neurocognitive makeup) out of trouble with the law is to provide conditions of care and stability. The tragic end of Tina's life only forces us to return to the question of what an FASD diagnosis provides to our society with a different emphasis. For, clearly, programs like WATSS and the MBFASDYJP, even the entire system of Child and Family Services, are not helping youth, or even reducing crime. They are simply giving us new ways of designating "special cases" for "emergency outlet" storage in hotels, or "targeted treatment" by police, probations, and a host of community programming that create a more "certain" means of their punishment. In other words, these are systems of surveillance and containment, pure and simple. FASD is only the newest way in which the state has figured out how it can contain and punish those youths who scare us. FASD allows us to channel this fear of the criminological through authorial medical discourses of the psychologically impaired.

¹¹¹ Steve Lambert, "Manitoba Stops Tracking CFS Wards in Hotels," *CBC News*, April 6, 2017, <https://www.cbc.ca/news/canada/manitoba/manitoba-cfs-tracking-hotels-1.4058633>.

¹¹² *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a, 2019, 560.

Spider Teachings

For several years I've been dreaming of spiders, never more lucid as when I was doing fieldwork, really trying to figure things out. They are not exactly dreams though, because I'm pretty sure that I'm awake when I see them. Often, they are crawling along the ceiling and out of the room I am sleeping in. Most of the time, though, I sense the spider in other ways. A feeling or knowing that it is in my bed. I try not to move, scared that I might provoke it. I bide my time, waiting for the right moment, but mostly the courage, to whip off my covers, jump out of bed, and turn on the light. The monstrous spider is never there, of course, and I feel silly, every time. Why can't I remember... this is *just a dream*?

Elder Charlie told me spiders are usually telling us something about control. He asked me, "that mean anything to you?" I lied and said I couldn't think of what that could be referring to. Shame washed over me as I began realizing how much anger I had been carrying towards Rich, a white social worker; how I had been blaming him for Lawrence's (a young and homeless Native man) lack of housing. My anger was nothing if not about control, or, more specifically, a feeling of a complete lack of control. I saw how the blame started as an irritation at Rich's occasional slips, but these niggling thoughts grew into a monster as I saw this incompetence absorbed by his employer, a non-profit housing program that was supposed to help young Indigenous people like Lawrence who were struggling with addictions and chronic homelessness. Every excuse Rich made compiled my irritation until the person of Rich became blurred into a grey mass of associations. Rich became the embodiment of the systemic suffering that I otherwise knew how to distinguish analytically from individual responsibility. How had I come to embrace this accusation in Rich? Not only did I accuse him of incompetence, which he certainly could be; I intuited a sinister intentionality of neglect, a personification of evil in his actions, in the regularization of his mistakes and the normalization of his ineffectiveness. Nothing made me angrier than his excuses, though, or of his desperate attempts to pass the buck. Could he truly care about Lawrence if he was always trying to get out of his responsibility for him? Clearly, he did not care about Lawrence's life, I thought with a pious and rabid bite. He was only collecting a pay cheque, maybe even taking a perverse pleasure in his sloppy work.

The first teaching the spiders gave me about control was to recognize its inverse in accusation and the insatiable anger and blame that could fill that void.

Chapter 1: Accusation

*“...the offender becomes an individual to know.”*¹

In the early morning of February 14, 2017, Winnipeg bus driver, Irvine Fraser was fatally stabbed at the last stop of his route. This stabbing occurred while, we were told, he was attempting to awaken a sleeping passenger who refused to get off of the bus.² The passenger was Brian Kyle Thomas, a young Cree man from Shamattawa First Nation who was “known” to police for past assault charges. Mention of his “long criminal record” filled news headlines for days as a fearful tone overtook the Winnipeg public that could not stop talking and worrying about this tragic event.³ It was truly a wounding of the collective psyche, including my own. Having occurred at the midpoint of two years of fieldwork, this case not only grabbed me but seemed to reorient everything I had been doing and thinking up until that point in my investigation on how exactly the neurodevelopmental condition known as Fetal Alcohol Spectrum Disorder was being integrated in the criminal justice system. I noticed immediately how the chaos of Thomas’s (then alleged) actions was tamed by descriptions of his criminal record and specific and vague descriptors of his Indigeneity. Similarly, his alleged condition of FASD somehow tied this all together. Thomas was a flashpoint of how FASD has come to inflect, or infect, the imagination of law and order in Canada, and particularly how the nation’s contention with Indigenous life is central to this medico-legal imaginary of justice, public safety

¹ Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans. Alan Sheridan, 2nd edition (New York: Vintage Books, 1995), 251.

² Winnipeg Sun, “Refusal to Leave Bus Led to Driver’s Death: Police,” *Winnipeg Sun*, February 15, 2017, <https://winnipeg.sun.com/2017/02/15/man-charged-with-killing-bus-driver/wcm/cb55bb6c-d9fb-4592-940a-7f6e24b43557>.

³ Kevin Rollason and Mike McIntyre, “Murder Suspect in Bus Driver’s Death Has Long Criminal Record,” *Winnipeg Free Press*, February 15, 2017, sec. Local, <https://www.winnipegfreepress.com/local/transit-driver-attacker-charged-with-murder-413840473.html>.

and punishment. It was the trauma at the heart of this public reckoning that gave me a new way into my questions.⁴ As Winnipeg seemed to be replaying this event over and over in their minds, as if we could somehow conjure a different outcome, it was the ways that Thomas's identity as an Indigenous man with FASD became repeated and rehearsed in this loop that provided some crucial insights into how concepts of Indigeneity and cultural and biological concepts of dysfunction inform the broader moral substance of the law and order debate and its material-institutional effects in Canada.

The public nature of this murder, its location on a bus and in an otherwise 'quiet' part of the city, a neighborhood that housed the University of Manitoba, was perhaps the most shocking and disconcerting aspect of this story for most people. Many (particularly those who use public transit) could imagine themselves at the scene of this violent event, which only facilitated traumatic speculation and constant wondering – *what if I had been there?* – that attributed a strange agency to the randomness of the event; *why did it happen then, to that person, and not me? Is it just luck? Why did Thomas do that to that person at that time?* In this way, the public was caught between the will of Thomas and his actions as much as they were caught in the inexplicable sociological narratives at hand, a zone of indeterminacy that some scholars of witchcraft suggest is central to the act of accusation, which accounts for the indeterminate space or gap between intention and action, where words or discourse cannot account for or explain the world.⁵ Thus, it was appropriate that Thomas was referred to in colloquial form as some version

⁴ I am thinking here specifically of the Freudian notion of trauma, and particularly his puzzling over the war neuroses of soldiers who would relive the negative stimuli that overwhelmed the 'protective shield' of their conscious, where the event then cannot be contained in memory but instead constantly ruptures the present. Indeed, these events mark a certain refusal of memory, an inability for the event to be absorbed or historicised by the subject, with each reliving, or rupturing, as a sort of futile attempt of leading to a different outcome. Sigmund Freud, *Beyond the Pleasure Principle*, trans. James Strachey, vol. 18, The Standard Edition of the Complete Psychological Works of Sigmund Freud (London: The Hogarth Press, 1955).

⁵ Rosalind Morris, "Witchcraft," *Social Text* 95 26, no. 2 (Summer 2008): 120; See also, James Siegel, *Naming the Witch* (Stanford: Stanford University Press, 2006).

of “*the bus driver killer.*”⁶ This name captured the public anxiety while also simplifying this violence within easily understandable terms, a protagonist and an antagonist. Fraser’s death was described to have been precipitated by a cold stubborn-ness of Thomas. “Refusal to leave bus led to driver’s death,” read one news headline.⁷ Such announcements of intent were part of a larger attempt at portraiture of Thomas’ life. Reporters scrounged through past judicial assessments that summarized particular capacities or propensities of Thomas. “The one thing judges, prosecutors and his own lawyers agree on about Brian Kyle Thomas,” recounted one article, “is that when he drinks alcohol he can get violent.”⁸ Finally, a narrative description of surveillance video of the events of Fraser’s death from a protected “police source” put the final nail in Thomas’s coffin: Fraser repeatedly told Thomas to get off the bus, then Fraser “apparently put his hands on the man [Thomas] in an attempt to escort him off [the bus], prompting a violent reaction.” What happened next was that “He [Thomas] spit on the bus driver.” Finally, “Fraser then grabbed Thomas and was in the process of pulling him off the bus when he pulled out a large knife and began slashing and stabbing. It was an extremely violent attack, one that left a large pool of blood outside the bus and resulted in Fraser’s arm nearly being severed, according to the source.”⁹ This police-sanctioned narrative of events became the official public account for the next two years, and provided some semblance of coherence to the events. But there were still major gaps that besieged the public eye. Namely, why would Thomas refuse to get off of the

⁶ Two years later, while inquiring about the location of Brian Thomas’s trial, the law clerk asked me with a puzzled look and asked, “Thomas?” She then immediately recalled, “oh, the bus driver killer!”

⁷ Winnipeg Sun, “Refusal to Leave Bus Led to Driver’s Death.”

⁸ Rollason and McIntyre, “Murder Suspect in Bus Driver’s Death Has Long Criminal Record.”

⁹ Ibid. There are several woeful inaccuracies and interpretive liberties within this account – particularly, the video was not in any way clear in the ways described by the police source. No knife was ever seen on video, and the knife that was eventually presented as evidence was not found until several months later during spring thaw, and a considerable distance from the scene of the crime. Descriptions of the attack, such as whether Thomas was “slashing” and “stabbing,” or whether Fraser might have produced the weapon that inevitably killed him, were also up for grabs in the court room. We will mark this for the time being and return to it in the following chapters. For now, our focus will be on the modest examination of how Thomas was figured in the public eye.

bus? Why kill for *that*? Thomas was fundamentally enigmatic, and, as such, was the source of great anxiety.

Such are the conditions of accusation, and that make accusation more than simply an act of blaming or holding one to account, or of upholding the law. Accusation is about subverting the law, “even when it claims to act on behalf of the law and even when, as is so often the case, it mimics the law and its institutional forms.”¹⁰ Indeed, accusations always come with an expectation that the accused will account for themselves, admit to their crimes. It is with this in mind that we can read the peculiar mode in which Thomas was made to ‘apologize’ for his actions only days later. In a *CBC News* article, Thomas is quoted apologizing to a judge in a 2016 court appearance in which he was being charged (accused) and convicted of assault: “I am just so sorry for what happened... If I wasn’t drunk I would have never did that.”¹¹ The same article ends with an equally peculiar apology from Chief Napaokesik, the chief of Thomas’s home reserve of Shamattawa First Nation. As if speaking directly to Fraser’s family, and on behalf of his nation, Napaokesik is quoted as saying: “We are so sorry, these are just words but I feel for what the family might be going through in Winnipeg. We wished it had never happened.” What are we to make of these two apologies, both of which are effectively ventriloquizing Thomas?

The historian, Luise White, has said that accusations and confessions “are matters of right answers in appropriate vocabularies, they’re not about getting truth or falsehood.”¹² Following historians of witchcraft she notes the common feature of similarity between the accuser’s

¹⁰ Morris, “Witchcraft,” 118.

¹¹ Jill Coubrough, “‘We Hoped He Could Be Helped’: Shamattawa Chief Says Community Reached out to Suspect in Bus Driver’s Killing,” *CBC News*, February 16, 2017, <https://www.cbc.ca/news/canada/manitoba/bus-driver-killed-winnipeg-transit-suspect-brian-kyle-thomas-1.3987093>.

¹² Luise White, “Telling More: Lies, Secrets, and History,” *History and Theory* 39, no. 4 (2000): 19–20.

accusations and the witch's confessions. "That the vocabularies are shared gives them their power... When vocabularies are shared and agreed upon, there can be no questioning of an accusation or the accuracy of a confession" (Ibid., 19). In addition to shared words, though, White's insistence of shared vocabularies has a more symbolic weight. In this way we can read the vocabularies of Thomas's and Napaokesik's apologies as confessions and, thus, the subject of accusation, for a couple of reasons. For one, they quite literally point to Thomas's crimes as if they are undoubtably true, and before any accounting of evidence. Crucially, Thomas's past is uncovered to account for and confess to his present actions, an apology for his past crime of violent assault on his then girlfriend as much an explanation for this current event as it is a confession to it. More directly, however, there is a shared sense of the unknown in these apologies/confessions, a "something else" that is alluded to by both Thomas and Napaokesik. From Thomas, it is the elsewhere of alcohol, that strange agent that is known to possess men and which has in recent centuries taken the place of Windigos or witches in Native life.¹³ For Napaokesik's part, he confronts the inexplicableness of it all, the *why* it happened at all.

Thus, with White's approach to accusation approached through a structural-functionalist framework we can see how accusation and confession here serve as mechanisms for mediating a social tension. This mediation aligns vocabularies and renders comprehension – the accusation itself as a means of creating sense and the confession serving as a means of affirming that sense.¹⁴ Thomas's acts may be horrendous and unspeakable, but with the confessionals from him and Napaokesik we now know for certain that he is the killer and we can put a name to his acts and by extension, his being, chaotic and unruly as it may be. But just like the police narrative

¹³ Harold R. Johnson, *Firewater: How Alcohol Is Killing My People* (University of Regina Press, 2016); Hugh Brody, "Alcohol, Change, and the Industrial Frontier," *Études/Inuit/Studies* 1, no. 2 (1977): 31–46.

¹⁴ "When vocabularies are too far apart," White writes, "they are incomprehensible to each: no confession is possible, no resolution, no common ground." White, "Telling More," 19.

above left a pesky remainder of why, so too these confessions abandon the possibility of clarity. As much as Napaokesik is affirming the tragedy of the loss of Fraser's life, he is equally lost in the realm of doubt and disbelief about Thomas. The words that escaped his mouth to explain this event, "We hoped he could be helped," reflected his astonishment just as much as it did the public's. As anthropologist Rosalind Morris summarizes accusation, it may thrive in the register of belief, but can "exist only in the space of doubt."¹⁵ In addition to this tension of belief and doubt, we note also that there is something inexplicable of Napaokesik's testimony itself; namely, why he was called on to account and apologize for Thomas in the first place, and particularly on behalf of his collective, his nation ("we are so sorry...we wished it never happened..."). As Morris also suggests of accusation, "[a]lmost invariably, it demands that the accused confess—and, moreover that she or he implicate others."¹⁶ In this sense of implication we come closer to White's meaning of accusation, where the objective is the coherence of shared vocabularies. For just as there is doubt in Napaokesik's narrative of having hoped that Thomas could have been helped, there is also an affirmation here, an answer that is characterized by a discernable fatefulness: clearly, Thomas could not have been helped. We will see that this question of tense is central to the figuration of Indigenous life in Canada, and particularly for Indigenous youth like Thomas who are involved with the justice system. It is the central means through which the enigma of these subjects are captured and tamed and, in White's notion of the vocabulary of accusation, where this tension is resolved. We will also see that this mode of accusation is better seen as a forceful attempt to block out the inexplicable, a means of plastering over contradiction. For within Napaokesik's account of Thomas is the tragic story of the last time he saw the young man on the streets of Winnipeg, without shoes, food, housing, or a penny to his

¹⁵ Morris, "Witchcraft," 119.

¹⁶ Morris, 118.

name. Thomas's refusal to return to the reserve with Napaokesik is taken in this article as an affirmation of Thomas as a lost cause. Indeed, journalist Coubrough doesn't ask at all why Thomas might have refused Napaokesik's invitation, a refusal-cum-silence that seems to affirm Thomas as a subject predestined to be precluded from the future. I push on this moment differently, however, insisting that we confront this gaping hole and, particularly, keep alive the question of why, for instance, Thomas might prefer to stay in his homeless state rather than return to the reserve with Napaokesik.¹⁷ Confronting this gap enables us to see precisely this grammatical-discursive mechanism in which Thomas's life is apprehended as a tragedy of the past, a subject foreclosed to the future. What I see in the apologies of Thomas and Napaokesik is not necessarily a shared vocabulary – I do not think Napaokesik actually thinks Thomas is gone, for instance – but the force of a *social* grammar, the imposition of a specific vocabulary for rendering Indigenous life and a symbolic field of language and law that Indigenous peoples are both forced to articulate themselves within while also finding space in the excess and remainders of this field to be and think and do otherwise.

This chapter will attempt to create a basic vocabulary for analyzing this symbolic field. The first half will work through the conditions in which Thomas's crime is imagined and figured through the sociological forms in which Indigenous difference is produced, particularly with regards to the enactments of public space and their specific meanings. By tracing how this public space is given meaning and enacted, and specifically how collectivities of Indigenous peoples both inform and are made by these public spacings, we will come to appreciate how Thomas's

¹⁷ Incidentally, the reporter did not ask about the (non)sense of this decision. I do not mean to suggest that there is a clear answer here. Even though we might say that housing is just as insecure on the reserve and thus this return is not really a solution for Thomas, I also maintain that we have to keep this question alive and not pretend that we can absolve ourselves from confronting it and its potentially impossible answers. Coubrough, “‘We Hoped He Could Be Helped.’”

acts can be construed and experienced as *random* and *senseless* outbursts of violence. From there, the second half of the chapter locates the specific discursive mechanisms in which Thomas's difference is produced, particularly as he is subjected to the genealogical inquiries that so capture Indigenous life across settler colonial states, in which they are imagined as subjects of inheritance that are radically constrained to their social structure of Indigenous kinship.¹⁸ If we see in the first half that Fraser's life is produced within a discourse of public and civic service and responsibility, in the second half we see that this evocation of public identity is equally predicated on an elaboration of Fraser's inherent entitlement to the future, and that Thomas's crime is so threatening because of his status as a subject of a *genealogical society* that is an inherent threat to this autonomous right to the future. We will see how Thomas's crime is imagined through the meaning of Indigeneity that characterizes his subject position, but with the added features of risk that specifically define this meaning of Indigeneity at the crossroads of violence and criminal justice in Canada. Specifically, we will examine how Thomas's genealogical figuration both renders and mitigates his status as an enigma in the eyes of the law and of society more generally. His alleged diagnosis of having Fetal Alcohol Spectrum Disorder (FASD), as well as his experience in child welfare are corresponding and interchangeable features of this genealogical story that explain his crime as a preordained outcome of the generalized misery and dysfunction of Indigenous life in Canada. Such an analysis is important because it speaks to broader discursive registers in which the Canadian state and society are regularly displacing the responsibility of colonial violence in the past while simultaneously condensing this violence within contemporary Indigenous life as disorders and mental health

¹⁸ I am drawing specifically on the discursive tense of *genealogical societies* and *autological* subjects theorized by Elizabeth Povinelli to think through the ways in which Indigenous life is caught by and disciplined by recognition in late liberal settler colonial societies. See Povinelli, *The Empire of Love*.

issues. An examination of the early accusations against Thomas for his killing of Fraser thus reveal to us important strategies for which Indigenous life is apprehended and contained in Canada today.

The threat and spatial regulation of the Indigenous underclass in Winnipeg

As would be expected, the incident of Fraser's death became a major issue of public safety, and many were shocked by what was described a "senseless" act of brutal violence.¹⁹ Fraser was described as having been "murdered for doing his job," and the public safety discourse quickly became focused on the plight of Winnipeg transit worker safety as drivers and workers began to speak out about this incident and how it was reflective of broader conditions lived by transit workers as well as the general public.²⁰ A fellow driver of Fraser's and nineteen year veteran of the transit force, Nelson Giesbrecht, spoke with tears in his eyes as he expressed his dismay to reporters: "My fellow brother was murdered for doing his job last night. That's all I know." In a reporter scrum, Giesbrecht described just how perplexing this event was for him and other drivers.

"I don't think he [Fraser] was the type of guy who would care about bus fare if some said "oh I need a ride!" [gestures with arm] I mean, yeah, come on in. Like, I don't care about bus fare. I don't care who knows it. I don't care. You want a ride, get on my bus. Let's go. If you're going to tell me a long story, I don't care to hear it, let's just go. There's no reason why this should happen. Not at all."²¹

¹⁹ Rollason and McIntyre, "Murder Suspect in Bus Driver's Death Has Long Criminal Record"; James G Jewell, "Suspect Charged in Transit Driver Attack," *The Police Insider* (blog), February 15, 2017, <http://thepoliceinsider.com/suspect-charged-transit-driver-attack/>.

²⁰ Darren Bernhardt and Bryce Hoye, "'Murdered for Doing His Job': Winnipeg City Bus Driver Dies after Stabbing," *CBC News*, February 14, 2017.

²¹ Giesbrecht's interview contained in video recording embedded in article: Rollason and McIntyre, "Murder Suspect in Bus Driver's Death Has Long Criminal Record."

His comments belie a subtle analysis of how bus fare creates disputes between drivers and riders, which has been cited as the number one reason for generating conflict on public buses, but which was received by deaf ears by the media who were more interested in the dramatic story of murder.²² When asked how he and his fellow drivers were coping in the short few hours since Fraser's death, Giesbrecht went on to say that he was, "Pardon my French, shit scared! I... I'm not... [shrugs] yeah... How many crazies are out there that I just let on the bus and they're just on the verge? Like, I don't know!" A sobering analysis of class and social inequalities fueling conflicts and even violence was thus overturned for the more elusive figure struggling with unknown mental health issues. Giesbrecht's anxiety of those "crazies" out there who are "on the verge" thus came to define the problem within the unstable boundaries of fear and anxiety while also providing discursive elements in which to publicly represent Brian Thomas.

Speculations about the mental health of "crazies" on the bus were situated within anecdotal and experiential accounts of the effects all of this was having on drivers. As one Winnipeg bus driver told the *Winnipeg Free Press* after Fraser's death: "Every day when I go to work, I expect to be assaulted."²³ This discourse of danger on the bus is relatively new in Winnipeg and has only become a regular topic of the news and everyday discussion with the past decade. As late as 2012 one could find the occasional story in a local news report that staged the grievances of transit passengers through a lens of annoyance of the bad etiquette or "bad behavior" of certain other "rude" passengers on the bus.²⁴ In more recent years, however, it has

²² Bartley Kives, "Low-Income Bus Passes Would Cost Winnipeg \$6M to \$15M a Year," *CBC News*, November 19, 2018, <https://www.cbc.ca/news/canada/manitoba/low-income-bus-pass-winnipeg-1.4910809>.

²³ Joyanne Pursaga, "Assaults Remain Constant Risk for Bus Drivers | Winnipeg Sun," *Winnipeg Sun*, April 20, 2018, <https://winnipeg.sun.com/news/local-news/0421-bus-driver-assaults>.

²⁴ "Bad Behaviour on Winnipeg Buses Common," *CBC News*, August 14, 2012, <https://www.cbc.ca/news/canada/manitoba/bad-behaviour-on-winnipeg-buses-common-1.1162346>. As a patron described to CBC news reporter her sense of "bad behaviour" was due to intoxication of patrons who get on the bus and create a "nuisance" for other patrons. "They're ignorant and rude," she said as she sided with a bus driver who

come to be represented more in terms of daily fear and anxiety of safety and bodily harm as recounted by the driver above. Roughly five years before Fraser's death stories of bus violence began making headlines in Winnipeg, generating a collective sense of insecurity and fear for passengers and bus drivers alike. A large portion of this violence was described in scatological narratives of the transgressions of bodily fluids and the fears of health violations from passengers who spit, shat, and vomited on or at bus drivers. In one particularly iconic news cycle, former Winnipeg Transit driver, Brian Lennox, was featured in the nightly news and papers describing how he had been forced to retire for mental health reasons, particularly the development of PTSD from all of the violence he faced while on the job. Visibly shaken, Lennox described to reporters his disturbing experience of swallowing feces, urine, and vomit that had been thrown at him in bags by two youths at a stop.²⁵

Of all the accounts of physical violence, for Lennox and other drivers it is the fluidity of such encounters that is so traumatic and which dominated the news cycle. "It went down my throat. It went up my sinuses. It went into my eyes ... I became hysterical," Lennox said of the disgusting and strange weapon that had been deployed against him.²⁶ The president of the bus driver union could regularly be heard on the nightly news describing drivers who had to be checked for HIV and Hepatitis C after being spat on by unruly passengers.²⁷ The state of the bus became so concerning that even the police labeled it as an exceptional and growing concern. Constable Rob Carver of the Winnipeg Police Service historicized this sociological phenomenon

had been accused of physically assaulting a passenger. "You're asked to get off the bus because you're being rude and obnoxious and you're intoxicated. Just get off the bus," she concluded.

²⁵ "Many Attacks on Transit Drivers Not Reported: Ex-Driver," *CBC News*, August 27, 2012, <https://www.cbc.ca/news/canada/manitoba/many-attacks-on-transit-drivers-not-reported-ex-driver-1.1218785>.

²⁶ *Ibid.*

²⁷ As Transit Union president, David Callahan, put it back in 2016 after a bus driver had been filmed beating on a passenger, the driver "saw red" after being spat on. "Winnipeg Transit Driver 'saw Red' after Being Spat on, Says Union President | CBC News," *CBC News*, August 5, 2016, <https://www.cbc.ca/news/canada/manitoba/winnipeg-transit-bus-attack-1.3709083>.

for the public at a press conference where he thought out loud about a recent beating of a transit driver by three individuals: "I can tell you a number of years ago, I don't think I was standing up here talking about any [bus driver assaults], essentially. And I think we're talking about them fairly regularly now."²⁸

Such statements have an echo to them, for barely a decade prior Sgt. Dennison and Sgt. Safioles of the Winnipeg Police Service were both warning the public about a troubling new breed of Indigenous youth terrorizing the city in stolen cars, who lacked that "little voice [of reason] in the back of their heads" and were possessed by violent urges.²⁹ These moments reflect a repetition of anxieties of unbounded Indigenous youth in public motion and presence; one who moves through the darkness of the city, ready to strike unsuspecting public at any moment, the other a traumatic presence in the locomotion of public space. But both of these repetitions of anxiety are similarly united in their lack of structural analytic. For where as we have seen in the introduction the hysteria of stolen cars became diagnosed and located in the cerebral constitution of Indigenous youth, here the structural contradiction of inequality was displaced into a fear of the Indigenous other. As was revealed by the Transportation Research Board at the time of this acceleration of brawls on city buses, the main contributing factor most likely to lead to assaults on buses, and particularly toward drivers, was dispute over fare.³⁰ The bus driver assault that prompted the Winnipeg Police constable to speak out to reporters (above) was reported to have

²⁸ Bartley Kives and Cameron MacLean, "Winnipeg Transit Supervisor in Stable Condition after Assault by 3 Passengers," *CBC News*, August 24, 2018, <https://www.cbc.ca/news/canada/manitoba/bus-assault-driver-sent-to-hospital-1.4797901>.

²⁹ "Another Pedestrian Targeted by Car Thief, Say Police," *CBC News*, March 19, 2007, <http://www.cbc.ca/news/canada/manitoba/another-pedestrian-targeted-by-car-thief-say-police-1.639338>; "Teens Targeted Joggers, Winnipeg Police Say," *The Star*, March 13, 2007, http://www.thestar.com/news/2007/03/13/teens_targeted_joggers_winnipeg_police_say.html.

³⁰ Bryce Hoye, "Are Shields the Answer? Fatal Stabbing Has Bus Drivers Calling for Safety Barriers," *CBC News*, February 18, 2017; Kives, "Low-Income Bus Passes Would Cost Winnipeg \$6M to \$15M a Year."

been precipitated by the fact that one passenger did not have enough fare.³¹ We accounted for this via a brief interlude into the “Indian problem” in the introduction, and particularly how Indigenous youth in the urban spaces of Canada are today a major concern for the settler state, but these two examples of fear and subsequent outlawing of different forms of the Indigenous requires a deeper theoretical approach.

That Thomas’s crime took place on a bus provides a dramatically clear formulation of this story of how public identities are created through the particular site of exception of violent Indianness. It certainly reveals certain structural realities and conditions in which Indigenous and other racialized populations can literally and figuratively occupy space in Winnipeg and other Prairie Canadian cities. In addition to the space of the bus, however, was the other social space in which the bus happened to be when this violent event occurred - the south end of Winnipeg on the campus of the University of Manitoba, a place where such violence is not expected. In the aftermath of this horrific event, and during mobilizations for increased bus driver security, former transit driver Chantale Garand unwittingly summarized how this spatialized violence had been embedded within the infrastructure of Winnipeg Transit itself – “Drivers are out there on their own, every single day, and they know it. They know if they leave downtown, help is not coming in a timely manner.”³² Garand was obviously arguing for increased safety measures for a group of workers, a legitimate expectation for any workforce or person in society. But in her statements could also be heard the implicit revelation that Winnipeg Transit has built its security infrastructure around the racialized geography of Winnipeg’s inner core, in which the valence of

³¹ Kives and MacLean, *CBC News*, August 24, 2018.

³² Bartley Kives, “‘Drivers Are out There on Their Own’: Transit Union Raises Spectre of Strike over Slow Pace of Safety Upgrades,” *CBC News*, November 21, 2018, <https://www.cbc.ca/news/canada/manitoba/winnipeg-transit-safety-drivers-1.4914804>.

violence shifts according to ethnic location.³³ Violence is expected in the ethnic inner city, but not in the affluent and largely white suburbs, a stunning example of how Sherene Razack would describe race (and white settler violence) as literally embedded in place.³⁴

Following Razack, we might point out how these expressions of fear and anxiety are part of normalizing the particular violence of colonial histories and geographies. As she describes the evolution of inner cities in the prairies, where Indigenous peoples have come to be an unavoidable presence, “the inner city is racialized space, the zone in which all that is not respectable is contained.”³⁵ As she notes in an analysis of the brutal rape and murder of the Saulteaux woman, Pamela George, by two white university men, Steven Kummerfield and Alex Ternowetsky, the regulation and definition of settler urban space as civilized is actively produced by beating, maiming, expunging, raping and killing of Indigenous peoples who are seen as sullyng this space with their primitive, chaotic and wild ways of spacing. The rape and murder of Pamela George in the secluded outskirts of Regina, she argues, can be read as an ongoing “identity-making process” in which the ongoing material processes of stealing Indigenous lands and displacing Indigenous peoples (whose presence in the inner city is a testament to this process) is made sense of by white settlers who “come to know themselves as entitled to it [the land].”³⁶ With Henri Lefebvre, we can think the public bus as a site that contains and maintains the social relations of production and reproduction, a highly charged social space in which the

³³ In the spatial distribution of poverty and race in Winnipeg accords the North End and the city center as sites where such violence is expected, where most of Winnipeg’s Aboriginal population, as well as a rapidly growing new immigrant population, lives. For a deeper history of the production of geography of Winnipeg across ethnic and socio-economic lines see Jim Silver, “Segregated City: A Century of Poverty in Winnipeg,” in *Manitoba Politics and Government: Issues, Institutions, Traditions* (Winnipeg: University of Manitoba Press, 2010), 331–57.

³⁴ Sherene H. Razack, “When Place Becomes Race,” in *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002), 1–20.

³⁵ Sherene Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George,” in *Race, Space, and the Law: Unmapping a White Settler Society*, ed. Sherene Razack (Toronto: Between the Lines, 2002), 129.

³⁶ Razack, 129.

material reality of the city is perceived, conceived and, quite literally, *lived* as it traverses bodies along planned routes.³⁷ As bodies are moved in dialectical relationship with the material and social, this becomes a central site where the “respectable is contained” and actively produced in relation to the degenerate and racialized underclass that is surveilled and monitored. This can be seen in how bus drivers themselves are repetitively interpellated within a discourse of professionalism, civic responsibility, and duty that explicitly defines them in relation to an unruly and violent underclass. Consider the pride in which Brian Lennox (the driver who had bodily excrements thrown at him) described his experience as a driver: “I like being friendly, I like helping people. I think you'd find that most of your transit drivers are people like that ... We're in a service job because we like serving people.” Crucially, though, this proud description of public service was elaborated vis-à-vis the constant threat he was forced to endure as he enacted this duty: “And yet here we are, and I have to watch my back everywhere I go.”³⁸

This framing of fear and illegality of Indigenous life is itself an expression of a fundamental obstacle to the political, economic and social viability and very legitimacy of colonial settlement. As scholars of Settler Colonialism remind us, Indigeneity itself is not only a mass adjective of a social or political group of people but also an analytic of the “before,” an interruption of “what is received, what is ordered, what is supposed to be settled.”³⁹ Attempts at reconciling this fundamental contradiction of settler life has often been played out in the legal and judicial sphere, where the impossibility of Indigenous life, or “Indianness,” becomes the heart of the construction of a logic of exception and, thus, the potentiation of the construction of

³⁷ Henri Lefebvre, *The Production of Space* (Cambridge, Mass.: Wiley-Blackwell, 1992), 7.

³⁸ Hoyer, “Are Shields the Answer? Fatal Stabbing Has Bus Drivers Calling for Safety Barriers.”

³⁹ Audra Simpson, “Settlement’s Secret,” *Cultural Anthropology* 26, no. 2 (May 2011): 208. See also Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014); Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (December 2006): 387–409.

other criminal forms.⁴⁰ The history of Canada's legal code provides rich elaborations of the simultaneous construction of the contradiction of Indigeneity and subsequent attempts at reconciling this contradiction in the law. Christopher Bracken's wonderful examination of the difficulty presented by the Potlatch ceremony is a case in point, as he analyzes with precision the nuance of the epistemological conundrum faced by law makers who sought to outlaw this ceremony but whose legal codes always came up short to its elusive anthropological definition and meaning.⁴¹ Similarly, the earliest days of the Canadian state in the late nineteenth century were defined by the particular problem of how to deal with *Windigo killings*, when Ojibwe and Cree groups enacted their own legal orders in dealing with individuals who had become mad with the possession of the cannibalistic Windigo spirit and thus presented a physical *and* spiritual threat to society. As the legal historian, Sydney Haring, has argued, it was well within the realm of possibility of Canada's legal system to incorporate these actions under prevailing traditional common law defenses, as these were seen to be more or less legitimate acts of self-defense based on culturally "primitive" beliefs. However, the Canadian state punished these acts harshly and held individuals accountable under statutes of *mens rea*, literally translating as *guilty minds*.⁴²

⁴⁰ Such as the tortured terrorist of Guantanamo Bay, for example. See Patrick Wolfe, "Corpus Nullius: The Exception of Indians and Other Aliens in US Constitutional Discourse," *Postcolonial Studies* 10, no. 2 (June 1, 2007): 127–51; Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: Univ Of Minnesota Press, 2011). See also Luana Ross, who has written how the legal codifications of the "savage," based on an implicit judgment of primitive and simple ways that is offensive to 'civilized' manners of living, has been central to the operations of the legal systems in North America and has left its trace in ongoing contemporary encounters with the criminalization of Indigenous subjects. Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (Austin: University of Texas Press, 1998).

⁴¹ For years law makers changed and updated their meanings of "Potlatch" while law enforcers and anthropologists alike struggled to derive its true meaning and adequately define it. See Christopher Bracken, *The Potlatch Papers: A Colonial Case History* (Chicago: University of Chicago Press, 1997). For a similar scholarly account of how Indigeneity eluded the state's legal apparatus as it constantly incorporated new meanings, particularly around the issue of the criminalization of alcohol consumption of Indigenous subjects and the racial formations of the elusive and ever-threatening *mixed-bloods*, see Renisa Mawani, "In between and out of Place: Racial Hybridity, Liquor, and the Law in Late 19th and Early 20th Century British Columbia," *Canadian Journal of Law and Society* 15 (2000): 9.

⁴² Sidney L. Haring, *White Man's Law : Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998); Sydney Haring, "The Windego Killings: The Legal Penetration of Canadian Law into the Spirit World of the Ojibwe and Cree Indians," in *Violent Crime in North America*, ed. Louis A. Knafla (Westport, CT: Praeger Publishers, 2003).

We see here an early iteration of the *limits of recognition* of the liberal order, as Indigenous law is recognized as legitimately different but whose traditional and religious motivations defied and disgusted the moral sensibilities of White Canadians.⁴³ Thus, Indigenous difference was produced as culturally backward while affirming the universality of British-Canadian law as reasoned and acultural. Anishinaabek legal theorist John Burrows pushes us to see how the killings of Windigos was not only repugnant to White Canadians, however.⁴⁴ As he argues, Windigo killings were based in highly sophisticated practices of legal order, which were enacted through processes of collective judgment and based on principles of compassion, not on retribution or anger. In other words, the killings of Windigos was also a profoundly sovereign act that escaped the jurisprudence of Canadian-British law and, thus, was considered to be a profound threat. The legal system, and particularly the criminal justice system, has thus always been a central battleground where the contradiction of Indigeneity was both produced, experienced as a threat, and where mechanisms of attacking and containing it were created and repetitively modified. With this we see how the Indigenous criminal is a dense discursive subject for the liberal society of Canada. The Indigenous criminal provides a sense of what is right and who belongs, not just because of whatever empirical acts of lawlessness they might enact, but because the Indigenous subject essentially defies and disrupts Canadian law. Acts of Indigenous lawlessness can also be assertions of Indigenous Law.⁴⁵

⁴³ Harring, "The Windego Killings: The Legal Penetration of Canadian Law into the Spirit World of the Ojibwe and Cree Indians," 96. For an account of the limits of recognition, see Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002).

⁴⁴ John Burrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010), 224–27.

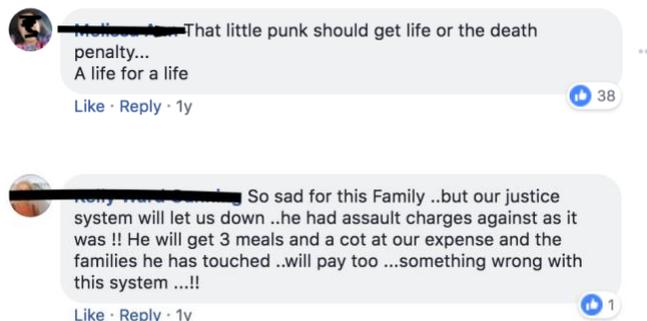
⁴⁵ I am referring to Indigenous Law in a symbolic sense, not necessarily as a positivist or natural legal ordering. Much of Indigenous lawlessness is recognized, precisely, in the way that it asserts an alternative ordering of the world, and is thus perceived as a threat to the mystical, and metaphysical, premises of the settler domain. For an exceptional account of the dialectical relation of settler Law and Indigenous lawlessness, and how historical constructions of Indigenous criminality were a means of constituting and averting attention away from the

The paradox of this political-ontological arrangement can be seen quite clearly in how Thomas was framed as an unruly subject but within a coded critique of multiculturalism, that is, as a subject whose heinous crimes were being given undue exception because of his constitution as a subject of Indigenous recognition. In the days following Fraser's death I had numerous interactions with strangers about their response to this case and a typical refrain was that the criminal justice system was not effective enough in dealing with offenders like Thomas. Particularly, this refrain was characterized in a common vernacular of basic minimum sentencing that typically informs the politically salient, but rhetorically shallow, debate of crime and whether a political leader is "tough" or "soft" on criminals, traits that tend to be respectively divided amongst the conservative and liberal parties in Canada. Many people sarcastically predicted that Thomas would be let off with a 'weak' prison sentence and that he would be on the streets in short order, ready to commit more crimes. Social media websites were a hotbed for such 'debates' and, particularly, the Facebook comment sections under various news media posts of this case. In these spaces of social commentary Thomas's name operated as a signifier to house this debate within the constitutive set of questions that revolved around what to do with Aboriginal peoples, in particular. As a group of people who are known to be overrepresented in the criminal justice system in places like Winnipeg, it is common for this statistical representation of a collective injustice to be framed by a theory of a culture that is bound by a lack of basic civility and prone to crime, otherwise constituting a regular threat and nuisance to Winnipeg.⁴⁶ Thomas's name was part of a signifying chain that synonymized various 'features'

illegalities and illegitimacy of the projects of settler states of Canada and the U.S., see Heidi Kiiwetinepinesiiik Stark, "Criminal Empire: The Making of the Savage in a Lawless Land," *Theory & Event* 19, no. 4 (2016).

⁴⁶ See for instance the editorial space given to a notoriously conservative and anti-Indigenous ex-judge in the *Winnipeg Free Press* to express such views. Brian Giesbrecht, "Battling the Bottle -- the Untold Story: First Nation Leaders Need to Move beyond Victimhood to Resolve Problems," *Winnipeg Free Press*, December 27, 2016, <http://www.winnipegfreepress.com/opinion/analysis/battling-the-bottle----the-untold-story-408372986.html#have-your-say>.

or experiences of Indigeneity (which will be described more directly below) in order to constitute this collective, often referred to as “these people,” which somewhat shielded commentators from accusation of direct racism. Instead, their commentaries were focused on the law, particularly its ineffectiveness and unfairness, and particularly in the incredible claim that Indigenous peoples have been unfairly excluded from the strong arm of the justice system.⁴⁷ Rather than being ‘soft’ on these cultural subjects there should be an emphasis on a universal law that deals with all such offenders with swift corporeal punishment [see figure 4]. Not only were commentators emphasizing an intolerance for such crimes, however, this rhetoric of intolerance was being deployed in the face of the discourse of multiculturalism that has come to be seen in some corners as a failed and naïve project for precisely the ways that it permits an overlooking of Indigenous savagery under the protective cloak of Indigenous difference. This signifying chain was rendered most explicitly by a Facebook comment under a local CTV article on Thomas’s case with the simple words, “sign the contract!”



⁴⁷ Such claims are patently absurd, and there is no shortage of reports and academic literature to demonstrate how Indigenous peoples are precisely treated with violent difference by the Canadian justice system, though most often described within the depoliticized statistical language of their *overrepresentation* in the Canadian justice system. For various documentations of this inequality, see C.A. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*. (Winnipeg, MB: Public Inquiry into the Administration of Justice and Aboriginal People, 1991). For statistical analysis of this issue, see Samuel Perreault, “The Incarceration of Aboriginal People in Adult Correctional Services,” *Juristat, Statistics Canada* 29, no. 3 (July 2009). For a critique of the usage of *overrepresentation* to frame this issue, see Robert Nichols, “The Colonialism of Incarceration:,” *Radical Philosophy Review* 17, no. 2 (2014): 435–55.

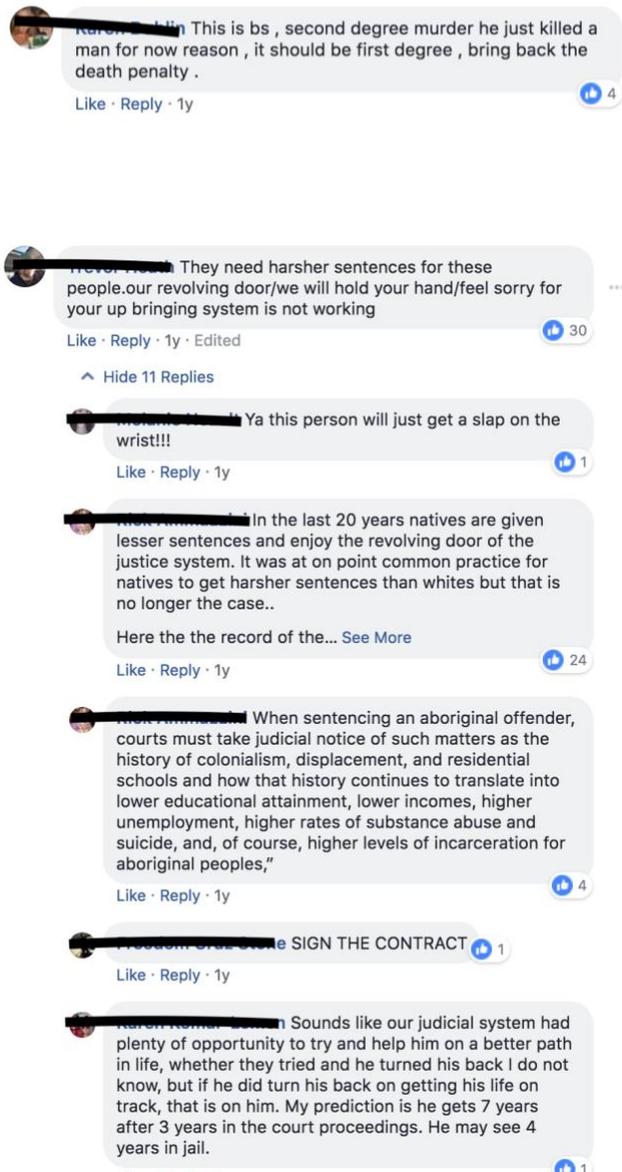


Figure 4 - Facebook debates. Accessed from Facebook page of CTV News under the link to an article on Fraser’s death.⁴⁸

Thomas is at a strange and recurrent crossroads here as both the Hobbesian savage threatening the bond of the social contract from without, as well as a subject of difference within society meeting the decisive moral limits of recognition and thus requiring discipline from “our

⁴⁸ “22-Year-Old Charged with Bus Driver Homicide,” Facebook, *CTV News Winnipeg* (blog), February 15, 2017, <https://www.facebook.com/ctvnewswinnipeg/posts/1551407458221362/>.

judicial system.” Interestingly, he is both subject to, and a subject of, the exception – the exceptional: “natives are given lesser sentences.” And the exception: “We need harsher sentences,” or even the death penalty, “for these people.” We could see this contradiction as the energetic site of the “limits of recognition” outlined by Elizabeth Povinelli, where publicly reasoned legal and philosophical arguments for incorporating difference are abruptly bracketed by decisive moral sensibilities of something that is too obscene, a difference that cannot enter into communicative rationality and moral sense of the public sphere.⁴⁹ But just as Hobbes, Rousseau and others mobilized the multfigurative capacity of the Indian and the Savage to construct the mythical notion of a conglomeration of individuals, who come together to constitute a collective civilization, so too is Thomas here revealing that at the core of this fantasy of civilization or of public belonging is the contradiction of exception/exceptionality. Thomas is precisely the figure of the impasse of liberal society and thought, the subject of his own perpetual deferral. The fantasies of his violence and crime that are constructed on either end of the spectrum of exception, something he has or that he will be treated to, shows us the specific coordinates of the “Indian problem” today and how Indigeneity is kept in abeyance in this specific Canadian context.

At the site of the public bus, Thomas is situated in a narrative of violence and conflict, a threatening presence, in the face of identities of public duty and responsibility. Responding to inquiries about a video that had been taken of a bus driver physically assaulting a patron, union president John Callahan described a bus driver who “saw red” before physically attacking an unruly passenger that was caught on tape, that he was simply “enforcing policy” and doing his public duty.⁵⁰ Indeed, the structural issue of poverty and inequality is in plain sight here as the

⁴⁹ Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*.

⁵⁰ “Winnipeg Transit Driver ‘saw Red’ after Being Spat on, Says Union President | CBC News.”

mediating factor of bus fare that was not paid, but this structural violence is reified within the unruly patron through a rhetoric of simply doing one's job. Not asking why a patron might not be able to pay a fare, the focus is entirely on the duty of the driver to enforce this normative fare, making the ensuing violence of the driver a professional act. Disavowed here is the fact that drivers are not required, nor permitted, to physically intervene with unruly patrons, nor to enforce fare, for reasons of the safety of drivers and the public at large.⁵¹ Equally disavowed is the related psychic interior of the driver who was so invested in going beyond his duty, and the law, to deny entry to this particular patron. The surplus elements of the driver's duties and actions are replaced with an alternative surplus, and thus libidinal, register of disgust. "When someone spits in your face it is hard not to respond to that," said Callahan, alleging that this was the incident that provoked the eruption of violence. The disgusting transgression of bodily fluids from an unruly member of the underclass thus broaches the uneasy tension between the claim that the driver was simply enforcing policy of charging fare and that the driver was obviously going beyond his duty in this situation by physically enforcing policy. As we have already seen with the driver, Lenox, these stories of bodily fluids have a particular resonance in Winnipeg, a phenomenon that Callahan expertly deployed to defend his driver's loss of control. He recounted several other instances of drivers being spat on and claimed that most drivers would "rather be punched or slapped than spat on... to them, getting spat on is the lowest of the low."⁵² In the

⁵¹ As stated clearly in Winnipeg by-laws, patrons are not permitted on buses unless they pay the requisite fare, but the only people who have authority to physically remove a patron from any Winnipeg Transit property is a member of the Winnipeg Police Service or Auxiliary Force Cadets who can apprehend citizens without warrant under the *Petty Trespasses Act* of Manitoba. See "The By-Law of THE CITY OF WINNIPEG to Regulate Conduct on and with Respect to the City's Public Transit Property," Pub. L. No. By-law no. 89/2014 amended 63/2017 (2014). Interestingly, there once was a transit policy that permitted drivers to simply wave fares if someone was homeless and could not pay, for example. But for reasons unknown, or undocumented, is no longer a Transit policy. "Winnipeg Transit Policy Allows for Free Rides," *CBC News*, January 3, 2012,

<https://www.cbc.ca/news/canada/manitoba/winnipeg-transit-policy-allows-for-free-rides-1.1275481>.

⁵² This discourse of disgust and violence of the exchange of bodily fluids will become a key analytical point once we discuss the trial of Brian Thomas.

same article Callahan provides dramatic stories of drivers having to be checked for hepatitis and HIV after such encounters, providing insight of the penetrating viral threat that characterizes these bodily encounters as so “low.”

Such stories of bodily transgressions prime the public to imagine such violent encounters and ask itself: *what would you do if someone spat on you and degraded you in such a way?* Such narratives thus produce a capacious temporality for both anticipating similar acts of violence and also retroactively justifying the violent acts that the public, or its frontline representatives of transit operators or police officers, will have to commit against this threatening body in the interest of preserving public dignity. One can identify with the driver, the fear he must have felt – the helpless experience of (almost) having one’s pores, one’s nose, or mouth penetrated by the fluids of another, and the ensuing rage.⁵³

In addition to explicitly referencing the disgusting and violent elements of those within society who disrupt our public safety, such professionalism and civic duty are also invoked to produce a sense of public belonging in the implicit exclusion of this same underclass. For instance, Fraser’s death prompted a student at the University of Manitoba to start a GoFundMe account for Fraser’s family and spoke of the injustice done to him in terms of his belonging in the educational community. “My heart just kind of broke, to be perfectly honest ... because it’s just so close to home and it happened in a community that I’m very much a part of,” said third-year biology student, Taylor Nimchonok, who started the GoFundMe page. Nimchonok went on to describe how critical public transit is for University students, as part of their daily routine:

⁵³ In another related context, Sherene Razack has noted how police officers testified to restraining an Aboriginal man in a position that was described as ‘hog-tying’ (where hands are bound to feet behind one’s back) and placing him on his face so as to avoid any chance of coming into contact with the spit or saliva of the apprehended individual. This restraint was a main cause of this man’s death, but it was justified in subsequent investigations as a reasonable and ordinary fear to not want to come into contact “with something diseased or dirty.” Razack, *Dying from Improvement*, 159.

"Public transport is incredibly important to the University of Manitoba Students, and university students everywhere, because it makes education affordable and accessible." "[Fraser] was playing a vital role in our education and I think that's really important," Nimchonok went on to say. Notably absent from this discussion of community and space, however, was any sense of Thomas's relationship to this community.⁵⁴ The discourses of 'civics' and public safety thus serve as social constructions of space and place. These are sites in which individuals like Thomas are intuitively understood as not belonging to, but also as interpretive frameworks for understanding violence. By tying Fraser's character to a selfless job of public service as well as his centrality in helping young aspiring students to build a better future as they engage the freedom of the liberal space of the university – a place that would be "out of reach" without Fraser – it could not be clearer that Thomas was being constructed as an obstacle and threat, a contamination (both literally and figuratively) to this social space and its social tense of self-determinations and aspirations.

These are moments of rehearsing a basic definition of what public space is through accounts of attack upon and within it – or, more specifically, its penetration by a disgusting other. We casually ignore the structural conditions of inequality that inform the majority of conflicts on the bus, which is bus fare, and focus instead on the moral and emotional charges of fear and disgust of contaminating bodies and their fluids, missing the opportunity to ask why

⁵⁴ Bryce Hoye, "'Put Me in a Cage': Bus Drivers Fear for Safety after Deadly Winnipeg Transit Attack | CBC News," *CBC*, February 14, 2017, <https://www.cbc.ca/news/canada/manitoba/winnipeg-transit-driver-dead-stabbing-1.3982007>. In her indexing of accessibility, it is important to note that Nimchonok does not mention the issue of bus fares in Winnipeg, which many cannot afford, and that bus fare disputes have been identified as the number one cause of conflicts between bus drivers and passengers. The point is not to criticize Nimchonok here, but to point out the community she constructs and the ways that the discourse of accessibility both affirms and ignores the violent class conflict that plays out on the public bus and helps us better understand what framework Brian Thomas can be recognized by in the public space of the bus. For info on bus fare dispute, see Kives, "Low-Income Bus Passes Would Cost Winnipeg \$6M to \$15M a Year."

these fluids are being used at this contested social-spatial site.⁵⁵ We further miss the opportunity to ask about the various relations that tie together this explosive emotional energy, unruly passengers, and the specter of bodily fluids. Is there a connection between the regulation of public belonging and meaning through the prohibition of movement, and the throwing of feces and spit? Can we see this a form of resistance that is specific to the contradictions of society, a diagnostic of power that does not impose consciousness or politics on subjects while also going beyond the claim of ‘false consciousness’?⁵⁶ Is this a similar example to Gilberto Rosas’s identification of “delinquent refusal” in which the youth of Barrio Libre articulate their power, or subordinated place in it, through shit and identification with abhorrence, a “reluctant acceptance” of living with(in) the structurally conditioned reality that is both figuratively and literally the “bowels of a new frontier”?⁵⁷

If we return to union boss Callahan’s account, we see that it was indeed spit that made the driver snap and see “red,” but we are also reminded that this incident revolved around the inability, or refusal, of the patron to pay their fare. Why did the driver in this instance feel the need to enforce fare so strictly? That such a quarrel should be so contentious presents us with an aching contradiction found in the words of Fraser’s colleague, Nelson Giesbrecht, who spoke candidly with the press on the day of Fraser’s death, affirming his utter discomposure over this incident by emphatically declaring to the public that there was no way this murder was over an

⁵⁵ As Amalgamated Transit Union Local 1505 president Aleem Chaudhary put it, “We... know that the majority of incidents on Winnipeg Transit buses stem from fare disputes and fare evasion.” Kives, “Low-Income Bus Passes Would Cost Winnipeg \$6M to \$15M a Year.”

⁵⁶ Lila Abu-Lughod, “The Romance of Resistance: Tracing Transformations of Power Through Bedouin Women,” *American Ethnologist* 17, no. 1 (February 1, 1990): 47.

⁵⁷ Rosas’s work is a masterful ethnography for thinking through how “new defiant subjectivities” and sensibilities emerge at the Mexico-U.S. border, where the signifying elements of specific youth cultures begin to echo the “dehumanizing, dense, degradations in the dominant order,” not simply as mimicry, but as the exertion of energy in which the conditions of life encircle a “radically conditioned choice” that is both recognized and reluctantly embraced by the youth of Barrio Libre. Gilberto Rosas, *Barrio Libre: Criminalizing States and Delinquent Refusals of the New Frontier* (Durham, NC: Duke University Press, 2012), 116–17, 123.

inability to pay a fare, because neither he nor his colleagues cared about fares that much to lose their lives over it.⁵⁸ For this other bus driver to become enraged in the first place was predicated on the fact that he didn't simply accept the penniless patron without incident or care. Instead of waving him on with disinterest this driver took keen exception to this patron, demanding an account of his inability to pay, refusing him service beyond his official duty or obligations. It is true that Fraser's death had nothing to do with fare, as we will see, but if we think of this issue of the fare as a *symptom*, as the sign of, and a substitute for, an instinctual satisfaction that has remained in abeyance because of repression, we see that these two incidents are intimately related.⁵⁹ We can think of the fare, as well as the struggle over it, as symptom not only because it is the site of the central material contradiction of inequality in Winnipeg, where the meaning of a public is made in relation to the ritualistic enforcement of spatial and monetary exclusion of a racialized underclass; or that there is clearly a contradiction between public speech on the importance of the fare and specific enactments and enforcements that drivers take it up and become invested in it. Namely, the fare is the site of a symptom because it is the site where the contradiction cannot hold; in the absence of a fare there was the substituted currency of a bus driver's rage, as well as the return exchange of spit and, in other instances, shit and piss. Getting spit on, Callahan tells us, is the lowest of the low, worse than brutal physical attack. And we see why when his drivers suffer the excruciating wait of HIV and Hepatitis test results after such encounters. This underclass is more than a threat of physical violence, more than an existential challenge to settler/ed space, they fundamentally present the risk of contamination, a disease that

⁵⁸ "I don't think he [Fraser] was the type of guy who would care about bus fare. If someone said "oh I need a ride!" [gestures with arm] I mean, yeah, come on in. Like, I don't care about bus fare. I don't care who knows it. I don't care. You want a ride, get on my bus. Let's go. If you're going to tell me a long story, I don't care to hear it, let's just go. There's no reason why this should happen. Not at all." See Rollason and McIntyre, "Murder Suspect in Bus Driver's Death Has Long Criminal Record."

⁵⁹ For a definition of symptom, see Sigmund Freud, *Inhibitions, Symptoms and Anxiety*, vol. 20, The Standard Edition of the Complete Psychological Works of Sigmund Freud (London: The Hogarth Press, 1959), 91.

threatens the sanctity of the settler body. There is more at stake here than the simple threat of a racialized underclass of Indigenous youth, there is an active resistance to this threat. That the youth use their shit and spit as currency here is important, for they are articulating not only their disgust but the risk in which they are discursively operative in society. It is not necessarily the demonstration of political subjectivity or even an intentional critique, it is created out of the contradictory conditions of society, or, as Rosas would put it, a “high-intensity refusal” to the “low-intensity warfare” that these youth confront every day, from bus drivers to probation officers, to social workers, teachers and doctors, all of whom regularly and casually, perhaps even innocently (as in the example of Nimchonok), fashion them within the zone of the non-respectable. Bodily fluids tell us about the discursive conditions in which they are made operative in society, perceived as viral contamination risks. This helps us to understand better the meaning through which Winnipeg is divided spatially. This “risk” infects imaginaries and constitutes anxious desires. Drivers who subsequently make it their business to enforce and protect this spatial identity-making ritual and “see red” when the risk/threat directly confronts them demonstrate the violence that maintains these spatial and discursive conditions of difference. Thomas’s violence was not random at all, but the latest iteration of an ongoing war in which the Winnipeg public reifies the conditions of Indigenous exclusion through fears of being penetrated by a sickly and fluid force.⁶⁰

Making a monster: ‘Suspect had FASD, was apprehended at birth, placed in 73 foster homes’

⁶⁰ I am here using the Marxist notion of reification, as in how social relations become perceived as inherent attributes. The “senselessness” of Thomas, as a fundamental enigma, is itself a reflection of the social contradiction of class and racial segregation in Winnipeg. See György Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (1923; repr., Cambridge, Mass: MIT Press, 1967).

We have seen how the signifiers of community, public safety, decency, and civic duty provide ritualistic form for defining an Indigenous underclass in relation to bus drivers like Irvine Fraser, including the narrative structures and temporal sensibilities that both generate fear and anticipatory anxieties as well as retroactive justifications for violence on Indigenous bodies. Elizabeth Povinelli's conceptual categorization of the late liberal discourses of *autological* and *genealogical* imaginaries provides analytical precision in deducing how FASD, Indigeneity and crime are inscribed with ethical and normative claims that permit the uneven distribution of life and death, rights and resources in liberal settler colonies.⁶¹ Particularly, we might see how Fraser and his bus driver kin are regularly imagined as autological subjects who have claims to individual freedom and self-sovereignty and, particularly, real estate in the future. These future-oriented subjects are constantly beset by a genealogical society that is regulated by constraints that come from some perverse set of inheritances, of which Fetal Alcohol Spectrum Disorder (FASD) is a congenital connecting point. With this connecting point the figure of Indigenous peoples is wedded to their genetic/social/biological inheritances and subsequent constraints. All then operate in the Indigenous subject as a simultaneously biological and cultural form of life rendered as "dysfunction." We turn now to a deeper articulation of the ritualistic form in which Indigenous subjects like Thomas have their pasts interrogated within the social tense of the genealogical society as a means of demonstrating their threatening risk to society.

The way we found out that Thomas had FASD was the same way we found out he was Indigenous. First, Thomas's Indigeneity was located through coded geographies. It was relevant to the news media, for example, that he is from the First Nation reserve of Shamattawa, Manitoba. Such spatial referents are saturated with cultural meaning that situates Thomas in a

⁶¹ Povinelli, *The Empire of Love*, 3.

geography of pain, suffering, and generalized misery.⁶² Within this geographical imaginary, Thomas can be recruited into a specific discourse of concern and urgency that is periodically, and increasingly, practiced by Canadian media outlets who become highly concerned about Indigenous issues of poverty and suffering in a burst of energy that is always temporally finite.⁶³ It is within this discursive mode that the fury of media questions and uncertainties of Thomas's "senseless killing"⁶⁴ came to figure an alternative story that sought to put Thomas "into focus," particularly by examining his "troubled life" that began on the reserve.⁶⁵ By interviewing the elected band council Chief Napaokesik of Shamatawa First Nation, reporter Jill Coubrough painted a disturbing, although sympathetic, picture of Thomas's tough life that fit in to familiar tropes of Indigenous suffering that Canadians have come to relate to. "We hoped he could be helped," said a grieving Chief Napaokesik, whose words also provided the headline for this news article.

It was in this racial geography of hopelessness that Thomas was also understood to be cerebrally disabled. For if the main title was about sympathy and sorrow of how Thomas couldn't be "helped," the subtitle provided an explanation as to why: "Suspect had FASD, was

⁶² Shamatawa First Nation is located in the far north of Manitoba, roughly one hundred kilometers inland from the Hudson Bay, and accessible only by planes or winter roads. Its remoteness and seclusion provide fecund material for speculative fantasies, periodically surfacing in the news as another temporary moment of care of Indigenous suffering and dysfunction. See, for example, Jillian Taylor, "4 Suicides and 4 More Attempts Shake Manitoba Reserve," *CBC News*, March 26, 2015, <https://www.cbc.ca/news/canada/manitoba/shamattawa-suicides-shake-northern-manitoba-reserve-1.3009897>. Even sympathetic and politically urgent pleas for help must be grounded within narratives of alcoholism and generalized social dysfunction.

⁶³ This common repertoire is part of a broader dynamic of representing Indigenous peoples as inferior in the public eye. See Mark Cronlund Anderson and Carmen L. Robertson, *Seeing Red: A History of Natives in Canadian Newspapers* (Winnipeg: University of Manitoba Press, 2011), <https://uofmpress.ca/books/detail/seeing-red>. Dian Million has situated this analytic of representation within a sophisticated genealogical account of how the discourse of historical trauma has come to inform a cunning undercutting to Indigenous self-determination and nationhood as the state continues to marginalize Indigenous peoples based on notions of mental health. See Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights*. Such repertoires are being theorized so as to actively challenge the subtle ways in which these concepts make their ways into research projects, methodological constructs. See, for example, Eve Tuck, "Suspending Damage: A Letter to Communities," *Harvard Educational Review* 79, no. 3 (Fall 2009): 409–27.

⁶⁴ Jewell, "Suspect Charged in Transit Driver Attack."

⁶⁵ Coubrough, "We Hoped He Could Be Helped."

apprehended at birth, placed in 73 foster homes.” The next chapter will deal more exclusively with the question of the abysmal but all too real and regular reality of Indigenous children like Thomas being thrown around an unfathomable number of foster homes and how this inflects the FASD conversation. For now, we will focus on how FASD linked the first quotient of this trifecta of his Indigeneity, criminality and child welfare wardship. It is where Thomas, and Indigeneity, becomes a specific statistical figure of risk, with FASD, apprehension and foster homes becoming metonymical markings of the various ways Indigenous peoples are thought of through systemic imaginaries of slipping through the cracks and of failed maternal, communal, and also state care that makes them the risky subjects of such brutal scenes of violence. As reporters summarized, it was this confluence of factors that made Thomas into a monster, a figure whose tragic life led him to end the hopeful life of another. One reporter in the now defunct *Winnipeg Metro* suggested that, “...I very much doubt that [Brian] was born the man who would later accumulate such a lengthy rap sheet.”⁶⁶ We see here clearly the stakes that Thomas presents. For at issue in the story of Thomas, and generalizable in our fascination with crime in general, particularly the ‘random’ and unexpected, violent varieties, is the question of the constitution of the subject. Were they born this way? Or did they become this way?

Foucault has noted how such questions are themselves expressions of contingent genealogical coordinates. Specifically, this framework of subjectivity began to take on a specific coherence at the juncture of emergent biopolitical frameworks for governing populations and what appeared to be a new and inexplicable form of violent crime in the nineteenth century, which generated a paradox at the heart of Western legal systems from which we have yet to

⁶⁶ Shannon VanRaes, “Accused in Bus Driver Homicide Another Victim of Failed System,” *Metro Winnipeg*, February 21, 2017, sec. Inside the Perimeter, <http://www.metronews.ca/views/winnipeg/inside-perimeter/2017/02/21/winnipeg-bus-driver-homicide-sad-example-child-welfare.html>.

emerge.⁶⁷ Namely, the notions of responsibility and punishment became hard to theoretically justify in light of these ‘new’ subjects who seemed to demand a problematization of free will and/vs. behavioral determinations. Are their actions environmental, or are they owing to reasoned faculties? If the former, can we consider them legally liable? If the latter, can we consider them truly sane, and thus, legally liable? This paradox at the heart of modern European legal codes was resolved, or deferred, argues Foucault, by the adoption and borrowing of the concept of ‘risk’ from civil law. “Risk” permitted courts, with the help of the emergent classes of psychiatrists and criminologists, to update the problematic of penal responsibility within a calculation of the potential ‘dangerousness’ of offenders. This calculus could then be quantified and even used to anticipate and prevent criminal acts as well as to intervene and manage criminals. It is this principle of intelligibility of risk, I argue, that provides fecund ground for the discourse of FASD to link up and make sense within the discursive imaginary of Indigenous conditions of suffering and depravity. This social matrix of suffering and depravity situates them as a constrained subset of the future-oriented settler society, formed from dysfunctional inheritances and depraved potential that must always be identified and rooted out.

Within the world of FASD research, advocacy, and policy development, FASD is regularly imagined and defined through a temporal imaginary of prevention and its associated, grounding concern of risky mothers whose alcohol consumption is subjecting their children to the risk of disability, a risk that will be borne by society by way of endless resources to this intellectually disabled child.⁶⁸ As we noted in the introduction, FASD itself is considered a ‘risk

⁶⁷ Michel Foucault, “About the Concept of the ‘Dangerous Individual’ in 19th-Century Legal Psychiatry,” trans. Alain Baudot and Jane Couchman, *International Journal of Law and Psychiatry* 1, no. 1 (February 1978): 1–18.

⁶⁸ Elizabeth M. Armstrong, *Conceiving Risk, Bearing Responsibility: Fetal Alcohol Syndrome and the Diagnosis of Moral Disorder* (Baltimore: The Johns Hopkins University Press, 2003); Michelle Stewart, “Fictions of Prevention: Fetal Alcohol Spectrum Disorder and Narratives of Responsibility,” *North American Dialogue* 19, no. 1 (April 1, 2016): 55–66; Amy Salmon, “Aboriginal Mothering, FASD Prevention and the Contestations of Neoliberal Citizenship,” *Critical Public Health* 21, no. 2 (June 1, 2011): 165–78.

factor' for criminal behaviors, as well as other matrices of failure that coincidentally overlap with measurements of Indigenous suffering, including poor education, rates of substance abuse, poor health outcomes, and generalized poverty.⁶⁹ This has become common sense within Canada, no more so than within the court rooms. This is why it made sense for reporters to dig up prior court records of Thomas and to recount how at a sentencing hearing for an assault charge of his former girlfriend, Thomas's lawyer explained that his client was diagnosed with FASD shortly after his birth in 1994. Such references to a client's diagnosis of FASD are increasingly common today, and have been building legal steam for over two decades as researchers continue to make arguments for the unique correspondence between FASD and legal trouble, where clients with FASD are said to be unable to control their impulses, which leads them to crime, and furthermore, that they may be unfairly treated by the principles of the normative legal system that uses punishment as a tool for reminding offenders that they have made mistakes.⁷⁰ FASD becomes a citation by lawyers to suggest that their clients cannot stay focused or stay on task, and that their impulsive behavior is usually expressed as a quick and explosive temper, all of which makes them susceptible to crimes that range from public masturbation to a chronic inability to comply with probation orders.⁷¹ FASD advocates regularly suggest that we need to accept that individuals with FASD might not be doing things for the reasons we assume – ie because they are criminally motivated – but because they are intellectually disabled. We need to

⁶⁹ AP Streissguth et al., "Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects," *Developmental and Behavioural Pediatrics* 25, no. 4 (2004): 228–38.

⁷⁰ Canadian Bar Association, "Fetal Alcohol Spectrum Disorder in the Criminal Justice System" (Niagra Falls, Ontario, 2011), <http://www.cba.org/Our-Work/Resolutions/Resolutions/2010/Fetal-Alcohol-Spectrum-Disorder-in-the-Criminal-Ju>; Kent Roach and Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder and the Criminal Law from Investigation to Sentencing," *University of British Columbia Law Review* 22 (2009): 1–68; Karina Royer Gagnier, Timothy E. Moore, and Melvyn Green, "A Need for Closer Examination of FASD by the Criminal Justice System: Has the Call Been Answered?," *Journal of Population Therapeutics and Clinical Pharmacology* 18, no. 3 (2011): 426–39.

⁷¹ For such an account, see Malone, "'Very Little Is Actually Being Done': Corrections Canada Funded Just 7 FASD Assessments Last Year."

figure out new ways of “dealing with” these offenders in the legal system, argue lawyers.⁷² But what does this “dealing with” look like?

Leonard

I recall the time that Leonard got arrested, again, because he “blacked out” on a cocktail of Xanax pills and alcohol and some other things that he wasn’t so sure he could remember taking. Speaking with his probation officer, Alexa, the next day was eye opening in the way that FASD informed her every thought about the legal strategy we should take for Leonard and, specifically, how to work with his lawyer and the judge in order to keep him out of the federal prison.⁷³ The first thing to note was how quickly our conversation glided over Leonard’s extreme intoxication when he committed his crime, or that he committed it with friends who were equally intoxicated. This intoxication drifted into the background, and had nothing really to do with his crime. Instead, Alexa framed the root of his crime with FASD. She yelled in frustration several times, “he’s so impulsive!” The other main point of interest in this conversation was Alexa’s perspective about prison and how it was a bad option for Leonard because “he doesn’t understand,” or has a hard time figuring out social norms and how things work. Rather than talk about how prison was going to be hard on Leonard because prisons are hard on everyone, Alexa outsourced this worry and reified this subtle critique within Leonard’s supposed lack of cognitive capacities. Clearly, Alexa was worried about the influences Leonard would face in prison, being surrounded by ‘hard core’ criminals, many of whom are serving life sentences, rather than the supposedly less serious criminals in the provincial jail. But this simple schematic does not hold up under scrutiny. There are a variety of offenders in both systems, and most of the guys I’ve

⁷² See claims of lawyer Wendy Martin White in Malone 2017.

⁷³ Leonard was facing serious charges and it was likely that he would get more than a two-year sentence, which generally means that one would serve federal time in the medium-security prison north of Winnipeg. Anything two years less a day would be served in the provincial jail just outside of Winnipeg.

worked with over the years have spent a great deal of time in the provincial jail and have some particularly horrifying, if not completely ‘normal,’ stories to tell of this place. Similarly, I’ve spent time with lifers transitioning out of the federal prison system who speak highly of the opportunities they had there, grateful that they were able to learn new skills, like carpentry, and get an education, things that would not have been similarly available to them in the provincial jail. This is not to make any argument for what oppressive carceral space is “better,” but to try and locate the complex associations that were being made by Alexa, and how a claim of Leonard’s FASD permitted a displacement of feelings and thoughts about the prison system in general. The conversation couldn’t be simply that jails and prisons are filled with people living in desperate and hard circumstances and that no one has good options here, which often leads to one get caught up in a “bad crowd” or makes them susceptible to “bad influences” – joining a gang for protection, for instance. By stressing that Leonard could return to the “special” program he’d been attending before in his previous sentence in the provincial jail, as a kind of safe haven for Leonard where there is more security and the inmates are “better behaved” because they have more privileges, Alexa even contradicted herself on several counts. For one, the federal prison is known to have more funding for programming than the provincial jail, especially for Indigenous inmates.⁷⁴ But more significantly, Alexa leaned back on the tired old notion, which is not entirely untrue, that “the sad thing is he will do so well in jail and learn a lot but will get out to the exact same situation and then it’s only a matter of time [before he goes back again].” Here, Alexa acknowledged to me how she understood the systemic and structural forces of poverty and how it influenced the conditions of Leonard’s life, much of which dwells in the grey and, often, explicitly black economic areas of society. But she could not do the same for the prison system

⁷⁴ Wesley, “Marginalized: The Aboriginal Women’s Experience in Federal Corrections.”

itself. Rather than critically analyze the prison system, prisons were bad only for Leonard *because* he had FASD.

We will delve into more sustained analyses of these assumptions and correlations of crime and FASD in subsequent chapters. But there is something even more primary that deserves our focus for now. Quite simply, it is how these law enforcement officials, like Leonard's PO or Thomas's lawyer, are making claims to FASD. Since I worked with Leonard, I knew that his FASD diagnosis was not "official," meaning that he was not assessed by an official team of FASD clinicians. He had various psychological reports from his childhood, some of which recommended an FASD diagnosis and that he was a "candidate" for assessment based on the opinion of one psychologist, but most of his medical and psych files referred to anxiety and depression, or the occasional "oppositional defiance disorder," all of which were related to unstable home environments in which Leonard and his sister were repeatedly taken from their parents and placed in temporary foster placements. Quite frankly, these reports read as documents of the hardships of abject, Indigenous poverty. Similarly, Thomas was not presented with an official diagnosis, but it was within the realm of the "suspected," as no file or assessment was referred to by the lawyer. And it is this communication chain of the "suspected" that is our focus here, as it originates first with the lawyer to the courts, and how it is subsequently re-presented by the media to the public, that is crucially important. Namely, the way that Thomas's lawyer alerts to the court, and media, that Thomas has FASD is by suggesting that he "had a number of *behavioral issues corresponding to FASD*."⁷⁵ We see that a diagnosis is not even required here, it is simply implied, an obvious interpretation of "behavioural issues," which puts the legal standard and qualification of evidence of FASD in particularly troubling waters. But

⁷⁵ Coubrough, "We Hoped He Could Be Helped." Emphasis added.

this is not an isolated event. In fact, it is a repetitively mobilized pattern, especially in the courts.⁷⁶

“The Look”

FASD is notorious as a difficult disorder to diagnose, which makes it incredibly susceptible to assumptions and cultural processes of lay-diagnosis. And most of this cultural diagnostic takes place at the intersection of sensual and impressionistic accounts of physiognomy, which is mediated by the highly rich metaphorical space of a “look.” Consider, for instance, how a group of crime beat reporters diagnosed some youths from a “subculture” of Winnipeg’s “highest-profile car thieves” in 2009.⁷⁷ Of one of the teens, who they call Dylan, they suggest “He’s *probably* got Fetal Alcohol Spectrum Disorder, judging by the way he looks and behaves.”⁷⁸ If such lay-diagnoses strike us as concerning, they come by it honestly. In the 1990s, the pioneering FASD researcher, Dr. Sterling Clarren, went on a segment of the U.S.-based *20/20* news program to plead for an inmate, Charles Gaston, to be taken off of death row. Without having clinically assessed the inmate, Dr. Clarren stated, “If you look at a baby picture of this guy, you go, ‘Well that’s fetal alcohol syndrome.’ There’s just no question about it.”⁷⁹ By referring to a baby picture, Dr. Clarren was insinuating a common refrain of the time that there

⁷⁶ Historian Janet Golden has argued that FASD has been “demedicalized” over the years as it moved from a purely medical diagnosis, to a public health concern, and eventually to a diagnosis whose meaning was dictated by legal mandates of guilt and responsibility. I accept this argument to a certain point, but diverge from its conclusions in the way that I still see the medical component of FASD as absolutely central to the court process, and particularly to the ways that FASD becomes attached to the Indigenous offender. This could be one difference that separates the “Canadian experience” of FASD from that of the U.S., which is the nation that Golden focuses on, as the Indigenous question/problem here inflects FASD in a much more prominent way than it has or does in the U.S., where the Indian question/problem is much more subdued. Janet Golden, *Message in a Bottle: The Making of Fetal Alcohol Syndrome* (Cambridge, MA: Harvard University Press, 2005).

⁷⁷ McIntyre, Turner, and Owen, “Perspective: Chill. Thrill. Kill: A Night in the Life of Winnipeg’s Car-Stealing Subculture.”

⁷⁸ *Ibid.*, emphasis added.

⁷⁹ Quoted in Golden, *Message in a Bottle*, 159.

was an “FAS face” that was thought to be typical in early childhood, but which many people “outgrow” in adulthood. Typical features of this “face,” which are measured by several different, and sometimes conflicting, diagnostic protocols,⁸⁰ include: a small head, a thin upper lip with no philtrum (the groove between the nose and upper lip), short palpebral fissures (which are the corners of the eye opening).

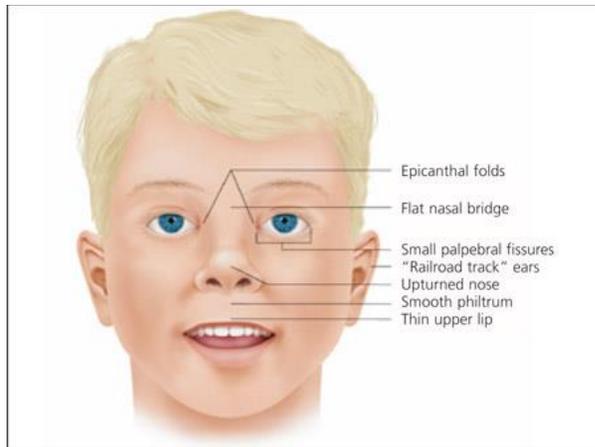


Figure 5 - The "FAS Face." Image accessed from Daniel J Wattendorf and Maximilian Muenke, “Fetal Alcohol Spectrum Disorders,” *American Family Physician*, Annual Clinical Focus, 72, no. 2 (July 15, 2005): 279–85.

It is also said that children with FASD tend to have small, round eyes, a flat mid face, and an upturned nose with a flat nasal bridge. In addition to these facial and cranial features, another symptom of children with FAS is that they have low birth weight, are small for their age and have delayed growth.⁸¹ These facial and physiological ‘features’ are typically referred to as

⁸⁰ For an accounting of different diagnostic protocols, see Susan J. Astley, “Comparison of the 4-Digit Diagnostic Code and the Hoyme Diagnostic Guidelines for Fetal Alcohol Spectrum Disorders,” *Pediatrics* 118, no. 4 (October 2006): 1532–45; For an account of the differences between these age-based expressions of physiognomic expressions between childhood and adulthood, and how Canadian clinicians have reconciled this difference, see Jocelynn L. Cook et al., “Fetal Alcohol Spectrum Disorder: A Guideline for Diagnosis across the Lifespan,” *Canadian Medical Association Journal*, December 14, 2015, cmaj.141593, <https://doi.org/10.1503/cmaj.141593>.

⁸¹ Such descriptions can be found regularly in journalistic accounts of FASD. See Mary Agnes Welch, “The Face of FASD,” *Winnipeg Free Press*, February 26, 2011; For an official account of FASD, see Cook et al., “Fetal Alcohol Spectrum Disorder.” For scientifically based clinical elaborations of these features, see Chudley et al., “Fetal Alcohol Spectrum Disorder.”

extreme symptoms, and are normally associated with the initial diagnosis of Fetal Alcohol Syndrome (FAS), what many people colloquially refer to today as “full blown FAS.” Dr. Clarren was stating a rather uncontroversial claim at the time, which focused on such “full blown” cases of FAS. Indeed, there were no other alternative diagnoses, but as the research continued it became apparent that clinicians were encountering children with the behavioral symptomologies of FAS but without the obvious facial or other physiological features. This led to developments of concepts and diagnostic procedures for determining a “behavioral phenotype” of FASD in lieu of the observable physiologies of the disorder.⁸² And this explains the very term of FASD itself, which was required in order to encompass a multitude, or “spectrum,” of symptoms and diagnostic categories that came to be associated with the medical science of alcohol-related birth defects, such as Fetal Alcohol Effects (FAE), partial Fetal Alcohol Syndrome (pFAS), and Alcohol-Related Neurodevelopmental Disorder (ARND).⁸³ To this day, most cases of an FASD are in these newer categories, where there are generally no discernible physiological symptoms required for a diagnosis to be made. And this is why FASD is regularly referred to today in the language of a “hidden disability” or as a “hidden epidemic.”⁸⁴

In a 2011 feature on FASD in the *Winnipeg Free Press* titled “The Face of FASD,” journalists used such normative language to warn the public of this misleading diagnostic.⁸⁵ As the subtitle put it, “Most kids with FASD look normal, making it an invisible problem. But depending on when the mother drank, some kids with FASD have telltale facial characteristics.”

⁸² K. Nash et al., “Identifying the Behavioural Phenotype in Fetal Alcohol Spectrum Disorder: Sensitivity, Specificity and Screening Potential,” *Archives of Women’s Mental Health* 9, no. 4 (2006): 181–86.

⁸³ Jon M. Aase, Kenneth L. Jones, and Sterling K. Clarren, “Do We Need the Term ‘FAE’?,” *Pediatrics* 95, no. 3 (1995): 428–30; James P. Fitzpatrick et al., “Development of a Reliable Questionnaire to Assist in the Diagnosis of Fetal Alcohol Spectrum Disorders (FASD),” *BMC Pediatrics* 13 (2013): 33; Nash et al., “Identifying the Behavioural Phenotype in Fetal Alcohol Spectrum Disorder.”

⁸⁴ “FASD: The Hidden Disability” (Winnipeg, MB: New Directions - Interagency Fetal Alcohol Spectrum Disorder Program), accessed August 17, 2018, https://www.gov.mb.ca/healthychild/fasd/fasd_hiddendisability.pdf.

⁸⁵ Welch, “The Face of FASD.”

Often, this language of relating FASD's "hidden" quality to normative physiologies is translated in ways that connect it to concepts of non-normative behavior, making it seem like something more sinister for the public to consider. In another article from the same newspaper feature, reporters described this hidden quality like this: "Maybe you sat next to someone with it at the doctor's office. Your daughter or son might have a classmate with it. If you're a foster parent, odds are any child who walks through your door will have it. It is fetal alcohol spectrum disorder, the umbrella term for the deluge of physical, cognitive and behavioural problems inflicted on a baby when a woman drinks when she is pregnant."⁸⁶ We see here one of the main features, which is also a main contradiction, of the FASD paradigm: FASD is something that is everywhere but undetectable, and FASD is something that is so obvious that anybody can detect it even though it is largely "invisible," physiologically speaking. Much of this contradiction can be understood if we focus less on physiology or physiognomy and more on the behavioral component of FASD.

Caleigh Inman has argued, within the analytical vein of a critical disability studies, that it is this emphasis on behavior that makes the diagnostic imaginary of FASD akin more to a "relational disorder" than a bio-medical disorder. Namely, the diagnosis of FASD is typically expressed as a recognition of socially inappropriate behaviors, which are then used to mark an individual's mind as disordered and their body as out of place.⁸⁷ We thus see the subtle warnings of the reporters a little differently, for they are raising our awareness of FASD by getting us to think about that incorrigible car thieving youth, or that annoying kid beside you at the doctor's office, or those disruptive and problematic kids in your child's class.

⁸⁶ Carol Sanders, Mary Agnes Welch, and Mia Rabson, "When Drink Destroys," *Winnipeg Free Press*, February 26, 2011.

⁸⁷ Inman, "Absence and Epidemic: Autism and Fetal Alcohol Spectrum Disorder in Indigenous Populations in Canada," 251.

Something else is revealed in these descriptions of FASD as both “hidden” and everywhere, however. For, as reporters Sanders, Welch, and Rabson make clear above, those troubling kids are all attached to a problematic mother that “inflicted” such harms by exposing their unborn child to alcohol. That is, it is not only the behavior of the offender that is under scrutiny, but also the behavior of his mother too. For instance, before Thomas’s lawyer could make such behavioral assessments of his client, of his “look” or behavioral profile, he had to first cite the irresponsibility of Thomas’s mother who inflicted this damage upon him. Namely, he noted that Thomas’s mom was addicted to a “superjuice” cocktail that maximized her path to inebriation to the point that she could not care for him as a child, which led him to be abducted by the child welfare agency, which is right around the time that the lawyer alleges that Thomas was then found to have FASD.⁸⁸ It is this citational chain that then makes Thomas’s “number of behavioral issues” able to be *corresponded* to FASD.⁸⁹ Such citational priorities are common whenever one makes their own judgment of FASD. For just as those reporters who diagnosed Dylan with FASD based on how he “looks and behaves” had to qualify their diagnostic judgment with a “probably,” this was specifically because “his alcoholic mother won’t discuss her history, so he can’t be diagnosed and treated.”⁹⁰ Interestingly, there is a certainty in their highly unprofessional and non-clinical capacity to diagnose a medical disorder, one that seems to be earned by the deployment of an irritation of Dylan’s mother, and one that is, as we will see, historically rooted in a entwinement of racial and misogynistic imaginaries of medical research.

⁸⁸ Coubrough, ““We Hoped He Could Be Helped.””

⁸⁹ Coubrough. Emphasis added.

⁹⁰ McIntyre, Turner, and Owen, “Perspective: Chill. Thrill. Kill: A Night in the Life of Winnipeg’s Car-Stealing Subculture.”

Origins and ‘Tacit Agreements’

Fetal Alcohol Syndrome (FAS) was “discovered” in the early 1970s in the U.S. as an offshoot of the newly established paediatric science of birth defects and dysmorphology. Such events as the rubella outbreaks at mid-century and the thalidomide tragedy of the 1960s were sources of shifting longstanding ways of conceptualizing a woman’s womb as a protective barrier, as it was clear that certain toxins could penetrate past this defensive ‘shield’ and have devastating effects on the development of a fetus.⁹¹ Equally important was the reproductive politics of the 1970s, and the new possibility of a woman to legally get an abortion, which shifted the social parameters of womanhood, motherhood and the meaning of birth and enabled the re-formation of old social problematics. The original diagnosis of Fetal Alcohol Syndrome was a new hypothesis on the teratogenic effects of ethanol on cellular development, but it was quickly revealed to be a tricky etiological issue as not all women who drink give birth to deformed children, and the synergistic and combined effects of malnutrition, smoking, maternal age and other environmental factors, such as poverty, are to this day not well known.⁹² As the 2005 Canadian Guidelines for FASD diagnosis readily admit, the question of amount of alcohol is at the heart of the etiological debate in the science of FASD. There is no precise science of the causal mechanism of how alcohol leads to cellular malformation, and because it is such a complex process of interrelated biological, as well as sociological, factors, most of the science today operates in measurements of “risk factors,” but which cannot provide accurate estimates of the thresholds of exposure of alcohol that lead to adverse neurodevelopmental harms except to say that there is a “dose-response relation”.⁹³ The scientifically endorsed mantra that has emerged out of this lack of scientific precision is that “there is no known safe amount” of alcohol for

⁹¹ Golden, *Message in a Bottle*, 42.

⁹² Armstrong, *Conceiving Risk, Bearing Responsibility*, 6.

⁹³ Chudley et al., “Fetal Alcohol Spectrum Disorder,” 2.

pregnant women, but as far as diagnosis is concerned there needs to be some form of quantification. In 2015 the Canadian Guidelines were updated with more recent research and noted: “At this time, the threshold of alcohol exposure known to be associated with adverse neurodevelopmental effects is 7 or more standard drinks per week, or any episode of drinking 4 or more drinks on the same occasion.”⁹⁴ Furthermore, because evidence is relatively scant for predicting the effects of a single binge episode on birth defects, they recommend that at least two binge episodes as a “minimum for diagnosis” (Ibid.). Immediately we see how this tenuous scientific consensus of biological mechanism and a corresponding lack of rigorous scientific testing quickly becomes susceptible to subjective and otherwise non-scientific modalities of measurement and observation. Because there is no known safe amount of alcohol, but there is an accepted “dose-response relation,” FASD is today regularly presented as an entirely “preventable disorder,” which has become a mythology of sorts that abstracts and ignores the complex socio-economic conditions of addiction and thus only serves to impose punitive and stigmatizing conditions on women whose bodies are read according to a calculus of “childbearing age” status.⁹⁵

Social prejudice has not only infiltrated the etiological science of FASD, but also the epidemiological gaps of the research, which regularly assumes it to be an “Indigenous issue.”⁹⁶ The very first scientific studies were characterized by deep seated racial biases. In 1973 Smith and Jones published their findings about the severe physiological and developmental impairments of children born to “chronic alcoholic mothers” in *The Lancet*. Notably, out of 11

⁹⁴ Jocelynn L. Cook et al., “Appendix to: Fetal Alcohol Spectrum Disorder: A Guideline for Diagnosis across the Lifespan,” *Canadian Medical Association Journal*, December 14, 2015, 15.

⁹⁵ Stewart, “Fictions of Prevention.”

⁹⁶ Stewart; Tait, “Aboriginal Identity and the Construction of Fetal Alcohol Syndrome.”

children subjects, three were Black and six were Indigenous, while only two were White.⁹⁷ Metis anthropologist Caroline Tait has provided one of the best critical reviews of this early research, noting how it measured the “facial features” of FAS with tools that assumed a white “standard” face that discriminated against certain Indigenous phenotypes and almost certainly led to over diagnoses of Indigenous children in these early studies.⁹⁸ Similarly, Tait has noted how these original studies that were methodologically biased and prejudiced against racialized subjects were taken up by Canadian studies. For the most part, the first studies in Canada were conducted in almost exclusively Indigenous geographies, which led to an obvious overrepresentation of Indigenous children in national epidemiological data. Tait notes how the first Canadian study by K. O. Asante in 1981 was done in Northern BC and the Yukon on children who had been clinically assessed for developmental issues. Asante found that 95% of children diagnosed with FAS were Indigenous, yet made no efforts to describe the overall proportion of Indigenous children in the study, nor did she describe the predominantly Indigenous population in this geography that would naturally bias the findings of an overwhelming proportion of Indigenous children with the diagnosis. Ultimately, Asante used this data to conclude that FAS is a major health issue for Indigenous communities.⁹⁹ Researcher Caleigh Inman has noted that this dubious research, as well as a host of subsequent studies that embarked on creating epidemiological data on FASD in Canada, began from the same troubling methodological and imaginative positions as Asante, much of which were subsequently cited by a 2006 Health Canada report on FASD, which claimed that “research suggests that the occurrence of FASD is significantly greater in

⁹⁷ Jones et al., “Pattern of Malformation in Offspring of Chronic Alcoholic Mothers.”

⁹⁸ Tait, *Fetal Alcohol Syndrome among Aboriginal People in Canada: Review and Analysis of the Intergenerational Links to Residential Schools*, 11. It is interesting that these eugenicist and phrenological tools have been central to the medical identification of FASDs, and that they are so bound up in the contradictions of *seeing* FASD, particularly because these features are so often lacking in subjects identified as having an FASD.

⁹⁹ Tait, 95.

Aboriginal populations, and in rural, remote and northern communities.”¹⁰⁰

Such racially biased research has seeped into the general attitude of Canadians as a “tacit agreement” that FASD is an “Aboriginal problem,” argues anthropologist Michelle Stewart.¹⁰¹ Old and new stereotypes have figured into this cultural imaginary, including the longstanding colonial framework of associating Indigenous peoples to alcohol and that Indigenous women are particularly “irrational” subjects.¹⁰² Anthropologist Michael Oldani has suggested the concept of “racial scripting” to identify the unique process by which doctors in Winnipeg regularly assume that symptoms of short attention spans or disruptive behavioral characteristics are signs of an FASD while non-Indigenous children will receive diagnoses of ADHD for similar symptomologies.¹⁰³ Caroline Tait has observed how this racial scripting penetrates broad conceptual spheres such as “intergenerational trauma,” where, rather than being an analytic of past and ongoing colonial violence and its collective harms - such as in generalized conditions of poverty or struggles with addiction - becomes a short hand for identifying a cultural pathology.¹⁰⁴ While Tait does argue that there is an important correlation between Residential

¹⁰⁰ Inman, “Absence and Epidemic: Autism and Fetal Alcohol Spectrum Disorder in Indigenous Populations in Canada,” 235–36. Inman notes several other exemplary studies that reproduced similar inaccuracies: Godel, Pabst et. al., 1992; Robinson, Conry et. al., 1987; Asante and Robinson, 1990; Habbick, Nanson et. al., 1997; Smith, Sandor et. al., 1981; Asante and Nelms-Matzke, 1985; Williams and Gloster, 1999.

¹⁰¹ Stewart, “Fictions of Prevention,” 60.

¹⁰² See also, Salmon, “Aboriginal Mothering, FASD Prevention and the Contestations of Neoliberal Citizenship.”

¹⁰³ Michael J. Oldani, “Uncanny Scripts: Understanding Pharmaceutical Emplotment in the Aboriginal Context,” *Transcultural Psychiatry* 46, no. 1 (2009): 131–56. This phenomenon is also confirmed by well-respected geneticists and pediatricians in the field of FASD research. See Albert Chudley and Sally Longstaffe, “Fetal Alcohol Syndrome a Complex Problem: Shame-and-Blame Approach Won’t Work,” *Winnipeg Free Press*, December 22, 2015.

¹⁰⁴ Tait, “Simmering Outrage During an ‘Epidemic’ of Fetal Alcohol Syndrome,” 71. Intergenerational trauma is notion commonly associated with the generational effects of violent colonial projects, such as Residential Schools, which sought to systematically destroy Indigenous social relations, and is a concept used as a means of identifying and solving this problem by repairing social relations. This discourse easily becomes a way for colonial professional practitioners, such as social and mental health workers, to cast individual blame on Indigenous families while also universalizing the concept to imagine all of the Indigenous community as pathological. See Krista Maxwell, “Historicizing Historical Trauma Theory: Troubling the Trans-Generational Transmission Paradigm,” *Transcultural Psychiatry* 5, no. 3 (2014): 407–35; Tuck, “Suspending Damage.” For a critique of how trauma has been integrated into political calculus of Canada who uses this pathology to continue to wield paternalistic power over Indigenous nations, see Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights*.

Schools and struggles with addiction, she firmly situates these issues within social and historical context whereas the doctors she refers to substitute collective experiences with both a cultural and biological proclivity, or deficiency, for making appropriate decisions.

The “tacit agreement” of Canadians is thus tied to a complex set of gendered and generational concerns of Indigenous bodies and futurities. In a famous Supreme Court decision in 1997, when an Indigenous mother was fighting against an agency of the state’s child welfare service in Winnipeg, who sought to forcibly confine her in order to ‘protect’ her unborn baby from her addictions, the public was never so collectively aware of the true threat posed by Indigenous mothers and their “anticipated risky” children. The rights of the mother in this decision, who is known as “Ms. G,” was ultimately preserved over the rights of an unborn child, but the sensational aspect of this case forever singed into the collective minds of Canadians the image of an Aboriginal woman “carrying the future of Aboriginal people in her toxic womb.”¹⁰⁵ It is important to note that one of the reasons that the Supreme Court overruled the original case was due to the concerning behaviors of the provincial court judge and particularly the ways that he took it upon himself to self-diagnose Ms. G as mentally disabled, which was key to the legal argument for her forcible confinement during the length of her pregnancy. In fact, to arrive at this conclusion he had to expressly dismiss the recommendations of clinical experts who assessed Ms. G and deemed her to be fully in touch with reality and capable of making her own decisions, and thus, to stand trial with all of the rights of an ordinary citizen. The judge, however, thought that Ms. G walked with a limp and occasionally slurred some of her speech, which indicated to him that she was clearly had cerebral degeneration and cognitive impairments, which thus made her mentally incompetent and thus permitted the courts to assert guardian-like

¹⁰⁵ Tait, “Aboriginal Identity and the Construction of Fetal Alcohol Syndrome,” 105.

control over her under specific mental health provisions in the Criminal Code.¹⁰⁶ Furthermore, this was not even a case of alcohol exposure, but of other substance use. Dr. Chudley, an expert in FASD, was called to testify, and provided speculative correlations between the effects to a fetus of alcohol exposure and other drug substance exposure, which satisfied the courts that there was sufficient correlation despite lack of scientific evidence. The case of Ms. G shows how the concern of FASD is less about alcohol damage, per se, than it is about the concern of the moral responsibility of Indigenous women, the control of their bodies, and, specifically, their reproductive capacities and how they affect society.

After Ms. G

Ms. G forced a recalibration of settler colonial tactics of controlling the Indigenous woman's body. Specifically, it led to two new ways of focusing on the Indigenous woman in discrete ways that further pushed the racist imaginaries underground, which was particularly picked up by a discourse of stigma. And secondly, it led to a new temporal approach in which the prenatal intervention was forced to become a postnatal intervention, which shifted the focus of risk from mother to an unfolding of the anticipation of that damaged child.

At the 7th International Conference on FASD Research in Vancouver in 2016, I was in a ballroom of about 3000 people to hear a set of talks about how we can de-stigmatize FASD and particularly the impact it has on biological mothers.¹⁰⁷ The keynote speaker was a woman named Janet from the southern U.S., who had a daughter with “full blown FAS” and came to found an organization dedicated to preventing FASD and providing services to mothers who might not

¹⁰⁶ *Winnipeg Child and Family Services v. G. (D.F.)* (MBQB August 13, 1996), para 19.

¹⁰⁷ The session was titled: “Let’s Talk: Stigma and Stereotypes—where do we begin?”

know, like she did not, how alcohol can affect one's unborn baby.¹⁰⁸ She had a charismatic demeanour that was mixed with playfulness as she talked about the extremely difficult memories she's had with her own daughter. At one moment, Janet caught the audience off guard with an abrupt, and blunt, question: "who here drank alcohol when they were pregnant?" I looked cautiously and nervously around the room that had fallen into uncomfortable silence, noting the many eyes directed squarely at the floor. Then, Janet, who seemed to have expected this, gently teased the audience to not "be shy" or "feel shame," reminding them about her own story. Slowly, women began putting up their hands, and Janet asked them to stand up and for the audience to give them applause. For several minutes the convention centre ballroom was filled with people whistling and yelling and applauding. Janet yelled over the crowd, congratulating the women for their bravery and reminding us all that this was a show of our strength and will help other women from feeling like they are "being stoned to death" for drinking during pregnancy.

After the talks, we were encouraged to face our table partners and reflect on the things we had learned from the panel. One woman, visibly upset, began with a very honest assessment of how she was "unsympathetic, mostly" about women who drink while they are pregnant, and so she expressed that she felt pressured to join in a standing ovation for something she felt was a deplorable celebration of women damaging children with irresponsible behavior. She was quick to say that she was also upset with herself for having this opinion, particularly because she knew it was not in the majority and because she felt like a "bad feminist" for having such thoughts.

¹⁰⁸ For context, biological mothers of children with FASD are rare at such conferences, which are typically overrepresented by adoptive parents of children with FASD. Michelle Stewart et al., "Listening in a Settler State: (Birth) Mothers as Paraprofessionals in Response to FASD," in *Imagining Child Welfare in the Spirit of Reconciliation: Voices from the Prairies*, ed. Dorothy Badry et al. (Regina: University of Regina Press, 2018), 117–38. More on this below.

“Women deserve second chances,” but should they not also be held responsible for their mistakes, she asked? Several other women from our table expressed gratitude for this woman’s honest expression of feelings as it allowed them to entertain their own ambivalent feelings and moralities, and the table seemed to collectively agree that this was precisely an example of how we were educating ourselves at deeper emotional levels where so much stigma against women occurs. I was sympathetic to much of this discussion, and thought it did reveal some interesting things about our collective behaviors. But I was deeply aware, and concerned, by how this discussion of the stigma against women left out any questions of class or race. Conspicuously absent in the presentations of our panelists, and in the demographics of our discussion tables, or the ballroom in general,¹⁰⁹ was Indigenous women who are known to experience the most aggressive and violent forms of institutionalized racism when it comes to FASD. Most conspicuous and unsettling about this absence was that as soon as we walked out of the ballroom we were confronted by a mass of book displays and informational booths that implicitly foregrounded Indigeneity in the FASD world, whether it was for culturally appropriate diagnostic clinics, or information on Indigenous defence lawyers who also worked with an “FASD lens.” Indigeneity was everywhere, but nowhere in our talk of stigmatized women. What did a conversation about stigma of women mean in this context? At the very least, stigma seemed to be a euphemism that was ignoring larger structural and cultural forms of violence, as well as centering a particular class and race of woman. And, based on the events that transpired at our table, at least, it seemed that a conversation of stigma was actually making us center on the feelings of a woman who felt prejudice, and thus was stigmatizing, toward other mothers.

If the conversation of stigma has permitted some of the more overtly racist and anti-

¹⁰⁹ Notably, the keynote speaker was a white woman, and the tone of the nearly 3000 people crowd was more or less the same.

Indigenous conditions of FASD to remain somewhat subdued, it is equally true that in the aftermath of Ms. G Indigenous women have been somewhat de-centred in the criminal justice stage of irresponsibility and carceral punishment. This is not to say that irresponsible Indigenous women are not still front of mind, however. As Tait reminds us, Indigenous women are still thought of as “carrying the future of Aboriginal people in her toxic womb.”¹¹⁰ Thus today there are still unhinged ultra-conservative voices out there, such as that of retired Manitoba provincial judge Brian Giesbrecht, who suggests that it is “time for another detention-for-treatment test case” like that of Ms. G’s in the higher courts. He adamantly believes that “common-sense” of the courts today would rule in favour of the original social service agency. This common-sense goes like this: if a woman with addictions “decides to continue a pregnancy [then] she must take reasonable steps to prevent her child from being born with brain damage,” and if she cannot take such responsibility it will have to be taken for her by way of incarceration.¹¹¹ As he sees it, “If we saw a parent beating a child to the point of causing brain injury, we would charge, prosecute and jail that person. We would also expect the child-welfare system to step in if those parents had more children.” Crucially, he ignores any of the extremely controversial measures that such a ruling would lead to, primarily the forcible confinement of a woman during her pregnancy, and the arguments and evidence produced to suggest how incarcerating pregnant women only has deleterious effects on mother *and* child.¹¹²

Giesbrecht remains an extreme outlier, however. And, for the most part, the Supreme Court ruling in favor of the rights of Ms. G over the rights of her unborn baby has been accepted

¹¹⁰ Tait, “Aboriginal Identity and the Construction of Fetal Alcohol Syndrome,” 105.

¹¹¹ Brian Giesbrecht, “Inquiry Needed into Fetal Alcohol Syndrome,” *Winnipeg Free Press*, December 19, 2015, <http://www.winnipegfreepress.com/opinion/analysis/inquiry-needed-into-fetal-alcohol-syndrome-363019051.html>.

¹¹² Martha J Paynter, “Reproductive (In)Justice in Canadian Federal Prisons for Women: Final Report for the 2019-2020 Reproductive Justice Workshop Project” (Ottawa: Canadian Association for the Elizabeth Fry Societies, February 2021).

as a feminist triumph.¹¹³ But such a celebratory embrace has a major blind spot in the effects that this case has had on Indigenous women's reproductive rights. For, even though the courts ruled against the ability of social service agencies to pre-emptively 'safeguard the health of children' by incarcerating 'negligent' mothers in treatment programs, it has had very little impact on the overall conditions or abilities of social services agencies in abducting children. Even Claire Houston, who laments the Supreme Court decision to rule against prenatal intervention tactics - "the *Ms. G.* decision failed to protect future children from prenatal substance exposure" - has noted that the result has simply been to transfer those prenatal efforts of saving children to postnatal forms of intervention.¹¹⁴ Essentially, child welfare agencies only now have two options for intervening in "substance-abusing families," Houston argues. The "more traditional form" is to intervene following an abuse or neglect allegation. The other form is to intervene following the birth of an "Substance-Exposed Infant (SEI)." This latter form can still be "triggered by a mother's actions pre-birth, specifically by the use of drugs or alcohol during pregnancy," but can only be acted upon postnatally.¹¹⁵ Rather than protecting the baby before it is born, social service agencies are now forced to wait until that baby is born.

The myopia of such claims, specifically that we have "failed to protect future children," is truly shocking, for protection as a social duty is clearly aligned here within a punitive and carceral imaginary - our only options as a society are to either incarcerate women or pre-emptively neglect our social responsibility to protecting children. In effect, advocates like Houston have doubled down on their postnatal interventions, particularly because "our policy of

¹¹³ Patricia Chisholm, "Does a Fetus Have Rights?," *Maclean's*, August 19, 1996.

¹¹⁴ Claire Houston, "The Case of Substance-Exposed Infants after *Winnipeg Child and Family Services v. G. (D.F.)1*," *Canadian Family Law Quarterly* 30, no. 2 (August 2011): 233.

¹¹⁵ Houston, 209.

non-intervention in the prenatal context has contributed to their fate” of damaged life.¹¹⁶ In this mode of postnatal intervention, conditions of suspicion become particularly amplified in determining SEI, or, as it is known in an FASD diagnosis, Prenatal Alcohol Exposure (PAE), which becomes grounds for apprehending children. And we know that, for pre-existing structural reasons, Indigenous mothers and children are most likely to be the victims of this aggressive and suspicious modality of intervention for things like “birth alerts” in which a social worker is required to check on a mother immediately after birth by virtue of the fact that the mother was in care herself.¹¹⁷ This further shows how the diagnostic category of Prenatal Alcohol Exposure needed for FASD is immediately pulled into a long standing history of increased surveillance and disciplinary mechanisms that are uniquely applied to Indigenous women. Furthermore, racial optics of medical staff and social workers can make them trigger a “birth alert” for suspicions that are constructed on racial stereotypes, like how they notice a mother walking, or if they think they smell alcohol on them.¹¹⁸

Can we get her birth records?

For several months I sat in the meetings of an assessment team at a local FASD clinic. It was here where children and youth were pre-screened to determine if they would be recommended for an actual diagnosis, which made this a particularly interesting place to witness how one became eligible, or legible, as a potential candidate for an official FASD diagnosis. The team of social workers, occupational therapists, language specialists, pediatricians, and

¹¹⁶ Houston, 233.

¹¹⁷ The MMIWG Inquiry has specifically targeted these practices as racist and discriminatory structures that target Indigenous women. See *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, 1a:355.

¹¹⁸ Recall that it was the incredible arrogance of a Manitoba judge who overruled the expert testimony of a clinical psychologist who assessed Ms. G as mentally fit to stand trial because he thought she looked like she had cerebral degeneration. See *Winnipeg Child and Family Services v. G. (D.F.)* (MBQB August 13, 1996), para 19.

psychologists would gather monthly or bi-weekly to sift through a pile of medical files on children who had been referred to the clinic for assessment.¹¹⁹ At several meetings I was able to observe a particularly challenging and recurrent issue of how some case files became problem files that stymied the neat flow of recommendations or disqualifications based on their lack of clear information on whether the child in was prenatally exposed to alcohol or not. We have already noted above how important the confirmation of alcohol is to the diagnosis of FASD, and how it is a perennial problem for diagnostic practices because, for one, there is still relatively large gaps of etiological specificity for the “dose-response relation” of alcohol consumption and FASD symptoms. How do we quantify alcohol consumption in a way to achieve causal certainty with behavioral abnormalities in a child and, more importantly, how do we even collect that information? In 2015 the Canadian Guidelines were updated with research to suggest that, “At this time, the threshold of alcohol exposure known to be associated with adverse neurodevelopmental effects is 7 or more standard drinks per week, or any episode of drinking 4 or more drinks on the same occasion.”¹²⁰ Furthermore, because evidence is relatively scant for predicting the effects of a single binge episode on birth defects, they recommend that at least two binge episodes as a “minimum for diagnosis” (Ibid.). The solution that the Canadian Guidelines provided to the second part of this quandary was to outline a “rigorous documentation” process of confirming PAE.

Such “rigor” is based on and defined by: “reliable clinical observation; self-report; reports by a reliable source; medical records documenting positive blood alcohol concentrations;

¹¹⁹ The clinic does not publish data on the demographics of these children, or where most of these referrals come from. But it has regularly been suggested to me in personal conversation with various clinicians at this centre that the majority of children referred for diagnosis are Indigenous, and the overwhelming majority of them are referred by child welfare agencies. Two of the clinic's most prestigious clinicians have further testified to this publicly in an op-ed piece in the *Winnipeg Free Press*. See Chudley and Longstaffe, “Fetal Alcohol Syndrome a Complex Problem: Shame-and-Blame Approach Won't Work.”

¹²⁰ Cook et al., “Fetal Alcohol Spectrum Disorder,” December 14, 2015, 15.

alcohol treatment or other social, legal or medical problems related to drinking during pregnancy” (Ibid., 11-12). As one might imagine, “reliability” is not clearly defined by the authors of the *Canadian Guidelines* beyond the expression that confirmed sources of PAE must be “devoid of any conflict of interest” and that any “unsubstantiated information, lifestyle alone, other drug use or history of alcohol exposure in previous pregnancies cannot, in isolation, confirm alcohol consumption” (Ibid.). Despite these basic attempts at clarifying reliability along lines of interest and substantiation, however, the assessment team I observed was regularly consumed by ambiguities and contradictions that emerged in the determination of “reports by a reliable source” or, less often, by clinical observations that were made in one’s medical records, which, as we will see, are highly susceptible to unreliable and racially grounded confirmation biases.

On one occasion our team was stymied by an ambiguous statement made by a social worker who claimed that she was “ninety five percent sure” that the mother of the child under consideration was confined to a local alcohol detox center on several occasions while she was on her “case load.”¹²¹ The narrow percentage of this social worker’s uncertainty was in fact a source of ambiguity, however, as our team also discovered that we could not confirm if the mother in question was even pregnant during the time she was on the case load of this worker. This unreliable testimony of PAE confirmation was compounded by testimonial contradictions or confusions in the assessment referral that was made by family members who claimed to have seen the mom drinking on several occasions during her pregnancy, but who could not confirm how much the mother drank on these occasions. After much back and forth, one of the social

¹²¹ The metaphorical and literal space where one’s life is translated into a portfolio of documents, which become the responsibility and ownership of a social worker. A file on their desk, overflowing with hundreds of others just like it.

workers finally asked, “can we get her birth records?” This was not the first time I heard this phrase, but it was significant as it implied a new set of bureaucratic red tape and ethical considerations of privacy, all of which made it an unlikely successful path to follow. Nevertheless, birth records were thought of as a sort of holy grail, a way to bypass all of this uncertainty. Such records contain recordings of dates, times, and locations, not to mention the aura of medical objectivity attributed to doctors and nurses who record such data. However, whenever medical birth records were in play, it became apparent to me that these symbolic sutures of truth actually concealed an equally fallible set of accounts and experiences in the procedures of the medical documentation. For instance, in these records we often encountered phrases like, “mother smelled of alcohol,” or “patient exhibited signs of intoxication” by doctors and nurses, but not once did we ever stop to question how these impressionistic statements of sensual encounter were not supported by corresponding objective facts, like blood tests, for example.

Such sensorial impressions are commonly given authority within the medical settings as well as in legal settings. We note, for instance, that in the case against Ms. G, the director of the Child Protection Centre at the Health Science Centre was called to testify against her and provide evidence about her conduct as a mother from her medical files. These files contained the records of her prior two births and in one of them it was noted by a nurse at one of her births that a “noticeable odor of solvents was detected, indicating that she was a solvent abuser.”¹²² Several other experts and social workers also testified that they detected very strong odors and based their assessment of her intoxication because she “smelled strongly of a glue-like substance.” Such unverified and impressionistic accounts became fodder for the judge to later dismiss the

¹²² Winnipeg Child and Family Services v. G. (D.F.).

findings of the clinical psychologist who found Ms. G to be of sound mind, backing up his observations that he saw her grasping for chairs to balance herself and slurring her speech, all of which became self-evident indications that she had some form of brain damage from abusing solvents. Such instances alert us to the fetishistic quality of diagnosis that occurs at these sites of authority that are thought to make clear distinctions between the objective and subjective, but whose boundaries are anything but clear. They also alert us to the centrality of the sensorial and impressionistic in these sites of power where diagnoses of FASD and other “mental disorders” often take place, and how the empirical is often skewed by unconscious intuitions built on racial stereotypes.

Within the assessment team at the FASD clinic, such sensorial or intuitive forms of knowledge and apprehension informed team members who interviewed and gathered statements from members of the mother’s kinship networks within a hermeneutic of suspicion. In following the Guidelines and trying to determine if those who were giving testimony of PAE were “a reliable source,” social workers would often cite curt or angry tones from various family members as proof of a “hidden agenda.”¹²³ Yet, oddly, even these *questionable* accounts were often still considered as supporting declarations of fact as we moved along with assessments. It added a whole other layer of ambiguity to the assessment process that it was these ‘suspicious’ testimonies that were often the original piece of evidence marshalled by a foster parent or social worker to initiate the referral in the first place. Interestingly, there seemed to be a correlation between the reliability of statements made by family members and the methodological form in

¹²³ While this kind of weaponization of care within state-sanctioned forms of surveillance is quite common in spaces of social and economic desperation (See, for example, Catherine Fennell, “The Family Toxic: Triaging Obligation in Post-Welfare Chicago,” *South Atlantic Quarterly* 115, no. 1 (January 1, 2016): 9–32.), there was a reflexive jump to a “hidden agenda” rather than, say, a frank expression of annoyance of having to speak to yet another pestering social worker, or that their emotions were sourced in the melancholic landscape of impossible choices some family members feel they have to make.

which they were gathered. Short verification “interviews” with a social worker, generally over the phone, tended to locate the credibility of statements as an object of the social worker’s intuition. Much of our meetings consisted of these workers describing in great detail how they navigated the unprofessional tendencies of family members to divulge information that was *too personal* (a true contradiction of terms in this most forcibly intimate encounter with bodies and kin), or how they interpreted the tones of speech of these kin, and ultimately, how they determined what was true and what was not.¹²⁴ Not unlike the doctors in the birth records, these social workers reconciled reliability with an investment in their own version of a “thereness” and an unquestioning trust in their senses and intuitions.

With this context in mind, we return to the claims of Thomas’s lawyer, or Leonard’s PO, or the reporters of the *Winnipeg Free Press* who so confidently, and paradoxically, cite that the Indigenous youth, Dylan, “probably” has FASD, and even the decades old example of Dr. Sterling who diagnosed a death row inmate from a baby picture. All of these accounts share the commonalities of a suspicious gaze, an interpretation of a “look,” which was initially thought of in literal and physiognomic terms, as in the case of Dr. Sterling, but whose challenge has been translated scientifically as a “behavioral phenotype” and taken up by laymen like the lawyers and reporters. Perhaps more important than the reification of phenotypic ghosts in the metaphorical language of the “look” is the Indigenous mother that haunts most of these texts, that stubborn figure and diagnostic category that is key, the only person who can confirm whether there was Prenatal Alcohol Exposure, and who thus stymies *and* affirms the diagnosis itself. If PAE is the cornerstone on which the scientific legibility and legitimacy of diagnosis is affirmed or falters, this is precisely where its most non-scientific pressures of the social and political are the

¹²⁴ In addition to a sensitivity to *tone* of speech, workers also examined speech patterns and various repetitions, and provided descriptions of how they unraveled the lies and deceptions, or confusions, of the family members.

strongest. This fragile piece of the diagnostic procedure is often forged through a delicate accumulation of rumour and other socially determined suspicions, or even a formalization of an “ascertainment bias” that accumulates in the large cracks of uncertainty between the etiological and epidemiological understanding of FASD that makes it so hard to diagnose in the first place.¹²⁵ There are many legitimate reasons why Dylan’s mother might have not wanted to divulge any of “her history” to a group of social workers and clinicians, let alone a bunch of prying reporters looking for a good scoop. The number one reason being that it would have had direct impacts on her ability to keep and raise her child as her own.¹²⁶ FASD permitted the reporters to associate the behaviors of Dylan to irresponsible mothering.¹²⁷ They didn’t even find it necessary to reveal how they knew that Dylan’s mom was allegedly an alcoholic, or how they knew with certainty that she drank during her pregnancy with her son. Who could have told them this? The invasiveness and arrogance of their claims only echo that of their social worker counterparts and shows just how confirmation of alcohol exposure can so often be affirmed, even in negation. Indigenous women are caught in an impossible bind of either talking or not talking, both of which can very quickly lead to a diagnosis, both of which confirm her irresponsible motherhood. None of this is to deny the existence of FASD, but it is to arm us with a tough shield of skepticism whenever someone says that another, especially an Indigenous person, has FASD. Whether that knowledge comes from “suspected” diagnoses that are based on rumor mills or whether it is “confirmed” by a clinical diagnostic team are not so easily distinguished from one another, and thus of little importance. What is important to note in these claims is what

¹²⁵ Armstrong, *Conceiving Risk, Bearing Responsibility*, 8.

¹²⁶ Michael Oldani has also show that even when an Aboriginal mother refuses such invasiveness into one’s life, it only creates more capacity for the system to surveil her body. Oldani, “Uncanny Scripts: Understanding Pharmaceutical Emplotment in the Aboriginal Context.”

¹²⁷ Tait, “Simmering Outrage During an ‘Epidemic’ of Fetal Alcohol Syndrome”; Oldani, “Uncanny Scripts: Understanding Pharmaceutical Emplotment in the Aboriginal Context.”

they enable. And, particularly, what they enable is determined on the place of the mother, which dictates where the emphasis of responsibility lies. To be quite simplistic and blunt, if not obvious, that the mother resides in the background means that it is not her responsibility that is on trial, but her children's. FASD is at the centre of the courts today, but it is not evoked as a claim for explicitly incarcerating pregnant mothers for irresponsible abuse; now it sits at the centre of the criminal justice apparatus for holding these incorrigible and chaotic children responsible, or, more directly, of trying to figure out how exactly to contain this unstoppable force.

Fear of the Generational Tsunami

As Erin Dej argues, children with FASD are caught within a peculiar criminological temporal loop, in which they are seen as victims who are born sick from the harms caused by their mothers, but who later become irredeemable criminals and predators as they move into adulthood.¹²⁸ The failure to confine Ms. G and set a legal precedent for the ability to confine other Indigenous women based on their addictions during pregnancy thus created a slight shift in the concern of irresponsible Aboriginal women to the future responsibility (measured in the threatening term of “risk”) of their disabled children.¹²⁹ One year after Ms. G's Supreme Court

¹²⁸ Erin Dej, “What Once Was Sick Is Now Bad: The Shift from Victim to Deviant Identity for Those Diagnosed with Fetal Alcohol Spectrum Disorder1,” *Canadian Journal of Sociology* 36, no. 2 (Spring 2011): 137–60.

¹²⁹ This is not to say, however, that there has been any less judicial or extra-judicial emphasis put on Indigenous women as a particular form of reproductive toxicity. Indeed, Indigenous women are the fastest growing prison population in Canada, whose rates of incarceration increased by over 90% in the first decade of the 2000s, and with nearly half of the federal women's corrections population today being Indigenous. Furthermore, there is a conspicuous lack of research by the government on the reproductive health of women in corrections. It has been argued by some that incarceration only deteriorates reproductive health by restricting the reproductive potential of prisoners and destroying family connections, betraying the lie behind the claims of all of those who wanted to incarcerate Ms. G for the sake of her and her child. The concept of reproductive justice that emerged out of Black feminist movements of the 1990s, which goes beyond the question of the rights to abortion to focus on more comprehensive conditions of health and resources of marginalized women, further betrays the intended goals of “detention-for-treatment” arguments as women are far less likely to have access to basic needs for reproductive health in prisons, including access to regular health tests and screenings for cervical cancer, or reliable access to

case and several years before he started working on the WATSS project, criminologist Rick Linden was “issu[ing] a warning” to the Canadian public about the “growing number of crimes” being committed by Indigenous individuals who “suffer from fetal alcohol syndrome — a physical brain disorder caused by a mother’s ingestion of alcohol during pregnancy.”¹³⁰ In fact, Linden predicted that “an entire generation of FAS youths are about to enter the criminal justice system — youngsters with little or no ability to comprehend the difference between right and wrong... youngsters [who] have little hope of rehabilitation.”¹³¹

Crucially, Linden had absolutely no credible data on which to base this hysterical opinion as there simply were no prevalence rates of FASD-affected inmates in those days.¹³² And this lack of evidence is precisely the evidence we can draw upon to show how such claims were rooted in a generalized fear of Aboriginal youth who have been continually subjected to a

sanitary products. Similarly, conditions of menopause are overlooked, which makes the conditions of incarceration even more challenging for older women. It bears noting that incarcerated mothers also give birth to children while in prison, most of whom are then put into a foster care situation. There does exist a “Institutional Mother-Child Program” in which a child can live with an incarcerated mom until they are four years old, but there are only a handful of women across the country who have been able to utilize this program. Additionally, women who give birth to children in prison receive far less prenatal care and treatment than non-incarcerated women. Paynter, “Reproductive (In)Justice in Canadian Federal Prisons for Women: Final Report for the 2019-2020 Reproductive Justice Workshop Project”; Mack Lamoureux, “The Convict That Rocks the Cradle: Raising Kids in Canada’s Prisons,” *Vice News*, October 16, 2016, <https://www.vice.com/en/article/8ge8ap/the-convict-that-rocks-the-cradle-raising-kids-in-canadas-prisons>; Samantha Craggs, “Pregnant Inmates Are Getting Prenatal Care Far below Health Standards, Study Shows | CBC News,” *CBC*, August 23, 2020, <https://www.cbc.ca/news/canada/hamilton/costescu-1.5692144>.

¹³⁰ David Roberts, “Native Murder Rate in Manitoba Alarming, Study Shows. Statistics Suggest Aboriginals 30 Times More Likely to Be Killed; Sociologist Links Prevalence to Loss of Cultural Identity, Poverty, Lack of Hope,” *The Globe and Mail*, November 2, 1998, sec. News.

¹³¹ Roberts. Note that Linden does not say “Indigenous FAS youths,” but this is the implication. This article was a report on the “alarming” murder rate of Aboriginal people in Canada. Linden does say explicitly that Natives are susceptible to such violence because, according to Linden, “the typical homicide in Winnipeg happens after a three-day drinking party... We had a case last year where a woman was stabbed to death during a three-day house party. Everyone there was too drunk to even notice she was dying. That, unfortunately, is tragically typical.” Alcohol was central to his criminological lens, as even poverty could not be used solely to understand this unbelievable rate of murder amongst Aboriginal people who were noted by Statistics Canada to be 30 times more likely to be murdered. If poverty were so significant, then Newfoundland would be the “homicide capital of Canada,” claimed Linden, yet it “hardly registers on the scale.” But it was not just alcohol consumption, that created the important exceptional quality, but the generational effects of alcohol in the Aboriginal community that concerned Linden.

¹³² This point is further elaborated in the introduction in the section titled “‘Information gaps’ and *ur*studies,” which specifically reviews the pioneering work of Streissguth et al. (2006) who argued that there was a causal relationship between FASD and criminality or “Trouble with the Law (TWL).”

criminological analytic that is based in irrational fear and moralities of hopelessness. Indeed, Linden's "warning" harmonizes with the two Winnipeg Police officers we saw in the introduction, Sgt. Safioles and Sgt. Dennison, who warned of the psychological disability of Winnipeg's car thieves to explain their peculiar amoral constitution, as well as that *something else* that couldn't really be explained but was somehow related to gang shootings from a few summers prior in an accusation of possession. There is something so fundamentally ghostly and ethereal about these claims in which Aboriginal youth violence, and, particularly, gangs, and intellectual disability are made to stick together in a coherent order of meaning, particularly because they struggle to base themselves in any reality whatsoever.

For instance, consider the 2010 *Winnipeg Free Press* article titled, "Nightmare' predicted as FAS makes some aboriginal youth vulnerable to gangs."¹³³ The sensational title is itself borrowed from the claims made by a social worker who has had experience in "some of Canada's most remote and troubled reserves," as who has tonnes of anecdotal "evidence" about how "gangs in Hamilton [Ontario] use youths suffering from fetal alcohol syndrome to conduct break and enters and petty crimes." His claim is simple: "If we don't get engaged for a solution for this issue, we are creating a nightmare, because we do know 60 percent of the Aboriginal population is under 25 [years of age]." He describes this as a "demographic tsunami facing Canada." Tellingly, 'Aboriginal youth' is presented as category that should be feared for no better reason than they are a growing demographic. The real magic is in the repeated claim of this article that "FASD makes gang life seem exciting and attractive" to Indigenous youth. The reason this claim is attached only to Indigenous youth is a clue itself, as it is part of a circular and

¹³³ Susanna Kelley, "'Nightmare' Predicted as FAS Makes Some Aboriginal Youth Vulnerable to Gangs," *Winnipeg Free Press*, March 16, 2010, <http://www.winnipegfreepress.com/special/fasd/nightmare-predicted-as-fas-makes-some-aboriginal-youth-vulnerable-to-gangs-87933702.html?viewAllComments=y>.

self-collapsing reasoning in which high rates of Aboriginal youth incarcerations make sense because alcohol is related to poverty and Aboriginal communities, which makes them have higher rates of FASD, and FASD makes one susceptible to gangs and violence, which is why so many indigenous youth are incarcerated.¹³⁴ This just goes to show how deeply this propaganda has infiltrated the thinking and sensorial constitutions of Canadians today.¹³⁵

Such fearful thinking has been deeply embedded into the academic sector of criminology and sociology as well. For instance, look how comfortably the claim of FASD fits in to various methodologies of predicting and accounting for Aboriginal youth gangs and violence.

Sociologist Mark Totten has proposed the methodological and theoretical “pathways approach” that creates a list of predictive factors that typically lead to an Aboriginal youth joining gangs.

¹³⁴ For instance, this article depends on the scientific knowledge of the geneticist and world renowned FASD researcher, Dr. Albert Chudley, who makes claims about how the “incidence of FAS can be up to 10 times” higher in Aboriginal communities than non-Aboriginal communities; that there are correlations between Aboriginally, poverty and alcoholism, which makes FAS thus more statistically relevant to Aboriginal communities (which, he maintains, does not make it a racial issue so much as “rampant use of alcohol” issue or a “disease of poverty”); and that there are scientific studies that show that those with FASD are overrepresented in the criminal justice system. A critique of the kinds of racial bias that inform these studies can be found in the work of Tait (2003), and more consideration will be given to some of them in subsequent chapters. For now it is sufficient to point out that not one of these studies proves that Indigenous youth are more susceptible to gangs because of FASD, but rather, there are a variety of studies that are conglomerated to make inferences that stretch scientific credulity but which make implicit social sense.

¹³⁵ If I were to interview this social worker, I would be seeking to understand how he *knows* that any of his clients have FASD in the first place, as was a basic approach with all of my interlocutors during fieldwork, but with the added specificity of trying to understand how he deduced that gangs were explicitly exploiting youths with FASD to conduct petty crimes? How, if at all, did the gangs know that these youth had FASD? If gangs were recruiting members based on FASD diagnoses, did all gang members have an FASD? What made those without an FASD *decide* to join a gang? And what made individuals with FASD better marks for petty crimes of break and enters versus, say, those operations involved in the selling drugs or managing prostitution? Based on several years of asking precisely these kinds of questions, I can make an educated guess that there was probably nothing explicit about any of this, beginning with the very diagnosis of FASD itself. Likely, he assumed that petty crimes are less sophisticated and thus equated this to FASD, as such “gang members” could not be counted on to manage complex operations. That these youth likely had low educations were probably only affirmations of an FASD, rather than, say, systemic problems with education systems and the broader conditions in which Indigenous youth are alienated from Canadian institutions. That FASD has come to make this particular kind of sense for this social worker in interpreting the horrible conditions in which youths become involved in crimes would be consistent with the overwhelming thrust of my findings in interviews and observations with interlocutors in social services, clinicians in FASD clinics, lawyers, judges, probations officers, community workers, and hundreds of conversations with ‘everyday people’ on their knowledge on, and impressions of, FASD. This social worker’s views and speculative interpretations are absolutely typical in his profession and beyond.

They are: 1. The process of ‘violentization’, rooted in experiences of serious and prolonged child maltreatment; 2. The prolonged institutionalization of children into child welfare and youth justice facilities; 3. Brain and mental health disorders, resultant from childhood trauma and FASD; 4. Social exclusion and devaluation; 5. The development of hyper-masculine and sexualized feminine gender identities.”¹³⁶ Such models are effectively risk-assessment models, heuristic devices that make it sensible for criminological prediction and more sensible and efficient intervention strategies, but they are theorized explicitly as “unique” to Indigenous life because this population can be statistically shown to suffer from these generalized conditions.

Similarly, we saw in the introduction how Rick Linden’s criminological reforms for “punishment models of certainty” – where “high-rate offenders” are given “special attention” in the form of regular random curfew checks that act as much more efficient models of deterrence as they actively back up the promises of zero-tolerance for breaking the law¹³⁷ -- created unique new tools for statistically understanding and profiling Winnipeg’s “subculture” of car thieves with psychological characteristics of impulsivity, lack of consequential thinking, and thrill seeking behaviors. In short, the WATSS program did not identify these youth as being explicitly Indigenous or even having FASD, but the effects were that the “subculture” that was identified by these criminological tools implicitly conveyed these characteristics. Linden’s research did not collect data on the ethnicity or race of the youth involved in their research, which Linden claimed was an intentional decision in recognition of wanting to avoid providing fodder to the racialized public discourse on crime and criminalization in a place like Winnipeg. Nevertheless, Linden confided that he suspected most, if not all, of the forty three incarcerated youth that

¹³⁶ Totten, “Investigating the Linkages between FASD, Gangs, Sexual Exploitation and Women Abuse in the Canadian Aboriginal Population: A Preliminary Study,” 12.

¹³⁷ Linden, “How Winnipeg Slashed Its Auto Theft Rate and What the Rest of Canada Can Learn.”

comprised the subjects of this research to be Indigenous.¹³⁸ Instead of making claims like Totten, that these social-psychological traits that linked poverty and impulsivity were “unique” to Indigenous life, Linden and colleagues created different demographic and statistical registers for the representation of race or ethnicity, something that was both implicitly recognized by the researchers and explicitly disavowed in the research publications, but then implicitly acknowledged by the police and community workers who worked with WATSS and the reporters who later covered it. Such reductive criminological thinking that works to create statistically relevant causal linkages between populations and crime is often a risk-factor for the racialization of thinking itself.

This racialization of thinking continues to be expressed in the most blatant and disturbing ways. In his most recent work, Mark Totten has claimed to be “investigating the linkages” between FASD, gangs, sexual exploitation and women abuse “in the Aboriginal population.”¹³⁹ The first problematic premise to note here is that this synthesizing research is, admittedly, based on the limited research in either field of study (of sexual exploitation and gangs, on the one hand, and sexual exploitation and FASD on the other). This research does little to account for or explain the reasons or causes of these “linkages” than it does to simply forcibly establish this linkage with brute force by tying these diverse sociological phenomena together under the umbrella of the “Aboriginal population.” Totten admits to the speculative nature of his “investigation,” but justifies it because by juxtaposing these divergent fields beside one another some kind of knowledge is bound to appear, or at least a further illumination of the specific

¹³⁸ Personal correspondence with author, at the office of Rick Linden, University of Manitoba, January 9, 2015.

¹³⁹ Totten, “Investigating the Linkages between FASD, Gangs, Sexual Exploitation and Women Abuse in the Canadian Aboriginal Population: A Preliminary Study”; See also Mark Totten and The Native Women’s Association of Canada, “Investigating the Linkages between FASD, Gangs, Sexual Exploitation and Woman Abuse in the Canadian Aboriginal Population: A Preliminary Study,” *First Peoples Child & Family Review* 5, no. 2 (May 5, 2020): 9–22.

“knowledge gaps” will emerge. Totten uses a Venn Diagram to visualize the “potential linkages between these issues,” but with little coherence in the various themes that are made to populate these circles.¹⁴⁰ But just as this simple visual juxtaposition of stats and demographics is critically deficient of any measure of rigorous analysis or research design, we also see that the empirical data in which he attempts to make ‘links’ is also suspect. Most disturbingly, he reveals that his entire categorization of “FASD youth” is based on strictly on his own *observational data* analysis, not on any rigorous clinical data. Quite simply, Totten suggests that many of his Indigenous youth research subjects “have the visible facial features indicative of FASD.”¹⁴¹ Thus, one of the main “pathways” in which Aboriginal youth join gangs, which Totten suggest is related to brain damage and FASD, is entirely made up by his own non-clinical observations and assumptions about what this means. Within Totten’s work there is a strange way in which the pathways to such phenomena as Aboriginal gangs, or the causes of sexual violence in Aboriginal communities, are all so completely overdetermined, yet in which factors like FASD or sexual violence are made to stand out as significant, as important “links” to explain this mess of tragedy and suffering.¹⁴² Analysis of FASD is thus not simply about how it is conjured out of flimsy

¹⁴⁰ Totten, “Investigating the Linkages between FASD, Gangs, Sexual Exploitation and Women Abuse in the Canadian Aboriginal Population: A Preliminary Study,” 14. “Vulnerable women” is posted in the left circle, “FASD children” in the right, and “FASD Youth Involved in Gangs and Sexual Exploitation” is located in the overlapping space of the two circles.

¹⁴¹ Totten, 12.

¹⁴² We also note in this context that Totten’s signature academic approach to “gang studies” has been the subject of controversy in the courts, and that his legal status as an ‘expert’ has been challenged and delegitimized by various legal teams and a judge, and which has been the source of launching a series of appeals and re-trials. Notably, Totten’s expertise was questioned precisely because he manipulated his quantified data, and particularly he inflated his data by including data of past studies as new research. See Betsy Powell, “Gangs ‘Expert’ Mark Totten Comes under Fire from Judges,” *Toronto Star*, March 21, 2012, sec. Crime, https://www.thestar.com/news/crime/2012/03/21/gangs_expert_mark_totten_comes_under_fire_from_judges.html; Paola Loriggio, “Third Trial Ordered in Toronto Murder Case over Teardrop Tattoo Testimony,” *Global News*, August 8, 2017, <https://globalnews.ca/news/3655165/third-trial-ordered-in-toronto-murder-case-over-teardrop-tattoo-testimony/>.

evidence or wild stretches of the imagination; it is how the meaning of Indigenous life is a phantasmic creation, conjured within by a prior set of associations to Indigenous life.

In spite of the castles of sand on which such studies are founded, or in spite of the flimsy and non-existent ‘proof’ of an FASD diagnosis, these figures and labels carry much weight and influence in the world.¹⁴³ In all of this accounting of the specific discursive coordinates of the imaginary of Indigenous peoples as genealogical subjects, and the supporting role of the specific, elusive, and flimsy status of FASD within this discourse, the point is that there are deep and profound effects. Thomas’s ‘diagnosis’ became a central animating feature of his biography and shaped the public debate on the meaning of his actions, as well as the broader meaning of responsibility, culpability, and punishment that would, should, come. Even for reporters who demonstrated sympathy with Thomas as a victim, *made* into a monster by a combination of a corrupt social welfare system and FASD that stole his birth right, it is FASD that ultimately allowed these reporters to conclude that they “would not want to live next door to [Thomas] or encounter him on the street.”¹⁴⁴ Thomas is a lost cause, a subject trapped in his history, in the constraints put around him by a corrupted system, but also by his mother, most directly, as well as his broader community that enabled this mother’s addictions and didn’t step in to help Thomas. All of which makes him a risk; potentially, probably, a dangerous individual.

¹⁴³ It is concerning to see Totten cite approvingly the collaborative research done by Sisters in Spirit, a program of Native Women’s Association of Canada (NWAC) – with whom Totten’s above cited work was in collaboration with – who are working with the Winnipeg Working Group on FASD and the Sex Trade in order to track the prevalence of FASD in murdered and missing Indigenous women and in the male offenders convicted in these cases. Totten notes that such work is “extremely difficult,” particularly because of the “lack of diagnosis” that pervades these cases, but he does not suggest how the lack of this fundamental information is dealt with methodologically or theoretically. If we are to base anything on his work we can see how easy it is to simply presume such diagnostic information. More importantly, however, is that such uncritical research frameworks risk profoundly missing the larger structural features of the phenomena of missing and murdered Indigenous women, or the generalized rates of death in Indigenous country. For when FASD becomes the ‘link’ in such investigations, inquiry of systemic investigations loses value and relevance, and individualized approaches to responsibility become centered. See Totten, “Investigating the Linkages between FASD, Gangs, Sexual Exploitation and Women Abuse in the Canadian Aboriginal Population: A Preliminary Study,” 24, note 52.

¹⁴⁴ VanRaes, “Accused in Bus Driver Homicide Another Victim of Failed System.”

Yet FASD seems to simply give words to a condition that has been on the top of mind of Canadians for decades. Indeed, when Linden foretold Canada of the rise of FASD, he was only marking a slight, legally mandated, shift in how we should fear the Indigenous subject. No longer was it strictly the mother who was the subject of risk. By losing the Supreme Court battle against Ms. G, Canada was forced to begin fearing the anticipated risky subjects that mothers like her were bringing into this world. Today, we are living with the consequences of these women. But even without the discourse of FASD there are many critiques and pundits in Canada who articulate this particular tensing of the genealogical imaginary of a permanently constrained Indigenous body, particularly with considerations of criminal justice and the anxieties in which Indigenous peoples are figured as risky beings to the social body. In one of his classical rants against Indigenous exceptionalism in the justice system, conservative editorialist Jonathan Kay ushered forth a particularly forceful theory of the permanency of Indigenous risk and dangerousness that emerges from the innately dysfunctional world of Indigenous life.¹⁴⁵ Specifically, Kay was ranting against the recent Supreme Court decision, *R v Ipeelee*, which had affirmed the duty and obligation of judges to consider the special status of Aboriginal offenders in the criminal code by virtue of how their lives may have been affected by colonialism and how this might carry explanatory value for considering their criminal behaviors. This debate, and the impetus of this SCC decision and its predecessor, *R v Gladue* in 1996, revolve directly around the question of Indigenous overincarceration as a primary index of inequality in Canada, with these judicial decisions as small attempts at rectifying this decision.¹⁴⁶ For his part, Kay admitted

¹⁴⁵ He was ranting specifically against the recent Supreme Court ruling, *R v Ipeelee* (2012) that had affirmed the special status of Aboriginal offenders in the Criminal Code. Jonathan Kay, "Jonathan Kay: A Supreme Court Dissenter Gets It Right on Violent Aboriginal Criminals," *National Post*, March 24, 2012, sec. Full Comment, <http://news.nationalpost.com/full-comment/jonathan-kay-justice-marshall-rothsteins-insightful-view-of-special-legal-treatment-for-long-term-offenders>.

¹⁴⁶ A sustained analysis of *R v Gladue* and *Ipeelee* is offered in the third chapter of this section.

that trauma and abuse likely informed the disproportionate rates of Indigenous offenders in the criminal justice system, but he admonished the majority decision of this SCC decision as a naïve ‘soft-on-crime’ approach because, he argued, whatever the cause of these conditions of trauma and abuse they are now constitutive factors of Indigenous life and, thus, conditions of violence.¹⁴⁷ Like some of the more colloquially ‘liberal’ journalists we have assessed thus far, Kay adopted the discourse of trauma and suffering to explain Indigenous crime and conditions of overrepresentation in prisons, but unlike those other journalists he left out any reference to colonial history. Not only would this rub his conservative readership the wrong way, it was also redundant to his overall argument that many, if not most, Indigenous offenders are simply “lifelong addicts who have sadism programmed into their tragically wounded souls.” What else can we do with these tragically wounded souls? No amount of sympathy will deprogram their violent constitution. As far as Kay is concerned, any individualized consideration of an Indigenous offender’s life and the ‘mitigating factor’ of colonialism is only proof that they belong in jail. That is, their history merely foretells their rightful place in the carceral system, even if that system must be reformed to account for this legally tricky issue of mentally disabled offenders who are distinctly ill-equipped to *learn* or *benefit* from its normative expectations of punishment, deterrence, and rehabilitation.

Anthropologist Caroline Tait was the lone critical voice to be quoted in the article discussed above about the “Nightmare” scenario of Aboriginal youth and gangs.¹⁴⁸ She noted, for instance, that “a child without the syndrome [FAS] who is raised in multiple foster homes, or is neglected or abused is just as vulnerable [of joining a gang].” Furthermore, she cautioned that

¹⁴⁷ Kay, “Jonathan Kay: A Supreme Court Dissenter Gets It Right on Violent Aboriginal Criminals.”

¹⁴⁸ Kelley, “‘Nightmare’ Predicted as FAS Makes Some Aboriginal Youth Vulnerable to Gangs.”

such spurious reasoning is likely to put blame for gangs on Aboriginal women and further isolate them as racialized pariahs to society. I agree with Tait, and would only add that such views have become the institutional and cultural norm for thinking of Indigeneity in general; the imperceptible background noise of our collective imaginaries and fantasies. Indigenous women may dwell in the back or front of our collective imagination as figures of irresponsibility and blame, but Canadians are no longer simply anticipating the storm of an “entire generation of FAS youths” to come, as warned by Rick Linden over two decades ago; today our collective imagination is one in which we are living this storm. In other words, while we continue to blame mothers, the sense is that we are now firmly drowning in the tsunami of their toxic offspring. As former judge, Brian Giesbrecht put it to his readers: “they [Indigenous peoples with FASD] *are* filling our youth detention centres and jails.”¹⁴⁹ And he topped it off with a generational analysis: “there are now grandparents, parents, and now children — all with FAS” living in our community. This is the political problem that should be the emphatic source of our attention, and not, Giesbrecht quipped, that “missing-women issue” that Aboriginal leaders love to be so vocal about. FASD is part of a broader discourse for how we identify the generational accumulations of the Indian problem today within the medico-legal framework of a psychological disorder.

¹⁴⁹ Giesbrecht, “Inquiry Needed into Fetal Alcohol Syndrome.” Emphasis added.

Chapter 2: Settler Secrets of Sex

The dream of safety can reach culmination or climax only in the nightmare orgasm of genocide.¹

On the day of Irvine Fraser's death, on February 14, 2017, over a bowl of Pho in Winnipeg's inner city, Billy asked me an abrupt and disturbing question. "You think Fraser was a didler?"² Such a macabre and seemingly shameless question was characteristic of Billy, and, as usual, it caught me off guard. He chuckled as I looked into my steaming bowl with a feeling of being slightly mortified. "How can you speak of the dead like that," I asked? As usual, Billy's dark and highly inappropriate humor was not only to get a rise out of me, but to say something serious and, as usual, was based in deep personal history that informed the endless love he put into the community. His question, while on the face of it appeared to be about Fraser, was more about Thomas's reaction. If he had been sleeping, as was being said in the news, Fraser's act of waking him must have been either highly careless or highly inappropriate, and, to Thomas, must have been experienced as a violent attack. I was familiar with Billy's meaning. In my work as a community outreach worker there were informal protocols and tips that we shared with one another regarding the best approach to the act of waking certain individuals. They were more like warnings, so as to avoid startling or potentially "triggering" someone into a negative reaction. I had mixed feelings about these informal stories, as there was always a dark cloud of sexual abuse that informed this knowledge, with obscene snippets of stories of brutal violations that felt more like rumor than anything else. Despite the fact that this mostly came from a place of care, for the

¹ James Baldwin, *The Evidence of Things Not Seen* (New York: Holt, Rinehart and Winston, 1985), 102.

² This term refers to one who sexually abuses children.

participant as well as our own sense of personal safety, it always made me uncomfortable that we could so freely talk about such deeply private experiences of the people we were working for.

But Billy wasn't gossiping. He knew Brian Thomas as he had worked with him a few years prior in a position of a community therapist. He knew of some of the most horrendous incidents that occurred in Brian's life, where the most intimate boundaries were crossed and securities violated, often within the surrogate familial space of the foster home that he had been put into in order to 'care' for him.³ With this seemingly insensitive question, Billy was locating Thomas's violence within a different story of the trauma of systemic sexual abuse that ran all the way back to the 1600s and the explorer of Samuel Champlain who demanded "very nice little boys" from Huron tribes, or the unchecked pedophilia of the catholic missionaries that penetrated Indigenous lands and bodies, or the "new epidemic of sexual abuse" launched by the Sixties Scoop when Indigenous youth were put into homes and "treated as domestic and sexual slaves" by foster and adoptive parents.⁴ Billy himself could relate to Brian's experiences, and he regularly spoke openly of his own PTSD that extended back into a childhood that was taken from

³ Billy worked as a community therapist in an organization in Winnipeg that contracts with social work agencies to engage youth in child build therapeutic relationships are best developed in movement - literally, whether walking, driving, or otherwise – and in direct positive engagements in the community. They do things like deliver beds to those in need; help people move; learn to be helpers (*shkaabe*) at ceremonies; and so on. Action Therapists tend to build quite in-depth relationships with a youth's broader kinship networks and so my friend was quite well informed with Brian's family life including his former foster parents, etc. That is to say, he could speak with a credible knowledge of some of the hardest moments of Brian's life. It was part of Billy's job to know these things and to help youth work through them in constructive, and hopefully, transformative ways.

⁴ Suzanne Fournier and Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Douglas & McIntyre, 1997), 118-121. Such rampant sexual abuse of Indigenous children by church leaders and staff of Residential Schools has also been documented in the Royal Commission on Aboriginal Peoples, as well as by numerous academic studies and personal accounts and memoirs. See Canada, Royal Commission on Aboriginal Peoples, *Final Report of the Royal Commission on Aboriginal Peoples (Online Copy)*, vol. 1, Looking Forward Looking Back (Ottawa: Canada Communication Group, 1996), 359-60, <http://data2.archives.ca/e/e448/e011188230-01.pdf>; For accounts of sexual abuse by foster and adoptive parents of abducted Indigenous children, see Margaret D. Jacobs, *A Generation Removed: The Fostering and Adoption of Indigenous Children in the Postwar World* (University of Nebraska Press, 2014), 261; Susan Devan. Harness, *Mixing Cultural Identities through Transracial Adoption: Outcomes of the Indian Adoption Project (1958-1967)* (Lewiston, N.Y.: Edwin Mellen Press, 2008), 103-4; Beatrice Culleton, *April Raintree* (Winnipeg: Pemmican Publications, 1984); SHARON SMULDERS, "'A Double Assault': The Victimization of Aboriginal Women and Children in 'In Search of April Raintree,'" *Mosaic: An Interdisciplinary Critical Journal* 39, no. 2 (2006): 37-55.

him by the violations of older men that he should have been able to trust. Far from a joke, then, Billy's question forced me to contend with something incredibly serious. Billy was relocating the story of trauma in the post-traumatic of history as it manifested in a singular life of pain and the incessant repetition of this pain. Billy's provocation on that afternoon of Fraser's death illuminated a reality of violence and transgression in which Thomas has learned to relate to his own body and other people and experiences. It was equally a commentary on who Fraser might have been and what his specific object relations might be. It was not a question of whether he provoked Thomas, but *how* and *why* he provoked him. More deeply yet, as Billy's explanatory framework revealed a gap between the overwhelming public narrative of Thomas and ours, and of the sliding location of the object of trauma, this also staged for me the importance of how Indigenous fit into the broader object relations of society, and particularly the ways that public rituals of knowing individuals like Thomas are libidinally invested. This more libidinal analytic of power deepens our understanding of why the issue of Indigenous crime is such a salient and enduring component to Canadian national discourse and Canadian identity itself.⁵

Unlike the general anxiety and fear being articulated by the public, of a looming threat, Billy's concern was not with phantoms of random violence. He knew that there was very often nothing *random* at all about violence. And there was nothing exceptional about Brian's act. Even if the conflict with Fraser was not literally sexual in nature, for Billy it was conceivable that Fraser did *something* to provoke Thomas. And that a possible touch in the act of waking one up could be potentially taken as the repetition of sexual violence tells us about how the sexual

⁵ In other words, I believe that this analysis gives us a sense of the energetics or *drive* of Wolfe's astute analysis of the "organizing principle" of settler colonial elimination (Wolfe 2006). I argue that an accounting of the libidinal is helpful for understanding the motivations and investments or attachments in Settler Colonial projects, the substance that attaches people to the variety of projects via a variety of modalities of care, love, hate, lust, some of which, or much of which, is unconsciously animated by ongoing conditions of dispossession and elimination.

transcends the bio-materiality of bodies and their organs. Such stories and the deep mixture of experience and theorization that sustained them were quieted by the dominant narrative in Winnipeg, however, and our dark ponderings dissipated along with the steam of our soup.

There were two exceptions that broke the boundaries of the dominant narrative of Thomas as monstrous murderer, however. The first was in the sympathetic treatment given by a reporter named Shannon VanRaes, introduced in the last chapter, who situated Thomas and his “senseless” violence within a narrative of the “failed system” of child welfare that was at least partially responsible for his criminality.⁶ Particularly, she attempted to provide some journalistic and even ethnographic substance to the otherwise rote story in which Thomas was simply “known to police.” Specifically, she was the only person to ask publicly what it must have been to grow up in seventy-three foster homes. “[A]s a baby, a toddler, a kid and teenager, Thomas packed up his meagre belongings an average of four times a year and moved to a different house, a different bedroom, a new routine, new rules, new foster parents and possibly a new school.” VanRaes was channelling a growing critique that is increasingly available to Canadians through studies and national inquiries that link the overwhelming numbers of Indigenous children in care as a continuation of Canada’s historical project of assimilating Indians and eliminating the Indian problem at the site of inheritance.⁷ In the province of Manitoba, such numbers are staggering,

⁶ VanRaes, “Accused in Bus Driver Homicide Another Victim of Failed System.” The child welfare system, otherwise known as “CFS” (for the governmental offices of “Child and Family Services” in Manitoba), is subject to much scholarly and activist critique as a contemporary tool of the state that perpetuates old colonial tactics of disrupting and destroying Indigenous communities in Canada by stealing children away from community and family. It is said to be a continuation of the Residential School System that sought to destroy the social and political backbone of Indigenous communities (Chrisjohn and Young 2006; Jacobs 2014; Milloy 1999; Sinclair 2016). This topic is covered in more depth in the next chapter.

⁷ Residential Schools were imagined as breaking the uncivilized “influence of the wigwam” and modernizing Indian children with an education that was likened to the “care of a mother.” Canada, Royal Commission on Aboriginal Peoples, *Final Report*, 1, Looking Forward Looking Back:309. It is regularly pointed out today that there are more Indigenous children in child welfare in Canada today than there ever were Indigenous students at the height of Residential Schools. *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 5, Canada's Residential Schools: The Legacy (Montreal: McGill-Queen’s University Press, 2015), 11–15.

where over 11,000 children are currently in care, over 90% of whom are Indigenous.⁸ VanRaes did not cite these numbers, but they were implied. Her focus was more on the absurdity of this system of ‘care’ that regularly apprehends (primarily Indigenous) children under the guise of “best interests of the child” yet is all too eager to rid itself of their burden as soon as they reach the age of eighteen years when they technically “age-out” and are cast to the streets to survive on their own, much like Thomas had been.⁹ VanRaes could not help commenting on the irony of how this system “that is supposed to not just protect them, but lead them into a successful adulthood” is otherwise driven by a cold bureaucratic logic that punctually, if not eagerly, abandons children like Thomas who do not even have a high-school diploma in hand and are fully expected to become homeless once they have been discarded from the “system.” As VanRaes summed it up, this system had something to do with this young Cree man who she doubted “was born” to become a criminal. This narrative casted some hope that maybe Thomas would not only be a monster to the Winnipeg public, but it was ineffective in persuading public opinion. Part of this might have something to do with the fact that for all of her investigation of child welfare conditions, VanRaes left out investigations of sexual violence that plagues that system, and, furthermore, in all of her discussions of FASD she fails to reflect how this discourse is utterly saturated with the concern of sexual violence and exploitation as a risk factor that both correlates FASD to the enactments of crime (and, particularly sexual crimes) and correlates individuals with FASD to being victims of crime (again, particularly sexual crimes).

⁸ Steve Lambert, “Manitoba Vows to Reduce Number of Indigenous Children in Care,” *The Globe and Mail*, October 12, 2017, <https://www.theglobeandmail.com/news/national/manitoba-vows-to-reduce-number-of-indigenous-children-in-care/article36565801/>.

⁹ “Aging out” is the euphemistic term that refers to when the government can legally abandon its responsibilities to children who have been apprehend and are still in the system.

The second exception to the dominant narrative of Thomas as monster was in a brief and challenging moment two days after Fraser's death when there was an article published in the *Winnipeg Free Press* about historical charges of child sexual abuse that Fraser had been fighting in the courts for the past four years before his death.¹⁰ Through an uncovering of court records, reporters were able to determine that Fraser had been arrested in 2013 after a "now-adult woman came forward to police, claiming she was repeatedly molested [by Fraser] between 1982 and 1991, beginning when she was approximately four years old" (Ibid.). For a moment, this breaking story seemed to affirm Billy's theory of the post-traumatic repetition of violence by Thomas. But if Billy and I could now imagine that maybe Fraser did in fact precipitate his own death by some kind of violent and inappropriate act towards Thomas, the public question was, for the most part, mostly concerned with whether Fraser's lying and secrecy of his sexual abuse charges had played an indirect and tragic role in his death.¹¹ Regardless, for a brief moment the public, in both Winnipeg and across the nation, were asked to consider a new set of fault lines of blame, culpability, and responsibility that had constituted the framework of accusation and its temporal fixtures that had so dramatically captured Thomas as *already* guilty. Fraser, who had otherwise been figured as a future oriented subject, was now having his past opened up within a broader imaginary of responsibility. Fraser's newly questioned innocence created a great deal of uncertainty and anxiety in an already taxing atmosphere of foggy horror and speculative fears of lurking Indigenous violence. But even as Fraser's charges upturned this discursive plane, it did not last for very long and was quieted by a visceral backlash from a certain segment of the

¹⁰ Mike McIntyre and Aldo Santin, "Winnipeg Transit Driver Was Facing Serious Criminal Charges Prior to His Death," *Winnipeg Free Press*, February 16, 2017, sec. Local, <https://www.winnipegfreepress.com/local/jubal-fraser-413899403.html>.

¹¹ As the *Free Press* journalists noted, had Fraser told his employer about his charges he would have been taken off duty and thus would not have encountered Thomas on this fateful night. See McIntyre and Santin.

population that accused journalists of offending one of the most deeply held taboos of respecting the dead. It was outlandish that any journalist thought these charges were in any way *relevant*. It was next to impossible to imagine Fraser as anything other than a victim.

The purpose of this chapter is to explore the relationship between the differences in which these two men's private and domestic lives were investigated along different discursive registers of responsibility and innocence and how this related to the imaginary of their identity as either perpetrator or victim. Particularly, we will look at how this private domestic sphere is marked by a double foreclosure of sexual violence. Where Thomas's being and his guilt was marked by the temporal horrors of child welfare, the well documented conditions of sexual abuse in this system were discretely bypassed and, despite the attempts of VanRaes, Thomas's life remained trapped in statistical form of just another broken Indian. Similarly, there was an uproar around Fraser's sexual crimes and an insistence that this history of domestic violations should be bracketed and eliminated from any question of his innocence as a victim. The selective genealogical investigation of Thomas's past lent to a reading of his violent nature and subsequent (or pre-determined) guilt, while the exposures of Fraser's abusive and violent past led, ultimately, to a reading of his pre-determined innocence. Both depend on the repression of the sexual. This formulation of foreclosures demonstrates an important assemblage or assembling of political and libidinal economies that inform the colonial condition of Indigeneity, and are, I argue, central to the story of FASD and how it has come to stick so strongly the Indigenous body in Canadian institutions and imaginaries.

The particular modalities of foreclosing these histories of sexual abuse reveal important structural features and principles of settler colonial worlding and the means by which violence on Indigenous life in Canada is constructed and normalized within dialectical practices of

public/private, and particularly that of public secrecy, where possible forms of the transgressional are created, maintained and adapted. As we will see, much of this infrastructure of public/private has been constructed by the particular domestic sphere of Settler desire and the historical and libidinal landscape of Indigenous child abduction by the Canadian state and adoption of Indigenous children by White Settler families. Thomas's story as a ward of the state and his experience of being in 73 foster homes was particularly informative of his genealogical status as a dysfunctional Indigenous man, but missed in this conversation was how such state infrastructures of abduction are facilitated by a domestic sphere of libidinal fantasies of family and love that become means of privatizing Settler colonial violence. Indigenous abduction has always been marked by this fundamental contradiction of trying to save the Indian while subjecting her to unspeakable brutality of sexual, physical, emotional, and spiritual torture. The repressions that mark the public recounting of the lives of Thomas and Fraser trace either side of this contradiction. And, as we will see, that FASD became intelligible and gained its discursive parameters largely from within the domestic sphere of child welfare – that is, from concerned and disappointed adoptive and foster parents suffering the breakdown of relationships with their surrogate Indigenous children – equally affirms this condition of the libidinal currents that underwrite Indigenous and settler relations. The investigation of Thomas, and the very question of Indigeneity and FASD, is a question of how the settler state disavows sex.

The “broken system”

We have already seen how a critique of child welfare is central to VanRaes's story of Thomas. How she makes this argument, and the research she draws upon to do so, is revealing. She relies particularly on an unnamed research study that she claims demonstrates the strong

correlations between high rates of child apprehension in Aboriginal communities and gross overincarceration rates of Indigenous peoples. The numbers are staggering: 88% of Aboriginal inmates in Manitoba had experiences with in foster care as opposed to 63% of non-Aboriginal inmates.¹² Very casually, as she is noting these figures and remarking on the gross implications of the pipeline between child welfare and prisons for Indigenous peoples, VanRaes notes that these “same populations [Aboriginal peoples]” are reported by the same study to have high rates of FASD.¹³ Here FASD is a minor figure, but that it needed to be mentioned at all is illuminating for it adds nothing to the ostensive argument of her article. Unless, of course, we consider that the mention of FASD only strengthens her overall assessment of Thomas as a dangerous individual as it plays a supporting, and *corresponding*, role to child apprehension and rates of incarceration in the signifying chain of Indigenous dysfunction.

It is most likely that the research referred to by VanRaes and the Children’s Advocate came from a well-known and highly cited study done for the Correctional Service of Canada, in which a highly respected research team of FASD specialists sought to develop a screening tool that could help determine the demographics of FASD in prison populations across Canada. Strikingly, but not surprisingly, this study found that within their sample of prisoners, “only Aboriginal participants received a diagnosis [of FASD],” a fact that they admit makes their data highly problematic and suggestive of the need for further work in the future so as to not

¹² VanRaes does not provide any identifying information about the study, as is common in such reportage, but notes that it was “cited by the office of the Children’s Advocate in 2012.” The Children’s Advocate is an ombudsman agency that advocates for the rights and safety of children and has been at the center of much criticism and fallout with child welfare policies and outcomes in Manitoba, particularly as it relates to Aboriginal children. See, for example, the report written about the systemic failures that have been attributed to the tragic murder of Anishinaabe teen, Tina Fontaine. “A Place Where It Feels Like Home: The Story of Tina Fontaine.”

¹³ VanRaes, “Accused in Bus Driver Homicide Another Victim of Failed System.”

reproduce stereotypes of FASD as a uniquely Indigenous-offender disorder.¹⁴ This goes unremarked by VanRaes and most other reporters who cite this research as evidence, however. All that VanRaes is after is a correlation, of Aboriginal prisoners and experiences with child welfare, one that this research produces as a byproduct of its original intent of establishing connections between prisoners and FASD. Indeed, the study found that 100% of those participants who were found to be ‘at risk’ for an FASD diagnosis were either adopted or put in foster care in their childhood.¹⁵ By referencing this study, and in the particular way that she does, VanRaes repeats and reifies the pernicious correlations that are permitted by this study, between Aboriginal prisoners, child welfare and FASD.¹⁶ As a result, Thomas’s life, which she is purportedly trying to thicken with ethnographic detail, is reduced to a series of statistical varieties. Not only was Thomas doomed because of his placement in foster care, he was already doomed from the start because he had FASD. It is a reverse formulation to Thomas’s own lawyer, who narrated Thomas’s criminal temporality as such: “His mother drank 'super juice' constantly while she was pregnant with him and as a result he was seized... He had a number of behavioural issues corresponding to FASD and to top it off, the local childcare agency lacked the resources and personnel necessary to care for Thomas as a young boy.”¹⁷ Either it is FASD, or it is child welfare that “tops off” Thomas’s doomed Indigenous reality. The private miseries of violence in Thomas’s life get a superficial gesture of care and concern but are ultimately lost and buried under this set of abstractions in which Thomas’s life is translated into statistical form. The

¹⁴ Patricia H. MacPherson, Albert E. Chudley, and Brian A. Grant, “Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalence, Screening and Characteristics” (Ottawa: Correctional Service of Canada, June 2011), 27.

¹⁵ Patricia H. MacPherson, Albert E. Chudley, and Brian A. Grant, “Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalence, Screening and Characteristics” (Ottawa: Correctional Service of Canada, June 2011), 47.

¹⁶ An in-depth look at this study is provided in chapter five.

¹⁷ Coubrough, ““We Hoped He Could Be Helped.””

story becomes less about violence or even the “failed system,” but more about a correlation of factors of Aboriginality, crime and incarceration, and FASD. And we recall from chapter one that despite this sympathetic accounting of Thomas, in the end, VanRaes did not want to find herself in proximity of him. Even if he’d been made into a monster, he was far too damaged now.

The chronicling of Fraser’s genealogy was subject to an entirely different set of concerns and discursive formulas of responsibility and innocence.

Taboo

As one could imagine, revelations of Fraser’s sexual transgressions on a child created stark polarizations in public opinion. On the one hand people contended that Fraser and his family were deserving of decent post-mortem treatment, on account of respect for the grieving. Fraser’s past should have no bearing on determining the guilt and punishment for Thomas’s own violent transgressions. On the other hand, a minority of chat room conversations and arguments in the comment sections of Facebook articles articulated that Fraser’s alleged acts as a child molester and sexual abuser made him culpable in his own death and even forced a reconsideration of Thomas’s own culpability and blameworthiness [see figure 6].

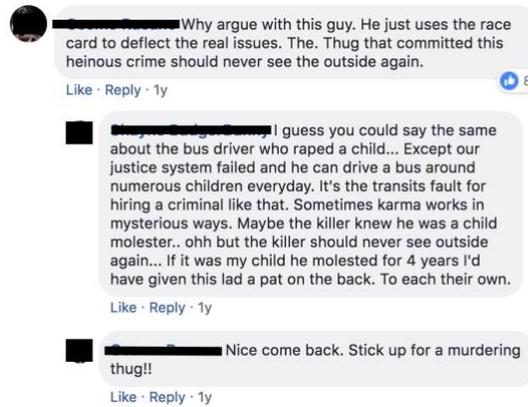


Figure 6 - Facebook debate

The news media generally played into this same general division of opinion. In a *Vice News* article, the reporter ended the column by noting how police were “still trying to determine if the killing was at all motivated or connected to Fraser’s charges.¹⁸ As the final sentence of the article, it quite effectively operated as a ‘quilting point’ by retroactively defining the meaning of the article around this speculative question that put the actions of Fraser and Thomas within an account of sexual violence. Even the dubious police-provided description of events immediately prior to Fraser’s death were cast in a new light: “...Thomas asked Fraser where his [Thomas’s] friends were. Fraser then tried to physically grab him, which prompted Thomas to pull out a large knife...” (Ibid.). Thomas was no longer a stubborn, cold and menacing threat, but someone who was defending himself.¹⁹ What kind of *grab* was made on Thomas, anyways? Other reporters expressed more speculative restraint but nonetheless noted a macabre irony that had

¹⁸ Jake Kivanc, “A Winnipeg Bus Driver Facing Child Sex Charges Was Stabbed to Death on the Job,” *Vice News*, February 16, 2017, https://www.vice.com/en_ca/article/wn7dxn/a-winnipeg-bus-driving-facing-child-sex-charges-was-stabbed-to-death-on-the-job.

¹⁹ Thomas is still described as someone with a “lengthy criminal history” with previous charges of assault, but the focus of this story is on Fraser’s sexual assault charges

Fraser been open about these sexual abuse charges he would have likely been temporarily taken off duty, which could have spared his encounter with Thomas and thus his life.²⁰

The first thing we notice about this ‘debate’ is that no matter where one stood there was generally an acknowledgement of its taboo features. Of course, as we have seen, the issue of child sexual abuse is its own particular form of taboo, but, for the most part, this taboo was subordinated or substituted under the prominence of another fundamental taboo over the rights of the dead and, particularly, the need to pay respects to the dead. Reporter Cassandra Szklarski implicitly noted how this taboo seemed to trump all other concerns, particularly in the “triggered outrage” that the revelations of Fraser’s charges by the *Winnipeg Free Press* seemed to provoke.²¹ She noted how the *Free Press* editor received a litany of emails and letters of furious citizens who admonished him for his faux pas of denying the right of Fraser’s family to “mourn in peace.” Interestingly, it was a sustained analytic of this taboo to not speak of the dead that framed Szklarski’s analysis of the implications of Fraser’s criminal charges, and not the question of child sexual abuse. Nearly all of her sources spoke to the “questionable” and “problematic” framing of Fraser in the revelations of the *Free Press*. Some spoke of the fact that he did not deserve this attention because he was not exactly a “public figure beyond the fact that he was killed on the job” and so deserved the same privacy we would all expect after our deaths. Others spoke directly to the unspoken rules of “basic etiquette” that “if you can’t say anything positive you don’t say anything at all.” Even a therapist was brought into the fold to acknowledge the complex experiences of victims and how silencing them from speaking their truths about dead

²⁰ McIntyre and Santin, “Winnipeg Transit Driver Was Facing Serious Criminal Charges Prior to His Death.” More on this below.

²¹ Cassandra Szklarski, “Rest in Peace: The Politics of Remembering the Personal Failings of the Dead,” *Pentictin Herald*, February 18, 2017, http://www.pentictinherald.ca/life/national_life/article_ff4f52c3-902a-56d0-8ad0-9114219f932d.html.

abusers can be counterproductive to their healing, but that ultimately maybe speaking of such things in public is not the most “helpful for anybody.”

A sociologist/criminologist from the University of Manitoba contained these taboo sentiments within a thinly veiled academic critique of justice and the importance of the status of victimhood for directing questions of blameworthiness. Lambasting the decision of the *Winnipeg Free Press* to publish on Fraser’s charges she asked incredulously, “[w]hat is the reader expected to take away from that?” She continued, “To raise that as an issue, you’re left with this impression that, OK, does this mean that somehow he’s a less worthy victim? Because of this are we to see him as less deserving of our sympathies and our sorrow?” She further dismissed the speculative characterizations that Fraser’s life could have been spared if he had only revealed his court charges to his employer and union, the suggestion being that he would likely have been taken off duty if he had done so. This, the professor argued, amounted to victim blaming, that Fraser was responsible for his own death.²² Interestingly, in this demand for emphasis on Fraser’s victim status, this same professor struggled to identify the other victim of repeated sexual abuse by Fraser, whom she referred to as a “complainant.” She did acknowledge that it was unfortunate that this complainant’s claims would not see the light of day in court now that Fraser was dead, but emphasized with certainty that this other question of justice was secondary, if not redundant. Fraser was “violently and tragically killed,” said the professor. “That’s the story right now.” Such insistence on the present, on the now of the crime, reveals an important entanglement of morality and temporality in thinking about crime and categorizing its actors. In contrast to the overwhelming emphasis on Thomas’s past in all of the other reporting on this violent event, which was mobilized to explain the cause of his crimes by way of explaining his character and

²² Szklarski. For the claim that Fraser’s life could have been spared if he had come forward with his charges to his employer, see McIntyre and Santin.

psychological-biographical profile, there was significant resistance to considering Fraser a genealogical and past-determined subject by virtue of his victim status. If his crimes were to be considered at all it was to be in the mode of deferral.

The criminologist provides us with a simplistic and rigid analytical tool set for thinking through this crime – a division of perpetrators who are considered as past-determined subjects, and victims who are limited to futurities (either as future denied, but also as a consideration of crimes deferred). The moral outrage in which this analytic is provided, however, as well as the unconvincing and short sited dismissal of Fraser’s crimes and his alleged victim, moreover, alerts us to a thicker set of conditions in which this decision of criminal and victim is being made, in which it makes sense to see things in this way. How does this criminologist come to see things this way, so clearly? Why is she able to be so insistent that the “story right now” is of Fraser’s tragic death, a denied future, and, by extension, Thomas’s controversial and determining criminal past? Following within the genealogical tradition of Michel Foucault and his political commitment to knowing who we are in order to then be (governed) otherwise, anthropologist Elizabeth Povinelli offers the concept of *ethical substance* for thinking through such scenarios, or, more immanently, how such scenarios are already politically conditioned by sedimented layers of interpretation and thinking. Ethical substance, argues Povinelli, is that immanent site, or relation, between thinking and being in the world; and so, more than just an analytic of ethics it is equally a call for us to take responsibility for the implicit positions and assumptions we carry with us through space and which inform how we read our world: “[w]here one intervenes... is a matter of obligation and implication rather than detached partial adjudication,” she argues.²³

Focusing analytically with such a notion as ethical substance permits us to ask slightly different

²³ Elizabeth A. Povinelli, *Economies of Abandonment: Social Belonging and Endurance in Late Liberalism* (Durham N.C.: Duke University Press Books, 2011), 130.

questions here, such as why this criminologist, as well as her public and lay counterparts, were so ‘enraged’ and upset by the publication of Fraser’s charges? What do we learn about how they package these visceral responses within narratives of taboo and decency, or rigid dynamics of victims and perpetrators? Ultimately, why are they so certain that the “story” is about Fraser’s violent death and, by extension, his victimhood? Given that Thomas was in an otherwise similar legal position of Fraser as both of their charges had yet to be proven in court, what enables, justifies, and sustains the implication of Fraser’s innocence and Thomas’s guilt? What is the force of “obligation” that drives this complex entwinement of interpretation and feeling?²⁴

There are other glimpses of articulation of these discursive coordinates of obligation and implication, none more pertinent than in a leaked memo of the Canadian Broadcast Corporation (CBC) who specifically instructed its journalists not report on Fraser’s charges because they “were not relevant to the *central issue* of whether bus drivers and their passengers are *safe*.”²⁵ For here the *CBC* thus provides us with an account of the substance of their decision, an articulation of *relevancy* that is based on the question of public safety that so consumed this violent event. With a bit of analytical pressure, however, the obviousness of this relevancy quickly falls apart. For one, “passengers” were empirically absent from the scene of the crime, yet are evoked here nonetheless as subjects of a public safety discourse, thus locating this subject of concern, and of its threat, within a future anterior. ‘Passengers’ and ‘drivers’ constitute a virtual public who are related to one another by nothing more than their shared use of space, but more specifically the shared potentiality, if not expectation, of violation in that space. This goes some way to explaining how the criminologist could dismiss Fraser’s victim as a “complainant,”

²⁴ Said another way, if we consider the Latin root of the word of oblige, *obligare*, the literal meaning is *ob* (“to”) *ligare* (“bind” or “fasten”), what is the substance or force behind the binding here?

²⁵ Szklarski, “Rest in Peace: The Politics of Remembering the Personal Failings of the Dead.” Emphases added.

for her crime was individualized and privatized, confined within the realm of the familiar.²⁶ But this neat division of public and private crimes was precisely one of the points raised by the *Winnipeg Free Press* reporters in their breaking story of Fraser. Specifically, they raised the question and wondered about why Fraser was able to remain a public employee and figure given his serious criminal charges of child sexual abuse? McIntyre and Santin noted that, curiously, Fraser's bail conditions did not contain the usual prohibition of contact with any child under the age of sixteen that is typical for such charges.²⁷ In other words, there was a relevant legal and moral argument to be made for the potential threat that Fraser presented to society. And given that his crime was so clearly based on the violation of trust of an authority figure, an adult abusing a child, it is remarkable that this did not gain much traction. Fraser was treated with legal, and moral, exception. It is relevant – and I would say that I certainly feel obliged – to ask, why?

There is a deep irony here, especially as the editor of the *Winnipeg Free Press*, Paul Samyn, defended his decision to include this report of Fraser's charges under the guise of the universal pursuit and duty of journalistic truth. Dismissing criticisms of violated taboos launched at his paper as themselves forms of backward emotional and cultural constraints, Samyn remained adamant that “our responsibility as journalists also involves revealing truths that unfortunately may be also inconvenient for those who only want a certain narrative from the media.”²⁸ Despite this holy commitment to the good word of truth, however, the *Winnipeg Free Press* never published another word on Fraser's charges, nor did any other newspaper. Perhaps the *Free Press* finally did succumb to the public pressure and tactics of moral outrage? Perhaps

²⁶ While it is not certain what Fraser's relationship to his victim was, it is clear that it was not a 'stranger' crime but one of acquaintance given that it was alleged that they occurred repeatedly over a seven-year period.

²⁷ McIntyre and Santin, “Winnipeg Transit Driver Was Facing Serious Criminal Charges Prior to His Death.”

²⁸ Szklarski, “Rest in Peace: The Politics of Remembering the Personal Failings of the Dead.”

they dropped the story because Fraser's charges were stayed by the Crown after his death and there would be no public hearing of his charges? Nevertheless, there were no further investigations into how Fraser became an exception within the criminal justice system, how his horrendous acts were permitted privacy while Thomas's life was subjected to unlimited and invasive exploration. "The story right now" is thus to unravel this mystery, to reveal the structures in which Fraser was able to maintain entitlement to his autologically ordained privacy in contrast to the open book of Thomas and Indigenous life.

Luise White has argued that dissembling is one of the most pointed forms of telling that we have, that the private acts of lying and the collective forms of maintaining secrets not only camouflage but explain, precisely because such dissimulations are constructed out of what is socially conceivable and plausible.²⁹ Thus, from an ethnographic point of view my interest in the public debate prompted by Fraser's alleged crimes of child sexual abuse is not focused on determining whether it is true or false but in assessing how this story was made sense of and what its various plausible revelations and their associated narrative forms can tell us about public discourse. These analyses tell us precisely how Fraser's secret was kept. We have seen how his crimes were differently recognizable by the public and the various emotive registers that were caught within specific narrative devices of decency, relevancy, or structures of victims and perpetrators. In asking how Fraser's secrets were kept we can go further than narrative analysis, however, and look at how these narratives emerge and are sustained within specific bureaucratic structures and mechanisms.

It was undeniable that Fraser's charges had caught his union off guard as Fraser had, in direct violation of policy directives and professionally enshrined ethical protocols, somehow

²⁹ White, "Telling More."

managed to keep this a secret. “Any time (an employee) is charged, they have to make it known to the employer and we have to represent them... It’s part of the process,” said transit union president, John Callahan.³⁰ Callahan followed up this emphatic statement with a peculiar and qualifying admission, however: “it wouldn’t be unusual for an employee to attempt to hide the criminal matter by booking vacation time to coincide with trial dates.” While Callahan’s statements attempted to claim innocence of knowledge on Fraser’s unsavoury past, his words betrayed an otherwise public ritual of semi-secret relations in which the union is generally aware of the nature and meaning, the how and the when, of employees that regularly attempt to bypass the rules. Indeed, by figuring this admission within the peculiar grammar of the double negative, of the *not unusual*, Callahan accounted for these transgressions of deceit as “part of the process” themselves. Perhaps aware of these revealing inconsistencies in policy and speech, Callahan then quickly turned to deflection, shifting the uncertainties of his own union’s knowledge and responsibility on to the public employer, the Winnipeg Transit. For, if the union did not know about Fraser’s serious criminal charges, which was, on the face of it, doubtful, then surely Transit must have “obviously kept that under wraps for him” (Ibid.). He continued, “[s]omeone was looking after him because we know nothing about it and typically we would.” Callahan was not asked to clarify how, exactly, the union accounts for the routine knowledge of criminal activities of its members, nor their attempts at deception, but by casting doubt on the employer he made it possible to consider that while he didn’t know, it was very likely that *someone* knew; that someone was covering for Fraser.

For the part of the City of Winnipeg, the employers of the publicly owned transit service, they would not say one way or another to reporters if they knew of Fraser’s charges. Instead,

³⁰ McIntyre and Santin, “Winnipeg Transit Driver Was Facing Serious Criminal Charges Prior to His Death.”

they provided limited statements and vague expressions about policy. David Driedger, the manager of corporate communications with the City of Winnipeg, said that, “in general,” if someone is charged under the Criminal Code it does not necessarily lead to a suspension (Ibid.). He went on to say that if a staff member has been charged or discloses a sexual offense the City then performs an “employment investigation to determine the potential risk to the public and to the employees” (Ibid.). Acting more like a lawyer than a public employer with interests in public safety, Driedger remains purposely abstruse and lets his words hang between ambiguous posts of the typical, (“in general”) and the particular exception (“not necessarily”), an evasive stance that directly echoes that of Callahan’s equivocations of “part of the process.” Unsurprisingly, there is no indication as to whether reporters pushed on this legal-speak, so the reader is left in the perfectly crafted ambiguous state of the publicly/privately (un)known – was Fraser investigated for his alleged crimes, and who knew about them? In other words, these answers remain secret.

I would argue this secretive possibility was by design, a unique possibility of the bureaucratic form of governance and its various divisions of jurisdiction that accounts for transgressions in a systematized set of procedures and that expertly exploits the tenuous boundaries of formal and informal. Terms like *plausible deniability* come to mind, which are negative acknowledgements, or a positive denial; a specific set of bureaucratic acts of knowledge, or, we might say, a certain bureaucratic will to ignorance. Callahan can deflect blame, and thus, risk, from his union to the alternative jurisdictional sphere of the employer, who then captures and tames this accusation within the very explicitly linguistic and processual sphere of risk assessment.³¹

In some ways both of these positions can be read as deployments of standard procedures

³¹ It is worth emphasizing how Fraser is entitled to mechanisms of risk management while Thomas is principally a subject of risk that is to be managed.

that betray a cynical reality of political speak that depends on equivocation in order to distribute risk and thus mute penalty or responsibility. This cynical structure of obsession with legal liability and risk is ever prevalent in Canada, and nowhere less so than in the dominant framework in which Canada deals with Indigenous peoples, specifically. Shiri Pasternak and Tia Dafnos have expertly analyzed how this logic of liability informs a shifting emphasis of “securitization” of critical infrastructures (of natural resources and their infrastructures of circulation) by the Canadian state and its private industry partners in relation to assertions of Indigenous jurisdictions and sovereignty, which effectively refigures Indigenous lands and peoples through categories of ‘legal risk’ and sources of ‘emergency.’³² This securitization of the relationship with Indigenous peoples goes beyond the political-economic strategies of protecting tar sand and other resource extraction capital, however.

We can see a similar logic creeping into the systemic racialization of FASD within the state’s carceral apparatus. For instance, in a recent report on Correction Service Canada (CSC) the auditor Stan Wesley noted how Indigenous inmates, specifically Indigenous women inmates, were faced with a severe dearth of FASD programming and other culturally appropriate programming:

...failure to accommodate persons with FASD may be considered a discriminatory practice. In the context of an Aboriginal female offender diagnosed with FASD, the discrimination could arguably be intersectional on the basis of race, gender and disability. Therefore, it would be in the *best interest* of CSC to develop and implement training... and programming specifically for persons with FASD across the Corrections spectrum.³³

This is less of a critique about the well-being of Indigenous women inmates than it is a legal warning of the “best interest” of the CSC, who might be making itself liable to legal action for its

³² Shiri Pasternak and Tia Dafnos, “How Does a Settler State Secure the Circuitry of Capital?,” *Environment and Planning D: Society and Space* 36, no. 4 (August 1, 2018): 739–57.

³³ Wesley, “Marginalized: The Aboriginal Women’s Experience in Federal Corrections,” 37.

discriminatory practices. One cannot help but notice in this legal formulation of liability a strategic deployment of concepts like cultural sensitivity and a progressive rhetoric of rights that are meant to “meet the needs” of Aboriginal inmates, and particularly those with neurodivergent minds and bodies, by way of “culturally appropriate” programming in the prison system.³⁴ But this is precisely on par with the analysis of Pasternak and Dafnos who identify the political and economic calculus at the heart of the Settler state’s relationship to Indigenous peoples who are a threat to the circulation of oil pipeline capital and other resource extraction industries. Prisoners are not exactly in the way of such circulation, but the way the state has previously dealt with past colonial violence allegations by Indigenous peoples with a specific strategy of *culturalizing* Indigenous politics has set the stage for Indigenous peoples to be equally *in the way* of future Settler projects as more and more lawsuits and potential national commissions and inquiries bog down the parliament business and state coffers.

For instance, as stories of chronic maltreatment and physical and sexual abuse of Residential Schools began emerging the 1990s, much of which was documented by the enormous five year investigation of the Royal Commission on Aboriginal Peoples, and with little other political options of recourse, Indigenous individuals and communities began taking the state and churches to court to seek criminal prosecution and financial restitution from the actors that had presided over the violence against indigenous children and their communities. Very few of these cases were permitted in criminal courts due to various statutes of limitations and most were subject to tort laws of the civil courts where liability was the guiding logic. Much of these court cases became class action lawsuits that revolved around legal disputes of injury, and specifically a translation of the loss of culture and language of plaintiffs due to years of sustained

³⁴ Ibid.

sexual and physical abuse, neglect and forced assimilation, for which the plaintiffs held the state and church responsible. Predictably, the state and churches responded that these forms of injury were not created by the Residential Schools but were inherent to the cultural fault lines of Indigeneity itself that may have crumbled under the pressure of these conditions but were not directly tied to this violence in a clear causal trajectory.³⁵ Such litigation processes thus simultaneously spared the state and churches from criminal liabilities while creating a precedent in the legal infrastructure for focusing disputes of colonial violence and its harms within a narrowly defined legal conceptualization of culture that, furthermore, is subject to an hegemonic narrative of Indigeneity as inherently dysfunctional. Nevertheless, as much as this has disadvantaged the political and legal recourse of Indigenous nations, it has also created an enormous struggle for the state.

One of these class action lawsuits led to the Indian Residential School Settlement Agreement (IRSSA) in 2006, which not only established a multi-billion dollar settlement process for individual Residential School survivors, it also secured billions of dollars for the funding of a broader “restorative justice” process that was eventually enacted as the *Truth and Reconciliation Commission of Canada*, which, like the RCAP before it, sought to investigate the history of Canada’s troubling relationship with Indigenous peoples and set a framework for reconciliation.³⁶ Such national frameworks of inquiry have become a regular occurrence in Canada, the most recent being the inquiry into Missing and Murdered Indigenous Women and Girls in Canada.³⁷ Such enormous projects cost the state billions of dollars and add additional strategic

³⁵ Carole Blackburn, “Culture Loss and Crumbling Skulls: The Problematic of Injury in Residential School Litigation,” *PoLAR: Political and Legal Anthropology Review* 35, no. 2 (2012): 289–307.

³⁶ Like the RCAP before it, the TRC similarly took place over a five-year period of investigation that took the form, largely, of massive public hearings of personal testimony and expert witness evidence gathering.

³⁷ *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*.

complications to ongoing legal battles with Indigenous nations and individuals, ranging from ongoing settlement processes like Federal Indian Day School Class Action lawsuit and a multitude of ongoing land claims processes across the country.³⁸ In 2016 the Canadian Human Rights Tribunal found that the federal government systematically underfunds child welfare on reserves and was guilty of racial discrimination, yet the federal government, under the leadership of Justin Trudeau (who was originally elected on a platform of Indigenous rights),³⁹ continues to resist this ruling under legal technicalities of the jurisdiction of the CHRT, and the government continues to break compliance orders issued by the CHRT.⁴⁰ If such cases demonstrate how resource distribution is a nodal point of anti-Indigenous policies and the ongoing exertion of Settler colonial power, it also shows how the state has adapted to this political struggle by imagining its relations to Indigenous communities through strategic negotiations of fiduciary responsibility laid out by historic treaties and enshrined in constitutional infrastructures like the Indian Act, while also appeasing multinational interests of extractive capital on Indigenous lands with concepts of monetary risk.

Here we see how the dominant framework of mitigating liability informs the policy

³⁸ The Federal Indian Day School Class Action lawsuit was initiated in 2009 by an Indigenous man seeking compensation for the damages and abuses he suffered in the forced attendance at an Indian Day School. In 2019 this became a nation-wide class action lawsuit against Canada that included any survivor who attended Day Schools, including First Nation, Inuit, and Metis peoples. See <https://indiandayschools.com/en/about/>. For more on contemporary land claims, see Arthur Manuel and Grand Chief Ronald Derrickson, *The Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy* (Toronto: Lorimer, 2017).

³⁹ For an excellent review of Justin Trudeau's exploitation of the "reconciliation industry," see Martin Lukacs, *The Trudeau Formula: Seduction and Betrayal in an Age of Discontent* (Montréal: Black Rose Books, 2019).

⁴⁰ This legal battle precedes Justin Trudeau, however. It began in 2007 during the Stephen Harper years, when the Assembly of First Nations and the First Nations Child and Family Caring Society first filed a complaint filed under the Canadian Human Rights Act that alleged that Canada discriminates against First Nation children by systematically underfunding child welfare on reserves. These facts were documented and corroborated in numerous reports by the Auditor General of Canada. For more information, see First Nations Child & Family Caring Society of Canada, "Human Rights Tribunal Finds the Canadian Government Is Racially Discriminating Against 163,000 First Nations Children," January 26, 2016, <https://fncaringsociety.com/sites/default/files/PressRelease%20on%20CHRT%20Ruling.pdf>. For accounting of non-compliance of the federal government, see Canadian Human Rights Tribunal, No. T1340/7008 (May 26, 2017). The continuity of strategy between the Conservative and Liberal federal leadership shows just how united the country is in divesting from Indigenous life.

directives and a formal/informal episteme that makes it increasingly possible to consider Indigenous life through the legal lens of risk, and how the related mechanisms of liability provide the means for individuals like Fraser to keep his secrets. But given that the case of Thomas and Fraser revolves around criminal acts, we might be better suited to explore this issue of liability from the perspective outlined by Michel Foucault, who genealogically traced the emergence of criminal “dangerousness” in European legal systems as a borrowed vocabulary from civil law in the nineteenth century, in which criminal responsibility became subjected to concepts of accident and legal infrastructures of insurance and risk management.⁴¹ This points us to a reality that is more than cynical deployments of a legal apparatus to protect a certain class of interests. For, as Foucault discovered, the radical reconstitution of the criminal justice system within the paradigm of risk management was the outcome of a desperation of historical proportions; namely, of the need to make sense of crimes that no longer fit within the principles of intelligibility of the shifting epistemes of an Enlightening Europe. The emergence of the *risky* and *dangerous* criminal was not simply a convenient strategy of incorporating crime under the mathematically quantifiable paradigm of insurance law that enabled more precise distributions of punishment, but a means of accounting for the very meaning of punishment itself. When, for instance, the courts were presented with a new form of violent criminal, one who could not account for his or her crimes, or refused to speak, “the judicial system ceases to function,” Foucault argued.⁴² Behind risk lies an unbearable abyss of the unknown and the unaccountable. Risk is a tool of managing and containing this unknown.

It is here that we can finally provide some tentative answers to the energy source of the ethical substance of obligations and the particular form of litigation and liability that informs the

⁴¹ Foucault, “About the Concept of the ‘Dangerous Individual’ in 19th-Century Legal Psychiatry.”

⁴² Foucault, 18.

Thomas-Fraser case as much as the ongoing legal disputes between the state and Indigenous nations. For isn't discourse and knowledge animated here also by a libidinal substance, of anxiety and fear, just as much as it is animated by a cunning calculus of fiduciary and political obligations? We might say that for all of the mitigation of liabilities to protect Fraser's secret, or the legal exceptions made in court orders to grant him unusual freedom, this was all possible because he simply was not perceived as a threat, and so there is no need for a revelation of what he is or was. Nothing about him or his crimes threatened the operations of the judicial system, or the discourse that sustained it. Thomas, on the other hand, required intensive scrutiny and explanation. He was an object of uncertainty, much like those dangerous criminals who arrived on the scene in nineteenth century Europe. To be condemned, one must be known, and this meant interrogating every inch of Thomas's past, though except for one important aspect that was trapped behind the curtains of the domestic.⁴³ It is this dynamic that can help us to understand why Fraser's brutal crimes, similarly obfuscated by the darkness permitted by the domestic, were simply not as important to society when juxtaposed next to Thomas, whose crime was less important than who he was. But what about the legal strategies outlined above, where genocidal violence is litigated in civil courts? Can these too be explained by this similar need to account for the Indigenous? Even if we feel tempted to fall back on technical-legal arguments in defense of liability as the only practical legal solution to a complex political sociology – that the courts simply do not have the adequate tools or concepts for dealing with problems like “cultural damage,” for instance – we will also see that the anxieties that animated these legal venues transcended this legal logic. Particularly, the role of sex in these historical legal encounters will demonstrate for us an element that transcends this cynical plane of political maneuvering and

⁴³ Foucault, 2.

cuts much deeper into a realm of excess that both troubles and titillates the Canadian state and its public, and which is thus central to the management of Indigenous life via tightly managed cynical sites of litigation. The next section of this chapter will explore this realm of libidinal and ethical substance, accounting for the specific place of sex in this story of Fraser and Thomas and its central role in determining and maintaining their respective statuses as autological and genealogical subjects, and the basis of accusing Thomas and assuming his guilt before he ever saw his day in court.⁴⁴

The Problem of Sex

The problem of sex, and particularly the specific problem of sexual violence, haunts this violent encounter between Fraser and Thomas. We have seen how there is a certain distribution of foreclosure and disavowal within public discourse that Fraser's charges could be kept secret for him, where they could be simultaneously held and known while also struggling to be directly spoken. In the last chapter we also saw how Thomas's past was an open book, and have alluded to the fact that the main exception to this genealogical invasion of his life was of the components of sexual violation.

What strikes me as so paradoxical of this distribution is that sex and sexual violence has been such an enormous discursive trait of making Indigenous politics intelligible within Canada. For centuries Indigenous peoples have fought in vain for justice to the historical and ongoing crimes of colonial violence, which included generalized dispossession and systemically

⁴⁴ We recall that the criminologist defined Fraser's accuser as a "complainant" rather than a victim partially on the basis that her accusations had yet to be tested in court. Szklarski, "Rest in Peace: The Politics of Remembering the Personal Failings of the Dead."

maintained poverty, policies of forced assimilation and ritualistic and systemic attempts to destroy Indigenous political formations, culture and linguistic life. It was not until the late 1980s, however, in which their fight finally became recognizable within the specific confines of the Residential School system that was run by church and state for over a century as an attempt to ‘civilize’ Indigenous children by reforming their cultural, linguistic, ontological and political status as “Indigenous.” Despite the widespread conditions of violence, abuse, neglect and the unquantifiable harms and impacts of the schools, it was the specific element of sex in the schools, argues historian John Milloy, that made the schools finally reachable to the Canadian public as an object of concern: “What had finally broken the seal on the residential school system... and made public the story of neglect, and physical and cultural abuse was, ironically, the deepest secret of all – the pervasive sexual abuse of the children.”⁴⁵

Milloy argues that this was so successful because Aboriginal child sexual abuse aligned with social concerns of child abuse and family violence that were becoming increasingly central to the minds of everyday Canadians.⁴⁶ Thus we saw in the immediate aftermath of revelations of rampant sexual abuse of Indigenous children in the Residential Schools a very vocal response from the public who was very moved by these deeply troubling revelations and demanded urgent action from the government, on the one hand, while the latter adamantly refused to take any responsibility or liability for these charges.⁴⁷ The state has maintained a very strategic stance by not admitting liability for colonial violences, and it has been primarily sexual abuse that is been the main issue of legal contention that has allowed them to limit the amount of responsibility and accountability of this history and its ongoing operations. There have only been a handful of

⁴⁵ Milloy, *A National Crime*, 296.

⁴⁶ Milloy 298.

⁴⁷ Milloy 300–301.

criminal convictions of perpetrators of such harms in the Residential Schools, but for the most part the question of responsibility for Residential School harms have been absorbed under the judicial principle of tort law and its processes of litigating the meanings and proof of damages and offering compensation that is quantifiably appropriate to said damages, where ‘truth’ is rigidly confined within the boundaries of finding liability.⁴⁸ This ‘truth’ has been artificially maintained under the banner of sexual abuse as statutes of limitations, legal precedents, and state and church resistance have effectively barred the consideration of more capacious meanings of harms, including losses of language and culture and other harms that fall under a conceptualization of intergenerational harms.⁴⁹ For the most part, then, the state of Canada, the churches, and even individual perpetrators, have been able to avoid accountability by way of criminal responsibility in favor for answering for the violence of Residential Schools by way of lawsuits that end with compensation packages.⁵⁰ Interestingly then, if disturbingly, sex has been central to this story, but it seems that sexual abuse was simply more legally relevant because of various statutes of limitations. Closer examination, however, shows that sex was complexly

⁴⁸ Blackburn, “Culture Loss and Crumbling Skulls”; Jennifer J. Llewellyn, “Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice,” *The University of Toronto Law Journal* 52, no. 3 (2002): 253–300. As we will see in chapter 4, Canadian law has attempted to account for residential schools and the broader effects of ‘colonialism’ within criminal law exclusively as a means of representing Indigenous dysfunction, specifically with changes to the Criminal Code and Supreme Court decisions like *R v Gladue* that make it obligatory to uniquely define Indigenous offenders as causally criminal by virtue of their Indigeneity.

⁴⁹ Kent Roach, “Blaming the Victim: Canadian Law, Causation, and Residential Schools,” *The University of Toronto Law Journal*, Special Issue: The Residential Schools Litigation and Settlement (2014), 64, no. 4 (2014): 568.

⁵⁰ The Indian Residential Schools Settlement Agreement (IRSSA) was the largest class-action lawsuit to emerge from these conditions in 2006, which sought to address some of these inherent and artificial restrictions of the civil court path to justice. In addition to providing the groundwork for individualized compensation processes (packages) for those who suffered sexual and serious physical abuse and common experience payments for all those who could establish (prove) that they had attended Residential Schools, the IRSSA also secured funding for a broader ‘restorative justice’ process of which the Truth and Reconciliation Commission of Canada (TRC) was the direct outcome.

intertwined with a variety of governance tactics that situated the relationship of the Canadian state, church, and society to Indigenous life.

If issues of child abuse, including child sexual assault and issues of incest, became a primary means in which First Nation political entities could make their struggles intelligible to the Canadian courts and a broader public in the 1990s, Athabaskan scholar Dian Million has convincingly argued that there was nothing natural or obvious about adopting the discourse of victimhood via child sexual abuse and trauma in order to articulate the historical harms of colonization.⁵¹ Thus, in addition to emerging as a very specific approach within specific legal impediments and structural limitations of justice, sexual abuse was also central to the biopolitical terrain of Canadian politics in this moment in the late 1980s and early 1990s. Indeed, she suggests that this is precisely a question of power since it requires Indigenous peoples to adopt a position of victimhood at the same time they are fighting for power and political autonomy, “spheres that speak the very opposite languages” (81). Milloy also acknowledges this capacious biopolitical sphere when he notes how the government’s denial of all liability for sexual abuse in its Residential Schools was articulated through a simultaneous practice of “recognizing the sequelae of those events,” as was officially outlined in a Department of Indian Affairs and Northern Development memo.⁵²

The story of sexual abuse was mobilized as a means to highlight Indigenous dysfunction while denying Canadian responsibility, but was subordinate to a broader temporal strategy of representing Indigeneity too. In a “cynical sleight of hand,” the government refused to apologize or take responsibility by adamantly focusing on the “now” of the problem, how Aboriginal people are now overwhelmingly “sick.” Noting how the Residential School system was born out

⁵¹ Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights*.

⁵² Milloy, *A National Crime*, 301.

of a deep-seated desire to “take control of Aboriginal peoples’ futures,” Milloy remarks ironically that in the mid-1990s the Canadian government had shifted its temporal position to one that was “determined to kill the past.”⁵³ While the government eventually did issue an official declaration of reconciliation and apology under the pressures of surmounting and irrefutable evidence – particularly through the amassing of documentation through the Royal Commission on Aboriginal Peoples (RCAP) that was released in 1996 - it was consistent with the spirit of this temporal orientation to the past and present. Namely, if the past could not be denied, then at least it could be isolated, made into an event and not as a structure that could implicate or turn the light on to the Canadian society itself. As then Minister of Indian Affairs, Jane Stewart, put it in the official response to the RCAP, in a Statement of Reconciliation, “Our purpose is not to rewrite history but rather to learn from our past and to find ways to deal with the negative impacts that certain historical decisions continue to have in our society today.”⁵⁴ The focus of this document is overwhelmingly of the past-tense, with euphemisms of “certain historical decisions” made to account for the legacies of problems in Aboriginal communities (“our society”) today. The ‘now’ of Aboriginal sequelae was still the focus, the main problem that was designated as something to be studied and a lesson of the past to be learned, central to “move forward together.” As other critical Indigenous Studies scholars have argued, the state continues to efface itself and its responsibility in the archive while emphasizing the despondency of Indigenous life that is trapped in the past, only given real estate in the future by way of its dysfunctional pain that requires the hand of the state if this life is to move forward at all.⁵⁵

⁵³ Milloy 302.

⁵⁴ See *Gathering Strength: Canada’s Aboriginal Action Plan*. Quoted in Milloy 304.

⁵⁵ See also Coulthard 137.

The political and material consequences of these exercises of maintaining indigenous life in the social tense of the genealogically constrained are pervasive. None clearer, however, than in the contemporary politics of child apprehension and under the signifier of child abuse that sustains this modern-day project of the abduction of Indigenous children in Canada. Codified under the ever-slippery concept of the “best interests of the child,” state functionaries, and particularly social workers, regularly interpret the landscape of historically produced and maintained poverty in Indigenous country through a racialized imaginary of negligent, abusive and otherwise dysfunctional Indigenous mothers and communities – and if these direct conditions cannot be proven, it is enough to cite the condition of poverty as potentiating these crimes against children.⁵⁶ As has been documented by researchers of this horrendous system, welfare interventions into Native families are often authorized under the *already known* sign of sexual abuse even though most placements are for reasons of neglect.⁵⁷ Furthermore, there is a much higher percentage of placements amongst white families for sexual abuse, revealing an ideological efficacy to the distribution of this economy of signs.⁵⁸ In other words, we see how Indigenous organizing and critiques of sexual abuse have been weaponized by the state to highlight sexual abuse as an auto-genocidal epidemic within Indigenous nations rather than as an element of genocide that is ongoing. Concepts of abuse and the moral sensibilities of sexual transgression are distributed along a very specific register of understanding and corporeality.

⁵⁶ Raven Sinclair, “The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias,” *First Peoples Child & Family Review* 11, no. 2 (2016): 8–18. Indigenous children account for upwards of ninety percent of all children in care in a province like Manitoba, with similar disproportionate figures across the prairie provinces.

⁵⁷ It can be further argued that ‘neglect’ is itself a residual sign of poverty, not of the substance of parenting that is made to associate with this sign of abuse. Barbara Fallon et al., “Placement Decisions and Disparities among Aboriginal Children: Further Analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect Part A: Comparisons of the 1998 and 2003 Surveys,” *Child Abuse & Neglect* 37, no. 1 (2013): 47–60.

⁵⁸ *Ibid.*

The Broken Cord

These were precisely the discursive and material conditions in which FASD was able to emerge on the scene in North America, first in the U.S. and then very quickly in Canada. It was none other than the very controversial novelist and Native Studies professor at Dartmouth, and noted “pretendian,”⁵⁹ Michael Dorris, who first broke open the story of FASD as a quintessentially Indian problem with the publication of the internationally renowned best seller, *The Broken Cord*, in 1989.⁶⁰ *Broken Cord* was a memoir, or a chronicling, of Dorris’s desire to become a single father by adopting a Lakota boy, and the subsequent journey of picking up the pieces of his shattered dreams once he learned that his adopted Native son’s cognitive challenges would never allow them to live the idyllic fantasy family life.⁶¹ It thus documents his journey of discovering FASD, but the path he takes is directly through Indian Country where his sensational accounts of an alcohol-ravaged and decaying cultural landscape is meant to account for his son’s brain damage. Most disturbingly, however, Dorris, and his then wife, the famous Anishinaabe author, Louise Erdrich, lay blame to Indigenous women for FAS and advocate for some

⁵⁹ A colloquial term that is used to identify those who falsely claim Indigenous status for their own personal gain. Darryl Leroux and others have deployed the concept of “race shifting” to categorize this process, which typically occurs as a mode of exacting anti-Indigenous revenge in geographical contexts of Indigenous land claims. Adam Gaudry and Darryl R. J. Leroux, “Becoming Indigenous: The Rise of Eastern Métis in Canada,” *The Conversation*, October 25, 2017, <http://theconversation.com/becoming-indigenous-the-rise-of-eastern-metis-in-canada-80794>. In the case of Dorris, he was able to exploit the desire of the literature world of North America that fetishized Indigenous authors, not unlike recent cases of Joseph Boyden. The case of Rachel Dolezal also shows how similar currents of race-shifting occur with White people appropriating Black identities in North America. Dorris’s fraudulent claims have been extensively investigated by Lakota scholar, Elizabeth Cook-Lynn. See Elizabeth Cook-Lynn, “A Mixed-Blood, Tribeless Voice in American Indian Literatures: Michael Dorris,” in *Anti-Indianism in Modern America: A Voice from Tatekeya’s Earth* (Chicago: University of Illinois Press, 2001), 72–90; Elizabeth Cook-Lynn, “Letter to Michael Dorris,” in *Anti-Indianism in Modern America: A Voice from Tatekeya’s Earth* (Chicago: University of Illinois Press, 2001), 69–71. See also Margit Stange, “The Broken Self: Fetal Alcohol Syndrome and Native American Selfhood,” in *Body Politics: Disease, Desire, and the Family*, ed. Michael Ryan and Avery Gordon, Politics and Culture (Boulder, CO.: Westview Press, 1994), 126–36.

⁶⁰ Michael Dorris, *The Broken Cord* (New York: Harper Perennial, 1989).

⁶¹ Dorris was, allegedly, the first bachelor to ever officially adopt a Native child in America. Dorris. For further critiques of the genre as well as political analysis of the anti-indigenous structure of *Broken Cord* and Dorris’s obsession with FASD as an Indian problem, see Elizabeth Cook-Lynn, review of *Review of The Broken Cord*, by Michael Dorris, *Wicazo Sa Review* 5, no. 2 (1989): 42–45.

particularly brutal and inhumane solutions, such as incarcerating Indigenous alcoholic women during pregnancy.⁶² This bildungsroman of FASD discovery and the conquering of family tragedy made such enormous waves that it was quickly translated into a movie script and became a made-for-tv movie starring Jimmy Smits as Dorris on the network ABC in the U.S.. *Broken Cord* truly became a bible of sorts to the fields of FASD research, politics and advocacy, and it really cannot be overestimated how much reach and influence this book commanded in the emergence of FASD as a diagnosis of concern.⁶³ Doctors have for years spoken openly and approvingly about how “All I know [about FASD] is what I read in that book.”⁶⁴ In a Health Canada symposium in 1992, whose mission was to build evidence about FASD as a problem of concern for the Canadian government, Jackie Herbert, an adoptive mother of two “FAE, possibly FAS, girls,” described to a committee that her life changed after she watched the *Broken Cord* movie. Up until that point her life was a nightmare of trying to get her daughters, who she described as “mentally retarded,” assessed with anything that could explain their behavior and get her some support in raising them. She was particularly resentful of judgments she felt from society, who assumed her adopted daughters’ problems were the result of bad parenting. But then Jackie saw the movie made about Michael Dorris’ book and she “was amazed — it was like watching my own life in slow motion. I then realized that my daughter was not to blame for behaviour, because she could not help it, and neither were we, her parents, to blame.” She goes on to then describing how she then read the book *The Broken Cord* and wondered how many other parents are out there like her who have “suffered in ignorance” because they did not know

⁶² A systematic review of such problematic advocacy is included in Elizabeth Cook-Lynn, “Letter to Michael Dorris,” in *Anti-Indianism in Modern America: A Voice from Tatekeya’s Earth* (Chicago: University of Illinois Press, 2001), 69–71; For Erdrich’s views, see Louise Erdrich, “Foreword,” in *The Broken Cord*, by Michael Dorris (New York: Harper Perennial, 1989), xi–xx.

⁶³ In addition to being a *New York Times Bestseller*, it also one the *Christopher Award*, the *National Book Critics Circle Award*, and received honors from *The American Library Association* and the *Library Journal*.

⁶⁴ Armstrong, *Conceiving Risk, Bearing Responsibility*, 111.

what was actually wrong with their children. She “decided to do something about it” and this is how a prominent FASD advocacy center was born in the city of Brandon, Manitoba.⁶⁵

Sociologist Elizabeth Armstrong has described *Broken Cord* an example of an “atrocious tail” in which this specific social problem of adopting cognitively deficient children has come to typify the issue of FASD and has become the main referent for discussing the problem of FASD.⁶⁶ But this atrocious tale was standing in for another enormous problem beginning to take root in Canada: the breakdown of adoption placements of Indigenous children into White Settler homes in the 1980s.

The Sixties Scoop is a term that designates an era in Canadian policy toward Indigenous communities in which children were abducted in unprecedented numbers and placed into largely White adoptive homes across the continent and sometimes overseas.⁶⁷ It began at a moment in which the Residential School system was beginning to ramp down its operations, which left a jurisdictional vacuum of policies and mentalities on the education and care of Indigenous children and, particularly, the goals of their assimilation, which led to a synergistic construction of new provincial child welfare systems and a highly motivated new generation of social workers who began abducting Indigenous children at explosive rates under pretenses of poor parenting. A new conceptual apparatus emerged in this moment in which Indigenous families were classified according to their parental abilities while children were measured according to their behavioral profiles, the particularly “incorrigible” ones being sent to the wardship of correctional officers or

⁶⁵ Benoît Bouchard, “Report on the Symposium on Fetal Alcohol Syndrome and Fetal Alcohol Effects” (Vancouver: Health Canada, October 2, 1992), 50.

⁶⁶ Armstrong, *Conceiving Risk, Bearing Responsibility*, 112.

⁶⁷ Raven Sinclair, “Identity Lost and Found: Lessons from the Sixties Scoop,” *First Peoples Child & Family Review* 3, no. 1 (2007): 65–82; Jacobs, *A Generation Removed*; Laura Briggs, *Somebody’s Children: The Politics of Transracial and Transnational Adoption* (Durham: Duke University Press Books, 2012).

welfare agencies.⁶⁸ These adoption placements began breaking down at phenomenal rates in the 1980s and 1990s,⁶⁹ and new schools of thought were born to explain this phenomenon of “cross-cultural” adoption breakdowns, including notions of cultural estrangement.⁷⁰ It was particularly this notion of cultural alienation, or any implication that White adoptive parents might be somehow unfit to care for Indigenous children, that FASD was so successful in fighting back against. As the white, adoptive mother, Marie Adams, put it in her memoir, *Our Son a Stranger*, which chronicled the struggle of her family and several others with their adopted Native children, FAS plays a “key role... in many if not most adoptive breakdowns.”⁷¹

Predictably, as child placement breakdowns began exploding in the 1980s and 1990s, this sentiment became a mantra FASD playing the “key role” was taken up with force by the very same social welfare systems that had been the cause for the devastating phenomenon of mass abduction of Indigenous children. Sociologist Irene Shankar has argued that FASD was “made” into a medical disorder and a public health concern in Canada at the site of child welfare, particularly in Western provinces like Alberta.⁷² Deploying a Foucauldian genealogical

⁶⁸ For an in depth analysis of this transition from Residential Schools to the creation of new provincial “welfare functions” see Canada, Royal Commission on Aboriginal Peoples, *Final Report*, 1, Looking Forward Looking Back:323.

⁶⁹ For an idea of just how bad this phenomenon of adoption breakdown was, which reached rates of 85% and more, see C Bagley, *International and Transracial Adoptions: A Mental Health Perspective* (Burlington, VT: Ashgate Publishing, 1993); Justice E. Kimelman, “No Quiet Place: Review Committee on Indian and Metis Adoptions and Placements” (Winnipeg, MB: Review Committee on Indian and Metis Adoptions and Placements, 1985); B McKenzie and P Hudson, “Native Children, Child Welfare, and the Colonization of Native People,” in *The Challenge of Child Welfare* (Vancouver: University of British Columbia Press, 1985), 125–41; Sinclair, “Identity Lost and Found.”

⁷⁰ Bagley, *International and Transracial Adoptions: A Mental Health Perspective*; Jeannine Carrière, “Cultural Planning, Aboriginal Children and Adoption” (University of Victoria School of Social Work, Indigenous Specialization, 2008); Jacobs, *A Generation Removed*; Kimelman, “No Quiet Place: Review Committee on Indian and Metis Adoptions and Placements”; Carol Locust, “Split Feathers: Adult American Indians Who Were Placed in Non Indian Families as Children,” *Ontario Association of Children’s Aid Societies* 44, no. 3 (2000): 11–16; McKenzie and Hudson, “Native Children, Child Welfare, and the Colonization of Native People”; K Richard, “A Commentary against Aboriginal to Non-Aboriginal Adoption,” *Child and Family Review* 1, no. 1 (2004): 101–9; Sinclair, “The Indigenous Child Removal System in Canada.”

⁷¹ Adams, *Our Son a Stranger*, .xxiii.

⁷² Irene Shankar, “The Making of a Medical Disorder: Tracing the Emergence of Fetal Alcohol Spectrum Disorder in Alberta,” *Social Work in Public Health* 30, no. 1 (2014): 38–50.

investigation of FASD, Shankar notes that FASD became intelligible as a problem in the province of Alberta the 1990s during an economic recession and a period of associated austerity cuts to child welfare agencies. As growing levels of poverty created ripe conditions for the apprehension of more children, and as spending cuts incapacitated that system to deliver adequate care, child welfare came under fire as having neglected and failed society's most vulnerable children. FASD, and the particular notion of a disorder of brain damage, became an attractive rhetoric for the government to cast blame on the 'crisis' of the system, yet it only provisionally accepted or acknowledged FASD as social and health concern and provided very limited funding for programs and services.⁷³ At the micro level, things are just as convoluted and interesting, for the question remains as to how and who translated this crisis of FASD in child welfare for various politicians and bureaucrats in the first place? Shankar provides illuminating analysis of two social workers, Isobel and Philipa, who started as everyday social workers but quickly progressed up the bureaucratic ladder of provincial social services and became the principal agents of convincing politicians and senior bureaucrats to take seriously the epidemic of FASD that was silently brewing in the background, as well as designing and implementing FASD policies and training modules for future social workers in the province. In other words, Isobel and Philipa did the work of making FASD intelligible.

It started with Isobel recognizing a "pattern" in some of her children in care, who all performed poorly in school, had multiple placements in foster care, were abused and neglected (in care) and were generally badly behaved. As Isobel puts it in her own words, she was motivated by a powerful "desire... to really figure out why these kids were so hard to take care of."⁷⁴ She quickly found a "common denominator" between these children, which was that their

⁷³ Shankar, 4.

⁷⁴ Shankar, 5.

parents allegedly abused drugs and alcohol. From here, she began doing research, which she claims led almost immediately to the work of Dr. Clarren Sterling, one of the founding clinical researchers to “discover” FASD. Before a single diagnosis was ever confirmed, Isobel had “discovered” FASD as a problem that was growing without limits and wreaking havoc in the child welfare system. As Isobel put it, “if you have kids in care, half of them have an alcohol-related disability, whether it is diagnosed or not -- half of them do.”⁷⁵ Such certainty was itself contagious, and one can hear nearly identical claims being made by reporters and everyday people on a regular basis.⁷⁶ And because the child welfare system is so disproportionately represented by Indigenous children reporters like Margaret Wenté repeatedly take enormous liberties to say unsubstantiated things like, “virtually every native child adopted over the past twenty years has some degree of alcohol damage.”⁷⁷ Given that Wenté leaned on the research of Dr. Albert Chudley to make such claims, I asked him about this in an email correspondence in 2020 in which he denied having ever made such a statement to Wenté, nor was there any research to back up such claims. He did note, however, that such claims were likely based on “a large group of parents who adopted First Nations children and experienced grief and problems of [sic] related to behavioral issues and adoption breakdown, etc.”⁷⁸ Much like the “patterns” detected by Isobel, adoptive parents and reporters were also making such links in the 1990s, misappropriating feelings to findings of research and extrapolating data sets in unprofessional and unethical ways to correlate with other issues for which Indigenous peoples can be related to, and which then becomes an unverified but alluring explanation for these conditions that are

⁷⁵ Shankar, 5.

⁷⁶ “If you’re a foster parent, odds are any child who walks through your door will have it [FASD].” Sanders, Welch, and Rabson, “When Drink Destroys.”

⁷⁷ Margaret Wenté, “Our Poor Ruined Babies: The Hidden Epidemic: COUNTERPOINT,” *The Globe and Mail*, October 7, 2000, sec. Counterpoint.

⁷⁸ Dr. Albert Chudley. Email correspondence with author. February 5, 2020.

otherwise accounted for by more rigorous and systematic analyses and contextualization.

Dorris spoke to an entire generation of adoptive and foster parents who were raising Indigenous children who had been stolen from Indigenous communities. The works of adoptive parents, Marie Adams and Bonnie Buxton, are two contemporary models that have reproduced this genre of “atrocious tale” and the bildungsroman account of a suffering white adoptive parent who was duped by the system and the violations of Indigenous parents who destroyed their capacity to become parents to needy and poor Indigenous children.⁷⁹ Buxton cites Dorris’ book as a “ground-breaking” inspiration for her own work because it alerted the public to the “tragic results of maternal alcoholism among Native Americans.”⁸⁰ A fuller account of this unique historical, sociological and political matrix is beyond the scope of this dissertation, but suffice it to say that there is a striking coincidence in timing between the beginning of the “Sixties Scoop” and the coming of age of Indigenous children in the 1980s when adoption placements with Indigenous children were beginning to break down at unfathomable rates. The Sixties Scoop occurred at a moment in which the Residential School system was ramping down its operations, which left a jurisdictional vacuum of policies and mentalities on the education and care of Indigenous children and, particularly, the goals of their assimilation, which led to a synergistic construction of new provincial child welfare systems and a highly motivated new generation of social workers who began abducting Indigenous children at explosive rates under pretences of poor parenting. A new conceptual apparatus emerged in this moment in which Indigenous families were classified according to their parental abilities while children were measured according to their behavioral profiles, the particularly “incorrigible” ones being sent to the

⁷⁹ Marie Adams, *Our Son a Stranger: Adoption Breakdown and Its Effects on Parents* (Montreal: McGill-Queen’s University Press, 2002); Bonnie Buxton, *Damaged Angels: A Mother Discovers the Terrible Cost of Alcohol in Pregnancy* (Toronto: Knopf Canada, 2004).

⁸⁰ Buxton, *Damaged Angels*, 48.

wardship of correctional officers or welfare agencies.⁸¹ These adoption placements began breaking down at phenomenal rates in the 1980s and 1990s,⁸² and new schools of thought were born to explain this phenomenon of “cross-cultural” adoption breakdowns, including notions of cultural estrangement.⁸³ It was particularly this notion of cultural alienation, or any implication that White adoptive parents might be somehow unfit to care for Indigenous children, that FASD was so successful in fighting back against. As the white, adoptive mother, Marie Adams, put it in her memoir, *Our Son a Stranger*, which chronicled the struggle of her family and several others with their adopted Native children, FAS plays a “key role... in many if not most adoptive breakdowns.”⁸⁴

We would be remiss if we neglected to note how Jean Chrétien, Prime Minister of Canada from 1993-2003, informed this victim discourse of adoptive parents with his own lived version of this Native adoption horror story. It was during his years as the Minister of Indian Affairs, while flying over the tundra, that a judge casually noted to Jean that “it was unfortunate, given the large number of broken native families, that very few Canadians adopted Indian children,” a comment that resonated with Jean and his wife Aline, who had just experienced a miscarriage.⁸⁵ Under troubling circumstances, which required the exercise of political power and

⁸¹ For an in depth analysis of this transition from Residential Schools to the creation of new provincial “welfare functions” see Canada, Royal Commission on Aboriginal Peoples, *Final Report*, 1, Looking Forward Looking Back:323.

⁸² For an idea of just how bad this phenomenon of adoption breakdown was, which reached rates of 85% and more, see Bagley, *International and Transracial Adoptions: A Mental Health Perspective*; Kimelman, “No Quiet Place: Review Committee on Indian and Metis Adoptions and Placements”; McKenzie and Hudson, “Native Children, Child Welfare, and the Colonization of Native People”; Sinclair, “Identity Lost and Found.”

⁸³ Bagley, *International and Transracial Adoptions: A Mental Health Perspective*; Carrière, “Cultural Planning, Aboriginal Children and Adoption”; Jacobs, *A Generation Removed*; Kimelman, “No Quiet Place: Review Committee on Indian and Metis Adoptions and Placements”; Locust, “Split Feathers: Adult American Indians Who Were Placed in Non Indian Families as Children”; McKenzie and Hudson, “Native Children, Child Welfare, and the Colonization of Native People”; Richard, “A Commentary against Aboriginal to Non-Aboriginal Adoption”; Sinclair, “The Indigenous Child Removal System in Canada.”

⁸⁴ Adams, *Our Son a Stranger*, xxiii.

⁸⁵ Lawrence Martin, *Chrétien: The Will to Win* (Toronto: Lester Publishing, 1995), 202.

no little bit of extreme sensibility of privilege, the Chrétien's had Jean's brother, Michel, go to an orphanage, inspect a series of children, and pick out the one who was most healthy in appearance.⁸⁶ The Native baby boy was named after Michel, but his identity was never quite clear, as he was referred to as Dene, Inuit, and as a Gwich'in Indian by the press, but most often was just that Native son who was creating so much trouble for the Chrétiens.⁸⁷ The only time his mother is every mentioned is in a 2006 *Toronto Star* article in which Aline Chrétien tells reporter Marie Wadden that this mother grew up extremely poor and "was unaware of the consequences of drinking alcohol during pregnancy."⁸⁸ What name she gave to Michel, whether she wanted him to be adopted, or what any of Michel's birth family thought of these circumstances is never mentioned. The only biographical information on Michel's birth family is that they were poor and alcoholics, which Aline suggested might have had some influence in Michel's tragic life of crime and disturbances: "Poor Michel... He has an uncle who died from the disease of alcoholism. It's a real problem for him."⁸⁹ The Chrétiens' experience of hardship with Michel is racialized as both biologically and culturally engrained at every turn. As Jean confided to his official biographer many years later, "Nobody told me that there was a big problem to take Indians, that the record was not good... We did not even look into that."⁹⁰ This is a statement even more shocking because Chrétien was the Minister of Indian Affairs when he adopted

⁸⁶ Lawrence Martin, *Chrétien: The Will to Win* (Toronto: Lester Publishing, 1995), 202. Biographer, Martin, recounts an "officious social worker" who insisted on all regulations to be adhered to, which included a home inspection for all new adoptive parents, which incensed the well-to-do Chrétiens and who called upon friends in high places in the territorial government to demand to "let the baby go!" *Ibid.*, 203.

⁸⁷ Christie Blatchford, "Chrétien Was Right. Maybe the Kids in Attawapiskat Need to Break Their 'Trauma Bonds,'" *National Post*, April 13, 2016, <https://nationalpost.com/opinion/christie-blatchford-chretien-was-right-maybe-the-kids-in-attawapiskat-need-to-break-their-trauma-bonds>; Darren Yourk, "PM's Son Faces Sex Assault Charge," *The Globe and Mail (1936-2016); Toronto, Ont.*, July 27, 2002; Martin, *Chrétien: The Will to Win*.

⁸⁸ Marie Wadden, "Troubled before They Were Born; Mothers' Alcohol Abuse Leaves Scars Aboriginal Kids Face Consequences," *Toronto Star*, November 20, 2006, sec. News. This

⁸⁹ Wadden.

⁹⁰ Martin, *Chrétien: The Will to Win*, 202.

Michel, but his experience as the Minister who tried to push through the infamous White Paper in 1969⁹¹ and his response to that failure perhaps sheds some light on how Chrétien remained confused about the Indigenous question and how his domestic and political views of Indigeneity were defined by a confrontation with a perplexing and absolute form of difference. As his biographer recounts, Chrétien felt betrayed by the rejection of the White Paper, and “beaten either way” by the Natives who had cried that they were being discriminated against when Canada didn’t help them and when Canada did try to help them:

“they [Indian leaders] were saying, ‘You’re discriminating against us...’ In the White Paper we said, ‘Yes, you’re right, so we’ll abolish the Indian Act, we’ll abolish the department of Indian Affairs...’ And they said, ‘Oh no no, it’s going to be a cultural genocide if you do that.’ I remember, when I told them, they were in shock. But it’s what they had told me for a year. And suddenly they didn’t want to be equal. They wanted to have a special status” (Martin 1995, 201).

Chrétien demonstrated a similar arrogance in adopting a “troubled native boy” as a means of assisting “broken native families” by taking their kin away as he did in trying to “help the Indians help themselves” by eliminating their limited political status in Canada. The very quick move to settler innocence and outrage – of “nobody told me there was a big problem to take Indians” and “suddenly they didn’t want to be equal” – shows how the social and political goals of assimilating Indigenous peoples are united with, while disavowing, the domestic sphere and its motivations of desire in much of this conflict. Inevitably, these projects of assimilating

⁹¹ The White Paper sought to eliminate the “Indian Problem” by divesting Indigenous peoples of their unique Indian Status, much of which kept them in a structurally unequal position in society, but which also afforded them historical rights to maintain their political identities as the original peoples of the land. Notably, the White Paper would have nullified all signed Treaties and would have eliminated the definition of “Indian” in the Constitution, which would have essentially divested the government of all historical-political and fiduciary responsibilities, and would have further eliminated struggles with Indigenous peoples in land settlement cases that are ongoing to this day. For a comprehensive critique of the White Paper by Indigenous nations, see response know colloquially as the “Red Paper”: Indian Chiefs of Alberta, “Citizens Plus,” June 1970.

Indigenous peoples under the settler household fail.⁹²

Where the Chrétien's chalked up Michel's "troubles" to some mix of biological and social affiliation with his Indigenous origins, who were genealogically united by alcoholism and poverty, FASD only remained a quiet "suspicion" in the family, according to official biographical accounts.⁹³ It was the media and FASD advocate parents who translated the sorrows of the Chrétien family into a story of the domestic horrors of FASD. Margaret Wentz of the *Globe and Mail* took it upon herself to use Michel as a "textbook illustration of fetal alcohol damage" and issue a warning to other unsuspecting adoptive families of Native children out there, who are sitting on a "walking time bomb" of "FAS babies that will create a social nightmare for years to come."⁹⁴ Just as Wentz was teaching the public to fear this generational time bomb, she was re-teaching them how to interpret it too: "Not long ago," she reminded readers, "Michel would probably have been diagnosed with a case of cultural estrangement. Now there are other explanations."⁹⁵ FASD began filling in for critiques of a disastrous policy of Indigenous abduction that has been described as genocidal on numerous occasions.⁹⁶

The Chrétien story of domestic drama was further translated by the adoptive mother memoirist and FASD advocate, Bonnie Buxton, as accountable by FASD, which was in no uncertain terms the "cause of [Chrétien's] son's lifelong problems," even without any clinical

⁹² For more on settler colonial desire and the figuration of settler domesticity, see Richard Phillips, "Settler Colonialism and the Nuclear Family," *The Canadian Geographer / Le Géographe Canadien* 53, no. 2 (June 2009): 239–53; Beenash Jafri, "Desire, Settler Colonialism, and the Racialized Cowboy," *American Indian Culture and Research Journal* 37, no. 2 (January 1, 2013): 73–86.

⁹³ Lawrence Martin, "Any Parent's Heartache: 'We Will Continue to Stand with Him,'" *The Globe and Mail*, July 30, 2002.

⁹⁴ Wentz, "Our Poor Ruined Babies."

⁹⁵ Margaret Wentz, "Searching for a Tragic Link," *The Globe and Mail*, July 30, 2002, <https://www.theglobeandmail.com/news/national/searching-for-a-tragic-link/article755930/>.

⁹⁶ Kimelman, "No Quiet Place: Review Committee on Indian and Metis Adoptions and Placements"; "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada."

data and, especially, even if the Chrétiens refused to acknowledge this fact.⁹⁷ Buxton convinced her readers that they could identify that Michel, and thus, others too, had FAS by virtue of three factors: having Aboriginal descent, having been adopted, and having a history of repeated run ins with the law.⁹⁸ The backdrop to these public education interventions on how to diagnose Indigenous children gone wild is that they are always highly emotional tales of languished settler domestic fantasies of love and fears of being portrayed as bad parents. Buxton invited the public, and the Chrétiens, to affirm that their parenting of Michel had nothing to do with the latter's troubles, and, in fact, emphasized that he was a good father and would be an even better father if he came forward and identified Michel as having FASD. This, she argued, would encourage others to learn about the risks of alcohol and bringing more "damaged souls" into the world.⁹⁹

Blaming domestic problems on biological damage not only spares adoptive parents from blame of bad parenting, but it also precludes any meaningful examination of the structural factors of adoption and fostering in which Indigenous children are severely overrepresented in Canada. Sick of being blamed for their child's "bad behavior" and labeled as bad parents, many adoptive parents become blinded by the allure of FASD to situate the problem with their Indigenous children in a cultural and biological elsewhere. For example, when Tim, the adopted son of Marie Adams, put a name to his apparently unwieldy anger towards his adoptive parents by saying that "your fucking grandmothers killed my fucking grandmothers!" Adams always found a way to explain to Tim and her readers that this was simply a misattribution of blame and that Tim was only "mad at your biological mother and grandmother because they hurt you so much [by giving Tim FASD and by allegedly abandoning him to care], but you're taking it out

⁹⁷ Bonnie Buxton, "A Lifetime of Grief: Fetal Alcohol Syndrome Leaves Families in Anguish. Here's How the Prime Minister Can Help Combat It.," *The Ottawa Citizen*, August 7, 2002.

⁹⁸ Buxton.

⁹⁹ Buxton.

on me.”¹⁰⁰ Even in surprisingly candid moments in which Adams recounts her husband threatening Tim with violence if he doesn’t behave, she goes back to his biological brain damage to explain his behavioral responses to such violent intimidation. Specifically, she refers to his gaze and the “look” of a “sick smile” that scared both her and her husband after Rod threatened Tim, yet does not consider in the slightest about how a ten-year-old might be afraid of physical threats from a grown man.¹⁰¹

The list is endless, and there are numerous testimonies we could draw upon to show how adoptive parents are oblivious to the hegemony of their anti-Indigenous racism that informs their relations with their children at every level, and how clear responses to this racist exclusion and isolation are considered as “acting out” of these children because they do not have the capacity to process feelings of sadness or loneliness, which is always a product of their origins and never the fault of their adoptive parents.¹⁰² Raven Sinclair has noted the concerning attitude of many adoptive parents who dismiss the reality of race and their own racial prejudices, which only makes the impacts of racist exclusions and treatments more harmful and insidious.¹⁰³ The irony of this is repeatedly featured in the words of adoptive parents, like Bill who says “If people

¹⁰⁰ Adams, *Our Son a Stranger*, 11–12.

¹⁰¹ Adams, 10. Rod recounts saying to Tim one night at the dinner table: “Your attitude, if you want to continue that way, I am going to beat the crap out of you.” Rod then says that he noticed a look on Tim’s face, and “it was almost like he was saying, ‘do whatever you want. I don’t care what you do.’” Ibid., 15. Interestingly, this incident is recounted several pages earlier in a different manner. Namley, a description of Rod’s threatened violence is left out, and there is a direct attribution between Tim’s “sick smile” and that he “said” those words mentioned above, not that “it was almost like he was saying.” See Ibid., 10. This is an interesting case in which we see how gaze of FASD, “the look,” is a condensation of phenomenological complexity that accounts for multiple relational settings of Indigenous children.

¹⁰² At the 8th Annual Anishinaabek G7-FASD Conference in Sault Ste. Marie in October of 2017, I watched the FASD motivational speaker and advocate, Jeff Noble, give a keynote address on how he coaches his Indigenous foster children through hard times when they are missing their bio-families and home communities, noting how their behaviors might be seen as “acting out” in negative ways because they cannot process the emotional complexities they are feeling because of their cognitive disabilities. These youth thus require the “secondary brain” capacity of surrogate parents and caregivers like him to help them process their feelings. But in this model, a social wound becomes a biological one. The harms of the settler colonial violence of abduction are disavowed and explained away by reference to brain damage and stories of neglectful Indigenous origins. See also, Jeff Noble and Tara Soucie, *Making Sense of the Madness: An FASD Survival Guide* (CreateSpace Independent Publishing Platform, 2015).

¹⁰³ Sinclair, “Identity Lost and Found.”

would mention that [my adopted daughter] was Native, I had a problem with that because I was thinking, “To me, she’s my daughter and I don’t see that in her. I don’t see that she looks like a Native. I see Allison. I see my daughter.” And I love her.”¹⁰⁴ In such reflections, one can see how the racialized condition of Indigeneity is not-so-subtly positioned opposite to the possibility of love. The parameters of this disavowal of race and racism shift, however, in moments when the fantasy of love is seen to fail. Bill similarly recounted a formative conversation with a friend who asked him, “Bill, do you realize what you’re doing? Do you realize that you are taking a Native person into a White, Mennonite home and when you look at the way Creation came about, you do not see a swallow in a robin’s nest. They don’t belong there, you’re going to have trouble.”¹⁰⁵ Whether we believe Bill’s naive claim that he did not “see race” or not, it is evident that race became a meaningful category to mobilize once he realized that they were having disciplinary problems with their adoptive daughter. He asked himself if “this man had a point” and, “what if this [that she is Native] was the root of it all [the troubles with my daughter]?” (Ibid.).

These racial explanations elaborate how Kamala Visweswaran argues that culture has come to do the work of race as Indigenous culture becomes a form of absolute difference that is further made biologically absolute.¹⁰⁶ Bill and so many other White adoptive parents have become so comfortable with the simultaneous and often contradictory claims that the “trouble” they have with their Native adopted children comes from a suspicion that they “must have been” abused by their biological, Indigenous, parents while also claiming that they suspect child

¹⁰⁴ Leona Huntinghawk, “Their Stories: The Experiences of Non-Native Adoptive Parents Who Adopted Native Children During the 1960s through 1980s” (Master of Social Work, Winnipeg, University of Manitoba, 2012), 98.

¹⁰⁵ Huntinghawk, 79.

¹⁰⁶ Kamala Visweswaran, “Race and the Culture of Anthropology,” *American Anthropologist* 100, no. 1 (1998): 70–83.

welfare agencies have deceptively lied to them about the FAS status of their adopted children.¹⁰⁷ The cultural and biological claims of this absolute difference, registered as “trouble,” cannot be disentangled as they resonate on the same libidinal sinew that holds these domestic spheres together. This, in turn, makes it virtually impossible to entertain broader structural conditions in which indigenous children are systematically abducted and how this might be playing a factor in familial dynamics. The only thing that makes sense is that these children have been damaged, particularly by their bio-cultural origins.

If Dorris was able to command such influence in these conditions of Indigenous abduction and dispossession, it is even more telling of the dark undercurrents of this political strategy that his legacy remained untarnished even after he was publicly accused by his adopted and biological children as being a sexual and physical abuser, allegations that were eventually sustained and corroborated by the claims of his then partner, and mother of his biological children, the Anishinaabek author, Louise Erdrich.¹⁰⁸ This was right around the same time that his identity as a Native man was also coming under scrutiny from various Native communities. And as Dorris saw his carefully crafted life and identity slipping away from him, he decided to end it in dramatic fashion the night before he was to receive a prestigious achievement award that celebrated his work as a Native scholar and one of the founders of the department of Native Studies at Dartmouth. The man who “raised awareness” of the terrible costs that FASD can have on a loving father like him, was shown to be driven by perverse desire. The hypocrisy was unbearable, a man who camouflaged his desire to punish Indigenous women for being abusive and irresponsible mothers was himself revealed to be a sadistic abuser of children.

¹⁰⁷ Huntinghawk, 70, 93.

¹⁰⁸ See Eric Konigsberg, “Michael Dorris’s Troubled Sleep,” *New York; New York*, June 16, 1997.

Margit Stange has provided a partial analysis for understanding this context. In her text on Dorris, she analyzes the disturbing misogynistic and racist undertones that drove Dorris's pursuit of revealing FASD as a disease that was slowly devastating and killing Indian country.¹⁰⁹ FASD showed him how Indigenous women were killing his fantasy of Indian nationhood, and adopting a Native son was a way of re-imagining Indianness through a lineage of fathers – the metaphor of *Broken Cord* was indeed an expression of the poisonous influence of irresponsible mothers as it was a declaration of the need to cast them out of his own fantasy of Indianness.¹¹⁰ It was these familial genre sign posts that made Dorris's book into a highly attractive and relevant book for a generation of adoptive and foster parents who, like him, had been experiencing the tragedy of bringing Indian children to their fantasies of the settler household. But if these desires and fantasies were so attractive to generations of adoptive and foster parents it was precisely because of how they were so well repressed by Dorris and subsequent research and advocacy. Even in the face of the overwhelming invalidation of Dorris's work, his legacy has otherwise remained unscathed and without even the smallest inkling that his work is incredible. In fact, quite the opposite. In the same year that he killed himself, Dorris penned the introduction to an enormously important edited volume on current medical research on FASD that is still widely cited to this day.¹¹¹ The respected geneticist Dr. Albert Chudley includes in his preface to Bonnie Buxton's *Damaged Angels* that her book replicates the best features of Dorris's writing that moves people as it "help[s] readers understand more fully the challenges and truths that we face

¹⁰⁹ Stange, "The Broken Self: Fetal Alcohol Syndrome and Native American Selfhood."

¹¹⁰ Stange.

¹¹¹ Michael Dorris, "Introduction," in *The Challenges of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities*, ed. Ann Streissguth and Jonathan Kanter (Seattle: University of Washington Press, 1997), xxi–xxvii.

concerning the plight of our children and adults with FASD.” Indeed, he suggests that her book “will surpass the phenomenal impact of Michael Dorris’s award-winning memoir.”¹¹²

The awareness that is referred to in these celebrations should be acknowledged for what it is: a declaration of hopelessness of Indigenous children. Even in his introduction to the Streissguth et al. volume, Dorris’s message was about the “chilling uniformity” and the “inevitable” “*dejectory*” (as opposed to trajectory) of FAS, which is that things will “always get worse with the passage of time” for individuals with FASD.¹¹³ And while he repeatedly made gestures of centering the children with FAS as victims, the real victim for Dorris was always himself and other parents like him, which he presented in a repeated allegory of the power of nature over nurture, where loving parents were never able to defeat the natural make up of these damaged children.¹¹⁴ Tragically lost in all of this is the children, like Dorris’s adopted son, Abel, who are simply hopeless and who do not become real characters in the world of Dorris because they can’t become what they “should” become, like fathers and mothers, or artists, or people with careers, much of which is expressed in flowery and metaphorical prose of how normal people dream and marvel and question at the world.¹¹⁵ For Dorris, “A drowning man is not separated from the lust for air by a bridge of thought—he is one with it—and my son, conceived and grown in an ethanol bath, lives each day in the act of drowning. For him there is no shore.”¹¹⁶

¹¹² Albert Chudley, “Forward,” in *Damaged Angels: A Mother Discovers the Terrible Cost of Alcohol in Pregnancy* (Toronto: Knopf Canada, 2004), xvi. Similarly, a reviewer of Buxton’s book suggested that *Damaged Angels* and *Broken Cord* should be within “arms reach” of one another because of how they both underscore “the urgent need for early diagnosis in people prenatally exposed to alcohol and for well-planned prevention and intervention strategies for women of childbearing age” and because of how these two books raise “awareness of these disorders within the medical, criminal justice, social service, and adoption communities, and the general population on the lifelong effects of drinking during pregnancy.” Patricia Price-Green, “Review: Damaged Angels: An Adoptive Mother Discovers the Tragic Toll of Alcohol in Pregnancy,” *Birth* 33, no. 1 (2006): 83–84.

¹¹³ Dorris, “Introduction,” xxiv.

¹¹⁴ Much of Dorris’s book can be seen as persuading good-natured people like him to abandon their stubborn beliefs in the power of love and that, in the end, nature always wins over nurture. See, particularly, Dorris, *The Broken Cord*, 29, 70-71.

¹¹⁵ Dorris, “Introduction,” xxi.

¹¹⁶ Dorris, *The Broken Cord*, 264.

When Dorris is discussed today, it is these words and sentiments that are remembered.¹¹⁷ The charges of sex abuse from his own children, all of whom were Native, are unspeakable. Abel, the Lakota boy who was the central figure of *Broken Cord*, was hit by a car and died tragically shortly after the publication of his surrogate father's book and subsequent international fame. Dorris and Erdrich's other adopted children have largely been shunned and are living tragic lives of poverty and substance abuse today.¹¹⁸ In all of this, Lakota scholar, Elizabeth Cook-Lynn, has noted how what is lost at the center of *Broken Cord* is the ability to actually grieve for these Indigenous children, like Abel, who were prevented from ever knowing the love of their Lakota mothers, of the "acceptance of... blood relatives." Dorris's blame of Indigenous women is a morally and politically impoverished world view that neglects to recognize the plight of "young child-bearing Indian women" and instead condemns them to incarceration and isolation rather than seeking to raise them up.¹¹⁹ As such, in his inability and refusal to advocate for Tribal solutions for Tribal problems, mixed with a selective historical analysis that blames Indigenous peoples for their suffering rather than analyzing structures of colonial violence, Dorris is a textbook case of an agent of anti-Indianism.¹²⁰ That successive generations of adoptive parents, like Marie Adams, Bonnie Buxton, Jean Chrétien, and so many more, have latched on to this

¹¹⁷ Take, for example, the ways that adoptive parent, Marie Adams, describes the death of her adopted Native son, Tim, in two distinct temporalities. At his funeral, her thoughts were of the son who had already symbolically died when he left their house. The real grief was always, for Adams and so many adoptive parents like her, about the children who "might have been." The thing that Adams grieves is her lost fantasy, not the actual life of an Indigenous youth. This is the only way we should speak about Indigenous youth who "never had a chance," for it is these libidinal Settler coordinates that will always exclude the Indigenous child. Adams, *Our Son a Stranger*, 74.

¹¹⁸ Another interesting aspect to this story is that Dorris was one of the first influencers of diagnostic categories like *Fetal Alcohol Effects (FAE)* and *Partial Fetal Alcohol Syndrome (pFAS)* because he was convinced that his other two children had some kind of alcohol-induced brain damage, which he deduced exclusively based on their 'difficult' behaviors and inability to fit into his expectations of family dynamics. See Konigsberg, "Michael Dorris's Troubled Sleep."

¹¹⁹ Cook-Lynn, "Review of *The Broken Cord*," 44.

¹²⁰ A fuller accounting of the critique of anti-Indianism can be found in Elizabeth Cook-Lynn, "Anti-Indianism in Art and Literature Is Not Just a Trope," in *Anti-Indianism in Modern America: A Voice from Tatekeya's Earth* (Chicago: University of Illinois Press, 2001), 3–23.

repertoire of hopelessness of Indigenous children as a means of affirming and repressing their own domestic settler desires shows how deeply this anti-Indianism has been baked into the foundation of the discourse of FASD, which comes to stand in as a medical discourse of blame for massive structural problems like the systematic abduction of Indigenous children.

We might keep this in mind at the peculiar juncture in which Thomas was publicly known as an FASD poster boy. This is a discourse that is saturated in the question of sexual exploitation and violence as risk factors, yet that the signification of Thomas and his relationship to FASD could not be made in reference to the stories of sexual abuse at the hands of surrogate foster parents. Even as Thomas was considered within expansive discussions of his uniquely Indigenous past of foster care, that story was largely told through the generalized pain and dysfunction of his home reserve of Shamattawa, and with particular, though passing, reference to his mother who drank a highly alcoholic cocktail of “superjuice” while she was pregnant with him. Thomas’s mother provides just enough of a signpost of neglect and abuse to evoke the speculations of her son’s FASD, but the sexual valence of this economy of signs stops short at the reproductive politics of the irresponsibility of motherhood and Thomas’s inherited disorders. Remarkable in the FASD discourse is how central the literal act of sex, as copulation, is, yet in this discourse of inheritance and the passing on of bad genes and backward social norms the sex and the sexuality of mothers is almost entirely left out. That we never talk about fathers within this discourse only affirms this observation.

This absence is made even more strange given that the research of FASD and its relationship to crime and, particularly, Indigeneity, is saturated with reference to sexual abuse and exploitation. For example, one of the most widely cited research in the field of FASD and

criminality is by Streissguth et al., who suggest that “inappropriate sexual behavior” is in fact a very common “secondary disability” of FASD.¹²¹ In a study on the profiles of Aboriginal youth who are incarcerated for sexual offences, authors Rojas and Gretton found that 30% of the Aboriginal youth had FASD, as opposed to only 4.3% of non-Aboriginal youth.¹²² Such figures are made profoundly real in sensational cases such as the Manyshots brothers in Calgary, an Indigenous duo who were found guilty of charges of abduction and rape of a young and White high school woman. What was particularly striking in this case was how easy it was for the courts and the news to seamlessly draw connections between Indigeneity, FASD, and the particular crime of sexual assault, yet in which the judge denied that FASD played any significant role in reducing the moral culpability of the brothers.¹²³ FASD characterizes their criminality, even explains it, but only to an extent. As their lawyer summarized his brother-clients, “they didn’t stand a chance,” a statement that both evoked their poor childhood and upbringing, and their disabled/disordered status, within the language of probability, but which worked ambiguously to emphasize their status as risky and dangerously unpredictable as well.¹²⁴ Much like how Fraser’s death posed the question of chance to the Winnipeg public, the young victim of the Manyshots brothers was an unlucky victim to this unpredictably violent duo. Their genealogical construction as damaged and disordered Indigenous subjects is both an explanation and affirmation of their guilt as sexual predators.

FASD is regularly correlated, and conflated, with sexual violence. In one prominent Manitoba Provincial Court case of sexual assault, it was particularly interesting that two

¹²¹ Streissguth et al., “Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects.”

¹²² Rojas and Gretton, “Background, Offence Characteristics, and Criminal Outcomes of Aboriginal Youth Who Sexually Offend.”

¹²³ R v Manyshots (ABPC February 13, 2018).

¹²⁴ Martin, ““They Didn’t Stand a Chance.””

psychological expert witnesses could not agree amongst themselves whether the accused had an FASD or a sexual disorder (a “sadist complex”).¹²⁵ Incredibly, FASD is raised over 40 times by the judge in this sentencing decision, yet FASD does not factor in the final calculus, leading one to notice not only how controversial and unstable FASD is as a sexual discourse but to also wonder why it is brought up at all?¹²⁶

The research is not only affirmative of individuals with FASD (particularly of the Indigenous variety) being unpredictable, risky predators, however. The same work of Streissguth et al. (2004) also observes that sexual abuse of children with FASD is itself a risk factor for the development of criminological profiles and other adverse life outcomes.¹²⁷ Other researchers have argued that individuals with FASD are at higher risk of being the victims of sexual assault,¹²⁸ while still others raise the alarms that individuals with FASD present challenges as both victims and witnesses within the court of law for the ways in which their FASD and associated symptoms of memory problems, tendencies to confabulate (mixing truth and fiction) and struggles with impulse control and executive management, makes them legally incredible and unreliable as speaking subjects.¹²⁹ This legal stance works in both directions too, for FASD has been allowed as evidence in cases in order to explicitly discredit the victims, or has been the subject of appeals on the basis that victims of sexual assault had FASD and were thus unreliable

¹²⁵ R. v. Steppan (MBPC February 18, 2010).

¹²⁶ Chapter 3 and 4 will directly cover this topic of how FASD is made relevant and irrelevant in the courts.

¹²⁷ Streissguth et al., “Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects.”

¹²⁸ Charlotte Fraser and Susan McDonald, “Identifying the Issues: Victim Services’ Experiences Working with Victims with Fetal Alcohol Spectrum Disorder” (Department of Justice Canada, 2009), https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr09_4/index.html.

¹²⁹ Michelle Stewart, “Environmental Scan: FASD & The Justice System in Canada” (Canada FASD Research Network, 2015), 12; Roach and Bailey, “The Relevance of Fetal Alcohol Spectrum Disorder and the Criminal Law from Investigation to Sentencing”; Diane K. Fast and Julianne Conry, “Fetal Alcohol Spectrum Disorders and the Criminal Justice System,” *Developmental Disabilities Research Reviews* 15, no. 3 (January 1, 2009): 250–57.

witnesses as they were prone to confabulate and engage in inappropriate sexual conducts themselves.¹³⁰

The contradictions of these academic investigations and judicial procedures, in which sex is central to FASD yet perpetually deferred or disavowed, are self-reinforcing. The poorly theorized and ill-defined boundaries of the category of “secondary disabilities” has only permitted more non-scientific researchers to make grossly capacious connections between the conditions of poverty, neglect, violence, abuse and criminality with the conditions of Indigenous life, all of which can be explained by the connecting glue of FASD. Sociologist and gang scholar, Mark Totten, has a particularly egregious formulation of this, where FASD is listed as a primary “link” for understanding gangs, drug use, and sexual exploitation and violence against women, all of which is housed under the identifier of the “Aboriginal population.”¹³¹ Worst of all is that this research is utterly speculative and Totten himself admits that he is trying to connect emergent literatures that are defined by less-than consensus, or are even based on unfounded data. With all of this gratuitous interest in Indigeneity and FASD as a conglomerated set of conditions that are defined by sexual abuse and violence, where sexual violence and abuse has *become* an objective truth, or truth factor, of thinking Indigenous life, it becomes a wonder why Thomas’s life was not inflected by this discursive feature. To generate some answers to this

¹³⁰ See *R. v. R.L.*, No. C44572 (Court of Appeal for Ontario May 8, 2007), in which the judge permitted the defense to enter FASD as evidence to discredit the adopted sister of the accused who had been charged with her rape. In *R. v. Titmus*, No. CA31004 (Court of Appeal December 9, 2004). *R. v. R.T.* the judge ultimately denied the appeal of a foster father who raped two of his foster children based on the fact that they had FASD and were thus unreliable. While it was ultimately denied, the appeal judge in this case nevertheless entertained the truth of FASD as a problematic issue for the courts and affirmed some of the accused’s claims by discrediting certain portions of the victims’s statements. Gagnier et al. has written approvingly of such judges because they consulted with experts on FASD in order “to gain better appreciation of the complainants’ diagnosis and help decipher which documents would be relevant to assess the complainant’s tendency to confabulate,” but such decisions and their consultations essentially strengthen the truth factor of subjects of FASD as incredible in the court of law. See Gagnier, Moore, and Green, “A Need for Closer Examination of FASD by the Criminal Justice System,” 430.

¹³¹ Totten, “Investigating the Linkages between FASD, Gangs, Sexual Exploitation and Women Abuse in the Canadian Aboriginal Population: A Preliminary Study.”

mystery, I think we need to return to the beginning, to the ways in which sexual abuse first became an intelligible feature of Indigenous life and generative of a different kind of social and political mobilization. But we must keep the frame of Dorris and Fraser alongside this, for the absence of their sexual violence within the discourse of FASD speaks to the structure of secrecy that was at the heart of the Residential Schools.

After he'd ejaculate on me, he'd curse and wail and ask God to forgive him, and call me a dirty, heathen temptress... I'd try to hide my underwear and stained sheets until I could wash them in secret because I knew what happened was my fault. I'd made him abuse me because of who I was.¹³²

John Milloy noted that there was a very specific form to the secrecy of child sexual abuse in the Residential Schools, one that was contained in traces and absences of the archive itself. Milloy notes that the issue of sexual abuse was almost effaced from the archive completely, but if it was mentioned at all it was in reference to the sexual behaviour of the children who were described in the racist views of Aboriginal people as sexually abnormal and beholden to primitive and naturalistic drives that could not be controlled. Alternatively, any references about sexual abuse by non-Aboriginal staff were encoded within a normative “language of repression” that “marked the Canadian discourse on sexual matters,” hiding sexual violence within barely remarked upon incidents of questionable ‘morality’ or descriptions of specific forms of punishment issued by teachers and school administrators.¹³³ Contained in the language of

¹³² Testimony of a Cree woman discussing the ritual abuse of her adoptive father, and white Methodist minister. Quoted in Fournier and Crey, *Stolen from Our Embrace*, 122.

¹³³ Milloy 296.

repression, or the repression of language itself, in the traces of erasure and metonymic distributions, we see how even the biggest secrets must be hidden in plain sight.

In some ways then, the contemporary political landscape of Indigenous politics is subject to this structure of secrecy, which is structured like a language. This is on full display in Canada's contemporary project of reconciliation and its obsessive apologies. Mohawk scholar Audra Simpson has come to see this current moment as being structured like an "Empire of Feeling" for the ways that the state has come to structure the relationship with Indigenous peoples through the language of apology and tears.¹³⁴ It is something more than sociopathic cynicism, however, for if Prime Minister Justin Trudeau is an expert at shedding tears for Indigenous peoples, it is more than his own machine-like exploitation of emotions that is at stake. Indeed, Simpson provides a potent analysis of what she calls the reconciliation machine of Canada itself, showing us how the settler empire of Canada is structured by feelings as much as it is constituted by an insatiable drive to extract lands and resources in addition to, as we will see, stories of Indigenous pain. Simpson demonstrates how the Truth and Reconciliation Commission of Canada (TRC) achieved this synthesis of sympathy and extraction quite literally in the physical staging of truth at venues that mirrored the architectural confines of the theatre where audience and actors are given their specified and scripted roles. 'Survivors' are put on stage and meant to tell their stories, all within a finite temporal framework, in front of a largely anonymous audience of spectators, reporters, and a board of commissioners, that watches and listens to these stories, writing them down in notes and, ultimately, processing them for immediate news feeds and archival posterity at the University of Manitoba. In this reconciliation theatre Simpson, and some of her interlocutors, experience something that is more akin to a space of entertainment.

¹³⁴ Audra Simpson, "Empire of Feeling," *General Anthropology* 27, no. 1 (2020): 1–8.

And with the audience in such a clear positionality of consumption it reminds Simpson of a modern-day form of the Jesuit harvest, but where it is no longer Jesuits collecting souls but everyday Canadians collecting the stories of Indigenous pain (5).¹³⁵ This is similar to John Milloy's characterization of the federal government's "cynical sleight of hand" in the early 1990s when it refused to accept liability for historical or present-day colonial violence and instead focused on Indigenous sequela of the present – the rhetorical 'problem' of the Indian shifted while the structuring principle stayed the same; instead of being savages in need of theological salvation Indigenous peoples were now 'sick' souls in need of psychological salvation.¹³⁶ What is meant by this salvation? What does Canada receive from saving Indians?

More directly, what does it mean to save Indians if one is not willing to actually do anything with this information? As Simpson notes quite dramatically, the structural form of the TRC was geared to collecting painful stories but with a concomitant inability or refusal to actually prosecute or hold criminally responsible any of the Residential School staff who perpetrated harms. As Simpson recounts the angry and disappointed voices of many who saw the TRC as a mechanism for uncovering the truth, it was jarring that all names of perpetrators of violence were expunged from the records, leading to what was seen as a clear "protection of the perps." Simpson asks, "[w]hat kind of society lets pedophiles and predators walk among them after the fact?"¹³⁷ (Simpson, 7)? This question entails a deeper provocation of what form of truth the TRC was after, what truth can even mean in this process, and how this relates to our ability to conceive of justice. Just as the brutal details of child sexual abuse by teachers and administrators

¹³⁵ Aileen Moreton-Robinson's theory of the white possessive rings here; Indigenous stories of suffering as themselves a storying of the nation, a possession of the nation. Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: Univ Of Minnesota Press, 2015).

¹³⁶ Milloy, *A National Crime*, 302.

¹³⁷ Audra Simpson, "Empire of Feeling," 7.

were effaced or encoded within the archives of the Residential Schools, are we not seeing a similar dynamic here where the real ‘perps’ are effaced in the official ‘truth’ of reconciliation? And as emphasis was put on the salacious details of backward and primitive sexual behaviors of Indigenous children themselves are we not seeing a parallel narrow fixation on the salacious details of Indigenous experiences of sexual and other abuses that are being written into the record? We are witnessing a pattern of recognition of sexual abuse and its simultaneous disavowal, a structure for effacing Canadian responsibility, or leaving it exclusively in the past, and displacing violence as an emic characteristic of Indigenous life.

With this active process of effacing the archive, I think we can agree that Canada’s mobilization of tears and its apologies are not strictly, or only, for the purposes of pushing through pipelines on Indigenous lands and achieving other projects of settlement and extraction. There are vested interests here, of, if not denying history, then strategically deploying it within a tense that is affirmative of the settler nation’s futurity. But there is something else other than self-interest or even conditions of shame. This insight is intimated in Simpson’s work, and particularly by an interlocutor who summarizes the Residential School system within the blunt and pithy statement, “The Church is Sex.”¹³⁸ Sex, as Simpson goes on to theorize in the echoes of Foucault, is a technique of power, a dense transfer point of power that was intersected and reflected by regimes of killing and civilizing, if there is a difference between these two end goals: “One way of attempting murder on the self and on future,” Simpson summarizes her interlocutor, “was... to have sex it seems, with children when they are legally entrusted to your care as wards of the state who were to be de-savaged, de-cultured in the pedagogic project of civilization” (Ibid., 2).

¹³⁸ Simpson 2.

Simpson and her interlocutor thus introduce us to sex as a technology of murdering the Indigenous subject, but we should pause on the important conceptual overlaps noted here, specifically the capacious erotic core of this political project where the literal act of sex as rape is coterminous with the pedagogic obligation of de-culturation. Sex, here, is a placeholder, a name for the symbolic suture of which the Canadian-British state and the church sought to reconcile the difference of Indigeneity. Sex is a name for the libidinal energy at the heart of this project, the source of enjoyment, or *jouissance*, that sustains this project where enjoying another's body is bound within the task of radically altering/destroying that body.

The settler colonial project has quite literally been obsessed with and organized around sex in its very practical and embodied forms – such as the long projects of defining and regulating marriage through concepts of descent and blood, as a means of regulating property, for example.¹³⁹ The Residential School was imagined precisely within the coordinates of the family structure, the juncture of sex and reproduction where European colonial imaginaries fixated on the importance of descent and lineage, and where the inheritance of savage influence of one's parents could be substituted with the parent of the state and its church-run schools.¹⁴⁰ The colonist politicians and church leaders referred to this process of inheritance and their intervention of re-subjectification by noting the pernicious “influence of the wigwam.”¹⁴¹ The domestic and reproductive space of the home and the family were the principles of intelligibility by which the colonial project was imagined. Even if sex within the repertoire of reproduction, inheritance, and lineage is thus a site discursive corporealization of Indigenous life, an attempt to re-matter the Indigenous body according to the propriety of civilization, there was something in

¹³⁹ Mark Rifkin, *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York: Oxford University Press, 2011); Simpson, *Mohawk Interruptus*.

¹⁴⁰ Simpson, “Empire of Feeling,” 3.

¹⁴¹ Canada, Royal Commission on Aboriginal Peoples, *Final Report*, 1, Looking Forward Looking Back:314.

excess and beyond of this sexual mattering of the world. Critical Indigenous Studies scholars have persuasively argued the centrality of rape, for instance, in articulations of sovereignty, of the ‘purification’ of settler space, and the act of forging connections between the symbolic and literal meaning of land, where the figuration of Indigenous women as *rapeable* establishes the figurative possibilities of taking, stealing, and extracting from land.¹⁴² The logic of sex oversaturates every element of Canadian colonization, providing the conditions of possibility for movement between the imaginary and symbolic features of the Indigenous savage and her propensity for reproduction to the material conditions of constraint and containment in the legal basis of property, citizenship status, and so on.

As a discourse, sex is central to the subjectification of Indigenous subjects, and equally central in capturing the colonial subject within power. And if the simultaneous capaciousness and elusiveness of this discourse of sex might seem to strain analytic judgment to the point of incredulity, it is worth keeping in mind that sex never just about sex, as a bodily act of copulation or exchanging of fluids (though it certainly is not *not* about this either).¹⁴³ Rather, from a psychoanalytic perspective, sex is the marking or placeholder of a constitutive alienation that informs a basic thematic of relation – to others, to oneself, to the world – that obtains particular formations within different political and social worlds.¹⁴⁴ And sex is also about a complex

¹⁴² Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis: University Of Minnesota Press, 2015); Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George”; Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, MA: South End Press, 2005); Stark, “Criminal Empire.”

¹⁴³ Alenka Zupančič, “Biopolitics, Sexuality and the Unconscious,” *Paragraph* 39, no. 1 (March 2016): 49–64.

¹⁴⁴ Following Lacan’s famous and characteristically sibylline expression/aphorism, *il n’y a pas de rapport sexuel* (*there is no sexual relation*), Zupančič and other psychoanalytically oriented theorists have argued that sex is one site, if not a primary site, of measure of the gap between the real and relation, between primordial antagonism and imaginary or symbolic suture, where sutures or provisional bonds are made across this void with libido. Thus Zupančič’s claim that sex is not repressed because it is fundamentally and excitingly dirty and obscene, but is *considered* excitingly dirty and obscene because something about it is fundamentally unconscious and thus in need of regulation (Ibid., 53).

dynamic of libidinal investments that circulate around and through pleasure and enjoyment, as well as pain.¹⁴⁵ It is this dynamic of sex that can perhaps shed light on the inherent contradictions of the colonizing project, the horrific irony of a colonizer as civilizer who ends up being the sexually depraved and savage abuser of children – or Dorris, who made it his life’s work to punish Indigenous women as abusers of children, who turned out to be himself a chronic abuser of his own children. The logic of the pedagogic re-subjectification and sexual abuse are dialectically entwined, for it is the status of savage that permits this civilizing project of citizenship even while the predicated lack of citizenship (by virtue of being a child *and* a savage with no rights to consent) permits the savage acts of having sex with Indigenous children by the civilizer.¹⁴⁶

This analysis of sex as technique of power allows us to see the connective tissues and processes of enfleshment inherent in this power, how the land literally becomes bound to the woman’s body, how the project of settlement itself is a mattering forth of domestic spheres and a remapping of lineages, a reimagining of inheritances of civilization even as an other’s inheritance permits barbaric transgressions. It is thus a site of contradictions, as well as excesses. Where colonists try to civilize while succumbing to the projected desires of the savagery they seek to save. A reconsideration, or re-reading, of the significance and structure of apology that Thomas was forced to make might help to illuminate this structure.

¹⁴⁵ The French term *jouissance* contains a connotation of orgasm that Jacques Lacan has stressed to explore the dialectic of tensions and unpleasures that is central to this form of enjoyment, pushing the meanings of sexual excitation beyond mere genital domain of sexuality in order to account for the expansive ways in which we can ‘get off,’ especially in the things that cause us distress, displeasure, and suffering – like the exhilaration that can be felt in losing one’s temper, or the painful gratification that one can have in their misery. See Derek Hook, “What Is ‘Enjoyment as a Political Factor’?,” *Political Psychology* 38, no. 4 (2017): 608.

¹⁴⁶ Simpson, “Empire of Feeling,” 3. The “unspoken church policy of tolerating pedophiles” in the Residential Schools that were trying to civilize and clean the Indians became an “epidemic of sexual abuse” in the adoptive and foster homes that were disciplining Indigenous children into the White norms of the Settler home. See Fournier and Crey, 119, 121.

For there is something more than irony of an Indigenous person making a public apology in these times of reconciliation. As I've already suggested, Thomas's apology is more appropriately considered as a confession, the outcome of a deeply energetic accusation. On that front we also saw how the apology/confession of Thomas was doubled through that of chief Napaokesik of Shamattawa First Nation who, as chief, also seemed like he was implicating his entire reserve, perhaps even apologizing on behalf of all Indigenous peoples. There is something about Louise White's theory of accusation that thus doesn't quite sit well here. Granted, White's notion of harmonization of vocabularies at the basis of her theory of accusation allowed us to think the interrelated dynamics of sense, truth and power that mobilized the image of Thomas within a neat discourse of injury that localized "the problem" of Indigenous country within its individuals who are in need of repair and not the colonial relationship.¹⁴⁷ But even if we can call this a harmonization of vocabularies, we notice also that there is no real resolution. The apology only marks a furthering, an excess, of the problem. "We hoped he could be helped," chief Napaokesik said, emphasizing both a tragic loss of figuring a futurity for Thomas within the register of hope as well as shifting the organizing question to what is to be done with Thomas? We saw too VanRaes emphasize this sympathetic hopelessness, who suggested that Thomas "likely wasn't born a killer," but even as she sympathized with his life of abject misery she could not help the dead summation that she wouldn't want to encounter him on the street. Questions of Thomas's accountability and possibilities for his rehabilitation were foreclosed. In other words, Thomas was, and is, thought of as an impossibility. Rather than resolve any central tensions, then, Thomas and Napaokesik's confessions only open up further anxiety as the body of Thomas continues to pose a threat.

¹⁴⁷ Coulthard, *Red Skin, White Masks*, 127.

We might consider, then, the deconstructivist approach to accusation offered by James Siegel, who argues against the claims of coherence, unity, and harmonization suggested by structural-functionalist theories of sorcery.¹⁴⁸ For Siegel, accusation is indeed a marking of power, but not in the conciliative sort whereby the shaman or medicine man gives articulation to that word or idea or problem which was unable to be spoken by a community. Instead, Siegel figures the deadly accusations of sorcery as precisely the unbounded release of power constituted by the infinite combinatory capacity of language to *conjoin*, a power that disturbs, he argues, precisely because of how it reveals the nonsensical disorder that constitutes our language and being. This is why another witch is always named, Siegel argues; the ever-agile capacity for power to be located anywhere, in any body, precisely because of its non-location in anything, the act of accusation itself being a temporary recognition, but ultimately elusive attempt, to contain this power.

Working with this theory of accusation and power in the contemporary social form of processing and making sense of Indigenous criminality, we can see an intimate, if not analogous, relationship to the divisions of knowledge and power in Elaine Scarry's theorization of the structure of torture, which she describes in the very precise sense of *stupidity*. For torture depends on emptying out all content of the tortured body except for pain itself, which becomes the reality of the regime of the torturer, a forceful exertion of power that facilitates a zero degree of knowledge.¹⁴⁹ In a more Hegelian or Fanonian dialectic of master and slave, as the torturer derives his knowledge, and identity, from this being who cannot speak or function and whose existence he cannot recognize, the torturer/master loses his own sense of existence and will

¹⁴⁸ Siegel, *Naming the Witch*.

¹⁴⁹ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1987), 278.

likely turn to more violence and thus dig himself deeper into the zombie-like and empty form of existence that he forces the tortured body to be.¹⁵⁰ And isn't it precisely a zombie-like figure that Jonathan Kay mobilizes in his language of the programmed sadism and "tragically wounded" *souls* of Indigenous offenders and prisoners? Jodi Byrd's notion of "Zombie Imperialism" reflects this dialectic quite specifically, where the 'wound' created by the symbolic and literal 'cut' of colonialism creates a surplus ("Indianness") that then reflects back to the liberal colonial order its own anxieties while also serving as a machinery for strategically deploying this excess at the intersections of life, death, law and lawlessness where ideological constructions like *corpus nullius* provide the connective tissues for exception, the machinery for the US empire to manage the world.¹⁵¹ Thomas and the rest of Indigenous offenders insist with an anxious throbbing. But if Thomas and others are zombie-like creatures for Kay, it is precisely this embodiment of excess and the problematic status of the living dead that Kay reflects back to his readers, and which thereby enables the figuration of exceptional solutions. One need not look very far to see how Indigenous inmates are regularly featured as impossible subjects who are thus treated to a "cruel and all too usual punishment" that is justified precisely on the grounds of the exasperation these inmates present to the institution.¹⁵² Interestingly, some lawyers and other advocates speak in the language of human rights to point out the barbarity of these conditions, specifically because Indigenous inmates with FASD might be mistaken for 'difficult' prisoners

¹⁵⁰ T.R. Johnson, *The Other Side of Pedagogy - Lacan's Four Discourses and the Development of the Student Writer* (Albany: Suny Press, 2014), 117.

¹⁵¹ Byrd, *The Transit of Empire*, 226–29.

¹⁵² Segregation and solitary confinement are typical forms of such punishment. An increasing dependency on controversial drugs in order to subdue 'notorious' and 'dangerous' inmates reveals how this excess is located in a psycho-pharmacological imaginary. Kenneth Jackson, "How the Federal Government Failed Marlene Carter – One of the Most Dangerous Female Inmates in Canada," *APTN News*, January 20, 2016, <https://www.aptnnews.ca/national-news/how-the-federal-government-failed-marlene-carter-one-of-the-most-dangerous-female-inmates-in-canada/>; Timothy Sawa, "Prisoners given Powerful Drugs Off-Label, Allegedly to 'Control Behaviour,'" *CBC News*, April 14, 2014, <https://www.cbc.ca/news/prisoners-given-powerful-drugs-off-label-allegedly-to-control-behaviour-1.2609940>.

because their conditions are not known to the prisons.¹⁵³ I argue that FASD actually provides the justification for their “all too usual” forms of punishment, a truth form that enables such treatment precisely because of its scientific veracity, where criminal justice has no choice but to treat these inmates with exception to address their exceptionality.

To conclude, then, the logic of sex, or the technique of sex, when taken in this broader conceptual apparatus of cuts and excess and libidinal sutures, helps us to recognize the specific set of discursive and libidinal problems that Thomas presented to the Winnipeg public and its prevailing modalities of criminal justice. For he both threatened and titillated this system; reflected its anxieties while providing further means and justifications for treating this excess. The pathologization of Indigenous life explains the conditions of mass- and over-incarceration of Indigenous peoples with a discourse of social tense that maintains the political conditions for further exception of Indigenous life. This is particularly so in the era of liberal reconciliation where Indigenous stories of pain and misery are staged in the ‘now’ while colonial violence is tidily kept in the past. Such pathologization confines Indigenous peoples to their genealogical inheritance and constraints, denying them an autonomous and self-determined future. If we accept that this social tensing permits the conditions of unfettered futurity and the specific abilities to lay pipe(lines), we also acknowledge the labored and crass double entendre of this sentence as analogous to the libidinal economy that supports these political acts. We might be a nuisance, a thing that is in the way of the pipeline construction, or a threatening body on a bus, but it isn’t just our lands that Canada wants to extract, or our bodies that it wants to store in overflowing prisons. It also wants our stories, of suffering and chaos, pain, inflicted and

¹⁵³ Katie May, “Changes to Solitary Confinement Won’t Protect Vulnerable Inmates,” *Winnipeg Free Press*, May 27, 2017, sec. Local, <https://www.winnipegfreepress.com/local/cruel-and-all-too-usual-punishment-424705373.html>.

inflicting violence. Just as the Jesuits sought to harvest our souls, and the Residential Schools sought to lead our savage hearts to salvation, today the objective is psychological salvation of ‘tragically wounded souls.’ The structure of enjoyment is the same. Perhaps that unknown thing inside of Indigenous peoples, that throbs with insistent anxiety, is the object cause of desire for the settler state? The thing that reflects desire back to the settler, which finds new places to dwell, in the dysfunction of Indigeneity, in the stories of negligent mothers, rampant alcoholism, sexual abuse, in FASD itself. In a way, this desire reflects the conditions of colonialism itself. I have argued that this is how Fraser’s sexual violence is relegated and foreclosed to the dustbin of history, subject to the mechanisms of effacement not unlike those found in the Residential School and the colonial archive, as well as the archive of FASD, where the sexuality of the Indigenous child that is more noteworthy (and excitingly dirty) than the sexual abuse of the church leader that must be contained, repressed. But why, then, did the genealogical gaze bypass such salacious details of Brian’s life? As noted by my friend Billy, the stories were there; whether they were true or not is beside the point. Such stories would have taken VanRaes’s sympathetic story of colonial violence too far, too close. And they would have, furthermore, distracted from the true objective that was the entrancement of Thomas’s monstrosity and misery. Just as Simpson’s interlocutor claimed “[t]he church is sex,” the story told of Thomas was always already about sex.

Witnessing

*“My memory stammers: but my soul is a witness.”*¹

Defendants always look so different from the pictures that circulate of them in the news. Generally, they look heavier in court. Regular access to meals and a lack of opportunities for exercise in the remand centre will do that. How many times I have seen young men come out of jail looking healthy, with meat on their bones and clarity in their eyes, only to see this image of health slowly deteriorate as old patterns and the constraints of being a poor, Indigenous person in Winnipeg returns to overwhelming their lives again. When I saw Thomas in court, he had the look of what I am calling “health.” He had certainly put on weight, about twenty or thirty pounds. And despite the violent experience of being locked up, I could tell that the regularity of jail reflected a sense of internal coherency in him that is hard to come by on the streets, a paradoxical dynamic only if one refuses to see the complex continuities of and between the carceral system and the particular worlding of Indigenous life in Canada. Thomas wore a state-issued plain grey sweat suit with flimsy navy blue slip on shoes issued to him when he was arrested. He wore the same thing every day. But there was another typical feature of Thomas that I noticed too, one of the first things I noticed: his cleanly shaved head and the many scars that it bore. A familiar feature of so many young men I know, it tells a story of falls, hits, and stabbings; of hospital visits and close calls. These scars and indents to the head are stories that can be seen but are not often heard or spoken about. He reminded me of one of my young guys, Richie, whose head always came to life when he shaved it. The jagged lines that spread out like spider webs; a bodily scroll documenting a life of experienced violence. I was mesmerized by Thomas’s head, thinking of the stories it spoke, of the stories I’d heard, of the hospital visits I’d made. Lost in thought, I didn’t even realize I was staring at Thomas as he sat in his box just a few feet in front of me. The loud clangs of his shackles as they met his hard-wooden seat startled me and as he looked up, we met eyes. Surprised and a bit embarrassed, I nodded to him with my lips but we both looked away almost immediately.

¹ Baldwin, *The Evidence of Things Not Seen*, xiii.

Chapter 3: The Trial

‘There’s no place nearby for you’: (Anti-)Indigeneity in the shadows (of doubt)

On January 22, 2019, the public finally saw the surveillance videos of the tragic events that led to Fraser’s death and Thomas’s arrest for murder.¹ The first experience of these videos was one of disorientation. The courtroom was deadly quiet as we all craned our necks to watch the footage on a screen that was far too small for the size of the room. Most of the video is mundane and uneventful. Thomas gets on the bus with some friends. He falls asleep, they get off a short while later. And then for nearly 15 minutes there is nothing but the background noise of a bus rattling through the streets, empty other than Fraser and Thomas. Finally, the bus stops, and Fraser screams, “Last stop! Get off the bus!” Thomas sits up and appears to be disoriented. He mumbles something about his friends. Fraser yells back that they had left long ago and accuses Thomas of playing dumb. “You were awake!” he barks. “I saw you!” The implication seems to be that Thomas is playing an angle, but of what, exactly, is unclear. What is clear is that Fraser will not be fooled. Thomas slowly walks to the front of the bus, rubbing his eyes and with his head in his hands. He speaks softly. His body is limp, shoulders slouched. He is not exactly relaxed, more so exhausted. His limp body and sluggish voice contrast to Fraser’s booming demands and a body that is aggressive and tense. Fraser appears to be doing mundane tasks that might be expected at the end of a driver’s shift, like moving papers or putting away clipboards, but his bodily movements are rapid, punctuated and jerky. And his focus is squarely on Thomas, with what appeared to be a mix of suspicion, anger, and resentment informing one sole objective: getting Thomas off of his bus.

¹ Josh Crabb, “Footage of Confrontation between Winnipeg Bus Driver and Accused Killer Shown in Court,” *CTV News*, January 22, 2019, <https://winnipeg.ctvnews.ca/footage-of-confrontation-between-winnipeg-bus-driver-and-accused-killer-shown-in-court-1.4264866>.

I felt a knot in my stomach as Thomas asked for help. "I'm sorry, I fell asleep," he said in a confused and sleepy voice to Fraser. "Can you help me?" he asked with his hand out in a gesture of pitted reason. "Please," he says several times as he asks if Fraser might drop him off at a "Tim Hortons or something." Brian Thomas was not aggressive; he was calm, even polite. One could describe him as meek, especially given his small stature next to Fraser. At 140 pounds and at a height of 5'6", he was tiny in comparison to the imposing 6' and 250-pound Fraser. An acknowledgement of this difference could be heard in Thomas's quiet voice. If Thomas's calm and polite gestures could be read as a shrewd recognition of his inherent disadvantage in this scenario, it is equally true that he seemed profoundly confused. He could be heard muttering at one point, "I think someone is following me." But such claims seemed to make Fraser even more determined to deny Thomas and he interrupted him, "I don't care!" He shook his head aggressively and yelled at Thomas to "get the fuck off the bus!" "I'm not going to ask you again!" Thomas was looking for a reasonable outcome. If he couldn't stay on the bus, perhaps Fraser could drive him somewhere nearby to use some payphones? Fraser responded in a suddenly low, but no less sharp, voice: "there's no place nearby for you!"



Figure 7 – Surveillance footage of Thomas and Fraser. Accessed at <https://www.cbc.ca/news/canada/manitoba/thomas-bus-driver-trial-1.4988345>

Fraser’s anger continued to escalate and his patience finally broke. Hostile words became physically aggressive actions. First, he jerked and pulled at Thomas’s arm and tried to forcibly eject him from the bus. But Thomas continued to plead with Fraser, holding on to the railing of the bus as he told Fraser that he did not want to go outside.² Fraser’s physical tactics then became more violent jerks and tugs, and finally escalated to throws, throws that not only “connected” with Thomas but body slams, as Fraser effortlessly tossed Thomas’s limp body from side to side

² Recall, this was at 1:30am in the morning in February, in Winnipeg, a Prairie city that is colloquially referred to as “Winterpeg” by locals in order to shed humorous light on a collectively shared plight of living through unforgivingly cold winters. The Crown made something of the weather on the early morning of February 14, 2017, which was said to be unseasonably warm for this time of year. Indeed, the temperature hovered around the freezing point of zero degrees Celsius.

<https://www.timeanddate.com/weather/canada/winnipeg/historic?month=2&year=2017>. The implication was that Thomas’s excuse of not wanting to leave the bus and go outside was exaggerated at best, deceitful at worst. Stunningly, the statement made by Fraser, that there was “nothing around here” for him, was not made to bear on this line of argumentation. Not by the Crown, and not by the defense.

of the bus, into walls and railings. Thomas's hands remained down and in frantic search of railings during this encounter, to keep himself upright and in the bus. He did not even put his hands out in a defensive posture. At one point in the video Thomas can be heard letting out a sharp groan as Fraser bent his body and spine unnaturally backwards over an unforgiving metal railing. With Fraser's indomitable body over Thomas's, and with his large hands at Thomas's neck, one can also see on the grainy video Thomas's face contort in agony. Yet his hands remained firmly on the bars that Fraser had converted in to weapons against his body. Thomas's physical effort was directed towards keeping himself inside of the warm bus. His body and voice were fixated on life. Eventually, Fraser managed to give Thomas one last heaving shove and pull and ejected him from the bus. This is when the scene took a decidedly different tone.

Thomas's behavior dramatically shifted. "Why the fuck are you pushing me?" he could be heard yelling at Fraser as the massive body stood in front of the door and blocked Thomas from re-entering. Thomas began to throw punches at Fraser, but the latter easily deflected them. Thomas instructed Fraser to "fight me then you fucking bitch!" Eventually, and for reasons that were not adequately considered or explained in the court, Fraser then left the bus in order to pursue Thomas. He lunged at Thomas and grabbed him by the shoulders. It was hard to make out exactly what happened next because the grappling men moved out of the surveillance video frame, with only their kinetically charged shadows and the odd foot visible within the frame. Approximately 20-30 seconds later, Fraser can be seen backing up and collapsing on to the ground next to the bus that he so aggressively refused to allow Thomas on. He had been stabbed several times and a main artery had been ruptured and he bled out on the University of Manitoba sidewalk.

Watching the surveillance video footage was shocking, and not only because of the horrific witnessing of Fraser's tragic death. In addition, it also showed a radically different story than the public had been led to believe by police for the previous two years, and which had been ritually repeated countless times in the press, coloring the rumors and whispers of everyday gossip. *A stubborn passenger refused to get off the bus, which led to violence. Or, a sleeping passenger explodes on an unsuspecting bus driver attempting to wake him up.* Such narratives fell apart now as we witnessed Fraser to be the original aggressive party. Even the Crown attorneys would later have to acknowledge, at the persistence of Chief Justice Joyal, that Fraser acted in ways that went beyond his professional duties and, furthermore, it could be argued that his actions "precipitated the violence" that led to his death. In the court halls during a recess after having seen these surveillance videos a fellow bus driver confided to me, while shaking his head, that "this tragedy was entirely preventable." I thought for sure that Thomas had a strong case for self-defense. And yet, on January 31, 2019, on the eighth day of the trial, and after a brief couple of hours of deliberation, the jury came back with a unanimous verdict of guilty on the count of second-degree murder. In a way, I was shocked by this verdict, but not entirely surprised. I thought the most likely best-case scenario was he would be found guilty of manslaughter. But recent high-profile cases that seemed to outline the distinctly different experience for Indigenous and non-Indigenous defendants prepared us all for an unfortunate outcome for an Indigenous person.³ Is there really this profound and stark a difference for how Indigenous and non-

³ The case of Gerald Stanley, a Saskatchewan farmer, and the killing of the young Cree man, Coulton Boushie, is the most obvious (2016). The acquittal of Raymond Cormier in 2018 for the murder of Ojibwe teen, Tina Fontaine in 2015, in Winnipeg was also fresh. These two cases involved white men being acquitted for murders of Indigenous teens, and while I shared most sentiments regarding the former I had other reasons for believing that Cormier should have been acquitted as there was not a very strong case at all to tie him to the death of Fontaine, a view not held by many of my Indigenous friends and colleagues at the time.

Indigenous peoples are treated by the justice system? How else can I explain the disorientation I felt on this day?

To find Thomas guilty of second-degree murder, the presiding judge, Chief Justice Joyal, instructed the jury that there were three main questions the jury would have to ponder. This case was not a “whodunnit,” as Thomas’s lawyer put it, and it was accepted by all parties of the court that Thomas had caused Fraser’s death. Thus, what the jury would have to answer, in the affirmative, was: 1) if Thomas killed Fraser unlawfully; 2) if Thomas had the state of mind required for murder; and, 3) if Thomas was not provoked. These conditions bled into one another. To determine the lawfulness of Thomas’s actions the jury was asked to consider the reasonableness of the act itself; could it reasonably be considered an act of self-defense given the circumstances? Reasonableness also informed the questions the jury would have to ask themselves when considering Thomas’s state of mind and whether he was provoked or not. Would a reasonable person, which is to say, an “average person,” have the reasonable belief that they were in danger in this situation, and would the acts of Fraser be enough to make a reasonable person lose self-control? Remarkably, the jury only had to affirm one of these conditions, *beyond a reasonable doubt*, in order to charge Thomas with second-degree murder. Otherwise, Thomas would become a candidate for a lesser charge of manslaughter. I find it shocking that the jury could not see self-defense in this scenario, or that they accepted that Thomas was “primed” for murder, or that he was not provoked, and that Fraser had no role to play in provoking Thomas.

The fact is, however, that we do not know which of the clauses, or if all of them, had been affirmed by the jury beyond a reasonable doubt. This issue speaks to a broader problematic of the Canadian criminal justice system in which the decisions of juries are inscrutable, and,

more specifically, the ways in which juries are often sites of affirming systemic anti-Indigenous racism.⁴ It is also a regular occurrence in Canadian courts that lawyers can manipulate legal decisions in their favor by using peremptory challenges to expel prospective Indigenous jurors, and the system is utterly incapable of determining or even posing the question of whether potential jurors might hold racist bias towards defendants or victims.⁵ Thomas case was characterized by the problem of jury formation, particularly that Thomas was judged by an entirely non-Indigenous roster of his peers. Legal theorist Kent Roach argues that such non-mixed juries lead to the inability to “recognize both different perspectives and understandings of justice.”⁶ Following Roach we could thus make an argument that the jury of Thomas was not able to see “Indigenous perspectives” in this case, but the problem or risk of such approaches is that we then fetishize such ‘perspectives’ as if there is some inherent and unapproachable essence to Indigeneity rather than considering the historical and political conditions of Indigenous and non-Indigenous relations that define this case. Furthermore, focusing on “Indigenous perspectives” prevents us from considering the fact that there was a deeper form of negation at work in this trial, one that reaches into the depths of semiotic intelligibilities of the jury as well as the judge, and which equally pervaded the argumentation and strategies of both the Crown and defense teams. The most profound occurrence of this trial was that if one were to read court transcripts one could not determine whether Thomas was Indigenous in the first place,

⁴ Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).

⁵ Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen’s University Press, 2018), 7–8.

⁶ Roach, 26. Roach grounds his analysis in the historical problematic of Treaties in the prairie provinces and related questions of multiple laws and how problems of jurisdiction have informed European and Indigenous relations over the past century and a half. This leads Roach to suggest the reform of enshrining mixed juries with equal parts Indigenous and non-Indigenous people, something he claims will appease the spirit of reciprocity of original Treaties. Importantly, this was an option that was never discussed with or suggested by a group of elders who provide Roach with his citational authority to ground his specific analysis of jury inequality within systemic racism and Canada’s historic negligence to Treaty obligations (*Ibid.*, 25).

a radical departure from the pervasive public discourse that had explained and understood Thomas's violence as a product of his Indigeneity, which comprised a constellation of stories ranging from his negligent mother and his subsequent (alleged) diagnosis of FASD, his dysfunctional community, and his tenure in child welfare. Now, none of these features were brought to bear on a consideration of Thomas's actions on that fateful Valentine's Day morning in 2017. We should not accept that these racial formations of Indigeneity are in fact legitimate descriptors of whatever we might mean by "Indigeneity," just as we should not accept that the simple presence of other Indigenous peoples on the jury would have somehow changed Thomas's fate. We are presented here, rather, with a question of semiotics and a profoundly political process of recognition in which Indigeneity is both imagined, or conjured, as a threatening essence while simultaneously being made unintelligible, or negated. The trial of Thomas provides us with an opportunity to understand the structure of this negation.

The first place we will start is thus by emphasizing the structural harmonies between the questions asked of the jury – of Thomas's lawfulness, his state of mind, and whether he was provoked – and the simultaneous absence of Indigeneity *and* FASD in this courtroom. We will see how a robust consideration of these factors could have re-constituted not only the content of the decisions made by the jury, but the form itself. I will argue that the encounter between Fraser and Thomas was built upon an entirely anti-Indigenous structure, seen particularly within the actions of Fraser and his implicit awareness of Thomas's racially spatialized otherness as he denied him protection in the warmth of this bus and demanded Thomas to expel himself into the remote cold. The parallels between Thomas being abandoned on the outskirts of Winnipeg in a neighborhood that he is visibly foreign to and the proven, genocidal ritual of 'dumping' Indigenous peoples on the outskirts of the city by police officers - euphemistically known as

Starlight Tours – is but one startling structural harmony that resonated in this case, yet went completely unmentioned in this trial.⁷ Similarly, if Thomas was denied this self-defense argument based on deep structural understandings of anti-Indigenous racism, it is equally true that FASD was denied as a potential argument for re-thinking Thomas’s state of mind. For all of the genealogical consideration and accounting of Thomas’s criminal subjectivity that led up to the trial – which, we will recall, made precise connections between his crime, his Indigeneity, and his (alleged) neurocognitive disorder – it is absolutely baffling that FASD would not then be part of a case for considering his state of mind. This is especially so because there is a growing literature claiming that several common symptoms of FASD – including impairments of executive functioning, memory deficits, and struggles with memory and consequential thinking – make individuals with FASD more susceptible to being involved in crime, either as perpetrators or as victims.⁸ My intention is not to make a case for the legal exceptionality of Thomas, particularly as a racialized or disabled person, but to highlight the particular logic in which FASD becomes attached to Indigeneity and how, in this case, we see this logic by virtue of how FASD becomes a corollary to the conditions of making Indigeneity invisible.⁹ The absence of FASD, we will see, is subsequent to, and informed by, a constitutive absence of Indigeneity in the courts; and this absence is intimately, intractably, related to the event that led Thomas before

⁷ See, for example, Tasha Hubbard, *Two Worlds Colliding* (National Film Board, 2004), https://www.nfb.ca/film/two_worlds_colliding.

⁸ Larry Burd et al., “Fetal Alcohol Spectrum Disorder as a Marker for Increased Risk of Involvement with Correction Systems,” *The Journal of Psychiatry & Law* 38, no. 4 (2010): 559–83; Katherine Wyper and Jacqueline Pei, “Neurocognitive Difficulties Underlying High Risk and Criminal Behaviour in FASD: Clinical Implications,” in *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives: An Overview on FASD for Professionals*, ed. Monty Nelson and Marguerite Trussler, International Library of Ethics, Law, and the New Medicine (New York: Springer International Publishing, 2016), 101–20.

⁹ Furthermore, we will see in the next chapter how Thomas is then treated to this exceptionality by virtue of his Indigeneity and his FASD!

the courts in the first place, where his body was being expelled, made absent, on the outskirts of Winnipeg in a place where there was “no place nearby” for him.

This perverse demand of Fraser: for Thomas to go where there was admittedly nothing for him -- is part of a cascading set of contradictions in which Indigenous life is held today, as both *recognized* and *unseen*. If Thomas’s Indigeneity or alleged FASD could not be raised by the defense, or indeed, spoken by the courts, as a means of challenging the lines between the legal categories of the lawfulness of his acts, or the state of his mind, it is equally true that the surveillance video would be subjected to the same interpretive foreclosure. Indeed, my analysis will be based around the discursive scene of the event itself, and particularly how the spatial and temporal logics of the scene of the expulsion continued to unfold in subsequent interpretive frameworks of police, reporters, and lawyers. No one, not even Thomas’s lawyer, asked where the Fraser expected Thomas to go. But this disavowal, or inability to perceive the contradiction, only echoes through other social-judicial spaces, such as the contradictory movement from considering Thomas as a monstrous Indigenous person to an abstracted and deracialized subject in the court of law. And here we see what other scholars have noted of the fundamental antagonism that Indigenous life presents to the Canadian state – particularly the legislative and criminal justice apparatuses – that repetitively and obsessively struggle to define Indigeneity in order to contain and eliminate it (Wolfe 2006) but whose juridical contours are constantly thwarted by a constitutive excess of this Indigeneity that makes it even more present and thus threatening (Bracken 1997). Indigeneity is thus less of an essence than it is the attempt to name, and control, an excess.

One of the direct questions asked in this chapter is how this structure is experienced in the everyday, particularly within the realm of the criminal justice system? Namely, if these

contradictions of settler governance are not resolved, but perpetually and repetitively re-produced, how are they encountered and/or reconciled in the everyday? Mark Rifkin's concept of "settler commonsense" offers promising possibilities for thinking through the everyday experiential level of settler colonial governance, and namely how its contradictions are both maintained while not being existentially registered as contradictions.¹⁰ By developing this concept, I argue that we can come to understand better how the figure of Thomas as a hyper-racialized and threatening subject becomes a deracialized and abstracted subject within the contours of "averageness" and "reasonableness" of the trial. Linking these phases of pre-trial and trial thus helps us to conceptually imagine the broader threads in which Indigenous life is judged as guilty and threatening in the juridical space of law as well as in the extra-judicial social landscape. As will be argued in this chapter, the settler commonsense we find in this trial revolves around, and can be conceptually registered as, a condition of expulsion. Just as Fraser was literally enacting the act of expelling an Indigenous man into the remote coldness of Winnipeg, so too was this expulsion unintelligible to the courts, which itself becomes a means of Indigenous expulsion.

Common sense

On the first day that I attended the trial I went to the front desk area to find out the court room. As soon as I told the cashier the name Brian Kyle Thomas, she looked up at me, as if startled, and said "oh, the bus driver killer!" She then put her hand to her mouth and said coyly, "oops!" as if to acknowledge her transgression while also sloughing it off as just a joke. In addition to the perverse mode of transgression that framed this encounter, there was an extreme

¹⁰ Mark Rifkin, "Settler Common Sense," *Settler Colonial Studies* 3, no. 4 (2013): 322–40.

confidence in her assumption of Thomas's guilt, a commonsense that I was fully expected to share with her. Ordinarily, I would engage such a moment with ethnographic curiosity and engage this receptionist like any other interlocuter in order to try and understand more fully the linguistic and emotional registers of her opinions and assumptions, but on this day, I could not stomach the charade and I stood silent and expressionless in the face of her 'joke.' But like any social force, we are most aware and can be analytically attuned when we stand in difference to the effervescence of social rhythms, and her drastic change in demeanor toward me expressed this unequivocally as she became awkward and sullen and then, without making eye contact with me, aggressively slid a piece of paper across the cold limestone stone desk that had the courtroom of Thomas's trial written on it. I said 'thank you' but she had already turned her back to me and gone back to her duties as if I weren't there.

If such Columbo-style ethnographic moments of encounter were demanding and exhausting, I learned that they were also quite useful too. Simply put, they helped me to attune myself to important social inflections of difference and (un)intelligibility. And while not originally a rigorously thought-out methodology, such moments became crucial for thinking through, ethnographically, the trial of Brian Kyle Thomas. After two years of being told that Thomas's crime was a result of his violent and incorrigible essence, which were derivations of his Indigenous conditions of life, these absences in the court of law were jarring, but even more so because no one else seemed to notice. I grew more and more anxious as I continued to explain my theory to field contacts, as well as colleagues and friends, who looked at me with indifference or, worse, dismay, as I tried to articulate the vacillations between Thomas's hyper-visible and -invisible status as an Indigenous man with a disorder, and why I thought this gap was relevant. Rather than feigning an ignorance or "playing the fool" in these moments I felt an

urgent need to communicate and explain myself in the face of incredulity. As my explanations seemed to so often fall on deaf ears, they also became more and more desperate, as if they were pleas. Far from practicing a sophisticated Columbo act, then, I constantly felt like I was embodying the worst parts of the slow-witted and exhausted detective. Was I really seeing these things?

On the last day of the trial, I had the chance to ask Thomas’s defense lawyer, Evan Roitenberg, about these absences. As I waited awkwardly in the marble halls outside of the courtroom during a recess, I thought about how I would ask him why FASD was not relevant to Brian’s defense, especially since it had been so widely publicized before the trial and given that FASD is increasingly subject to such scrutiny by legal scholars and legislators. Why did FASD not factor in considerations of Thomas’s state of mind, for example, or of his reasonableness? While I remain cautious and skeptical of the research, there is a burgeoning field of clinical research that argues that one of the main symptoms, or “secondary disabilities,” of FASD is a “reactive aggression.”¹¹ Other major research publications have argued that FASD leads one to be more likely to be involved with criminal behavior and criminal victimization,¹² and it cannot be lost on anyone that FASD is becoming more and more integrated into the criminal justice system itself, particularly in places like Manitoba where “FASD courts” for youth have been operational since 2005 and adult FASD courts were brought online in 2019. In addition to the

¹¹ Joseph P. Hornick et al., “FASD and Access to Justice in the Yukon” (Whitehorse, Yukon: Department of Justice: Canadian Research Institute for Law and the Family, March 2008); Stewart, “Environmental Scan.” For more on the notion of “secondary disabilities,” see Ann Streissguth and Jonathan Kanter, eds., *The Challenges of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997); Streissguth et al., “Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects.”; Fast and Conry, “Fetal Alcohol Spectrum Disorders and the Criminal Justice System.” My argument here is not to conflate or even correlate FASD with criminal behavior, which is often the outcome of such mentioned studies. Rather, it is to point out how Thomas’s defense ignored this growing list of research, which suggests broader patterns for how FASD and Indigeneity are entangled in the criminal justice system.

¹² Fast and Conry, “Fetal Alcohol Spectrum Disorders and the Criminal Justice System.”

question of FASD in the criminal justice system, I was also pondering the overwhelming data and research on systemic discrimination and racism of Indigenous peoples in the criminal justice system, how they are overpoliced, more likely to be over sentenced, and chronically under protected, when Roitenberg came walking by.¹³

My questions tripped over themselves as I tried to walk and talk with Roitenberg, who immediately expressed his displeasure with me. He first asked me, incredulously, who I was, not recognizing me as a reporter or family member. My explanation, that I was a PhD student doing research on the criminal justice system and FASD, seemed to provide me with some credibility as Roitenberg slightly let down his guard. He then bluntly responded that FASD had “nothing to do with what I needed to prove in this case.” He casually dismissed FASD as relevant to any of the numerous factors of Brian’s “reasonableness” or his “state of mind,” or whether he thought he was provoked or not. Roitenberg was eager to leave and showed that he was growing tired of my questions and clarifications, so our conversation did not last more than a minute. I did not even get a chance to ask him about the bizarre absence of Thomas’s Indigeneity in the courtroom, so I walked away very disappointed and unsatisfied. If I was left with more questions and uncertainty after speaking with Roitenberg, however, I did walk away with the distinct impression that Roitenberg’s legal stance was clear. Even if it was a bit shocking to me that FASD had “nothing to do” with proof or strategy for making a case of Thomas’s self-defense or casting reasonable doubt on the case of the Crown, I knew that for Roitenberg it was all so absolutely obvious. He emphasized this obviousness to me in his not-so-subtle conveyance of being annoyed with me. In fact, it was his expression of annoyance, as if I did not understand

¹³ This literature is vast. Two relevant examples are: Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*.; Gillian Balfour, “Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women,” *Feminist Criminology* 3, no. 2 (April 1, 2008): 101–20.

these basic legal principles and why he chose the strategy that he did, that made me realize I was outside of some form of commonsense. This is where I first began to understand that the absence of FASD was a condition of a broader commonsense, one of Indigenous expulsion.

This commonsense was not just a feeling, or a demonstration of one's outsidership, however. I began to notice how it bled into every aspect of Thomas's trial and case, including the rhetorical structures and modes of reasoning utilized by the opposing lawyers. For one, there was a commonly accepted legal 'fact' by both Crown and defense that Thomas was responsible for the killing of Fraser. This was not a "whodunnit," defense lawyer Evan Roitenberg put it in his closing, and only, statement to the Jury.¹⁴ The trial, it turned out, was exclusively a matter of proving his intent: was he a cold blooded murderer, or, did he make a mistake and cause the death of someone while defending himself? The Crown, Keith Eyrikson, told the jury that its job was simple: "you must determine what is true." He instructed to the jury that they did not "have to check your common sense at the door," and that they could "take your life experiences" and apply them to this case. Their argument was equally simple: Thomas stabbed Fraser and planned to do it before they got into a fight, and his intoxication or state of mind could not be used as mitigating claims of self-defense. Thomas wanted to fight Fraser, they argued, and when someone wants to fight someone the clear intent is to hurt them. And how intoxicated do you have to be to not know that stabbing someone will be potentially fatal? The defense, alternatively, stuck to the well-worn defense position of presenting less of their own case than of presenting a series of negations to the Crown's case. Simply put, they did not seek to prove Thomas's innocence, or even to robustly argue for a case of self-defense. Their main question was whether this was a case of meditated murder beyond a reasonable doubt. The Crown, they

¹⁴ Unless otherwise cited, all citations of courtroom proceedings are gleaned from ethnographic notes taken in the courtroom.

argued, must prove Thomas's actions were not reasonable under the circumstances. No surprise that the defense disputed and disagreed with the Crown's position, but it was how Roitenberg presented his case to the jury as if it was all pretty straight forward and simple, and particularly his with the same sarcasm and cynical undertones that had characterized his conversation with me, where I detected an unmistakable rhetoric of 'commonsense.' Remarkably, Roitenberg repeated to the jury the words and sentiments of the Crown, verbatim, that they did not need to "check your common sense at the door."

In their closing arguments, both Crown and defense thus presented arguments that were similar not only in the confident delivery or use of the same rhetorical gestures of the obvious. Such sophistic performances are typical of the adversarial theatrics of the court, but there was something different about this moment as the claims to truth, the rhetoric and the sentiment of these two lawyers bled into one another. Of course, technically both legal parties had agreed as fact that Thomas was responsible for Fraser's death, but, as we will see, between the arguments and efforts, and various assumptions and blind spots of these legal teams, there was not much of a difference in the ways they treated Thomas, and they did not seem to be really competing with one another at all. As the days wore on a troubling question began to insist: could they both be arguing for the same outcome, if not truth?

This became evermore apparent on the last day of the trial when Judge Joyal gave his instructions to the jury and similarly told them to use their own 'commonsense' when determining Thomas's guilt. Interestingly, Joyal instructed them that as long as the jury disregarded completely anything that they heard about the case outside of the court, did not make decisions with sympathy, fear, or public pressures, and relied exclusively on their memories for determining evidence, then commonsense would prevail. Commonsense, he instructed, would

logically determine reasonable doubts. While there is no such thing as absolute certainty in law, and no such thing as “likely guilty,” Joyal made it seem quite simple: if you are not sure if Thomas committed the offense he is charged with (second-degree murder), then he is not guilty. Similarly, when considering the credibility of witnesses, there is “no magic formula,” but commonsense would guide one to decide if a witness “seemed honest” or if they “seemed to have a good memory” or if anything they said “seemed genuine or made up.”¹⁵ Finally, Joyal asked the jury to use their “life experience” to measure the evidence as a whole, to put themselves in Thomas’s shoes, so to speak, when determining the reasonableness of his actions. He noted that of course they would inevitably have to abstract here and consider Thomas against a “reasonable person” who is, by definition, “sane and sober” and “has self-control,” baseline qualities that we would expect of any other citizen. He curiously then qualified this abstract citizen even further by instructing the jury to consider Thomas’s actions against a “reasonable citizen” who was the same age, gender, and relative size of Thomas. The crucial qualifiers of race and class were conspicuously absent here. And as we saw in chapter one, would any of the jurors truly be able to consider things like what it must have been like to live through 73 different foster homes? Would they wonder about *reasonability* through the prism of FASD, which is cited as a disorder of executive functioning, consequential thinking, memory and thus, presumably, reasoning itself? Joyal’s instructions of commonsense thus harmonized with much of what the lawyers had been arguing in the conspicuous abstracting of Thomas’s life which included, most crucially, the absence of his Indigeneity and thus all of the context that had previously come to inform public thought about Thomas’s actions.

¹⁵ These quotes come from my notes and are, to the best of my knowledge, direct quotes. There was a repetitive use of the verb “seem” and I emphasized this in my notes of Joyal’s delivery. Court transcripts are cost prohibitive to obtain in Manitoba courts, so I cannot verify this with absolute certainty, but my memory and my notes lead me to infer that Joyal’s language here was a highly relevant and important ethnographic observation to note.

As indicated by both lawyers and Chief Justice Joyal himself, we were being guided in this trial by a notion of commonsense that is quite literally subject to that realm of the “feeling of givenness” that Indigenous Studies scholar, Mark Rifkin, cites as central to the ideological structure of *Settler colonial* commonsense.¹⁶ Rifkin builds explicitly on the late Patrick Wolfe and his theorization of settler colonialism as a *structure*, rather than an event, and asks how the ‘logic’ of the elimination (of Indigenous life) at the heart of this colonial project becomes part of the “geographies of everyday non-Native occupancy that do not understand themselves as predicated on colonial occupation or on a history of settler-Indigenous relation”? Furthermore, what are the “contours and effects of such experiences of inhabiting and belonging?”¹⁷ It is in the affective realm of *givenness*, Rifkin argues, that need a deeper theorization as this is where the falsifiable premises and fundamental contradictions of settler governance and its administrative infrastructures, legal categories, geographies, and subjectivities are sublimated in sensible ways. Namely, it is the “quotidian experiences of space (with respect to jurisdiction, occupancy, and ownership) and subjectivity (as modular, self-identical, and extralegal) [that] affectively register and iterate settler sovereignty in ways that shape the generation of... ethics, ideals, and political projects that do not take Native nations, voices, and lands as their direct object.”¹⁸

To stage this notion of settler commonsense more generally, it is helpful to recount the highly studied and sensationalized criminal trial of Gerald Stanley in January and February of 2018.¹⁹ This case helps us to see what we mean by the commonsense of Indigenous expulsion from the criminal court process, specifically, and offers an important inverse case in which to

¹⁶ Rifkin, “Settler Common Sense.”

¹⁷ Rifkin, 324.

¹⁸ Rifkin, 337.

¹⁹ Stanley had killed Colten Boushie in August of 2016, on his farm near Biggar, Saskatchewan, after Boushie and some of his friends stopped for assistance with a flat tire.

juxtapose the case of Thomas and other Indigenous defendants as the outcomes are, predictably, in direct inverse relation, with a white, settler man being acquitted for the crime of murdering an Indigenous man, Colten Boushie, at pointblank range. Both cases were not “whodunnits,” and it was accepted as fact that Stanley had killed Bushie, just as Thomas had killed Fraser. However, Stanley was acquitted of all charges, even manslaughter, while Thomas was found guilty of second-degree murder. By juxtaposing these cases we can develop a greater understanding of the metonymical mechanisms by which Indigeneity is strategically expelled in the courtroom through manipulation of Indigenous presence and absence in these spaces.

Commonsense fear of Indigenous truth

The Stanley trial was, in many ways, a demonstration of how Indigenous representation is strategically mobilized in the courts of Canada, and a testament to how anti-Indigenous structures work at this level of representation through various manipulations of legal structures and their impasses. Many commentators have highlighted the representational battle ground that this trial symbolized. Legal theorist, Kent Roach, has observed the most bizarre condition of this trial, whereby outside and in the media and chatrooms the trial was divided down the symbolic lines as a case of anti-Indigenous violence and white vigilantism or as a case of poor white farmers under siege by wild Indigenous communities; but within the courtroom itself these stories were kept under strict lock and key, mainly by the tactics deployed by the defense team on behalf of Stanley. As Roach summarizes: “The Indigenous presence in the courtroom appears to have been approached with, at best, a lack of understanding and, at worst, suspicion.”²⁰ Thus, Roach notes how the defense, fully aware of the historical, cultural, and demographic story

²⁰ Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen’s University Press, 2018), 147-48.

disadvantaged the optics for their client, systematically eliminated Indigeneity from the courtroom, beginning with a culling of the jury itself, where they used five of their fourteen pre-emptory challenges to eliminate any visibly Indigenous people from jury selection, which resulted in an all-white jury (117). More symbolically, the defense team approached all “evidence representative of Indigenous identity” with suspicion (162). So, for instance, the defense team treated it as “something odd” that witnesses to Boushie’s death had spoken with investigators with the Federation of Sovereign Indigenous Nations (FSIN) (162). Formed in 2000 in aftermath of explosive revelations of what became known as “Starlight Tours” by Saskatoon police that had killed several Indigenous men, the FSIN was created to conduct investigations of complaints by First Nations peoples against the RCMP and other municipal police forces in Saskatchewan.²¹ As Roach notes, the FSIN is a highly symbolic entity not only for Indigenous peoples as a beacon of accountability and even safety, but one that has inevitably come to stand in for the white/rural-Indigenous divides in the province (162). As Stanley’s lawyers used the common language of “meddling,” “colluding,” and “interfering” to describe the efforts of the FSIN in this case, Roach surmises that this was a way of communicating to the all-white jury that their defendant was being persecuted by an anti-white ‘cause’ (162-63).²²

While Roach recognizes these moments of systemic and highly individualized prejudice as enactments of ‘suspicion,’ the weight of his arguments are geared towards a “lack of understanding” of “Indigenous difference.” Indeed, the title of his book reflects his sense of difference and how the Canadian legal system has not included Indigenous laws or values. This

²¹ Starlight Tours will be discussed below.

²² The FSIN was a prime antagonist in a documentary film, *When Police Become Prey*, that was highly critical of the starlight tour investigations. A former police officer is quoted in the film accusing the FSIN of being driven by “an agenda... by special interest groups to advance a sympathy cause.” See also Candis McLean, *When Police Become Prey: What Lies Behind Starlight Tours* (Silver Harvest Productions, 2006).

analytical position is appreciated, but it leads to some particular blind spots in Roach's analytical framework. For instance, in his commentary of the defense team's presentation of pictures of Boushie's dead corpse in the court, he wavers between this being a demonstration of a lack of understanding of Cree law with respect to representing a deceased while they are on their journey after death, and a deliberate and cunning exploitation to shake up and ultimately challenge the credibility of various witnesses (147). Of course, his ambiguity naturally emerges because it is both of these things. When some witnesses broke down in tears Roach says that the lawyers and the judge tended to "responded compassionately," yet adds that they did "not seem to appreciate why the witnesses may have reacted to the photo as they did," or, in other words, that they did not understand Cree protocols of representing the dead (156). It is also true that the defense explicitly feigned ignorance on this issue when one witness said that they did not "want to see" the picture. When the judge intervened to make sure Stanley's lawyer knew this, the latter responded: "Yeah, which concerns me a little bit that there's been some talking, but it doesn't have – it's – it's a pretty neutral picture" (156). As Roach makes clear, these strategies directly came to bear on a broader strategy of discrediting such witnesses, whose literal inability to speak became demonstrations of their incredible testimonies for the defense team. But whether more 'understanding' of Cree law would have made a difference in the strategy of the lawyers is a dubious assertion at best, for it seems that the lawyer in question was deliberately exploiting this 'cultural' protocol for the benefit of his strategy.²³ Perhaps if the judge had known about this Cree law he would not have pushed for the witness that he needed her to "answer in words for me," but the disclaimer by the Stanley defense that the picture of the corpse of Boushie was "neutral" adds a whole other element to this dynamic. This was a repeat *strategy of showing* that

²³ It also doesn't strike me as necessarily a matter of 'cultural' difference here, as showing a picture of the brutalized corpse of a loved one seems to me to be universally traumatic.

was deployed by the defense, who seemed to not only derive strategic benefit from this but also a perverse enjoyment in displaying the corpse of Boushie with a bullet hole in his head, slumped in the driver's seat of the car. The jouissance of this profane act is witnessed in its more ambiguous forms in other moments of the trial.

In light of these highly strategic deployments of Indigeneity by the defense team, there appears to be a certain excess or surplus that cannot be captured by Roach's characterization of Indigeneity as a cultural object of either ignorance or even suspicion. In one of the most significant points of the trial, when Gerald Stanley took the stand, a request was made by a juror who claimed that someone waving an eagle feather in the galleys was creating a distracting and menacing environment (147, 162). The judge framed his and the juror's request in terms of cultural sensitivity – “I want to respect culture, and I want to do what's fair” – but subjected culture to the procedures of the court and the feather was explained to be a distraction – “I would respectfully request that you not wave it at Mr. Stanley. Okay. Is – is that fair?” (161-62). An “unidentified speaker” claimed that the feather was not there to present harm but a reminder that “the creator is here” and an embodiment of “truth and justice.” The feather, this anonymous speaker said, calls for “the truth to be told” (161). Roach notes that this eagle feather was “perhaps indicative of a sense of justice that was not limited to man-made justice” (161), but he misses the fetishistic quality of the feather here, which, if it does in fact sit as a metonym for another order of law and being, is experienced more as a spiritual hex. We are reminded here of stories of justices of the peace running out of courtrooms because they interpret the speech of Indigenous languages in their courtroom not as disrespectful but as a threatening spells.²⁴ This is not simply an ironic, isolated, moment of the Canadian courts, where the feelings of the juror, or

²⁴ Kenneth Jackson, “Ottawa Judge Tells Ojibway Man She Doesn't Want to Hear Another Sob Story,” *APTN National News*, November 10, 2015.

of Stanley himself, are given precise attention and understanding, in opposition to the brutal inflictions made upon witnesses who were forced to endure the excessive and repetitive display of their mutilated loved one. Where the pictures of Boushie's dead body were 'neutral,' this feather possessed a power that was decidedly menacing. As per Judge Popescul's intervention to "...not wave it *at* Mr. Stanley," the feather seemed to go beyond distraction or even suspicion. This is not simply, or only, about how the courts and its legal structures are strategically manipulated, but how such anti-Indigenous structures are motivated by deeper feelings and even, dare we say, fears of the Indigenous, magical other. Importantly, though, these are not necessarily experienced as encounters with the contradictions of settler colonial governance, but as encounters with legal neutrality, decency, and the related acts of display and of complaint.

We see this most clearly in the Stanley trial in the repeat complaints of "distraction" made by the jury, who felt that the Indigenous peoples populating the gallery were "snickering" at them or perhaps even taking pictures of them (Ibid., 162). These fears, of which the accusations of picture taking appear to be largely groundless, at least by the judge's account, nonetheless illuminate a much deeper dynamic, clues of which we might find in Chief Justice Popescul's address to the gallery when he attempted to dispel any notion of opposition between the jury and the largely Indigenous gallery: this trial is not "a sporting event where we're rooting for one team or another," he said. Rather, he continued, "It – we have to be very – respect [sic] the sanctity of the courtroom" (161-62). The reference of the sacred and the sacrilegious seems to be lost on Roach, who, in a bewildering understatement, suggests that these moments of paranoia indicate "that there *may* have been some tension between the all-white jury and the Indigenous spectators" (162, emphasis added). This is particularly shocking in the face of the infamously publicized video of the jury literally running out of the court room upon reading

Stanley's verdict of not-guilty on all accounts.²⁵ More than a cultural object of suspicion and ignorance, then, Indigeneity is something to be strategically manipulated and overcome within the structures of the court and its unfolding process of legalistic due process. We might say, then, that underneath the suspicion of the FSIN, the insecurities of snickering Indigenous peoples, the fears of having one's photo taken by an Indigenous person, or the fears of an eagle feather lies a deep truth: the reminder of an alternative social, political, and spiritual order of truth and justice. But in the commonsense of the everyday, in the structures of feeling of belonging, citizenship, decency, as much about upholding the sacred oath of the "rule of law" as it can be about perversely taking enjoyment in watching Cree witnesses fall apart under cross examination.

With this theoretical perspective in mind, we will now turn towards an analysis of Thomas's trial to consider how Indigenous expulsion moved from the feelings and demands of Fraser, to the interpretive encounters of police officers and media reporters, to the conceptual and rhetorical structures used to make arguments by Crown and defense. Specifically, we will be especially attuned to the peculiar disavowals contained in this event, from the demand to exit to a nowhere land, to the inability for lawyers, police, and media to recognize such contradictions. What are the lived realities of occupancy and jurisdiction, and what kinds of extralegal identities, are necessary for, or immanent to, these conditions of possibility and intelligibility? We will see that the acts of disavowal and the unlimited capacities for absorbing contradictions of settler-Indigenous relations are contained within a social signification of *expulsion* that comes to inform not only the absence of Thomas's FASD and Indigeneity, but as the guiding experiential signifier

²⁵ It was particularly galling to most that Stanley did not even receive a guilty charge of manslaughter given the accepted fact that he killed Boushie with his pistol and a point blank shot to Boushie's head. It was as if the jury could not even consider Stanley to be a negligent gun owner, but more centrally, they recognized that their decision was in some violent opposition to Indigenous peoples who they quite clearly feared.

by which settler subjects inhabit and belong without ever truly confronting the relationship with Indigenous life. Curiously, we will see how the shadows of the surveillance video itself come to articulate, if not accentuate, the murky everyday experiences in which Indigeneity is kept in the shadows.

The frame of the crime, the truth of shadows

I remember feeling so disappointed in myself for being naïve enough to think that the showing of the surveillance video footage would make any difference in Thomas's case. Why would I think that watching this video would give Thomas a chance for developing a case for self-defense? Yes, Thomas's acts could now be requalified. Thomas did engage Fraser violently, but there were incidents of violence committed by Fraser that preceded and could be interpreted, I thought, as even precipitating Thomas's actions. At the very least, I thought, the official accounts provided by the police – and the official and publicly accepted story – that Thomas's unruly refusal to get off the bus led directly to Fraser's death – would have to be thrown out and the public would have to begin constructing a new story about this violent event. But herein lied the rub, for it was precisely that the video *could* be presented as anything else that I avoided with deluded optimism. That Constable Jason Michalyshen's could describe to reporters that Fraser's death was caused because “this individual [Brian] just refused to comply, and became confrontational, until this erupted to a very physical confrontation,” should have made me more sensitive to the ideological murk from which this video could be seen at all.²⁶ So, I will now account for this ideological formation. Beginning with the most pointed question that I asked myself after my optimism had been squashed: How else could Fraser's impossible demand to

²⁶ Winnipeg Sun, “Refusal to Leave Bus Led to Driver's Death.”

“get the fuck off the bus,” into a nowhere scenario, be described as a refusal of compliance? What did anyone think that obedience to compliance would have meant for Thomas?

Implicit within this narrative of compliance and the framing of refusal is a peculiar mobilization of the concept of choice; namely, that Thomas could have simply accepted the order of Fraser, but chose to resist it.²⁷ There is something so strange about this loose arrangement of choice that deserves analysis. It is similar to how reporter Coubrough casually did not follow up with Chief Napaokesik’s claim that Thomas *decided* not to return to the reserve with him months before this fateful encounter, that he *decided* to live on the streets of Winnipeg rather than on his home reserve. She did not ask basic questions like, would Thomas even have access to housing on the reserve, and would he really be ‘better off’ there?²⁸ Similarly, no one thought to question the structurally limited, if not impossible, demand of Thomas to comply, that his ‘choice’ not to comply was itself a response to the impossibilities of adhering to the demand to leave the bus and be stranded in the cold. It was easier to see Thomas as refusing, *choosing* not to comply than to see him as faced with an impossible choice – violence on the warm bus or the chance of exposure in the outdoors.²⁹ It is tempting to think of *choice* here as an element of ideological-fantasy, specifically in the psychoanalytic register of the *staging of an impossible scene or gaze*, for there is something precisely impossible of this scene: Where did Fraser, or anyone else, expect Thomas to go?³⁰ I imagined how this might be explored by a news headline:

²⁷ I suspect that part of the reason that this event was so troubling for people was thinking about this radical decision contained within this concept of refusal, that Thomas was not simply being disobedient but expressing and enacting a pure and radical subjective will. Perhaps this is why it was so easy to assume Thomas’s guilt, because of how the assumption of his will, of his exercising of choice, demonstrated his radical responsibility for this event?

²⁸ Coubrough, “‘We Hoped He Could Be Helped.’”

²⁹ This dialectic of safety and danger could just as easily apply to his experience of housing in foster care before he was released in to homelessness. The very idea of living in seventy-three foster homes betrays the lack of basic tenets of comfort and safety that a home is typically supposed to provide. There is a way in which Thomas’s *choices* are always made within a fluidity of home/homelessness, safety/danger.

³⁰ For an elaboration on the ideological formations of fantasy, see Slavoj Žižek, *The Plague of Fantasies*, 2nd edition (New York: Verso, 2008), 11.

To remain on a bus and face violent confrontation, or leave the bus and risk the physical challenges of exposure. Such a headline would have framed the impossible conditions of choice here, but its impossibility belies a deeper structure of the efficiency and efficacy of a symbolic fiction that structures experience. More fundamentally, however, it shows us a particular impossibility of this sphere of representation to conceive of the materiality of this event. Absent in all of this is any consideration of the space of the bus itself, of the location that Thomas would be thrust into, or the temperature, or the very fact that Thomas was ‘choosing’ to stay in a place where he was experiencing violence.³¹ And it allows us to more directly perceive the historical resonance of this ideological formation. For it was precisely a false choice that was presented to Indigenous groups in the late nineteenth century when Canada was expanding westwards, asking Indigenous groups to sacrifice their freedom in turn for mutual and equal relationship in Treaty. Except that in conditions of famine, these ‘choices’ were subtended by strategies of deliberately starving bands and thus coercing them into treaty with the promise of food. As bands continued to starve under Treaty agreements, it was clear, argues historian James Daschuk, that Treaties were a means of subjugating Indian populations and secluding them onto reserve lands, and thus facilitating the construction of the Canadian Pacific Railway and Canada’s continual expansion west.³² Fraser mobilized choice in a similar fashion, and the ideological framework of his non-compliance buttresses this contemporary form of the demand of Indigenous subjugation.

³¹ Similarly, reporter Coubrough abstracted the spatial question of urban and reserve, assuming out of the equation the very material realities of universalized poverty and an extreme shortage of housing that afflicts every single reserve community in Canada. Was it a choice to not return to equal conditions of poverty but in a more secluded geography?

³² James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina, Saskatchewan: University of Regina Press, 2014), 114, 125.

Bus driver common sense

It was not only Thomas's choice that came under fire during the trial, however. On the day that the court saw the surveillance footage I had opportunity to speak with a couple of bus drivers who showed up to witness the trial and show support for Fraser's family and solidarity for their fellow bus drivers. One of my conversations was with an older man who I assumed was nearing retirement. His hair was white and unkempt, and he wore an over-sized, well worn, blue transit winter jacket with the zipper open, which made him look smaller than he was. With quick eyes, this man spoke frankly and with the wit of an older working-class generation. He told me without hesitation that this incident, tragic as it was, was "entirely preventable." Shaking his head, half in regret, half in cautious judgment of Fraser, he began listing the many "close calls" he had as a driver and how, as a public transit operator, one needed to learn quickly how to "read people." To me he was communicating in his own words what I took to be a very candid explanation of what I might call "de-escalation techniques." While refusing the flourishes of human-resource-speak, this driver said plainly that this strategy of reading people was entirely in the realm of "commonsense." It was about "basic decency," he said, and showing people respect and lending a helping hand whenever one could to those in need. As he muttered under his breath, again, that Fraser's death was "entirely preventable," I asked him what exactly he meant. Could Fraser have simply given him a ride back downtown on his way to return the bus to the depot, I asked? He looked at me for a second and cautiously nodded, adding, "yeah, or he could have closed the doors" once Thomas was off the bus. The focus of our conversation was not on the bus, but in the moments after, on Fraser's *decision to leave* the bus. This was, interestingly, one of the main arguments made by defense lawyer, Roitenberg, several days later, when he recounted to the jury how an eyewitness bus driver who pulled up to the scene decided to shelter

himself on his own bus and call for back-up when he saw the struggle of Fraser and Thomas. Roitenberg championed this position, noting, “because this is how you make things safe.”

As this driver and I continued our candid conversation, I noticed a man watching us from the corner of my eye. He had been around the entire trial, mulling with the drivers and family members, speaking with reporters whenever he could. I assumed he was a Winnipeg Transit union representative based on how differently he dressed – with nice leather shoes, a cleanly shaven face, neatly cropped hair, khaki pants and a dress shirt covered with a neat, thin wool sweater – though I never was able to confirm this. He quickly approached us as my interlocutor was getting animated about his stories about commonsense decency and how he’d avoided so many violent encounters in his day. Stepping between us and with his back to me, and in a quiet but firm managerial voice, he encouraged this driver to “be careful” about how he was speaking about the surveillance video we just saw. The driver seemed to be embarrassed and began apologizing that he meant no disrespect to Fraser. The managerial man interrupted him and said, “I know, but you just never know who is listening.” He then walked away and began mingling with other drivers. And with that, the feisty driver who had been so willing to speak to me before now gave me a shrug and a sarcastic huff, indicating that our conversation was over.

What we see here is an interesting alternative angle in which to consider our prior concern of obedience and compliance. It seemed clear to me that the manager figure was intervening from a public relations perspective, demanding that the driver not stray from the line of advocating for transit operator rights, of which Fraser’s death was a major flash point of mobilization.³³ And comply the driver did, though not without expressing his own clear sense of disagreement with this demand as he slightly rolled his eyes to me. By considering the

³³ Pursaga, “Assaults Remain Constant Risk for Bus Drivers | Winnipeg Sun.”

similarities between the driver's interpretation and the legal argument made by Roitenberg, however, we also witness here a shared fixation on where an assessment of choice should be focused. For the part of the driver, he was interpreting the surveillance video from his own life experiences and values of decency, as well as how one must handle oneself in the heat of the moment. As he described his close calls to me, the implication was that Fraser should have closed the doors because he should have read the imminent violence on the wall. Roitenberg echoed this sentiment of Fraser's bad choice by suggesting that the latter simply chose not to keep himself safe. In both cases, the temporality of this question is artificially limited, which leads both to simply accept that Thomas was the violent threat. And the obvious question, of why Fraser didn't simply drive Thomas back downtown, was thus never posed. The manager, for his part, was less interested in judging Fraser's choices as he was in preventing them from having a negative impact on how Fraser's death would compromise further advocacy for transit driver rights, all of which were expressed in the modality of safety and the dangers presented by an unruly underclass of bus patrons. While these three actors all have their own reasons for making these claims of Fraser's choice, there is a shared temporally modified assessment of the danger posed by Thomas as a risky and violent subject who can only be viewed as a potential threat in the tense of the past perfect continuous (he had been a threat), present (he is a threat) or the future anterior (he will have [already] been a threat). And in this shared sense, all three of these differently situated social actors enacted a specific disavowal of the spatial and temporal qualities of choices made that tragic night, particularly in how they neglected everything that led up to the moment of Fraser's alleged bad choice. Was this his only moment of making a bad choice? And was it only this choice that could make sense of the tragic event that transpired? As

we will see, this temporal narrative was largely the work of the carefully crafted argument of the Crown prosecutors.

The Crown's case

In the Crown's closing remarks to the jury the lawyer, Keith Eyrikson, suggested to the jury that "it is easy to say Fraser should have acted much differently and should have been less aggressive." But he reminded the jury, that this had nothing to do with the task in their hands: "...at the end of the day, this does not justify what happened *next*." The Crown thus began with a tactic of making strategic temporal cuts in the event that was caught on the surveillance footage: the period where Thomas is on the bus; the moment he is removed from the bus; and the moment that takes place immediately once Thomas is outside of the bus.

The first stage proved to be the trickiest to narrate because it is where Fraser is the obvious aggressor and Thomas is literally pleading for help. Clearly, Eyrikson had already alerted the jury to focus on "what happened next," namely, Fraser's death, but he still had to attempt to clean up this first temporal moment for, as Judge Joyal would ask of the jury, they would have to consider what Fraser said and did, before, during, and after the event in order to determine things like whether he provoked Thomas, or whether Thomas had reasonable belief that his life was in danger. Eyrikson's reasoning as he took the jury through these earlier moments was decidedly not of legal provenance, but was rather of the quality of affective and impressionistic conjecture. He began with a prompt: "put yourself in his [Fraser's] shoes for a minute," and laid out the scene: *it is the end of your shift, it's the middle of the night, and you're tired from a long day. Then you encounter a troublesome patron.* "He's not a crisis worker," Eyrikson adds for the jury. Within the linear narrative that the Crown constructed, this is, of

course, hard to accept, unless we accept that Thomas asking for help was troublesome. The emphasis of Fraser not being a “crisis worker” provides necessary significance to his meaning, however, and while Thomas is not identified by any demographic descriptors, such as Indigenous, poor, or as a lifer in foster care, it is this linguistic phrasing that colors in such demographic impressions of a troubled life and a troublesome being.³⁴ He continues describing Fraser’s dilemma: “He’s a bus driver. And he wants to go home.” If the jury is in Fraser’s shoes, wouldn’t they too just want to go home and sleep? Eyrikson phrases this affective state within curious juridical language: “can you blame him?”

With the impressionistic and emotional realm of exhaustion standing in to rhetorically and pre-emptively exculpate Fraser of any “blame,” Eyrikson then moves on to list some significant facts, such as the number of times Thomas was asked to leave the bus (twenty five times, to be precise). He notes that it was unseasonably warm that February morning (though still freezing weather!). He also made some bold declarations of Thomas’s intent and character that explicitly parroted Fraser’s own accusations and sentiment. For one, Thomas was not being followed, like he claimed. Where Fraser explicitly accused Thomas – “you were awake!” – Eyrikson simply disputed Thomas’s story by suggesting that Thomas appeared to be awake when the group he was with departed the bus. Both were rooted in an undeclared premise that Thomas was out to dupe or fool Fraser, yet no evidence or argumentation is ever offered by either Fraser or Eyrikson to back up this claim. Such as, what would be the point of ‘duping’ Fraser? To stay warm? To get a ‘free ride’? Even if Thomas was engaging in an act of subterfuge, in what world are these goals able to be considered as pernicious? To top off these subtle and unspoken

³⁴ The usage of “worker” also conveys well-established associations to social services and details not simply Thomas’s socio-economic and racial position, but a set of a structural conditions and relations of as a youth who is of ‘the system.’

assumptions, Eyrikson further suggested that, because Thomas was found with nearly \$25 in his pocket, he had other options, such as calling for a cab.³⁵ Despite this Crown attorney's (willful?) ignorance of Thomas's poor economic conditions that this line of reasoning implies, it is consistent with the Crown's overall argument that Thomas was out to get Fraser and that Fraser was justified in his actions towards the deceptive and violent Thomas. Such impressionistic and, unclarified premises, were being proposed to the jury in their deliberations of Thomas's intent and, more directly, his state of mind that fateful morning.

It is worth repeating here that the story told by the Crown – that *if only Thomas would have left the bus, things would have turned out differently* – bears almost an identical resemblance to the causal narrative offered by the police to reporters, who told reporters that it was Thomas's "refusal to leave bus" that then "resulted" in the death of Fraser. But, again, to remain within this *frame* there are some explicit disavowals and unfathomable interpretive flexibilities required that make this narrative much more.³⁶ The clearest example was given by the Crown when they downplayed Fraser's violence by suggesting it was "minimal force" and that he did not kick, punch, or slap Thomas. Strategically avoided were any considerations of the pain inflicted on Thomas's body. Indeed, the only way that Thomas's body is taken into consideration is in the way that it can be construed as a weapon or a threat. As will be discussed

³⁵ The quickest route from Chancellors Circle at the University of Manitoba, where Fraser's bus ended its route, and to the "gates" of the North End just beyond the downtown of Winnipeg, the area most often associated with Indigenous peoples, is 11.7 KM, approximately a 25-minute ride by car. According to taxifarefinder.com this would work out to roughly \$40 before tip. See <https://www.taxifarefinder.com/main.php?city=Winnipeg&from=66+Chancellors+Circle%2C+Winnipeg%2C+Manitoba+R3T+5V6%2C+Canada&to=715+Main+St%2C+Winnipeg%2C+Manitoba+R3B+3N7%2C+Canada&fromCoord=49.80957,-97.132684&toCoord=49.903953,-97.134145>

³⁶ And here we might return to a more psychoanalytical concept of the fantasy scene as the "primordial form of narrative," a function that conceals the "original deadlock" of the pre-symbolic (*real*) and offers a sense of resolution precisely through rearranging the terms of this antagonism in temporal succession. Žižek, *The Plague of Fantasies*, 11. If this antagonism of the *real* is, indeed, why we tell stories, we would read here not Fraser's violence as the deadlock to be narrated, but as a temporalizing and rearranging feature itself of a much more universal and grounded deadlock of the encounter with Indigeneity itself.

below, Eyrikson focused on Thomas's hands as they held on to the railings as evidence of his stubborn refusal. As he zoomed in on these desperate hands, he slowly built an argument of Thomas's aggression and shifted the more obvious account of his self-defense.

Despite these incredible attempts at weaponizing Thomas's body, it is Fraser's actions that still required a great deal of explanation continuing into the "second stage" of events, for it was at the end of this stage that Fraser ultimately left the bus and pursued Thomas in combat. He admitted that Fraser "wouldn't get a merit badge" for his behavior, though he carefully rebutted such claims with rhetorical questions that always returned the question of morality to Thomas: "but what about the behavior of the accused?" he asked. He noted that in this 'second stage,' once Fraser has "escorted" Thomas from the bus, it was the latter who prevented Fraser from closing the door because he was punching at Fraser and taunting him. This is inferred, though not convincingly argued or demonstrated as there were several moments when it seemed clear that Fraser easily could have closed the doors.³⁷ Instead, Eyrikson returns to Fraser's standoff character: for he "would be justified" if he had punched back in this moment. Eyrikson suggested that it was remarkable that he did not. Even after Thomas called Fraser a "bitch," Eyrikson seemed to be impressed that Fraser was able to contain himself. But it was after Thomas allegedly spat at Fraser that the latter then pursued Thomas, marking, as it did, an act that went one too far and prompted a response in Eyrikson that he seemed to implicitly identify with. "Mr. Fraser understandably can't take it anymore," Eyrikson told the jury. Again, the legal meaning of Fraser's actions was sublimated within experiential morality: "And can you blame him?"

³⁷ For their part, the defense rightfully suggested that Fraser could have simply closed the doors in this moment and used a witness – a driver of another bus – to express this point as he ran back to his bus and closed the doors to protect himself when he saw the two men fighting.

It is important to note that the claim of Thomas spitting at Fraser was precisely that, a claim, and it was disputed by the defense who suggested that *if* there indeed was a spitting action, which is anything but obvious in the video, it was most likely gum that Thomas had in his mouth. We have already seen in chapter one how significant the substance of spit is, particularly in the mediation of young Indigenous bodies and bus drivers in Winnipeg, which helps us to interpret the Crown's interpretation of this moment. It is also important to note that most news networks uncritically reported on this claim of the Crown, as if it were a fact, leading us further to infer that such moments were crucial for building a case against Thomas as a threatening subject, with the specific trope of bodily fluids coming yet again to rouse fear and anxiety amongst the public.³⁸ By asking the jury if they can "blame him," he is not arguing with legal principle or reason here, but appealing to a common trope of emotional and affective fear, and the justified losing of one's temper against such contaminating bodies.³⁹ Similarly, this narrativization of events is deceptive as it anticipates Chief Justice Joyal's instructions to the jury that will ask them to consider Fraser's behavior along temporal lines. Namely, did Fraser's actions suffice to take an "ordinary person's" self-control, and, did Thomas indeed lose self-control in this moment? This depended on answering whether Fraser's conduct was sudden, and if Thomas's acts were committed suddenly before passions could cool? So, if we take the

³⁸ For a sampling of reports that repeated the Crown's claim that Thomas "spit" in Fraser's face and did not alert the public that this was an unverified claim that was under dispute by the defense, see Dean Pritchard, "Bus Driver Killer's Sentencing on Hold While Judge Ponders Joint Crown-Defence Recommendation," *Winnipeg Free Press*, June 17, 2019, <https://www.winnipegfreepress.com/local/bus-driver-killers-sentencing-on-hold-while-judge-ponders-joint-crown-defence-recommendation-511428752.html>; "Winnipeg Bus Driver Fatally Stabbed Repeatedly Asked Passenger to Leave: Crown," *Winnipeg Sun*, January 30, 2019, <https://winnipegnews.com/news/news-winnipeg-bus-driver-fatally-stabbed-repeatedly-asked-passenger-to-leave-crown>; Elisha Dacey and Diana Foxall, "Video Footage Shows Bus Driver Irvine Fraser Being Spit on, Muffled Sounds of Struggle," *Global News*, January 22, 2019, <https://globalnews.ca/news/4875771/video-footage-shows-bus-driver-irvine-fraser-being-spit-on-muffled-sounds-of-struggle/>.

³⁹ Recall the words of bus driver union president, Callahan, who justified and excused the video footage of one of his driver's brutally assaulting a patron because the latter allegedly spat on the driver and led him to "see red." See Chapter one for account of this.

Crown's temporal division of this event, what moments are we considering these temporalities of suddenness? In the moment that Fraser abruptly woke Thomas up with "last stop, get off the bus!"? Or, when he began throttling Thomas in the bus? Or, when he left the bus to pursue Thomas? Indeed, given the very obvious violence and aggressivity in Fraser's speech and actions from the very beginning, could we even meaningfully use the notion of 'sudden' here at all? Clearly, however, it was the Crown's strategy to foreclose such questions and focus all of the jury's energy on the final moments of Fraser's life, which came about because he simply and "understandably" could not "take it anymore" and had to pursue Thomas in battle. The jury was asked to implicitly inhabit Fraser's emotional and affective temporality in which Thomas was always already a threat, or a nuisance, or a troublesome and crisis-prone passenger that aroused a mixed sense of contamination, debasement, humiliation, as well as fear and endangerment. And by inhabiting this affective temporality, the Crown and jury very efficiently foreclosed any meaningful contemplation of the temporality of Thomas as he slept, pleaded for his life, or was being violently assaulted by Fraser.

We have seen how the ideologically charged notion of choice was expertly manipulated by both Fraser, and subsequently selectively disavowed by the Crown. But just as we have seen that this choice was also manipulated by strategic, and perverse, logics of temporal reasoning – that it was precisely a *choice* that Thomas did not have, that he really had no choice but to *leave*; and that Thomas's *choice* could only truly be contemplated in the negation of Fraser's perverse formulation of a choice – there is an equally spatial scenario to this scene or frame, a neglect of the fundamental materiality of this scene that is nothing less than astounding that it could be missed; namely, that Thomas's body was expelled, was expected to be expelled, into the winter cold in the middle of the night, in a place far from home and where Fraser admitted that "there is

nothing around here for you.” If we accept the theoretical tool of fantasy we must then go deeper to understand the real that is being written around, or out, of this scene, for all actors thus far have been otherwise blind to the basic material conditions of this event, which was the cold vulnerability of Thomas who was made to leave a bus into a space where there was nothing for him. Could this not be seen, or did it simply not matter?

Starlight tours – geographies of expulsion

The brutal materiality of this event, of the expulsion of Thomas into the cold, and its symbolic framing is grounded, (haunted, actually) by a broader historical and sociological phenomenon of Indigenous expulsion in Canada’s prairie provinces. One of the first things that drew me in while watching this video was Thomas’s thin coat, which looks more like a windbreaker than a proper winter coat with insulation. The Crown would ultimately cite that the evening of this tragedy was “unseasonably warm,” which means that they had to acknowledge the ‘problem’ that this thin protective layer presented to their argument of Thomas’s unreasonableness, and so they argued that it was freezing, but not ultimately *freezing enough* like it typically is at this time of year. As I looked in vain for any news report that discussed Thomas’s lack of protective winter wear, I began to see a disturbing syllogism taking form around the argument of Thomas’s intent: Thomas was not wearing reasonable winter wear, but it was unseasonably warm so while he would have been uncomfortable in the cold of winter, he would most likely have been fine. Thus, Thomas was not concerned about being cold or destitute (which, to the Crown, meant that he was obviously concerned with killing Frazer from the start). Such a syllogism was central to the incredible disavowal at the heart of this frame, however; one where people ultimately had to accept as reasonable that Thomas should be made to suffer in the

cold in the first place. And it again came back to the contradiction of compliance, for Thomas had no real choice to but comply to this preventable suffering. If it had been -30 degrees centigrade, as is common at this time of year in Winnipeg, would the Crown have argued differently? Would Fraser’s demand and Thomas’s refusal of compliance have stood out differently? That is to say, would it have been reasonable to make Thomas suffer *that* much?



Figure 8 - Bus driver gratitude⁴⁰

To answer these questions, we can make educated inferences by emphasizing the structural harmonies between the encounter of Fraser and Thomas and other events in which Indigenous bodies are subject to similar acts of expulsion into desolate, cold lands where the objective is precisely to ‘dump’ them where there is ‘nothing for them.’ Not only are Fraser’s words relevant clues for us, but the very image of Thomas’s wind breaker, a light form of outerwear, becomes an immensely powerful piece of evidence, precisely because it is not treated as evidence at all and was missed by all commentators. The image of Thomas’s windbreaker is analogous to the image of the one shoe that was found on the frozen body of Neil Stonechild on the outskirts of Saskatoon on November 25, 1990.⁴¹ Particularly, it was unremarkable to the officers who found Stonechild’s body in a desolate and industrial field that he was only wearing

⁴⁰ A random Twitter comment to the Winnipeg bus service that offers another perspective to the ways in passengers are treated.

⁴¹ David H Wright, “Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild” (Saskatoon, October 2004), 133.

one shoe. And just as was negligible that they never did find this shoe, even after a search in the surrounding fields, it was equally unremarkable to investigating officers as to how, and why, Stonechild was in this remote area in the first place. Instead of raising suspicions of foul play, officers assumed, incredibly, and against their own facts, that Stonechild must have been drunk and “stumbling around” in a confused stupor that led to his death in this nowhere land.⁴² Such initial assumptions and a generalized lack of care for a dead young Native man let this case go uninvestigated for nearly a decade before it was finally discovered that Stonechild was not the only victim of what was later discovered to be a regular practice of police officers who were found to be routinely and ritualistically dumping young Native men outside of the city limits without their shoes or coats.

The geographer, Sherene Razack, has categorized this violent phenomenon as a ritual of cleansing Settler spaces through a highly specific form of extra-judicial punishment.⁴³ Through a theorization of the racialization of space, Razack argues that this practice of expulsion of Aboriginal people from space is the objective expression of a symbolic terrain in which the humanity of Aboriginal peoples is experienced as a fundamentally contaminating force, and thus a waste product in need of ‘dumping’ outside of the space of respectability. It is ritualistic, however, because it is through this process of ‘dumping’ that settler subjects both inscribe their claims ‘on the ground’ of both the racial order of colonialism and their own subjective place within that order.⁴⁴ Furthermore, this ritual is informed by historical trajectories. Through the

⁴² Despite voicing his suspicion of inebriation, Cst. Rene Lagimodiere described Stonechild’s footprint tracks as straight, for example, which, under scrutiny appeared to be a dramatic oversight or misjudgment. Most incredibly, however, was that his footprints began in a gravel parking lot, but which never prompted the police to investigate the very distinct possibility that Stonechild was dropped in this field. See Wright, 197.

⁴³ Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George”; Sherene Razack, “‘It Happened More Than Once’: Freezing Deaths in Saskatchewan,” *Canadian Journal of Women & the Law* 26, no. 1 (June 2014): 51–80.

⁴⁴ Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George,” 60.

exploration of the diaries of members of the former North West Mounted Police (now the Royal Canadian Mounted Police), for instance, historian and political scientist, Tyler Shipley, has argued that Canada's expansion westward, particularly in its military adventures and deployments of force, have often been supported by a dialectical fantasy of love for land and space and a hatred for Indians.⁴⁵ The important feature to recognize here is that Starlight Tours are not simply a practice of policing, but a specific example of the socialization of the logic of elimination (Wolfe) via ritualized enactments of expulsion.⁴⁶ The institution of policing in Canada today, and particularly the contemporary RCMP, has been built on this legacy of expelling and containing Indigenous life in the Prairies, conditions that undoubtedly inform the possibilities of subjective expressions of identity that can emerge from these legal adventures and subsequent experiences of and relations to space, occupancy, and belonging. We can see Fraser's actions are part of the enforcement and reproduction of a particularly racialized order. Not only his absolute dismissal of Thomas, but the geographic and spatial dynamics of this case draw undeniable connections with disturbing events like starlight tours.

Fraser's last stop was at the University of Manitoba on the southernmost outreaches of the city, just before the 'Perimeter highway' that forms an official boundary for the city. The demographic is a higher socio-economic bracket, with a large ethnically white population, though also having a diversity that is reflective of the University housing. Fraser knew that Thomas did not belong there, yet he waited until the last stop to tell him to "get the fuck off my

⁴⁵ Tyler A. Shipley, *Canada in the World: Settler Capitalism and the Colonial Imagination* (Winnipeg: Fernwood Publishing, 2020); David Cruise and Alison Griffiths, *The Great Adventure: How the Mounties Conquered the West* (New York: Vhps Trade, 1997).

⁴⁶ Sociologist Elizabeth Comack reminds us, however, that the police serve a specific function in the "reproduction of order," and that such rituals of racialization are distinctly informed by formulas of law and order, and that aberrant bodies are subject to legitimate uses of violence, even if this legitimacy is often within a grey zone that is ultimately supported by the state. Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Winnipeg: Fernwood Publishing, 2012), 57.

bus.” He *knew* that Thomas was up to something, that Thomas “was awake” when his friends left the bus, yet, by his own words, Fraser thereby went along with the charade of (who knows what?) until the last stop. Why? As Razack notes of the cases of officers who were charged with dumping Stonechild, as well as other stories told within the ranks of the police about similar incidents, there is always a distinct sentiment and desire to “teach a lesson” to “these Indians” who were made victims precisely because they were intuited to be offenders, or drunks, or up to no good, or, quite simply, a threat.⁴⁷ It is undeniable that Fraser’s demand for Thomas to expel himself into a region where there is nothing for him was contradictory at best, but one cannot help but hear a distinct perverse demand in this ambiguity. As Fraser dropped his voice and told Thomas that “there is nowhere around here for you,” a certain pleasure could be detected in his voice. Between being offended and outraged at being Thomas’s apparent dupe (and the trope of “teaching a lesson” to such cunning Indians) and his perverse demand, we might also consider the psychoanalytic concept of *jouissance* to think through this encounter of the other where Fraser is not simply experiencing the quotidian sensorium of an inherited occupancy that accommodates the contradiction posed by Thomas’s Native presence, but that he is also actively

⁴⁷ Razack notes a recurrent ambiguity in the testimonies of officers who speak of an alleged anger in the Aboriginal people they select for dumping. One officer described one former Aboriginal victim of his as an angry man who needed to “walk it off,” thus justifying dumping him outside the city to facilitate this exercise in blowing off steam. Yet in such testimony there is always a palpable anger or resentment in the tone of the officer, begging the question of whose anger is really being acknowledged, or expressed, here. Is it the perceived anger of the victim or the anger of the officers who perceive a nuisance in their suspects? Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George,” 62–63. Sociologist Elizabeth Comack also notes that the systemic racialization of Aboriginal peoples by police officers emerges within the prevalent sociological conditions of poverty - where officers are dealing “with people who are in crisis, intoxicated, emotionally disturbed, injured, sick, dying, or dead—and sometimes just plain angry”— that lead officers to be, according to Comack, justifiably angry and frustrated in the face of these repetitive conditions of social nuisance. While such an argument risks uncritical analysis of policing, I accept Comack’s summary of the sentiment of much of the criminological discourse as providing data and helping us to think through the important juncture of anger and the perception of the other in these complex processes of racialization. Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police*, 14.

enforcing the expulsion of this ontological threat in ways that make perfect sense as an extra-, but inevitably judicial, form of enforcing jurisdiction and spatial ownership.⁴⁸

To this day this ritualistic practice is euphemistically known as a “Starlight Tour,” a name that cannot even entertain the horror of such a practice without first rendering it through some kind of tourism metaphor.⁴⁹ This infamous case of police murdering and brutalizing Indigenous peoples through barbaric practices of dumping and expulsion continues to haunt Canada, particularly within the cities in the prairie provinces.⁵⁰ While there is documented proof of these practices, and while they are even given technical terms such as “police-initiated transjurisdictional transport (PITT) by various criminological literatures to justify this as a normalized practice, there is still a concerted effort to deny this phenomenon as part of “an agenda... by special interest groups to advance a sympathy cause.”⁵¹ Such experiences are regularly dismissed as incredible, particularly because they remain unverified stories (itself a condition that individuals cannot readily seek out the police to help them with violence committed by the police), and are often thoroughly dismissed by energetic police

⁴⁸ Derek Hook and Sheldon George help us to think with *jouissance* as central to racist encounters with the other, where the other can be seen as possessing something that I lack, perhaps even having stolen that something. Importantly, *jouissance* is dependent on the symbolic and socially determined dimension, and most importantly is an energy that is located at the limit set out by the Law and is constituted precisely by the act of transgressing this limit. The trope of the fear of being duped by poor Indigenous peoples is utterly pervasive in Winnipeg across every sector you could imagine. The welfare office is a site where I have encountered this relational form repeatedly, which I document in chapter 5. For more on *jouissance* and racism, see Sheldon George and Derek Hook, “Introduction: Lacanian Praxis and Social Intervention,” *Psychoanalysis, Culture & Society* 23, no. 3 (September 1, 2018): 235–43; Derek Hook, “Racism and *Jouissance*: Evaluating the ‘Racism as (the Theft of) Enjoyment’ Hypothesis,” *Psychoanalysis, Culture & Society* 23, no. 3 (September 1, 2018): 244–66.

⁴⁹ Also known in police vernaculars as ‘dumping,’ most terms are startlingly euphemistic, such as ‘drop-offs,’ ‘breaching,’ or ‘unarresting.’ Within the criminological literature this becomes even more troubling as these practices are given technical titles like “police-initiated transjurisdictional transport (PITT),” that further separate us from the violent practices of racialization and reproduction of order. See Comack, *Racialized Policing*, 150-51.

⁵⁰ See Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police*.

⁵¹ Retired constable Larry Lockwood in documentary *When Police Become Prey: What Lies behind Starlight Tours*, by Candis McLean. McLean has subsequently turned her documentary into a book. Candis McLean, *When Police Become Prey: The Cold, Hard Facts about Neil Stonechild’s Freezing Death* (Influence Publishing, 2015).

investigations.⁵² I wondered many times while re-watching the surveillance footage if Thomas might have imagined himself freezing to death on the outskirts of Winnipeg that night, much like Neil Stonechild, Rodney Nastius, or Lawrence Wegner did on the outskirts of Saskatoon after being “dumped” there by police. Of course, I don’t assume Thomas even knows the names of these men, and I don’t suspect that his actions emerged from a rational consideration of his ‘options.’ These images sit deeper in the psyche, simultaneously reflecting and intuiting the intense chasm between Indigenous peoples and this society. It is, I suspect, an intuition that is analogous to, if not the inverse of, Fraser’s feelings and approach as he dismissed Thomas’s pleas for help and eagerly ejected him in to the cold of the night. Not exactly a set of rational or irrational ‘choices,’ but an accumulation of feelings and images that made it *make sense* to lunge at Thomas who was taunting him; an indignity that could not stand, as Eyríkson so clearly conveyed. Images of dead Indigenous men, frozen on the side of the road or in the middle of a prairie field are more than just visual bits of information, they are visual metaphors of a place and how to conduct oneself. These visual bits of information carry with them an admonition “or else.” And, in a place like Winnipeg, no one has the pleasure of being ignorant of these images. Such awareness is demonstrated precisely when a shoe or a thin coat are dismissed as unremarkable.

⁵² In December of 2010, a local Indigenous Winnipeg teen accused the police of dumping him on the outskirts of Winnipeg. An investigation was rapidly mobilized and concluded in unprecedented time to clear the officers. The teen was then charged with public mischief, which was later stayed after the police offered him a “restorative justice” diversion in which he issued a public apology to the police. The public was left to consider his accusation as a way of garnering attention. I met Maud and his uncle at the law courts one day and we spoke of this event. Their general nervousness and even a subtle fear in their eyes suggested to me that attention was precisely the last thing they wanted to achieve in this case. “Man’s Abuse Claims False: Winnipeg Police,” *CBC News*, December 17, 2010, <https://www.cbc.ca/news/canada/manitoba/man-s-abuse-claims-false-winnipeg-police-1.944025>; “Winnipeg Man Sorry for Claiming Cops Left Him at City’s Edge,” *CBC News*, February 21, 2013, <https://www.cbc.ca/news/canada/manitoba/winnipeg-man-sorry-for-claiming-cops-left-him-at-city-s-edge-1.1309199>.



Figure 9 - Surveillance footage. Fraser "escorting" Thomas from the bus. Accessed at <https://www.cbc.ca/news/canada/manitoba/thomas-bus-driver-trial-1.4988345>

Battle (of truth) in the shadows (of doubt)

With the temporal and spatial context of Indigenous expulsion all caught on video, it is interesting to see how the Crown built its argument from the visual scene of the footage itself and translated their metaphors of Thomas's choices and malicious intent into cues selectively found in the footage. As Eryikson described it to the jury, these videos "could decide this case on the videos alone, without a reasonable doubt." While this shocked me, I was well aware of the epistemological and ideological limits to video evidence. Critical theorist Judith Butler and anthropologists Laurence Ralph and Kerry Chance have written eloquently about how even beaten and injured Black bodies can still be affirmed as endangering to white bodies through the strategic manipulations of media technologies, fast forwarding the beating of Rodney King to show his alleged aggressiveness, or slowing down the movements of Trayvon Martin to express

an allegedly suspicious demeanor.⁵³ Such manipulations of the visual field were certainly on display as the Crown confidently showed key selections of the video that made them speak their argument for them. Instead of simply claiming that the video demonstrated that Thomas was guilty of murder, which of course they did argue, they *showed* how this was true by incessantly replaying selected and edited segments of the video that ensured the jury understood their claim. In doing this editorial work, they expertly avoided the repetition of Fraser as an aggressor and took every opportunity to argue that the video showed, or rather, *proved* that Thomas was a violent killer. Crucially, they came prepared for their final arguments to the jury with edited clips of the video, some of which were zoomed in so as to provide a *closer* look at the admittedly fuzzy footage. I noted the absurdity of the meticulous sophistry of the Crown's arguments that combined tightly crafted visual arguments of Thomas's violence, particularly in their tactic of zooming in on Thomas's hands gripping on to the railings as evidence of his aggression and therefore for his responsibility in precipitating violence. As Thomas's character and behavior was metonymically focused on his highly pixelated and zoomed hands, the visual context of Fraser's imposing and massive body with muscles engaged and hands around Thomas's throat were out of focus and frame. The Crown went on to further show neatly edited, frame by frame, sequences of the grainy videos to provide tidy narratives. "I saw three distinct swinging motions by the accused," as the Crown summarized his highlights of a six second clip. He then showed it again, explaining to the jury, "so you can see what I mean." Ultimately, the narrative of Thomas

⁵³ For analyses on the importance of producing narratives of violence, and particularly racialized accounts of violence, through techniques of visual representation and technical manipulation see Kerry Chance and Lawrence Ralph, "Legacies of Fear: From Trayvon Martin to Rodney King," *Transition* 113 (2014); Judith Butler, "Endangered/Endangering: Schematic Racism and White Paranoia," in *Reading Rodney King, Reading Urban Uprising*, ed. Robert Gooding-Williams (New York: Routledge, Inc., 1993), 15–22. See also concluding chapter to Laurence Ralph, *Renegade Dreams: Living through Injury in Gangland Chicago* (Chicago: University Of Chicago Press, 2014).

as victim or aggressor came down to the selective repetition of video that choreographed shadows into veritable proof of guilt.

The meaning that the Crown was producing through visual manipulation often stretched the boundaries of reason, but it was effective in making itself clear through its repetitive simplicity. So for instance, the “three distinct swinging motions” emphasized by the lawyer above was used to construct a very detailed math equation that combined with the time stamps of multiple intervals of videos. As the segment of video from which these “three” swings were inferred came from a 6-7 second period shortly after the two left the bus, and since Fraser was keeled over within roughly 14 seconds and during which time no other “swinging motions” could be detected, the Crown’s point was neatly summarized by a rhetorical question: Where did Fraser’s other three stab wounds come from? Doesn’t this mean that Thomas was stabbing Fraser immediately after getting off of the bus? He answered his own question: “Of course it does!” It did not matter that such things were next to impossible to actually verify by watching the grainy videos, even with the assistance of zooming and advancing frame by frame. Through meticulous repetition of the Crown’s meaning, that Thomas ultimately “planned to stab Fraser” from the outset, they could be *seen* nonetheless. As Laurence Ralph critically notes of the infamous Rodney King tapes, it is in media effects where

cultural presuppositions about urban blacks and their place in society fill... the gaps between the frames, rendering the texture of the grainy footage culturally clear, even as the actual picture [is] blurred beyond recognition. That framing is what allowed the jury to invert their perception of danger, correcting the imbalance concerning what the film evidently showed (police with wooden sticks beating an unarmed man) and what they already believed: We should fear urban blacks, and policemen should protect us from that fear.”⁵⁴

There is a nearly identical ideological procedure at work here, where Thomas’s life is perpetually rendered as endangering and Fraser’s actions are made reasonable rather than violent. From

⁵⁴ Ralph, *Renegade Dreams*, 174.

within the grainy shadows Eyrikson argues that “at no time do you see Fraser strike the accused,” yet contradiction abounds between the murky footage and argumentation as Eyrikson then asks them: “if you were being stabbed to death would you not do what you could to save your life?” It is yet another temporal manipulation, a retroactive justification of Fraser’s actions based on a phantasmatic scenario in which Fraser was already being stabbed before he attacked, lunged at, Thomas. The presuppositions are always the same: “can you blame him?”

In Chief Justice Joyal’s final instructions to the jury he asked them to consider if Fraser’s actions and behaviors constituted an indictable offense. One might ask, then, if Fraser even had the right to expel the passenger? What are the by-laws of such an act? We were never presented with such evidence in the courtroom.⁵⁵ Joyal also coached the jury to consider whether Fraser’s actions sufficient to rob another of self-control? Were Thomas’s actions committed suddenly and before passions could cool? We’ve already seen how the Crown fundamentally ignored any robust consideration of Thomas’s state of mind and how they strategically and ideologically avoided any consideration of what it might be like for an Indigenous person to be stranded on the outskirts of a Prairie city like Winnipeg. In some ways, it makes sense, in a twisted sort of way, that the Crown would not pursue this line of reasoning or argumentation. They are, after all, opponents of this truth in the adversarial modality of Canadian law. While the Crown’s neglect of these broader political contexts are at least understandable, if not ethically justified, it is all the more shocking and disturbing that these lines of reasoning were fundamentally neglected and ignored by Thomas’s own defense team.

⁵⁵ Winnipeg’s by-laws are unequivocal in this regard that a bus driver does not have any authority to expel a patron from any Winnipeg property. This power is only granted to police or other explicitly deputized forces. The By-law of THE CITY OF WINNIPEG to regulate conduct on and with respect to the City’s public transit property; “A By-Law of THE CITY OF WINNIPEG to Amend the Public Transit By-Law.,” Pub. L. No. By-law no. 63/2017 (2017).

Roitenberg's arguments

While shocked at the extreme nature in which the Crown was able to manipulate a video that seemed to offer an obvious defense of Thomas, I was not prepared for the shock that followed my witnessing of defense lawyer Evan Roitenberg's absolute ignorance of the power of the visual narrative that contributed to a globally weak and incompetent defense of his client in his final, and only, address to the jury. In striking contrast to the Crown's combined strategy of visual manipulation and rhetorical repetition, Roitenberg struck a very different relationship with the surveillance video evidence. Namely, he barely showed it at all. However, right off the bat, Roitenberg did address the issue of Fraser's comment to Thomas - "there is nowhere around here for you." He repeated the sentence to the jury twice, and paused for dramatic effect, but, oddly, he did not spell out what he thought the significance of these words were for the jury. He simply left it to the jurors to ultimately decide what these words meant. He did not even play the video portion when Fraser could be clearly heard uttering these words. His implication, it seemed to me as I watched and listened from the gallery of the court, was most certainly that Fraser was acting in a racist manner, that he was judging Thomas as an Indigenous man who did not belong in this white and affluent suburban neighborhood and university campus. But this was only implied, and never stated directly. Instead of showing it he suggested to the jury several times that they should "watch and re-watch" the surveillance videos. And again Roitenberg parroted the Crown in one of its brazen claims - specifically that the surveillance videos could "solve this case alone, beyond a reasonable doubt"- by saying that these videos "speak for themselves." What were they to make of these words, especially if Roitenberg made no attempt to account for them? What was this commonsense he kept speaking of, so true as to not require argumentation, evidence and analysis of materials? What can this contradiction between claims to an inherent

truth that speaks for itself that cannot otherwise be spoken or demonstrated in the courts tell us about the symbolic structure of the courts?

Was it, in fact, that Roitenberg was referring to the aforementioned Starlight Tours that seems to dwell in the back of cultural memory in Winnipeg? Perhaps it was so obvious that this scenario was racialized because in a place like Manitoba one knows all too well that systemic racism is alive and well. Isn't this precisely what has been said over and over again in Manitoba, beginning, most prominently, with the *Aboriginal Justice Inquiry* in 1988?⁵⁶ It is worth reviewing this history as it informs the "commonsense" archive of anti-Indigenous racism that although unevenly distributed, definitely inhabits the recall of many. The AJI stands out as a prominent inquiry to me, as it is native to Manitoba and was the first of all of these reports and inquiries and commissions to be published, under the authorship of none other than Anishinabe judge, Murray Sinclair, who also subsequently presided over the *Truth and Reconciliation Commission* and was a member of Senate of Canadian Parliament until very recently. Which is to say, the AJI has a lot of institutional memory, and there is absolutely no way that Roitenberg or anyone else in this court could *not* be aware of its findings that, specifically within the justice system, racism is rampant and that Aboriginal peoples experience deep systemic inequality.

⁵⁶ Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*. Or in the systemic inequality of the child welfare system, as shown in the inquiry into the death of the Indigenous baby, Phoenix Sinclair, while in the custody of child welfare; or the death of Brian Sinclair who was neglected for 17 hours and died in the waiting room of a Winnipeg hospital; Or the recent Manitoba Children's Advocate report on how the murder of teenager, Tina Fontaine, was tied to conditions of neglect of the child welfare system; or how Fontaine's death actually prompted the Murdered and Missing Indigenous Women and Girls Inquiry (MMIWG); Or perhaps the Royal Commission on Aboriginal Peoples, or the Truth and Reconciliation Commission, all of which testify to an undeniable history of systematic oppression of Indigenous peoples in this country. Ted Hughes, "Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair; The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (Winnipeg, December 2013); "The Provincial Implementation Team Report on the Recommendations of the Brian Sinclair Inquest Report" (Winnipeg: Ministry of Health, March 12, 2015); "A Place Where It Feels Like Home: The Story of Tina Fontaine"; Canada, Royal Commission on Aboriginal Peoples, *Final Report; The Final Report of the Truth and Reconciliation Commission of Canada; Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*.

It was not simply a lack of *access* to justice that informed this historical inquiry, but the conditions of perpetual assault on Indigenous life by the justice system itself. For one, it was the killing of Aboriginal leader, J.J. Harper on March 9, 1988, by a Winnipeg Police officer, and the latter's immediate exoneration under cover of lies and corruption by the Winnipeg Police Service, that generated explosive community responses that put political pressure on the province of Manitoba to launch this inquiry. This event of racialized and corrupt policing was on top of the already simmering outrage of the brutal rape and murder of the 19-year-old Cree woman, Helen Betty Osborne, in The Pas, Manitoba, in 1971, whose case laid nearly dormant and under-investigated for over sixteen years before one of her attackers was convicted of her murder.⁵⁷ The mandate of the AJI was vast, covering police brutality, systemic inequalities within the courts, racist and prejudicial investigations that preclude justice for Aboriginal peoples, and, furthermore, an implicit interrogation of how the bureaucratic apparatus of the justice system is but one ideological extension of the society. For it was clear that the case of Helen Betty Osborne was not just about whether her murder was motivated by race, or if officers neglected the investigation because of racism, but also too how these four men could have walked freely in The Pas for over 16 years after this grizzly murder when it was an open secret within the town that they were responsible.⁵⁸ A strange contradiction thus begins to present itself

⁵⁷ The Royal Canadian Mounted Police and many members of the northern town of The Pas knew the four young men who were implicated in her rape and death - Dwayne Archie Johnston, James Robert Paul Houghton, Lee Scott Colgan and Norman Bernard Manger. Even after charges were laid, only one of the men, Dwayne Johnston, was convicted for the murder. Houghton was acquitted; Colgan received immunity for testifying against Houghton and Johnston; and Manger was never charged.

⁵⁸ The AJI mandate with regards to Helen Betty Osborne was: "investigate into the death of Helen Betty Osborne and all aspects of the laying and prosecution of charges which followed, including whether the right persons were charged, whether the appropriate charges were laid, whether charges should have been laid earlier, whether immunity from prosecution should have been granted to Lee Colgan, whether there exists any evidence of racial prejudice with respect to the investigation of the death of Helen Betty Osborne, whether the acts or omissions of any persons outside the Police Department impaired the investigation and whether the prosecution was properly conducted."

as Roitenberg and the court simply ignores any direct consideration of a racialized logic of violence at the heart of this case, leaving it, in Roitenberg's case, to "speak for itself," while in many ways this is precisely a dynamic of negation of the reality of race that inquiries like the *AJI* have ostensibly sought to highlight. Yet, if we look a little closer, we see that Roitenberg's omissions might not be so conceptually or practically outlandish, as such inquiries are already stymied by a pernicious legal positivism that limits their reach beyond superficial gestures of race and racism.

It has been well documented that inquiries like the one into the death of Neil Stonechild overlooked the ideological factors of racism and were mobilized around concerns for how to better and more rigorously implement and adjudicate current bureaucratic-legal systems rather than calling for radical change to such systems.⁵⁹ Sherene Razack has convincingly argued that inquiries, particularly inquiries prompted by Indigenous deaths in the justice system, are 'theatres of power' in which ways of speaking about social life are ritually affirmed and thus make possible the ongoing work of organizing political forms of subjection.⁶⁰ Importantly, the *AJI* was co-authored by a prominent member of the Aboriginal community, which perhaps prevented some of the more egregious rituals of legally bypassing questions of racism in favor of "culturalization," "where problems are attributed to culture and not to domination."⁶¹ Yet the *AJI* was stymied by several legal institutional, and, I would argue, ideological impasses that absorbed its potential for radical intervention.

⁵⁹ For such an analysis of the *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Wright 2004), see the astute analysis by Metis scholar, Joyce Green. Joyce Green, "From Stonechild to Social Cohesion: Anti-Racist Challenges for Saskatchewan," *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 39, no. 3 (September 2006): 507–27. (2006).

⁶⁰ Razack, *Dying from Improvement*, 32. Razack specifically means that such inquiries help to organize the relationship between settlers and Indigenous peoples through a spatially and racially organized relationship of modernized subjects and those who must be assisted into modernity.

⁶¹ Razack, 36.

For one, the AJI was never mandated, or interested, in the decisions of the jury, particularly in the case of Helen Betty Osborne.⁶² The thoughts and decisions of juries are protected from scrutiny by the law, making this perhaps a taboo subject that the AJI simply could not touch. But by avoiding this investigation, the AJI also missed an important opportunity to investigate the central piece of this puzzle; namely, how was it possible that Osborne's four murderer/rapists were able to avoid justice even when their secret was publicly maintained by friends, family, and even police? Similarly, they were not able to think about racism as anything but an individual act of prejudice. So, for example, the AJI "concluded that racism played a significant role in this case," and it was clear that the four men targeted Osborne based on her racialization as an Indigenous woman, but they denied that racism had anything to do with "any delay in the investigation of the killing or in the prosecution of those responsible," and they struggled to attribute racism to the broader collective actions of the town itself who did not come forward with information or even cry foul "to bring the four [murderers] to justice."⁶³ Importantly, these dismissals of racism were on legalistic grounds: yes, it was true that the town was largely in the know about who the killers were, as a couple of them more or less bragged about their acts to friends and family members. But, the authors of the AJI argued, these were in the realm of rumours and gossip and did not even remotely approach "what could be called evidence" or subsequently be "used in a court of law." They further suggest that even if most people in the town did have second-hand knowledge, or "hearsay," of the murderers the late 1970s, it was insignificant because the police already had the same knowledge of who the culprits likely were. The AJI thus limited their concern for collective racism by dividing people

⁶² "We wish to make clear... that we are not attempting to circumvent the jury's decisions" or to "determine whether their decisions to convict Johnston and acquit Houghton were proper decisions."

⁶³ See AJI, Vol. 2, Ch. 9, "Racism."

with “hearsay” from those few family members who probably had “actual and real knowledge admissible against the accused.” It was the latter group who were most likely driven by prejudicial motivations of not caring for the victim because she was Aboriginal, the inquiry argued, but for everyone else who did not have credible knowledge and were only circulating legalistically dubious rumors the AJI was not convinced that they were driven by racist motivations. While perhaps legally true, this framework of reasoning is dubious at best, for the question is why townspeople would not come forward with potential information of who the murderers of Osborne were, and it is unlikely that anyone would ever not think to offer such information because it might not be legally admissible as evidence.

Finally, the AJI stumbles over the fact that there was “no outcry from the population to bring the four [accused] to justice,” arguing that it is difficult to prove whether this is racially motivated or not. While they argue that this was not demonstrably an act of collective racism, the inquirers suggest nonetheless that it demonstrated an “atmosphere of uncaring” and that, compounded with the structural-spatial conditions in which Indigenous and non-Indigenous peoples are segregated from one another in The Pas, led to a predictable outcome in which the community would not think it natural to come forward with information or support for seeking justice for Osborne. I sense a great ambivalence in the authors of the AJI who, on the one hand, are unanimous that these two events of the deaths of J.J. Harper and Helen Betty Osborne are clear examples of systemic racism of a justice system that is “inefficient, insensitive, and... decidedly unequal” for Aboriginal peoples. On the other hand, they seem hamstrung by their own legal tools to make a robust conceptual argument for this beyond the individual acts of people.

We might thus conclude that these same conditions of legal impasse are the source of Roitenberg's cryptic repetition of Fraser's violent words. Perhaps to actually say what he thought they meant would be precisely that, an opinion with little legal import. Such an interpretation is far too generous, however, and, as we will see, cannot be made with good faith since Roitenberg was very much willing to enter into murky territories of pseudo-psychological and sociological claims-making, and we have already seen that the Crown's approach demonstrated a distinct capacity for the courtroom to entertain wild extra-legal forays into the realms of affective storytelling. We are presented with the troubling proposition that Roitenberg's commonsense, if not his conscious intent, was mobilized not to defend Thomas but to condemn him much like the Crown.

If anti-Indigenous racism was so obvious and went without saying for Roitenberg, or if the videos themselves were thought to have the capacity to "speak for themselves," Roitenberg should have at the very least been cautioned by his own theory of suggestibility that he later attempted to explicate for the jury who were to consider several dramatic changes between police statements and court testimonies made by several eyewitnesses. For instance, one eyewitness who saw the events unfold through her rearview mirror originally told police that she could not make out what was happening, describing a rather indeterminate and chaotic scene of bodies in contact. While on the stand two years later, however, this witness was emphatic in her new claim that she saw Thomas initiating distinct "swinging motions" with his arms the night of the stabbing. Another witness, a student at the University of Manitoba, noted in his original statement to police that he saw the driver attacking the passenger, which he then shifted under examination in the court to an account of the driver "getting him [Thomas] together" during their confrontation. Roitenberg argued that these radical shifts in accounts – notably favorable to

Fraser's character and conspicuously supportive of the Crown's official story – reflected a distinct example of how the memories of witnesses had been influenced and impressed upon by the prior two years of media portrayals in which Thomas had already been publicly judged. Such lapses in memory were normal, Roitenberg suggested, and reflected not only to the impressionistic susceptibility of the human mind, but a more universal truth of the condition of “human frailty.” Notably absent from this account of impressionability, however, is the ways that this story was mobilized by a racial and anti-Indigenous reading practice from the start, as argued above.

Even more egregious, however, was how Roitenberg seemed steadfast in not robustly supporting these theories or claims. So, Roitenberg noted that the university student witness changed his testimony from what he originally *saw* (Fraser attacking Thomas) to what he now thought the driver “meant” (“getting him together”), which Roitenberg argued had been influenced by repetitive media accounts that colored this *meaning*. Yet Roitenberg stubbornly refused to show the jury what *he himself* meant by any of this! He did not demonstrate the interpretive liberties taken by the police in their original accounts to reporters of this surveillance footage, from the painfully euphemistic descriptions of Fraser's “escorting” of Thomas off of the bus, or even that Thomas pulled a knife on Fraser, which, as everyone knew, was now up to the jury to decide if there even was a knife to be seen at all. Similarly, Roitenberg refused to counter the highly specific visual arguments of the Crown, of which I have demonstrated is rife with contradictions and fanciful and fabricated content. Roitenberg did not allow Fraser to speak his words, “there is nowhere around here for you;” he did not show the attack on Thomas; he did not zoom out for the jury and show the full frame of not only Thomas's hands desperately hanging on to the bar, but which also showed Fraser's hands around Thomas's neck and his massive body

easily holding him down; no shot, either, of Thomas's agonizing face, or sounds of his body being slammed around and screeching in pain. These were the moments Roitenberg could have argued that Thomas's state of mind was one of fear, that he was fighting for his life rather than plotting to kill an innocent man, that his intent was to stay inside a warm bus and avoid being trapped in the cold, even if it meant facing certain violence from Fraser.

Or what about Thomas's confusion and his declarations, such as, "I think someone is following me"? Even if this was a dubious claim, perhaps a sign of Thomas's own paranoia (though there really is not any other evidence to suggest this), why is it Fraser's paranoia of being duped that is permitted by Roitenberg and the Crown to be affirmed or to go unquestioned? Based on my years of field work, if I have learned nothing else, it is that this fear of being duped is absolutely a "commonsense" response by people in positions of power – like welfare workers, social workers, police, and lawyers – towards people who are struggling and in need of help – like Indigenous peoples seeking services at the welfare office, or who have social workers by virtue of their socio-economic life conditions of being in foster care.⁶⁴ While this might be commonsense for Roitenberg, demonstrated by his simple lack of countering the Crown's affirmation of Fraser's state of mind, the most fundamental and painfully obvious question of this whole trial was never asked by Roitenberg: given the very clear violence that Thomas faced on the bus, how could Thomas possibly think that it was in his interest to stay on the bus? Instead, he let this question hang and, thus, effectively allowed the Crown to answer it for the jury: that Thomas clearly wasn't afraid of Fraser's violence because he had a knife and could kill him. And whether one finds this logic convincing or not, it is absolutely unconscionable that Roitenberg left it to the Crown and just repeated his weak rhetoric to the

⁶⁴ See chapter 5 for a more sustained theoretical elaboration of this ethnographic observation.

jury: “I’m not afraid of you watching the video!” “You need to watch it!” Where the Crown worked with the immediate and perceptual encounter of the surveillance videos and literally transformed and manipulated the shadows with repetitive narrativization and selective framing, Roitenberg argued against his own theory of suggestibility by refusing to offer an alternative visual story of events and left Thomas’s fate to the same murky shadows.

It is truly difficult to account for this accumulation of blunders as a set of individual mistakes, instead of a set of strategically operative, or culturally influenced, *choices*. This becomes astonishingly clear when we realize that Roitenberg explicitly *fought for the opportunity to make these blunders*. Indeed, in the first several minutes of his address to the jury, Roitenberg suggested that it was “imperative” for a defense team to always be able to *respond* to the Crown’s arguments. Where the Crown put so much effort into putting the jury into the shoes of Fraser, and quite literally showed the jury “what I mean,” there was simply no attempt by Roitenberg to counter these dubious and easily refutable arguments or even to establish a basic symbolic connection between Thomas and the jury. It is hard not to see Roitenberg’s opportunity, and thus choice, to not do this as anything but negligence. But it is also interesting to consider Roitenberg’s reasoning a little bit further. For he was also quite dramatically insistent on the sacrifice that was required of him and his team in order to respond to the Crown, which itself was reflective of a “great anomaly” of the Canadian criminal justice system, as Roitenberg described it: namely, if a defense team wishes to have the final word in the final address to the jury they must forfeit their right to call any witnesses to the stand. Roitenberg was emphatic that it was “not an option” to lose the strategic advantage of responding to the Crown, and so explained that he had to make this difficult trade off. Thus, not only did Roitenberg not respond to the Crown’s arguments, he permitted all evidence to be called by the Crown. But while this

feature might be anomalous, and thus slightly unfair, as Roitenberg was inferring, it was nonetheless part of a broader “golden thread of our criminal justice system” that has institutionalized the principle of “reasonable doubt” and the “presumption of innocence.” Instead of building a case, then, Roitenberg was quite clear, and outspoken, that his role, and his strategy (indeed the responsibility of defense teams in general), was to simply build a “wall” in front of his defendant, protecting his innocence from the onslaught of the Crown while poking holes of reasonable doubt in the Crown’s position. Such narrative fantasies sound nice, but what did they look like in practice?

One particularly stunning feature of the trial revolved around a complete lack of DNA testing and a conspicuous absence of any blood tests. Of course, this may have been strategic by the Crown because such exhibits might not have had conclusive evidence as to whether Thomas had Fraser’s blood on him. I thought that this could be either because there simply was no DNA or blood evidence, which would be shocking, or that the evidence collected was inadmissible because of its destruction, or of sloppy police work. Incredibly, however, in maintaining his “imperative” to respond to the Crown’s arguments, Roitenberg did not call upon the one officer to give critical testimony in the court as to why there was no DNA evidence in the court exhibits. Roitenberg then mobilized this absence of evidence and the explanation for its absence under a rhetorical veil of uncertainty. Indeed, Roitenberg explained to the jury that this was one example of how in the absence of evidence sometimes “silence speaks loudly as its own evidence.” If such reasoning was not spurious enough -- that instead of calling this officer to testify as to why no blood or DNA tests were conducted, he allowed the absence of the officer to cast a suspicious doubt on the Crown’s case – it became absolutely farcical when Roitenberg used this same

suspicious absence to cast doubt on the controversy and uncertainty about the actual murder weapon itself.

While it never would have been known to the public reading along with the trial in newspapers, the murder weapon in this case was itself subject to a great deal of inconclusiveness and even some questionable police and prosecutorial tactics of evidence collection and submission. For the knife that was presented to the courts was not found until two months later on April 17th while snow was thawing and “at the base of a tree, on top of a pile of grass and leaves.” However, under cross examination, the officer who found the knife could not confirm with any certainty the precise location in which it was discovered, which was somewhere near the bank of the Red River on the campus of the University of Manitoba.⁶⁵ Much speculative musings were given to determining whether Thomas could have thrown it from where his path had been reconstructed based on footprints, but since there was no documentation of the location of its finding these became entirely speculative gestures.⁶⁶ In addition, there was no accompanying DNA evidence, or fingerprints, from this knife that could definitively indicate if it was used to kill Fraser. Finally, Roitenberg noted another peculiar absence in the evidence, which was a pair of scissors that had been reported in some police notes to have been found at the scene, but which were never logged into evidence or, apparently, checked for DNA.⁶⁷ Again, Roitenberg did not call on this witness to account for this bizarre situation in order to actually provide some credible components to his argument that could then be analyzed and assessed by

⁶⁵ Such riverbanks are notorious for accumulating trash during the regular seasonal flooding, and such river banks are popular spots for people to hang out, drink, and fish. Not to mention that such embankments are becoming increasingly popular as living quarters in Winnipeg as conditions of homeless continue to worsen.

⁶⁶ Furthermore, it was an open question as to whether Thomas had actually ventured on to the river, made it to the other side, and then turned back, or whether he was scared of falling through the ice and thus turned back before crossing the river. Which is to say that Thomas’s exact path was subject to much speculation and uncertainty.

⁶⁷ Laura Glowacki, “Defence Argues It Was Winnipeg Transit Driver, Not Accused, Who Produced Weapon during Fatal Altercation,” *CBC News*, January 30, 2019, <https://www.cbc.ca/amp/1.4999373>.

the jury. Instead he suggested that the absent DNA testing, scissors, and testifying officer all “speaks loudly” as evidence in favor of his position.

Ultimately, Roitenberg’s big counter argument that was meant to poke holes in the Crown’s position was that Fraser himself may have produced the weapon that was then used to kill him. In one of the only times that Roitenberg actually plays a segment of the video and engages in a narrativization of visual elements, he shows the scene just milliseconds before Fraser can be seen leaving the bus and pursuing Thomas. He called on the jury to focus on Fraser’s hand. Was that a knife in his hand? He does not, however, zoom in or have a prepared edit for the jury to actually consider this visual evidence. He merely asks them to revisit the video and consider this, later. By contrast, the Crown focused on an alternative moment after Fraser had stumbled to the ground and Thomas was about to leave the scene. With one of their trademark edited clips, fully zoomed in and even more grainy, the Crown replayed this scene several times and suggested to the jury that Thomas could be seen bending down and picking something up. “I suggest to you,” said Eyrikson, “that looks like a knife. It does not look like scissors.” It looked nothing of the sort to me, but I understood exactly what Eyrikson was up to. In contrast, Roitenberg’s alternative temporal moment of conjuring murder weapons, just seconds after Fraser leaves the bus to fight Thomas, he alerts the jury to, *but does not show*, what he claims is Thomas’s shadow bending over and picking up an object that perhaps looks like Fraser might have dropped. He encourages the jury to ask: *was this the weapon?* Such a seemingly important argument, one that could help the jury to seriously question the state of mind of each individual is not made. Roitenberg is only “half in,” noting mostly with empty gestures that the jury independently return to these shadows that are so obviously clear to Roitenberg that he only has to show the absolute bare amount of the video .

There is a fundamental contradiction between Roitenberg's words of the obvious and his decision to engage in the visual that characterizes his conception of truth. For the visual field is less about transparency than it is about cryptic rhetorical musings in which the shadows of the frame are meant to stand in as shadows of the Crown's argument. He does not alternatively explain, or show, what he means; instead he argues that "the shadow casts a very dark shadow of doubt." In this sense we should take him at his word when he argues that he is the "wall" in front of Thomas, for it appears to work at cross-purposes with his other main metaphorization of the Enlightenment principles of transparency that is meant to break through the darkness and shine a light on the truth. Instead of being the legal protector of Thomas and his presumed innocence, however, Roitenberg used his weapons of reasonable doubt to build an even bigger wall in front of Thomas and shroud the latter's innocence in doubt. Instead of actually shining any light – that is, of showing the surveillance video footage – Roitenberg simply doubled down on his Enlightenment ideals with a religious zeal: "I am not afraid of you watching the video," Roitenberg would declare. "You need to watch it!" The video footage continued to serve as a signifier of the obvious whose claim was beyond reproach as it could not, would not, be demonstrated. And all the while Roitenberg parroted the Crown, rather than respond to him, by continually gesturing to the jury as the bearers of commonsense. "Don't take the Crown, defense, or judge's word for it," Roitenberg made sure to repeat to the jury several times. In the end, there was almost nothing distinguishing these two 'adversaries' from one another. This became painfully true when Roitenberg seemed to be quoting the Crown prosecutor as he addressed the jury: "Only you can decide what is true." Perhaps instead of this repetition of Fraser's words – "there is nothing around here for you" – indicating anti-Indigenous racism, then, we should consider that Roitenberg was actually rehearsing a much darker form of commonsense in which

the expulsion of Indigenous life into the cold outside shares a conceptual border with the expulsion of Indigenous life in the courts.

Conclusion: beyond a reasonable doubt

How to put a final mark or punctuation on this convoluted mass of commonsense and legal structures that seem to be working against the Indigenous lives of people like Brian Thomas?

We have already seen how Chief Justice Joyal instructed the jury on how to make their decisions of Thomas's guilt based on an account of *reasonableness*, one that forced the jury to use their "everyday experience" but which fundamentally robbed Thomas of his own experiential world. Particularly, we saw how Joyal precluded a consideration of Thomas's Indigeneity, which was conspicuously left out of Joyal's categories of age and gender and size that the jurors were meant to use to more precisely compare themselves to Thomas. We saw how this precluded a meaningful accounting of whether it was reasonable or not for Thomas to believe he was under threat that night, or whether he had reasonable *purpose* to defend himself from the use of force with the use of force. Joyal was also clear that it was up to the jury to precisely determine facts in this case, while it was his job to teach them the laws in which they must determine these facts. They were the judges of facts; he was the judge of the law. Incredibly, whenever there was any confusion or uncertainty about evidence or what took place during the trial, Joyal informed the jury that it is "the jury's memory that counts" in the determination of fact, not his or the lawyers. Yet as he conveyed this neat division of duties, it rubbed uncomfortably with his account of another reasonableness that could never be so neatly determined by law; namely, reasonable doubt.

He did his best to coach the jury on how to consider the statements of witnesses and experts, acknowledging that there was no rule book but that they could use their “commonsense” to determine if someone “seemed” to be telling the truth. More systematically, he argued that if they were to determine facts based on inferences made by, or encouraged by, the lawyers or the evidence itself, it had to make global sense and be rationally coherent with the larger rational framework of evidence. It was impossible, however, to prove anything with absolute certainty, he said. This simply “does not exist in law.” But he also said that it was “not reasonable to say” that Thomas was “likely guilty.” Reason always came back to commonsense, something that would “logically arise” through evidence or lack thereof. He even deliberated on the important meanings between inference and speculation to help flush this meaning out, and how this would help them to specifically consider both direct and circumstantial evidence. He used the analogy of how one might determine if it is raining if they cannot see it directly. The inference that it is raining could be drawn from someone walking in wearing a wet raincoat and shaking themselves off – this is logically permissible from the facts of the sign of a wet raincoat. But it would be circumstantial to suggest that it was raining if someone was simply carrying an umbrella. But in this circularity between the logical reason that would “arise” from the evidence and the inability to be certain with any certainty, it always came back to the concept of doubt that was to be a conjugated form of both “reason and commonsense,” which Joyal broke down quite simply: “if you are not sure that Thomas committed an offense he was charged with, then he must be found not-guilty.”

Irresolvable determinations aside, it is useful to consider the provocative theory of the reputed legal historian, James Whitman, who has argued that the cherished legal principle of “beyond a reasonable doubt” that is so widely celebrated today – on full display in Roitenberg’s

summation of it as part of the “golden thread” of our justice system – is less the product of Enlightenment reasoning and the slow institutionalization of rational principles of making legal truth claims than it is a theological import of medieval times.⁶⁸ That is, beyond reasonable doubt was never meant to make it more difficult for a jurors to convict, as we assume in our sense of the modern rule of law, but was designed to make it *easier* to convict by providing jurors assurances that their souls were safe if they voted to condemn an accused and their condemnation turned out to be wrong.⁶⁹ In contrast to Roitenberg’s claim that reasonable doubt is of the “golden thread” of presuming a defendant’s innocence, it is, according to Whitman, a structural feature that permits the prosecution, and persecution, of defendants, and so we must be willing to entertain here that in the court that judged Thomas it was being equally deployed as a tool of ensuring his guilt and affirming the common sense of this guilt all while absolving the jurors, as well as the lawyers and judge, of any guilt or sense of blood on their hands.

Indeed, the notion of “reasonable doubt” and its “beyond” seemed to provide a heuristic space in which to abstract oneself even further from the already messy and paradoxical reality in which Thomas was abstracted beyond any meaningful recognition as an “average citizen,” just as it becomes a place of imposing some arbitrary sense of objectivity within the subject of the jury who is tasked with reconciling this split of not-guilty/guilty, doubt and truth. It is not reasonable to be “likely guilty,” Joyal told the jury, but it is anything but obvious where the scales tip, and what should make one fully guilty, or fully not-guilty.⁷⁰ To be unsure leads to not guilty, but does then a verdict of guilty require one to be sure? How sure? How much more sure than unsure do

⁶⁸ James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2008).

⁶⁹ *Ibid.*, 4. “Wrong” in the sense of factual, legal truth of the crime, but also more generally in the sense that it was difficult to get juries to judge others as it was uncertainly, uncomfortably a profane act of religious decree. Beyond a reasonable doubt was just as much a way of absolving jurors should they make a false conviction as it was of absolving them of doing God’s work of judging others.

⁷⁰ It is a further curiosity of the courts that one is not found “innocent,” but “not-guilty.”

they have to be? Beyond a reasonable doubt provides conceptual grounds in which this fundamental contradiction of thinking and being can be ignored and replaced with an abstract certainty.

For all of the competing claims to some obvious and commonsense truth, it is ironic that the obvious truth of Fraser's violence and Thomas's unheeded pleas for help, and the inferences we could draw from these facts, are what was cast to the shadows. And it is through the observation that it was the legal logic of this case – to either prove Thomas had intent to kill Fraser; or to raise a reasonable doubt of this proposition – that these truths remained in the shadows and which therefore holds my attention. Indeed, by looking closely at this case we see how it is not simply that Indigeneity is made absent in the courtroom – that Thomas's Indigeneity was suppressed within the shadows along with his please for help. Nor is it that this simply accounts for why his FASD equally remained in the shadows as a rather obvious defense tactic of building at least some kind of alternative account of his state of mind that night. We see these things in dramatic contrast to the ways they were excessively illuminated under the two-year period of accusation that preceded the trial. As we saw both Roitenbergn and Eryikson speak to the same commonsense that the jury was supposed to see, and where the Crown did this more or less through positive affirmations and the defense did this more or less through the casting of doubt, they both demonstrated how the impossible space between truth and doubt is a highly dynamic zone in which not only the jury was expected to intervene, but where the jury was expected to recognize itself in this commonsense, where the uncertain becomes crystal clear. The extreme anti-Indigeneity of this case was rooted in this gap, not simply as the outcome of an active process of negation, but as a positive expression of this fundamentally negative space.

This is where Fraser's act of expulsion becomes indistinguishable from the acts of expulsion performed in the courtroom by the legal councils, the jury, and the judge.

This theoretical proposition of the negative space in which anti-Indigeneity dwells, is capacitated, and is given such enormous power gives us conceptual material in which to further consider how we deal with such anti-Indigenous structures in the legal system, such as the unrolling of inquiry after inquiry that seems to tell us the same thing over and over again, but which is constantly iterating the injustice towards Indigenous life through the cunning tactics of "culturalization," which Razack defines as the attribution of problems (ranging from conditions as diverse as poverty, vulnerability, or mass incarceration) to cultural explanations of Indigeneity as such, and not to the materialities of settler colonial domination.⁷¹ (Razack, *Dying*, 36). Indeed, the previously discussed *AJI* of 1988 demonstrated a perfect iteration of this logic when, after arguing that the justice system is "inefficient, insensitive, and... decidedly unequal" for Aboriginal offenders, it turned to rote solutions of representation and an emphasis on incorporating Aboriginal "cultural values" into the system. For instance, Aboriginal peoples should be given more opportunities within business, government, and policing, in order to turn these systems around with the influence of a, presumably, more Aboriginal perspective. The *AJI* concluded that, in addition to incorporating things like "culturally appropriate programs for Aboriginal inmates," the broader Canadian populace would also have to "learn to respect Aboriginal people and their culture" (conclusion). They continue: "Most people in the justice system have little understanding of Aboriginal people, their history, culture, or way of life. Our study has convinced us that there are widespread misconceptions about Aboriginal people and about their perception of the law and the legal system." While the focus is on a notion of a

⁷¹ Razack, *Dying from Improvement*, 36.

cultural chasm, and particularly of understanding, they insert a sufficient amount of ambiguity into how we are to understand this condition of encountering difference by claiming that this is not simply about a lack of knowledge about “ways of life,” but also more generalized, and even material, condition of segregation: “We are convinced that those administering the system have no idea of some of the hardships they cause by automatically applying practices and procedures that work in other communities. They do not do this intentionally, but lack sufficient knowledge of the impact on Aboriginal people to foresee the results.” Even with this ambiguity, however, it is not clear, or in any way satisfying, how the AJI asks us to understand the rape and murder of Helen Betty Osborne, or how what we should take away about those friends, family members, and, indeed, the whole community of The Pas, who said nothing or did nothing to fight for Osborne’s justice.

“It is clear that Betty Osborne would not have been killed if she had not been Aboriginal,” the Inquiry suggested, and “those who abducted her showed a total lack of regard for her person or her rights as an individual.” They condemn “[t]hose who stood by while the physical assault took place, while sexual advances were made and while she was being beaten to death showed their own racism, sexism and indifference,” and claim that “[t]hose who knew the story and remained silent must share their guilt.” Yet as the context pans out from their legalistic concept of racism as an individualized phenomenon, as a public who reads this report we are left with the conceptual uncertainty as to why more Aboriginal people on a jury, or in the courts, would be able to bring this silent majority to justice. This repeats the problem of the Brian Thomas trial, which, while selectively examining his violence on Fraser and disavowing Fraser’s violence on Thomas, was utterly incapable of considering the conditions of violence in which

this was all predicated upon, as it was iterated in the procedures and conceptual intelligibility of the court itself.



Figure 10 - Surveillance footage of Fraser's unprovoked attack on Thomas. Accessed at <https://www.cbc.ca/news/canada/manitoba/thomas-bus-driver-trial-1.4988345>

Chains

“Mr. Thomas? Mr. Thomas!?” he announced. But there was no response. Through my headphones I could feel the tension in the courtroom. Judge Joyal addressed Brian again, but with an elevated and annoyed voice, “Mr. Thomas?” All I could make out from Brian was a grumble, maybe a “yeah?” and some movement, scuffling of feet and, particularly, the sliding of chains on the hard-wooden bench that he was sitting on. Perturbed, but equally unphased, Joyal went on to explain to Thomas that he would not be sentencing him today. The Crown had some documents to prepare for Joyal before such things could be considered. It was all so formal, but basically Joyal was telling Thomas he would need to wait another two months before he would hear his fate. And with that, Joyal adjourned, papers shuffled, and the tape cut out just as I heard Brian’s chains begin to lift from their wooden seat.

The echo of Brian’s chains, and the sharpness of the cut in which they were expunged from the record, reverberated in the awkward silence that he drew from the court. This shackled noise accentuated Brian’s silence – or his inattention, from the perspective of the court. They also accentuated the fact that this was the first time that Brian was acknowledged as a speaking or listening being by the court, and the only time he was given a chance to formally use his voice in these chambers. It seemed entirely appropriate that this formal invitation, or demand, to speak and listen was met with silence and indifference from him. It made me think of all those court cases I’d been reading, with names like *R v Okemow*, *R v Ipeelee*, *R v Wells*, all Indigenous people, spoken of *as if* they wrote these decisions and “raised the issue” of the various principles of law being debated on their behalf: “The young person argues that the judge erred in principle in concluding that the Crown had rebutted the presumption of diminished moral blameworthiness...” and so on (*R v Anderson* 2018, paras 4, 47). Really, though, they are expropriations of names and lives, a ritual of ventriloquizing those we hold in chains, whose attention we demand while paying very little of our own in return. How these names become calcified historical relics is only one step further to how we treat the lives they belong to and consign them to waiting.

Chapter 4: Post-trial Sentencing **Mitigating, Explaining, Remediating(?) the Indigenous Body**

*So what if in the end my living amounts to an evidentiary act.*¹

There is an element of my hurried conversation with Thomas’s defense lawyer, Evan Roitenberg, that I have saved until now. While the substance of our conversation covered in the last chapter revolved around the questions, and common sense, of why FASD was absent in his legal reasoning and argumentation because it had “nothing to do” with what he needed to prove, this did not mean that FASD was not on his mind at all. Indeed, he was very much aware of FASD, and indicated as much to me when he abruptly dismissed my curiosity as to why FASD bore no relevance to a self-defence case for Thomas by saying that, “generally speaking,” FASD becomes relevant only in sentencing hearings. When I asked him if FASD would then be relevant in the sentencing hearings for Thomas’s case, Roitenberg only gave me a cocky smirk and sarcastically raised his eyebrows before simply walking away from our conversation. Of course, I had a hunch that this would be true, but the answer to my dodged question was affirmed almost immediately after the jury found Thomas guilty when, barely without a pause, Roitenberg stood to address judge Joyal to inform him that he would be requesting a *Gladue* report for the purposes of Thomas’s sentencing trial. *Gladue* reports are, as one CBC reporter covering the Thomas trial aptly described it in a tweet, meant to “take... into account the background of Indigenous offenders when making sentencing recommendations.” As we will soon learn, *Gladue* reports denote a unique infrastructure within the Canadian criminal legal system that

¹ Billy-Ray Belcourt, *NDN Coping Mechanisms: Notes from the Field* (Toronto: House of Anansi Press Inc., 2019), 3.

calls Aboriginal peoples, and Aboriginal peoples only, into a specific relationship with the court. Namely, the behaviors and actions and, ultimately, guilt, of Aboriginal offenders are measured in these reports through an accounting of a genealogical script that situates the specific biographical story of an offender within a general story of how colonial history has negatively impacted or altered Aboriginal life. In a sense, we see here quite clearly the difference between the legal punishment and the punitive technique, as outlined by Foucault in his analysis of modern paradigms of discipline:

The legal punishment bears upon an act; the punitive technique on a life; it falls to this punitive technique, therefore, to reconstitute all the sordid detail of a life in the form of knowledge, to fill in the gaps of that knowledge and to act upon it by a practice of compulsion. It is a biographical knowledge and a technique for correcting individual lives.²

Gladue is nothing if not the attempt to “reconstitute all the sordid detail” of Indigenous life into a form of knowledge. But where contemporary settler colonial forms of discipline differ from those of Foucault’s European history are in the ways that the gaps of biographical knowledge constitute not a technique of correction, but a discursive formation of containment.

I’ve had enough experience to know that if there is the remotest possibility that an offender has FASD, it is within such *Gladue* reports where it will be raised and thus become centrally meaningful to the courts in their contemplation of an offender. But it was Thomas’s trial where I first started to discern the very important set of logics that constituted this relationship between Indigeneity, FASD and *Gladue*, including the particular temporal dynamic in which FASD, and *Gladue*, become relevant *once guilt has been established* and, more importantly, how this temporal moment of guilt marks the *return of the storying of Aboriginal life* where FASD is again central to the framing, questioning and explaining of Aboriginal

² Foucault, *Discipline & Punish*, 252.

dysfunction. In short, it was in the before and after of the trial where Thomas's status as a disabled Indigenous criminal became relevant for the courts and the media. In these two moments and styles of guilt-making, in public accusation and in the affirmation of the legal trial, there is a connection drawn between Aboriginal guilt as a cultural, if not congenital, self-replicating quality of Aboriginal crime and dysfunction. As we will see, a similar temporal imaginary of Thomas-as-criminal returns here too. If Thomas was not someone that reporters would want to live next to or encounter on the streets, then we find Thomas's Indigenous criminality to be equally inexhaustible as his alleged disability and dysfunctional cultural upbringing make him an 'unlikely candidate' for rehabilitation. It is in the sentencing trial where Thomas was given a precise quantification of his incorrigible essence – life in prison, with a minimum twelve years served before eligibility for parole.³

As we will see in this chapter, it is the ethnically exclusive infrastructure of *Gladue*, in which Aboriginal peoples are called upon to story their historical injury as a means of constructing possible mitigating factors for their sentencing, that makes FASD possible as a factor for qualifying Aboriginal genealogies. These genealogies are thus a central infrastructure for making the prevalent linkage between Aboriginal life and FASD. *Gladue* makes it possible to represent FASD as an "Indigenous problem." But if *Gladue* makes the linkage between Indigeneity and FASD possible, this is true because of how FASD is able to articulate itself to the fundamental contradictions of the Canadian legal system and its particular relationship to

³ In Canada's Criminal Code, a second-degree murder conviction comes with 'life sentence,' which means that one will spend a minimum of ten years, and a maximum of twenty-five years in prison, but will be on parole for the rest of their lives. The purpose of the sentencing trial was to determine the minimum amount of time Thomas would have to spend in prison before being *eligible* for parole. He might never be eligible for an 'early release,' but would have to be released at the end of his twenty fifth year. If we know anything about these systems, we know that Thomas is likely to face stricter sanctions and will be less eligible for parole than his non-Indigenous inmate colleagues because of 'systemic discrimination against Indigenous persons in the Canadian correctional system.' See Ewert v. Canada.

Indigenous peoples. *Gladue* emerged as a Supreme Court decision in 1999 after a decade of energetic attempts to solve the particular problem of overrepresentation of Indigenous peoples in the prison system that was acknowledged to be the effect of a complex set of systemic factors that plagued Indigenous populations. These factors ranged from ‘colonial history,’ to abject poverty, to overt and subtle forms of racism in society that keeps Indigenous peoples in a disadvantaged position relative to Canadian society. *Gladue* emerged as a ‘legal fix’ to address this problem of Indigenous overrepresentation in the justice system. However, it was poorly conceived. Its impact was reduced because of its positioning at the tail end of criminal justice process in the sentencing phase. By the tail end of sentencing the ‘systemic’ factors have already assembled and calcified in the lives and communities of Indigenous peoples, making it an otherwise a moot point. With the crimes of Indigenous peoples having already occurred, and their guilt confirmed, what could *Gladue* do to intervene in the systemic forces that were thought to have led Indigenous peoples to the courts? Predictably, *Gladue* has thus done nothing to achieve its intended goal of alleviating gross overrepresentation, which has only gotten worse since 1999, but – and this is a central point to this chapter – it did create a new infrastructure in which to rehearse Indigenous suffering and misery and to draw conceptual linkages between broad and vague notions of ‘colonialism’ and Indigenous criminality.

If the formula of *Gladue* is to reduce culpability of an Indigenous offender by offering mitigating factors to their legal file, these mitigating factors are, by definition, related to the exclusive experience of Aboriginal peoples in Canada. This is the first step to racializing *Gladue*, but it goes further still. For, as we will see, how the courts understand the meaning of ‘colonial impact’ is grossly inadequate and, quite frankly, conceptually hopeless. Very quickly we learn that ‘colonial impact’ becomes synonymous with other signifiers like “Residential Schools,” and

where the ‘systemic’ impacts of colonization are displaced into considerations of “Aboriginal culture” and, very quickly, stand ins for a general understanding of Aboriginal dysfunction. *Gladue* becomes a way of representing Indigenous criminality as a form of Aboriginal dysfunction, while displacing any meaningful analysis or account of what colonial violence actually looks like, or, indeed, what is so ‘systemic’ about Indigenous discrimination. In fact, this semiotic exercise of substitution and condensation of meanings itself demonstrates what colonial violence can be, and so it is perhaps understandable how *Gladue*, the courts, or the legislative branch lack the self-referential capacity to elucidate these complex dynamics.

More specifically, however, in terms of procedure and the everyday operations of *Gladue*, we see how this repetition of colonial violence becomes facilitated by other distinct legal epistemological impasses. For instance, *Gladue* must navigate the causal passage between the generalities of ‘colonial impact’ on Aboriginal life and the specific, legible biographical stories of individual Aboriginal suffering that fill out this ‘impact.’ Between these two variables is a gap that we very well might characterize as the *gap of colonial discretion*, where colonial habits of thought are both confined within narrow parameters of legal rules and where judges make interpretive acts within these limitations and thus exercise them as if they were their own personal choice. Indigenous offenders are thus rendered, or split, into two subject positions here, one representing the universal category of Indigenous suffering, and the other being the individualized biographical subject. The former is granted considerations of diminished responsibility while the latter is, quite often, as we will see, denied it. For, as dictated by the *Gladue*, a judge must operate within the parameters of the Criminal Code itself and always move from the general concept of colonial harm or Aboriginal cultural dysfunction to the singular conditions of “this offence, committed by this offender, harming this victim, in this

community...”⁴ With an already poor understanding of ‘colonial history,’ lawyers and judges struggle at the best of times to draw a meaningful causal link between colonialism and individual, Aboriginal, crimes. And if one were to say that this is philosophically, or even tautologically, true, that causal links are near impossible to make with any certainty or objective grounding – and indeed, this bears an echo to judge Joyal’s instructions to the jury that there is no such thing as absolute certainty in law, as we saw in the last chapter – I, for one, would not take issue with them other than to point out that the structure of *Gladue* raises this requirement, if ambivalently, within itself, and thus demands an accounting as to why such a causal link could be imagined between colonialism and Aboriginal crime in the first place.⁵ More importantly, what is made possible by the concept of such a causal link?

Just as the intent and purpose of *Gladue* contradicts itself in practice, if not also in its theoretical elaboration (more on that below), within the courts, this inability to pass from the general condition, or cause, of Indigenous suffering to the specific experiences of an Indigenous offender are replicated by the legal discourse of FASD. Take, for example, the well-known legal resolution written by the Canadian Bar Association in 2011, which called on all levels of government to recognize that the criminal justice system, and particularly, the sentencing principles of specific and general deterrence found in the Canadian *Criminal Code*, are based on “normative assumptions that a person acts in a voluntary manner, makes informed choices with respect to the decision to commit crimes, and learns from their own behavior and the behavior of others.” These assumptions, argued the CBA, are “not valid for those with FASD” due to their

⁴ R. v Gladue (Supreme Court of Canada 1999), para 80. Emphasis in original.

⁵ In a dialectical fashion, we might also ask why no such causal link has ever been proposed, or considered, of the generational impacts of a settler class inflicting violence on Indigenous peoples and subsequent sociological and political formations of settler crime. Though I think such a question points us toward an unsettling realization of how only certain crimes are legible in this settler-colonial historical formation, and becomes very quickly a circular exercise as we return to how Indigenous crime is increasingly being recognized through an imaginary of dysfunction and disability.

underlying brain and central nervous system damage that impairs their mental functioning and judgment.⁶ In simpler terms, anthropologist and FASD advocate, Michelle Stewart, has stated that “what we need, when it is possible, is a justice system that understands this person might not actually be purposefully doing the acts that they appear to be doing,” and to thereby adjust our approach to punishing/sentencing this person based on a better understanding of their “cognitive difference”, now rendered a recognizable and actionable disability.⁷ This is not, on the face of it, an unreasonable demand, and carries the spirit of purposeful and progressive reform of our legal system to be more in line with human rights principles, say. However, we can see here an obvious limitation in how this legal argument of FASD replicates the temporal logic of becoming meaningful, or urgent, as a mechanism of intervention into the unjust scenarios of the criminal justice system by intervening almost exclusively at the tail end, *after* peoples have been in *negative contact* with the justice system, much like *Gladue* was meant to intervene on Indigenous overrepresentation in prisons by intervening after Indigenous guilt had been determined.

In addition to being a limited legal-temporal approach, however, this legal FASD discourse replicates, or harmonizes with, another significant contradiction of *Gladue*, particularly as FASD is mobilized so as to distinguish between the progressive principles of individual rehabilitation, on the one hand, and the unprogressive sentencing principles of deterrence and denunciation that focus on public safety, on the other hand.⁸ Clearly, the intention of the CBA is

⁶ Canadian Bar Association, “Fetal Alcohol Spectrum Disorder in the Criminal Justice System.” The full list of symptoms of FASD that make the disorder relevant for their claims are: “impaired mental functioning, poor executive functioning, memory problems, impaired judgment, inability to control impulse behavior, inability to understand the consequences of their actions, and inability to internally modify behavior control.”

⁷ Michelle Stewart, quoted in McEachern 2015.

⁸ Gagnier, Moore, and Green, “A Need for Closer Examination of FASD by the Criminal Justice System,” 432–33. There are six primary sentencing principles/objectives that a judge must consider: denunciation, deterrence, separation from society (protection of the public), rehabilitation, reparations, and instilling a sense of responsibility in the offender.

to acknowledge that FASD should be treated as a mitigating factor – that individuals should not be held criminally responsible for things that could very well be beyond their control. And, furthermore, sentencing principles of deterrence will obviously not work or be effective for such individuals since they struggle to learn from their mistakes. But it is these same arguments against deterrence that often convince judges to ignore principles of rehabilitation and, in fact, overemphasize retributive principles of deterrence, denunciation and, separation of the offender. For if individuals with FASD cannot learn from their mistakes, and if this disorder is neither treatable or reversible, what is to stop a judge from considering FASD itself as an inherent threat to public safety?⁹ In short, it is here where a similar gap of interpretation or discretion is permitted for a judge to either accept FASD with the framework intended by CBA, or to impose the harsh inverse of this framework.

As we will see, this particular contradiction in which FASD is deployed as affirming either a progressive or reactionary legal outcome is only a superficial schematic. For one, it contains significant exceptions, particularly on the side of judges who express their thoughtfulness and care toward individuals within a framework of wanting to help and protect individuals with FASD as much as they want to help and protect the rest of society from these allegedly unpredictable automatons of violence.¹⁰ This schematic ultimately prevents us from

⁹ Gagnier, Moore, and Green, 432.

¹⁰ There certainly is no shortage of judges who speak in such registers of care and progress while simultaneously situating their FASD advocacy and calls for legal reform in a discourse of hopelessness that requires nothing else but harsh penalty of separating individuals from society via prison or some other kind of community resources that resemble structures of surveillance and containment. In the Manitoba Provincial Court decision, *R v S.K.* (2010), a judge is at pains to justify her own use of power to bring a teen before the courts, using her FASD as a legal excuse because it demonstrated the high degree of support and supervision needed by the youth, and that her concern for the youth, and subsequent demand for more supervision, was because she did not want the youth to “fall through the cracks” but also it was “vitally important to the protection of society” (para 68). See also, Barnett, “A Judicial Perspective on FAS: Memories of the Making of Nanook of the North.” Such views should also be compared against the open hostility and racism that informs the views on FASD of a former Manitoba judge: Giesbrecht, “Inquiry Needed into Fetal Alcohol Syndrome.”

taking stock of the shared outcomes in which these two sides of the spectrum lead to, for, despite the various locations from which one may speak, all paths ultimately lead to some form of *apprehension* of criminals with FASD. It is either in alternative sentencing protocols that inevitably incorporate broader ‘community’ resources, or in harsher stints of incarceration. If anything, the progressive approach to FASD only leads to an increased vocabulary and grammatical sphere in which to render, and ultimately, surveil, such offenders. And because it is precisely the *Gladue* infrastructure that makes FASD an intelligible feature in which to anchor the sordid genealogies of Aboriginal offenders, such increased capacities only contribute to the momentum of translating Indigenous crime into broader categories of Indigenous dysfunction that thereby contribute to the construction of further infrastructure in which to render such realities.

Thus, to focus on this shared outcome is the anchor of my overall analytic within this chapter, and within the broader dissertation, and it helps us to see how *Gladue* and FASD are two intricately related puzzle pieces in the broader machinery of storying Indigenous life as dysfunctional and representing it as *already* guilty. As a mode of representation, this set of discursive relations has the power to reorient and re-explain the most material of political landscapes. That FASD has become associated with Indigeneity is proof of an increasing capacity for apprehending Indigenous life through a frame of dysfunction. Whether FASD or *Gladue* become mitigating or aggravating factors in their attempt to address the ‘Indigenous problems’ of overincarceration, the inevitable reality is that in accounting for this ‘problem’ it is also being re-presented, explained, and figured. Indeed, instead of serving as remediating mechanisms of systemic discrimination, both *Gladue* and the discourse of FASD are becoming mechanisms for justifying the fundamentally unequal conditions of Indigenous life. *Gladue* and

FASD, while techniques of gathering biographical life, are not techniques of correction of Indigenous life, but a new discursive formation for the *apprehension*, as both a physical-material and conceptual-metaphorical act of containment and capture, of Indigenous life.

Explaining overrepresentation

A Supreme Court ruling in 1999, *R v Gladue*, was the first ‘test’ by the high court of a 1996 amendment to the sentencing principles of the *Criminal Code* of Canada, which included the new subsection “(e)” of s.718.2. This section addressed all sentencing judges to consider that “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community, should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”¹¹ This legislation had emerged out of a long debate about the crisis of overincarceration in Canada and the particular problem of overrepresentation of Indigenous peoples in the prison system. S.718.2(e) was thus a remedial solution to this problem.¹² The defence counsel of *R v Gladue* challenged that the provincial judge in this case had not taken into consideration the Aboriginal identity of a woman who was ultimately charged with manslaughter for the death of her boyfriend because she lived in an urban setting and, as far as the provincial judge was concerned, was disconnected from her culture and thus was not truly “Aboriginal.” The judge argued that there was therefore no relevance of s.718.2(e) in the case. In ruling that this was an error in judgment, the Supreme Court thus enshrined its decision in *Gladue* as an everyday reminder to

¹¹ Legislative Services Branch, “Consolidated Federal Laws of Canada, Criminal Code,” December 12, 2013, <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-163.html#docCont>.

¹² *R v Gladue* noted that in these parliamentary debates it was acknowledged that this crisis of overrepresentation was largely due to an overemphasis on the archaic principles of retribution and other carryovers that try to correlate “the severity of the sentence” with a “perceived seriousness and moral blameworthiness of the offence” (*R v M (CA)*, [1996]; Parkes and Milward, 95).

the courts that s.718.2(e) shall be relevant in every case involving an Aboriginal offender, and a basic remedial effort to counteract the overwhelming problem of disproportionate representation of Indigenous peoples in the prison system.

It is relevant to note, if only to point out one of those great legal curiosities, that as an appeal to the highest court of Canada, *R v Gladue* was ultimately *dismissed* by the Supreme Court. That is, the ultimate intent, and the goal, of the appeal, to have Mrs. Gladue's sentence reduced, was denied. For one, the slow nature in which cases reach the high court meant that Mrs. Gladue had already been released on parole and had gone through relevant treatment programs, making any consideration of a lesser sentence a moot point. Even still, the Supreme Court ultimately decided that while the sentencing judge erred in neglecting s.718.2(e) in his factoring of Mrs. Gladue's sentence, when the Supreme Court corrected for it by considering her 'background factors' of being an Aboriginal woman they came up with a nearly identical sentence. The point was thus doubly moot. However, this has not stopped *Gladue* from serving as a reminder and clarification of the statutory duty of all sentencing judges to exercise their discretionary capacity to consider the "unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection."¹³ While *R v Gladue* was a failed appeal, it has nevertheless become one of the most well-known and most regularly cited Supreme Court decisions that affects Indian Country today. It was not the granting or denial of the appeal that mattered, it was the reading, and affirmation, of the overall purpose and intent of s.718.2(e) of the *Criminal Code* that mattered. It was, and repeatedly is, a significant rehearsal

¹³ *R. v Gladue* (Supreme Court of Canada 1999), para 66; *R. v. Ipeelee*, No. 33650, 34245 (Supreme Court of Canada 2012), para 59.

of the assumptions, and political conditions, that had informed that crucial piece of legislative reform in the first place.

Without a doubt, s.718.2(e) and *R v Gladue* assume a direct causal link between Aboriginal crime and the “background factors” of colonialism in which that crime takes place, which it defines, vaguely, as overall poverty in Aboriginal communities, poor opportunities, poor education, substance abuse, loneliness, and community fragmentation that have been created by years of colonial policy of dislocation and economic isolation. Such “background factors” translate, *Gladue* argued, into a “higher incidence of crime and incarceration” in Aboriginal communities, and thus make these systemic and background factors “bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness.”¹⁴ Noting that ‘background factors’ are implicated in all crimes, *Gladue* distinguished those factors for Aboriginal peoples: “aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination.”¹⁵ This criminal justice infrastructure thus calls Aboriginal peoples into a distinct relationship with the criminal justice system, one where they are called upon to provide details of personal life history to the court and to describe their criminal behavior through a story of colonial impact as genealogy.

Most of these assumptions were derived from the particular historical moment of the 1990s when the brute inequality and systemic oppressions that informed Indigenous relations with the state and its non-Indigenous population were coming to a head in explosive and volatile confrontations, such as the Oka Crisis. This particular crisis was crucial in prompting the Royal Commission on Aboriginal Peoples (RCAP), a five-year investigation into the systemic inequality and degradation of Indigenous peoples that was just wrapping up as Canada

¹⁴ *R. v Gladue.*, para 59

¹⁵ *R. v Gladue.*, para 68.

implemented its *Criminal Code* reforms.¹⁶ In this historical moment of reckoning with Indigenous peoples in the country, RCAP was enormously influential in shaping such reforms like that of s.718.2(e). It has been noted, however, that of all the recommendations the RCAP made to restructuring the relationship between Indigenous and non-Indigenous peoples, and for all of the recognition it paid to the systemic discrimination of Indigenous peoples in the justice system, in particular, it made very few recommendations for *judicial reform*, and instead reserved its judgment and subsequent recommendations for *systemic change* on broader *political reforms*.¹⁷ What is particularly troubling is how this drastic shift in emphasis from the political to the judicial is largely ignored, but also how this shift seems to be accompanied by an equally significant shift in emphasis toward “culture.” As legal scholar David Stack argues, s.718.2(e) and *Gladue* gleaned from RCAP that overrepresentation is due not only to socio-economic disadvantage, but also to “cultural assault” and the contributing factors of an “uninformed” judiciary whose subjective preference can be influenced by unconscious bias that is remedied by

¹⁶ RCAP did not emerge in a vacuum, however. It was preceded by other inquiries, like the *Aboriginal Justice Inquiry* in Manitoba in 1991, which we saw in the last chapter.

¹⁷ David Stack, “The Impact of RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom Other Articles,” *Saskatchewan Law Review* 62, no. 2 (1999): 474. RCAP discussed fundamental principles of governance and participation, concrete shifts in government policy that could articulate a meaningful and just world that could “better the life conditions of Aboriginal people” through targeted enhancements of educational and economic opportunities. It called on the neglected obligations of original agreements, like Treaties, where Aboriginal peoples decided to become part of Canada. “Promises ought to be kept,” RCAP suggested. It called for legislation to be re-written with proper accounts of what “Indian” means as laid out in the treaties. Ultimately, any sense of justice in Canada must be able to accommodate multinational citizenship and a universal respect for human rights; a vision of a “just multinational federation” that combines “self-rule and shared rule.” Canada, Royal Commission on Aboriginal Peoples, *Final Report of the Royal Commission on Aboriginal Peoples (Online Copy)*, vol. 1, Looking Forward Looking Back (Ottawa: Canada Communication Group, 1996), 6, 7 <http://data2.archives.ca/e/e448/e011188230-01.pdf>. Within the volume of RCAP titled, *Bridging the Cultural Divide*, which addressed specifically “Aboriginal People and the Criminal Justice System,” it was also political solutions that were provided. Namely, “recognizing the right of Aboriginal peoples to re-establish their own justice systems and providing the resources to exercise that right is a necessary part of the new relationship we have proposed.” Even as the Report addressed the issue of “healing” in relation to the systemic problem of “overrepresentation,” it was always more than a “cultural perspective” that they advocated for, it was the large scale political and economic shifts that was central to this healing that “can be provided only by Aboriginal people themselves to replace “the great Canadian lockup.”” Canada, Royal Commission on Aboriginal Peoples, *Final Report of the Royal Commission on Aboriginal Peoples*, vol. Bridging the cultural divide: a report on Aboriginal people and criminal justice in Canada (Ottawa: Canada Communication Group Publishing, 1996), 76–77.

making them “sensitive” to “the Aboriginal context.”¹⁸ The move of accommodating the large-scale political shifts demanded by RCAP within a technical tinkering of the judiciary was met with an equal move from systemic analysis to a prompt of “sensitivity” and to “accommodate the perspectives of Aboriginal peoples” within the existing Canadian legal framework.¹⁹ *Gladue* is thus nothing if not a political procedure within the courts, but the slippery movements from political change to judicial mandates and cultural imaginaries shifts the coordinates of this political solution, and particularly how it makes invisible the causality of colonial violence that was being addressed by reports like RCAP. This important insight is crucial to keep in mind when we consider how *Gladue* and its legislative statute of s.718.2(e) have been colossal failures.

Indeed, there have been no qualitative changes to the conditions of overincarceration of Indigenous peoples in Canadian prison systems over the past two decades since *Gladue* made its ruling affirming a “different approach” for Indigenous offenders, and in fact such conditions have gotten demonstrably worse.²⁰ This very practical and material assessment of *Gladue* is crucial for framing one of the fundamental hypotheses of this chapter; namely, that from the start the spirit of *Gladue* has not been to remediate the overrepresentation of Indigenous peoples in the jail systems but to explain it and, in some ways, to justify it. *Gladue* does more to rehearse common tropes of Indigenous dysfunction than it does to detail the systemic mechanisms of colonial violence. We will explore the theatrical logics of this rehearsal, particularly the genealogical imaginary that *Gladue* facilitates for the court and how it permits a pattern of

¹⁸ Stack, “The Impact of RCAP on the Judiciary,” 475.

¹⁹ Stack, 474.

²⁰ While non-Aboriginal incarceration rates were plummeting in the immediate years after *Gladue*, Aboriginal rates continued to increase without hesitation. This trend continues to this day. See *R v Ipeelee* (2012), para 62.

accounting for Indigenous crime and violence that is more akin to consumption than anything that might resemble the remedial efforts of a deflection from the system. It is a strange feature of capacitating the further absorption of Indigenous bodies into the system while providing a ready-made explanation for this increased proliferation of bodies. The solution offered by *Gladue* has become the problem it sought to remediate. Roitenberg's officially sanctioned request of a *Gladue* report was thus one important step in a process that has come to genealogically trace and affirm Aboriginal dysfunction, in which FASD plays an increasingly supportive, if not lead, role.

Requesting a Gladue Report

The first act of the *Gladue* performance was in the moments shortly after Joyal had affirmed the jury's verdict of Thomas's guilt of second-degree murder. If this were a TV show where judges regularly let their gavels fall to dramatize decisions or make calls to order, it would have been a mere couple of seconds after Joyal's metaphorical gavel had landed that Roitenberg stood to formerly ask for a *Gladue* report. Even more notable of this moment, however, was how utterly mundane, and even reflexive, it all was. It felt as if this this moment had already been well-rehearsed, and that I was watching an orchestration that was not exactly legal. As if on cue, and demonstrating an anticipation of Roitenberg's request, Joyal nodded in agreement with the lawyer, noting with a frank sigh, however, that such a report would take time. Similarly, Roitenberg assured the judge that he had already been in contact with probation services to draft a pre-sentence report that is common for all offenders as a document that guides a sentencing judge in their final judgement. It is easy to overlook, but this in and of itself demonstrates a certain anticipation on the part of Roitenberg and probation services, who fully prepared for Thomas's guilt. Nevertheless, and continuing with the main point here, Joyal then intervened to note an important disclaimer about pre-sentence report; namely, the production of pre-sentencing

reports is the purview of probation services, while *Gladue* reports were not. Roitenberg agreed that the two are different and Joyal thanked the counsels and said, “we’ll put the matter to the assignment list,” and then adjourned. In chains, Thomas was carried away... to wait.

What Joyal and Roitenberg were discussing, though not specifically addressing, was the highly contentious issue of representation that surround *Gladue* reports, and, thus, Indigenous genealogies of suffering, which stems primarily to a lack of political will and, specifically, from a chronic problem of underfunding. Namely, *Gladue* reports are supposed to be researched and written by specialists (typically, Aboriginal court workers who are hired, and specifically trained, for this precise task) who can take the time to gather relevant data on the offender, who have an analytical eye for how colonialism takes form in the lives of Aboriginal people and, presumably, leads them to be before the courts. For the most part, however, these specialists are virtually non-existent in Canada, being located only in a select few jurisdictions across the country.²¹ It is probation officers, primarily, who write “*Gladue* reports,” the scare quotes denoting that these are merely tacked on as an addendum, an afterthought, to their pre-sentence reports (PSRs).

An even more substantial difference exists, however, between a PSR that is written in the form of an actuarial risk analyses of an offender, a predictive logic that judges then use to make judgements. Between a PSR and a *Gladue* report exists a wide chasm of logic and thinking, which has been demonstrated by many researchers as conflicting purposes and intents of these differing reports. As Kelly Hannah-Moffat and Paula Maurutto have cogently argued, when “*Gladue* factors” are simply tacked on to a PSR it effectively places the “culturally situated information” of *Gladue* and its attempt to reframe the offender’s “risk/need” within a holistic

²¹ Kyle Edwards, “Why Gladue Has Not Lived up to Its Promise for Indigenous Justice: Across the Country, Gladue Rights for Indigenous Offenders Are Being Ignored, Underfunded or Flat-out Denied,” *Maclean’s*, October 18, 2017.

social-historical understanding of their community and individual experiences, within an actuarial framework of criminogenic risk that has contradictory outcomes. Particularly, a probation officer's attention to the offender's race actually makes them *more* criminogenically risky based on actuarial calculations.²² Debra Parkes and David Milward similarly elucidate this contradiction with a specific example that shows how PSRs cannot even contemplate the intentions and spirit of *Gladue*:

...if an accused has previously been through probation or a conditional sentence for a similar offence, it would be likely that a PSR would assess the accused as unfit for another supervisory sentence. For a *Gladue* report, an important question to ask is whether the accused has ever had access to rehabilitative services that are grounded in Aboriginal culture and spirituality. Convincing evidence has accumulated demonstrating that Aboriginal people respond better to culturally appropriate rehabilitative services in comparison to mainstream rehabilitative services.²³

Such contradictions inform a general systemic inequality in the justice system in which Aboriginal offenders are effectively punished with automatic and machine-like reflexes simply because of their designation as "Aboriginal" or, relatedly, because they tick off other questionnaire boxes that algorithimically coalesce around such identifiers of "Aboriginal heritage" or "background," such as whether they were adopted or lived in foster homes, if they grew up in poverty, or have lower educational levels, all of which effectively identify them as actuarially more at-risk for criminogenic behaviors.²⁴

²² Kelly Hannah-Moffat and Paula Maurutto, "Re-Contextualizing Pre-Sentence Reports: Risk and Race," *Punishment & Society* 12, no. 3 (2010): 274–75. As they put it, "Gladue factors are positioned and itemized alongside (and sometimes interpreted as) risk factors" (Ibid., 274). For a more general account of how actuarial technologies of risk assessment affect, target and indirectly discriminate against racial minorities, see Bernard E. Harcourt, *Against Prediction: Profiling, Policing and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007).

²³ Debra Parkes and David Milward, "Gladue: Beyond Myth and Towards Implementation in Manitoba," *Manitoba Law Journal* 35, no. 1 (2012): 89.

²⁴ This contradiction was recently tested by the Supreme Court in slightly different circumstances where it was claimed that parole decisions effectively discriminated against Indigenous offenders because they used psychological and actuarial risk assessment tools to test an offenders psychopathy and risk of recidivism that were developed and tested primarily on non-Indigenous populations. This appeal claimed that these risk-assessment tools essentially created the kind of algorithimic constellation of details around the construct of "Aboriginal" that

These grave and significant differences between the two report styles were whitewashed by Joyal, Roitenberg and the Crown on the first day of the sentencing hearing, June 17, 2019. As a matter of order, Joyal noted that the report that had been submitted to him was, in fact, a PSR, as it had been conducted by probation services and not a trained *Gladue* reporter. Nevertheless, he asked for agreement by the defense and Crown that it would be referred to as a “Gladue report” and, further, that it would be officially submitted as a “Gladue report,” as long as there were no objections. There were none.

Such a scenario is baffling, and not only because the “important differences” between these two reports were gestured to several times by Joyal, but never actually explained in any meaningful way. While we do not have to accept the logic of *Gladue* reports, it is still striking that no clarification was sought on why an actuarial PSR might differ from a qualitative genealogy of an Indigenous offender’s life, or how calculations of risk become coded into conditions of racial inequality. Most troubling, however, is that these differences were ultimately buried under the cloak of an official naming ritual. Joyal had to ask for permission for this report to be submitted as what he admitted it was not, leading one to ask what this performative charade of misnaming accomplishes? Or, more specifically, what power does “*Gladue*” really have for the courts?

To move towards an answer to these questions it is best to turn to the representation of the content of the report and the slightly different performances in which it was presented by the defense team, lead by Ted Mariash, by Judge Joyal, and, as we will see, eventually

effectively discriminated against Indigenous inmates and kept them in prison for longer periods of time than other ethnically identified, “non-Aboriginal,” inmates. See *Ewert v. Canada*.

(begrudgingly) by the Crown’s representative, given by Paul Girdlestone, during the two days of sentencing hearings on June 17th, and August 7th, 2019.²⁵

Thomas’s Report

The first thing one takes from the presentation of a *Gladue* report is the aura of anomie in which it operates. The second is that these descriptions are vaguely associated with notions of colonialism and synonymous policy signifiers like “Residential Schools,” “Indian Act,” or semi-descriptive notions like “dislocation,” but most often simply as descriptions of destitution and suffering. As an example, consider the choice words used by Ted Mariash, Thomas’s legal representation at his sentencing trial.²⁶ For the most part, Mariash spoke in histrionic and theatrical terms about Thomas’s home reserve of Shamattawa in northern Manitoba, which he described as “unlike any other place in Canada” due to the generalized levels of dysfunction and suffering that thrive there. Referring to details of Thomas’s “*Gladue* report,”²⁷ Mariash described Thomas’s home reserve as “plagued” by substance abuse, unemployment, poor housing conditions, a gross lack of educational opportunities, and grievous mortality rates. With careful modulations of voice and intonation, Mariash summarized Thomas’s home as a “lawless reserve” where children get in to trouble for fun because there is simply nothing else to do. “That is abysmal!” he yelled to the court. “Why do we let human beings grown up in such a community? But we do. Mr. Thomas is a product of this.”

²⁵ I was not present for these sentencing hearings, as I had been for the majority of the Thomas trial. Instead, I was able to gain access to court audio files from for these sentencing hearings. I accessed these recordings at the Law Courts in Winnipeg on October 4, 2019. For legal reasons of privacy, PSRs and *Gladue* Reports are for court purposes and are not open to the public, however, so anything that I gleaned from this PSR/*Gladue* report is from what was said at the sentencing hearings by defense and Crown counsels, as well as by Judge Joyal.

²⁶ Roitenberg was not present during the sentencing hearings. This is not an uncommon practice to send other members of a law firm to serve this alternative role of representing arguments of sentencing.

²⁷ I will no longer use scare quotes around *Gladue* report, but it should be implied when referring to Thomas’s report, specifically, and should be pondered whenever any other *Gladue* report is cited.

While Mariash was technically presenting his remarks to judge Joyal in an attempt to garner a more favorable outcome for his client, his theatrics were also undoubtedly shaped by a third other, the public audience beyond the courtroom walls. Reporters were present to pluck many of Mariash's most choice bombastic quotes. For instance, Dean Pritchard from the *Winnipeg Free Press* found resonance with this statement made by Mariash: "In Shamattawa, 85 per cent of residents are on social assistance and 84 per cent of those over the age of 15 don't have a high school education, Mariash said. Substance abuse is rampant. In one eight-day period, 38 residents or four per cent of the population, attempted suicide."²⁸ From a blurb on the sentencing trial on Global News, Mariash is quoted reflecting on his own self-disappointment to get his message of suffering across: "I don't think even I did enough justice there to it to explain just what a hell hole his [Thomas's] upbringing was, the difficulties of his family, the difficulties of his community and the ongoing difficulties of a young man living on the streets of Winnipeg."²⁹ To what end were Mariash's theatric gestures of these remarkably disturbing statistics relevant?

At one point during his deposition, as he descended from a crescendo of moral outrage, in a low and mournful voice, Mariash suggested to the courts that it should not be surprising at all that Thomas was sitting before the courts; it was all perfectly explainable: "[t]his is one of the clearest-cut examples of how the implementation of the Indian Act and its policies has led to the over-representation of Indigenous offenders in our jails."³⁰ In some ways, none of this information even needed to be presented. It was already expected, if not presupposed. And it was

²⁸ Pritchard, "Bus Driver Killer's Sentencing on Hold While Judge Ponders Joint Crown-Defence Recommendation."

²⁹ Amber McGuckin, "Crown Seeking 12 Years before Parole for Second-Degree Murder in Death of Bus Driver Irvine Jubal Fraser," *Global News*, June 17, 2019, <https://globalnews.ca/news/5398047/brian-kyle-thomas-sentencing-winnipeg/>.

³⁰ Pritchard, "Bus Driver Killer's Sentencing on Hold While Judge Ponders Joint Crown-Defence Recommendation."

certainly in the *Gladue* report that Joyal had in front of him. None of the news reports on these *Gladue* citations really gave them any additional explanation either. It was assumed that policies like the Indian Act or associated political projects like Residential Schools have led to the overrepresentation of Indigenous peoples in “our jails,” as Mariash described them. That is, an obvious causal connection between colonialism and Indigenous crime is readily accepted. But, ironically, the circuitous logic of how colonial law has produced the conditions of lawlessness that it must re-submit to law seems to be lost on such lawyers and commentators.

One way to explain this unbelievable short-sightedness might be to consider the fetishistic structure of such statements, and the aura-like quality that they exhibit. For one, such statements are treated as if they are *a priori* knowledge, which is absolutely faithful to the expressed assumptions laid out in *R v Gladue* where generalized Indigenous suffering is assumed as *judicial notice*:

The background factors which figure prominently in the causation of crime by aboriginal offenders are by now *well known*. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.³¹

The problem with these statements is that while they presume an overall association to the explanatory value of “colonialism,” this prior causal force receives mention and is conflated with a more conceptually amenable concept of the “background” of an Aboriginal offender’s life.

While *Gladue* purports to be addressing itself to the colonial legacies of dispossession and colonization, of which overincarceration is a direct example, there is not a very robust attempt to

³¹ *R. v Gladue*, para 67, emphasis mine. Judicial notice is the doctrine in which something can be established without the burden of offering any evidence. See Christine Boyle and Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination,” *Windsor Yearbook of Access to Justice* 20 (2001): 78.

define colonialism as a causal factor at all, and colonialism is rarely addressed directly beyond vague descriptions like “legacies of discrimination” or “dislocation.” Instead, causality is referred directly to the “background factors” of the Aboriginal offender, while the safely assumed universal conditions of Aboriginal destitution is simply “well known.” Any explications of causality, of the *causes*, are thus presented instead as generalized accounts of the *effects* of colonialism, like common poor socio-economic conditions. Aboriginal offenders, are, rather, “a result of these unique systemic and background factors,” which makes them, obviously, it would seem, more prone to be “adversely affected by incarceration.”³² When the focus is on effect, it is no wonder that the discourse so narrowly focuses on the histrionic emphasis of Indigenous suffering and dysfunction, rather than on the complex causes and active mechanisms in which these conditions are maintained. Mariash again: “There’s no schooling, or work, [the reserve] is isolated. Everyone is an addict. They’re violent. And not everyone wants to live so much.”

It is within this rhetorical *and* structural focus on the colonial effects of generalized Indigenous dysfunction that FASD becomes a highly relevant, if not central, “factor” in many *Gladue* reports. Simply put, the logic of the FASD discourse fits neatly into the pre-existing genealogical framework of *Gladue* reports, both of which depend on this fetishistic rhetoric and logic in which colonialism is conceptualized as its *effects* rather than as a complex set of conditions or *causes*. FASD certainly figured prominently in Thomas’s *Gladue* report, particularly through the biographical treatment that *Gladue* requires to clarify and explain, or contextualize, his life. So, while we heard much about the general decay and dysfunction of

³² *Ibid.*, para 68.

Thomas's home reserve, we also heard about the specific genealogical threads that connected Thomas within this story.

Under the section of *R v Gladue* titled, "The search for a fit sentence," they lay out some prominent tools of the unique methodology for sentencing Aboriginal offenders: "What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown?"³³ Mariash moved in an almost identical fashion of this linear line of questioning that starts in communal relations and moves to familial breakdown. For instance, repeated several times was the story of Thomas's parents, who were both convicted of manslaughter; that Thomas never knew who his biological father was; that Thomas's brother was also convicted of serious crimes and was currently residing in a federal penitentiary. But the genealogy focused mostly on Thomas's mother, who, it was noted with ironic commentary by Mariash, suffered strikingly similar conditions as the young Thomas when she was a child, being raised by parents who had suffered from Residential School and were too preoccupied by their substance abuse to care for her. Her subsequent struggles with addiction and a general inability to parent were genealogically drawn together here in a concept known as "intergenerational trauma," which explained how Thomas came to be apprehended by authorities and became a permanent ward of the state at the fragile age of six. Her intergenerational struggles with addiction also explained Thomas's subsequent struggles with substances, a short temper, and, particularly, a diagnosis of FASD and ARND in 2005 that came to compound all of these factors with neuro-biological

³³ *R v Gladue*, para 80.

accounts of impulsivity and inability to control his temper or consider consequences of his actions.³⁴ FASD was also linked to his extremely low IQ that was in the range of 47.

Importantly, this intergenerational transference was paralleled in an equal intertransferral relationship of *Gladue* reports, as these precise details were remarked on in Thomas's mother's *Gladue* report when she was charged with manslaughter, and then subsequently noted in Thomas's *Gladue* report. This recounting of Thomas's mother as a "*Gladue* factor", in particular, but also his other immediate family members, and their intergenerational entanglements, were used to construct a broader kinship analytic in which Thomas and his family. And crucially, this genealogy was always tucked within the broader descriptions of Thomas's community, who were a bunch of criminals, or potential criminals (kids who break the law for fun; where everyone is an addict and violent). Furthermore, this was all tucked under the broad and elusive construction of "colonialism" that neither Mariash, nor anyone else, ever attempted to define or parse, except to say it was obvious, as a clear-cut example of how the Indian Act makes criminals, for instance. This is essentially the same story as was told by reporters in the immediate aftermath of Fraser's death.³⁵ Here we have FASD being connected to the broader, but undefined, storying of colonialism, which prominently includes graphic details of general dysfunction and suffering of his home reserve of Shamattawa and the specific failures of his family who are steeped in violence and addiction. FASD featured

³⁴ Note that I do not recall Mariash saying that Thomas was diagnosed with FASD *and* ARND, just FASD. Judge Joyal later suggested both FASD and ARND, which is peculiar for reasons that will be addressed below.

³⁵ Reporter Pritchard's summarization of Mariash's arguments, that Thomas was "shaped by his experiences growing up in Shamattawa" and his "Indigenous background" are almost identical to reporter VanRaes's argument that Thomas was not "born a criminal" but was "made" into one. See Pritchard, "Bus Driver Killer's Sentencing on Hold While Judge Ponders Joint Crown-Defence Recommendation"; VanRaes, "Accused in Bus Driver Homicide Another Victim of Failed System."

centrally in the narrative of the report that sought to establish a causal connection between Thomas's criminal involvement and his genealogical connections to colonialism.

This 'cyclical' imaginary of Indigenous misery, and particularly how it is presented as some sort of cultural claim about familial and communal errancy, bears a striking resemblance to Sherene Razack's theorization of the political act of "culturalization," whereby the conditions, and outcomes, of colonial domination are regularly attributed and conceptualized as internalized cultural problems.³⁶ This is certainly nothing new to Indigenous country or, for that matter, to broader conditions of racialization in North America in general, as was neatly argued over fifty years ago by Lakota scholar, Vine Deloria Jr., in his castigation of the troubling and unexamined anthropological knowledge embedded within such infamous reports as the Moynihan Report. He took particular issue with the arrogance of anthropological claims that poverty in Black communities could be blamed on absent fathers without ever truly considering the hundreds of years of slave trading and how the brute economization of bodies might have impacted the integration of the Black 'family unit.'³⁷ And we can similarly examine how the sister "Hawthorn Report" in Canada emphasized the "social and cultural factors influencing motivations, attitudes and behaviour patterns" in order to "explain the generally depressed conditions of Indians in Canada."³⁸ Where kin obligations were identified as culprits in keeping Indians artificially poor in this report, it was the "slatternly and demoralized appearance, living habits and behavior patterns of their womenfolk" that created impoverished conditions of the Indian community in

³⁶ Razack, *Dying from Improvement*, 36.

³⁷ Vine Deloria Jr., *Custer Died for Your Sins: An Indian Manifesto* (1969; repr., Norman: University of Oklahoma Press, 1988), 93. The 'structural' problem is fetishized, which is to say that it can only be thought or recognized as the embodiment of an errant sociality or, in the case of Indigeneity, of a distinct criminality.

³⁸ H.B. Hawthorn, *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies* /, vol. 1 (Ottawa: Indian Affairs Branch, 1966), 63.

particular.³⁹ We see how not much has truly changed in the *Gladue* report, and particularly how all dysfunction is ultimately traced through the family unit, always leading back to an irresponsible, neglectful, if not “slattern,” Aboriginal mother. And it is well documented within the FASD research literature that this scientific discourse was (and is) steeped within similarly misogynistic and racist structures of social organization and thought.⁴⁰ As we saw in chapter two, these cultural cycles of errancy are now deeply embedded within the biological makeup of Indigenous children, in the plague that is found “particularly in the Aboriginal community, who are “troubled before they were born.”⁴¹

How the law ‘sees’ FASD

Given the confidential nature of *Gladue* reports that is strictly enforced, it is impossible to have precise data on how much FASD enters in to Gladue reports. However, I can venture an educated, if not entirely anecdotal, hypothesis that it is a very high proportion of all reports. In all of the young Indigenous men I have ever worked with in Winnipeg if there is even a remote chance that they have FASD (or are “at risk” of having FASD) it will be mentioned in their PSR/Gladue reports that are referred to periodically throughout sentencing trials or meetings with probation officers, or simply mentioned, often cryptically, in ‘case files’ or in conversation with social workers. That is to say, *Gladue* reports trades in that same discursive register of speculation and certainty that we have seen in other social environments. Indeed, within the courts especially, FASD is subjected to, and the subject of, contradictory procedures of legitimization that lean on medical authority while often eschewing it all together. In the case of

³⁹ Hawthorn, 1:62. I am grateful to Margaux Kristjansson for this critical comparative observation between Moynihan and Hawthorn, and particularly the ways in which the conditions of Canada’s genocide against Native peoples was displaced into colonial misogynistic analytics of Native women’s flesh and comportments.

⁴⁰ Armstrong, *Conceiving Risk, Bearing Responsibility*; Golden, *Message in a Bottle*.

⁴¹ Wente, “Our Poor Ruined Babies”; Wadden, “Troubled before They Were Born; Mothers’ Alcohol Abuse Leaves Scars Aboriginal Kids Face Consequences.”

R v. Steppan, for example, there was wide disagreement between ‘expert witnesses,’ which included a barrage of mental health counsellors, forensic psychologists, social workers, and teachers, as to whether the offender had a sexual disorder (particularly, a sadist complex) or was suffering from the neurocognitive disorder.⁴² Incredibly, this unusually long judgement contains over forty references to a discussion of the offender’s FASD status, yet it ultimately does not factor in the determination of the judge. In another case that I became acquainted with during my field research I noted how a non-medical or scientific ‘expert’ was called to testify to what constitutes the “likely” signs of FASD in an offender.⁴³

If at best the consensus of FASD can be uncertain and lack uniformity, this is equally true of the possible legal outcomes. There have been instances in which appeals have been discarded because trial judges had simply presumed a defendant to have FASD, which, it was claimed by a higher court of appeal, led to erroneous considerations of guilt and sentencing.⁴⁴ Similarly, other appeal courts have affirmed stricter sanctions on defendants due to a presumption of FASD in lieu of formal diagnoses because expert witnesses “opined that certain of [the defendant’s] behaviors were *consistent* with FASD.”⁴⁵ Sometimes, there is an important difference between an assumption and an observed declaration of behavioral consistency, but it all depends on the

⁴² *R. v. Steppan*. Interestingly, the expert who proffered the sadist complex suggested this was a more hopeful diagnosis as there was more possibility and “hope” for treatments, while the expert that suggested FASD claimed that it did not really matter in the end so much as to agree that there was a “cognitive impairment” at all (para 295). Yet another expert doctor claimed that whether the offender has FASD or not is irrelevant in comparison to the “therapeutic viewpoint” of understanding how the individual functions and adapting treatments to this assessment (para 335).

⁴³ *R. v. Friesen* (MBQB 240 October 3, 2007). This case was particularly close to my work as I knew the expert witness called in this case, as they were a director at an FASD program that I was well acquainted with. I also knew the offender.

⁴⁴ *R. v. Harris* (Court of Appeal British Columbia July 16, 2002).

⁴⁵ Gagnier, Moore, and Green, “A Need for Closer Examination of FASD by the Criminal Justice System.” Precisely, the forensic psychologist in this case cited that he “could not rule out the possibility that FASD” played in the defendant’s actions, as his “impulsivity and at times sustained rage during assaultive behaviour could be consistent with the neuropsychology of FASD.” See *R. v. Cook*, No. CR 08-01-29017 (Court of Queen’s Bench of Manitoba October 26, 2010), para 109.

judge, or the lawyers. The point is that FASD is mobilized as a specific object of knowledge with varying degrees of efficacy or legitimacy. The larger question, however, is why judges and lawyers have become so accustomed to making inferences and judgements based on FASD at all?

Just as the racialization of FASD occurs within the infrastructure of *Gladue* reports, it is here where we must continually return to understand these dynamics. In an article about the evolving uses, abuses, and misunderstandings of neuroscientific evidence in Canadian courts today, legal scholar Jennifer Chandler has provided an exceptional analysis that indirectly makes the suggestion that *Gladue* makes it possible for FASD to become an Indigenous problem.⁴⁶ Namely, Chandler argues that *Gladue* reports have led to higher rates of associations of brain damage, and particularly FASD, for Indigenous peoples in the courts. This is, Chandler argues, specifically because *Gladue* reports constitute an absolutely unique condition in the legal system as the only example of an ethnically exclusive infrastructure that seeks to generate narrative accounts of an Indigenous offender's criminal behaviors. Thus, and quite simply, there is more of an institutional effort to make this particular link of FASD as a mitigating factor for Indigenous peoples, and a "reduced tendency to look for this problem in the non-Aboriginal population."⁴⁷

This systemic feature by which FASD comes to explain, explicitly, Indigenous criminal behavior is replicated in efforts to enshrine FASD itself within the legal code. There have been several Private Members Bills submitted to the Canadian Parliament in recent years that have sought to legally define FASD and give courts abilities to request FASD assessments as well as

⁴⁶ Jennifer A. Chandler, "The Use of Neuroscientific Evidence in Canadian Criminal Proceedings," *Journal of Law and the Biosciences* 2, no. 3 (February 1, 2016): 550–79.

⁴⁷ Chandler, 560–63.

to consider FASD as a mitigating factor.⁴⁸ In a parliament discussion of his bill on June 5, 2014, then Conservative Member of Parliament of the Yukon, Ryan Leef, described the intention of his bill (C-583) as translating the medical meaning of FASD into legal understanding. This, he argued, would eliminate any potential uncertainties about FASD in the courts: “Sometimes we have social definitions and sometimes we have medical definitions of words that do not always mirror each other or connect properly. What I have tried to do in Bill C-583 is come up with a definition that would meet the test of the legal mind and the legal definition.” In the absence of such a definition, Leef argued, “the courts are very much limited in their judicial notice of being able to account for what I will get into as somewhat of an explanation for criminal conduct.”⁴⁹ Along these lines of providing the courts with a working definition and awareness of FASD, Leef’s bill ultimately sought to “allow the court the discretion to consider FASD to be a mitigating circumstance in the sentencing phase.” He went on to say that, “It is important to understand that mitigation is not absolution. It is not an excuse for poor behaviour, but it is an explanation.”

Ultimately, Leef’s and other such Private Members bills died in Parliament, despite an overwhelming, if not unanimous, expression of support for the spirit of their goals. For the most part, however, fellow MPs who spoke in favor of this spirit argued that it did not make sense to explicitly isolate FASD as an exception in the legal system – with some MPs citing the truly overwhelming amount of disorders that could be found in the DSM that begged the question as to why FASD and not... anything else? – and that pre-existing legislation that categorizes mental

⁴⁸ Ryan Leef, “BILL C-583 An Act to Amend the Criminal Code (Fetal Alcohol Spectrum Disorder)” (2014); Larry Bagnell, “Bill C-235 An Act to Amend the Criminal Code and the Corrections and Conditional Release Act (Fetal Alcohol Disorder)” (254AD), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8126048>.

⁴⁹ Ryan Leef, § Criminal Code - Private Members’ Business (June 5, 2014).

disabilities could already be used (and, indeed, regularly are) to consider the behaviors of an individual with FASD as mitigating factors. Manitoba Court of Queen’s Bench judge, Colleen Suche, repeated this sentiment to me in an interview in her office at the Manitoba Law Courts on April 4, 2018, claiming that there is already plenty of legal precedent for judges to consider FASD as a mitigating factor and that, plainly, such bills are “barking up the wrong tree.” For example, she cited two of her own decisions – one where she weighed FASD as a mitigating factor, and a case of severe brain damage that approximated symptoms of FASD with permanent intellectual impairment, memory problems, impaired impulse control and judgment impairments – as proof that judges were anything but limited in considering FASD in their decisions.⁵⁰ For judge Suche, the problem wasn’t that a court is limited in its capacity to consider cognitive impairment; rather, it was an issue of lack of resources for these offenders. Namely, if a judge thinks an alternative, or even a deflection of, sentence is required, will there be the necessary “community supports” in which she can direct such a sentence?

A good example of the extent of resources required in such cases is demonstrated in the Manitoba Provincial Court decision, *R v S.K. (2010)*, where the ruling judge articulates just how difficult things can be when delving into the waters of ‘alternative,’ if not extra-judicial, sentencing, and just how many flexibilities of legal mandate, as well as personal energy and time, are required in these scenarios.⁵¹ For this entire ruling was a legal test of the laws of youth probations that dictate that an offender “must appear before the youth justice court when required to do so.” Specifically, the judge wanted to know if she had the “power” to make a female youth appear before her for a “further probation review,” all of which was subject to her keen interest

⁵⁰ R.v.Adamo 2013 MBQB 225, No. CR 10-01-30375 (MBQB September 23, 2013); R v Laquette 2015 MBQB 79, No. CR14-01-33776 (MBQB May 14, 2015).

⁵¹ R. v. S.K. (MBPC October 22, 2010).

and, even care, for this youth.⁵² Crucially, it was FASD that tipped the scales for this judge to rule in her own favor, citing it not only as something that made this youth in high need of more “support and supervision” so that she would not fall through the cracks, but, even more importantly, creating such extra-judicial ‘teams’ of social workers and other interest groups to supervise (and surveil) this girl was “all too often vitally important to the protection of society” (para 68). Clearly, the judge admitted, such extravagant expenses of legal resources and time would not be sustainable for every offender, but, she reminded the young girl, there was just “something about you” that justified the exception. Clearly, if this judge could set a significant legal precedent of calling a youth before the courts without cause, and ultimately create a legal precedent and thereby justify that there was good legal reason (public safety) for doing so, of which FASD was ultimately one of the most significant justifications for this extra-legal process, then judges have a great deal of discretion in which they can deploy FASD in the courts.

Of course, we could say that this example only demonstrates the potential pitfalls of not having a substantial legal definition of FASD in the courts, as this case could certainly be argued, and as I am suggesting, to be an abuse of power by exploiting the meaning of FASD, in this case to be a condition that is a particular threat to society. But what is peculiar about the private members bills is that they do not actually fill any gaps of meaning, nor do they create any fundamental certainty as to how to properly use FASD in the courts, or even clarify what it is. As we will see in more depth in the next chapter, these bills are loaded with ambiguities pertaining to FASD, not least of which is the language of “belief” in which it is described as if it is already known in advance, *a priori*. If any of my ethnographic work in an FASD assessment clinic has

⁵² The youth had not done anything wrong in this case. It was explicitly the judge’s desire to see the youth, for which she made an enormous show of interpreting the law and creating a precedent to do so. All of this was based on her care for the youth, which she simply could not explain, except to say to the youth that “there is something about you.”

taught me anything, it is that medical diagnosis of FASD is always caught within a highly socially malleable field of meaning that bends to particular political conditions of intelligibility. Rather than creating certainty or even more clarity, then, Private Members bills such as Leef's do nothing but create an official legal set of parameters to institute the gross discretion already rampant in and, arguably, constitutive of, the FASD discursive field.

We see clearly here a repetition of the colonial gap of discretion that is characterized by the fetishistic structure in which cause becomes the effect for both *Gladue* and FASD. But how does such fetishistic logic become racialized as Indigenous? While FASD might indeed provide an "explanation" for crime, as Leef posited, the legal wording of his bill did not explicitly correlate it to Aboriginal peoples. But it is important to note how during Parliamentary debates this correlation was implied through direct references to FASD as an issue that operates primarily along the ethnic lines of Aboriginality. Interestingly, members from the three main parties of the country (Conservative, Liberal, and New Democrat Party) all made lengthy comments that supported the spirit of the bill, with direct allusions to how it would particularly help Aboriginal populations. Conservative MP Robert Goguen related the impacts of the bill to ongoing federal programs that were specifically addressing Aboriginal communities and problems of crime. Liberal MP Yvonne Jones supported the bill because FASD is an issue that "affects our Inuit and aboriginal populations to a much higher extent than the rest of Canadians" and that this bill would therefore be a welcome support to the overrepresented population who doubly "suffer" not only as marginalized aboriginal people but those who have a neurodevelopment disorder too. NDP MP Ève Péclet centered her comments on the overwhelming vulnerability of Aboriginal peoples in Canadian society and that this bill would be

a welcome support to this population.⁵³ For Péclet, Leef demonstrated a profound shift in Conservative nomenclature, and celebrated this with the summary that “We need to rehabilitate these people, not just take a repressive approach.”⁵⁴ Most interestingly, however, Péclet then linked this bill and its approach of considering FASD as a mitigating factor to the *Gladue* principle where “family situation[s] and background[s] must be taken into consideration” when sentencing individuals. She then explicitly linked the harmonious juridical logics by clarifying that this meant taking into consideration, “for instance, if there is a history of violence of drugs and particularly if he suffers from fetal alcohol spectrum disorder.” The debate and discussion of these private members bills is but one space of intra-settler discussion and consensus making, where racist and eugenicist arguments and concepts are mobilized within progressive discourse to render Indigenous criminality not only as a sociological phenomenon but as a congenital phenomenon.

What we have here, then, is a very strange and distinct movement from attempting to remediate the gross phenomenon of Indigenous overrepresentation of Aboriginal peoples in the Canadian carceral system, to a process by which Indigenous peoples are being systematically isolated as candidates of cultural dysfunction and, increasingly, a particular form of brain damage that, inevitably, comes to explain this overrepresentation. In many ways, it is not surprising that an ethnically specific set of legislation and legal codes would lead to such accounts and productions of Aboriginal exceptionalism. But beyond the hard-legal infrastructure

⁵³ 41st Parliament, 2nd session, November 20th, 2014. Private Members’ business.

⁵⁴ She commended Leef for being a different kind of Conservative MP who seemed to be delivering a crime bill that was other than ‘tough on crime’ and the “virtually non-existent will” of his party to help vulnerable peoples, particularly Aboriginal peoples. She ended her speech by paraphrasing some of Leef’s own characterizations of citizenship and belonging to society as he argued for the ultimate purpose of the FASD bill, particularly noting that people with FASD are capable of “return[ing] to society. They are not necessarily criminals... [and] [e]ven if they are, they are people who can doubtless be citizens like everyone else.” 41st Parliament, 2nd session, November 20th, 2014. Private Members’ business

of codes and courts and obligations, there is an interpretive logic and associated parameters of cultural meaning-making that inform these hard features. I am giving this logic and parameters of sense making particular emphasis in this chapter because they are so often taken to be “common sense,” and treated as scientific and yet subject to no verification by every arm of the social and legal services that deal in Native lives. We have already seen how *Gladue* focuses on the genealogical features of one’s life to explain their presence before the courts, and that there are particular notions of transmission, such as intercultural trauma, that are presumed to be structurally salient as explanations of some kind of learned behavior. Indeed, we notice that it is the features of Aboriginal behavior and their causal transmission that are prominently featured, rather than the causal features of transmission of the unique systemic colonial factors themselves. It is worthwhile to look at how this conflation of systemic colonial structures with Aboriginal cultural factors is made within *Gladue* itself in order to begin to consider how this conceptual slippage leads to further confusion and a general sense of elusiveness of *Gladue* in the court process. We may now ask how this space of confusion and uncertainty is productive for the courts in making, representing, Indigenous offenders as abnormal and dysfunctional subjects.

From the systemic to the cultural

Borrowing a guiding question from the *Aboriginal Justice Inquiry*, *R v Ipeelee* (2012)⁵⁵ asks: “Why, in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves

⁵⁵ *R v Ipeelee* was a further clarification or ‘test’ of *R v Gladue* and s.718.2(e), which bore on whether long-term Aboriginal offenders were eligible for considerations despite the risk of danger that they presented to society that inevitably required considerations of denunciation, deterrence, and separation over rehabilitation and reintegration. *Ipeelee* affirmed in its majority ruling that, yes, *Gladue* still applies in these scenarios, with significant dissent from one judge who worried that there was an irresolvable contradiction between the needs of incarcerating long-term offenders and the obligations of considering rehabilitation. These contradictions are highlighted below.

immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system.” Answering its own question, *Ipeelee* suggests that “The available evidence indicates that both phenomena are contributing to the problem (RCAP).”⁵⁶ Yet the approach of sentencing is incapable of resolving this question, for any Aboriginal person who is before the courts with a *Gladue* report has already been found guilty. *Gladue*, *Ipeelee*, and the genealogical reports that they stipulate are constitutionally required for Aboriginal peoples, are only relevant in the sentencing period. In a way, a judge considering a *Gladue* report has no way of even asking this question as it is moot; for all he is concerned, the guilty offender before him for whom he must sentence is Aboriginal. To a certain extent, *Gladue* and its sibling, *Ipeelee*, express a humility in the face of this impossible determination by affirming that sentencing is but one meagre and extremely small piece of the overall puzzle of overincarceration. They admit, for instance, that sentencing is a limited piece of the puzzle that has been decades in the making and requires multiple inputs for various social, economic, and political venues. They thus hold on to an understanding of systemic discrimination as something that exists society wide. Overincarceration of Indigenous peoples is, after all, a “social problem” and “crisis.”⁵⁷ Yet with this acknowledgement, they also affirm their very specific powers of sentencing that can remedy this overwhelming problem in small but significant ways:

“Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which

⁵⁶ *Ipeelee* para 65; AJI p. 85; RCAP p. 33. “RCAP” is left as a citation of this “available evidence,” without any specific page citations. *Ipeelee* seems to be suggesting that the whole of RCAP bears relevant and obvious fruit for this question of simultaneous systemic discrimination and the disproportionate number of crimes that Aboriginal peoples commit. Such a presumption, however, is based in a flawed reasoning in which such determinations can only be made from the perspective of Indigenous offenders in jails. It is a paradox in which wanting to account for overrepresentation is judged and assessed by the problem of overrepresentation itself.

⁵⁷ *R. v. Ipeelee*, para 58.

will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.”⁵⁸ As we will see, the discretionary powers of judges to actually present alternative sentences is often significantly reduced by legislative principles of mandatory sentences, particularly in the case of charges like Thomas’s charge of second degree murder, which requires a “life sentence” with a minimum of 10-years, maximum of 25, served in prison with life on parole. And so, this contradiction between systemic discrimination, on the one hand, and the objectivity of higher rates of Aboriginal crime, on the other, is maintained as a central blind spot, one that can only be approached with a side glance, and whose obfuscating boundaries continue to deepen within the elaboration of the principles of *Gladue* in ways that cannot be seen by sentencing judges, nor the majority opinion parties to either *Gladue* or *Ipeelee*. Instead, it is covered over with rhetoric of taking into consideration the unique (and heavily detailed) background factors of an Aboriginal offender in the interest of recognizing the (tragically elusive and unspecified) systemic barriers that may have led them to be before the courts.

This can be seen best in the very fundamental call that *Gladue* sets out when it requires judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. On the one hand, this means that a judge is to consider: "(a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts, as these “may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness.” On the other hand, judges are to consider, “(b) the types of sentencing procedures and sanctions which may be appropriate in the

⁵⁸ R v Ipeelee, para 65. Ipeelee argues elsewhere, “It would have been naive to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely” (para 61).

circumstances for the offender because of his or her particular Aboriginal heritage or connection.”⁵⁹ These two tasks are fundamentally different, one requiring contemplation of systemic factors that influenced the actions of the Aboriginal offender (ie. how their experiences impact their culpability), the other requiring a contemplation of their unique Aboriginal cultural coordinates that is meant to harmonize their punishment with their community, who is assumed to also possess these same coordinates (ie how their culture will determine the effectiveness of their sentence). Quite plainly, these two modes of contemplation, of experience or heritage, become conflated for the precise reasons of ‘determining a fit sentence’ that effectively limits the capacities of both, though particularly the former, and which makes the second seem somehow more applicable in theory - though as we shall see, very seldom in practice.

For example, *R v Ipeelee* notes the significance of the former principle of contemplating unique systemic factors by referencing an Alberta Court of Queen’s Bench decision, *R v Skani*, whereby the judge reflected on the Indigenous persons background factors: “[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled.”⁶⁰ While noting that such “hell hole” circumstances (to borrow Thomas’s lawyer’s characterization of his upbringing in Shamattawa) implicate considerations of responsibility, they are only *mitigating* and considered as playing “a part in the aboriginal offender’s conduct”, due to the nature of Canadian criminal law which is based on the premise that “criminal liability only follows from voluntary conduct.” They conclude by saying, “Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that

⁵⁹ Originally in *Gladue*, cited in *Ipeelee*, para 72.

⁶⁰ *R v Ipeelee*, para 73.

their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability” (Ibid.). Such considerations of underlying causes may impact the mode of sanction too as it might not be aimed at only “punishment *per se*,” suggests *Ipeelee* echoing the logic of *Gladue*’s writers who suggest that such factors are cause for a judge to consider whether imprisonment would “actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member” (Ibid.). Again, such statements presume an easy causal connection between crime and “background factors,” for which, as we will see, are nearly impossible to determine in actual legal practice. Second, they presume that there are actually alternatives to imprisonment for “serious crimes,” itself another contentious and aporetic presence within *Gladue*.⁶¹

With the seriousness of culpability potentially shifted, though with guilt rigidly affirmed, by definition and design, judges then move on to considering the *effectiveness* of punishment. It is here where *Gladue* and *Ipeelee* do the most work to conflate the considerations of systemic factors – of the collective and individual experiences of Aboriginal peoples – with Aboriginal cultural difference, where “appropriate” forms of considerations of “heritage” become confused with considerations of “systemic” experience. As *Ipeelee* makes clear when outlining the problem of overincarceration as a systemic form of discrimination, it quotes a long passage from the *Royal Commission on Aboriginal Peoples* to explain this within terms of cultural difference:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural — in all

⁶¹ *Ipeelee* does work to clarify this notion of “serious crime” but ultimately does not provide a convincing response to how judges are to consider alternatives for cases of, say, murder, rape, or aggravated assaults where the character of the offender effectively elucidates the contradictory principles of sentencing that exist between punitive measures of deterrence, denunciation and separation, on the one hand, and rehabilitative on the other.

territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.⁶²

In both stages of the methodology, then, we have articulations of an alternative form of justice in terms of how they are “meaningful to the community” or culturally “appropriate” in terms of recognizing a “fundamentally different world view.” The systemic factors become subdued within this pseudo-culturalist interpretive lens.

This conflation between “systemic factors” and Aboriginal culture in *Gladue* has informed much of the subsequent debates around Aboriginal peoples and conditions of overincarceration, in particular, and Aboriginal peoples in the justice system, in general. Consider the work of Parkes and Milward, who offer an otherwise excellent review of how *Gladue* has been systematically neglected by all levels of government, and the not-so-subtle shift in emphasis that they make between the generalized argument of how prison does not “deliver on ... its promises such as public safety, rehabilitation, and deterrence” and the specific cultural claims that “prison does not work for Aboriginal people.”⁶³ By citing research and parliamentary reports that debated this general problematic of overincarceration, and which was the impetus for s.718.2(e) and other *Criminal Code* reforms in the mid-1990s, it becomes very quickly associated as an Aboriginal specific problem. This error of argumentation and thinking is laid out in *Gladue*, which they cite as legitimating their own move from the general to the Aboriginal-specific: “As has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely

⁶² R. v. Ipeelee, para 57; Royal Commission on Aboriginal Peoples Canada, René Dussault, and Georges Erasmus, “Bridging the Cultural Divide : A Report on Aboriginal People and Criminal Justice in Canada” (Ottawa: Royal Commission on Aboriginal Peoples, 1996), 309, <http://trove.nla.gov.au/version/45900434>.

⁶³ Parkes and Milward, 105.

affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.”⁶⁴ Parkes and Milward simply repeat the confusions of cause and effect that inform a broader notion of genealogy of Aboriginal dysfunction for *Gladue*. By doing so, Canada, the prison system, the courts, and policing are all rendered beyond reproach.

Is it any wonder, then, that we have such controversial and scandalous abuses of *Gladue*, such as the documented practice that can be aptly described as the Wikipediaization of Gladue by probation officers? Discovered by Manitoba appeal judges back in 2013, it was found that probation officers were simply cutting and pasting snippets from Wikipedia posts on “colonization” and other synonyms in order to fill in the ‘*Gladue* section’ of their pre-sentence reports with mechanical reflexiveness under the very vague, and sometimes resented, notion of reducing the moral blameworthiness of Indigenous offenders.⁶⁵ Legal scholars Parkes and Milward have written about complaints levied by the president of the Criminal Defence Lawyers Association of Manitoba, who have suggested that the “*Gladue* assessment” portion of pre-sentence reports (PSRs) are treated like a procedure of “add *Gladue* and stir.”⁶⁶ A common

⁶⁴ *R v Gladue*, para 68. Again, the “background factors” that “figure prominently in the causation of crime by aboriginal offenders are by now well known,” *Gladue* suggests. They describe these “factors” as: “years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration” (para 67). Note how there is a fundamental confusion with factors and causation here, as they are detailing the *outcomes* – low incomes, high unemployment, etc. – of colonial history. But it is these that are treated as the “factors” that “contribute” to crime and incarceration.

⁶⁵ Dylan Robertson, “Indigenous Jail Rates Criticized: Governments Accused of Failing to Honour Gladue,” *Winnipeg Free Press*, November 27, 2017.

⁶⁶ Parkes and Milward, “Gladue: Beyond Myth and Towards Implementation in Manitoba,” 88-89. Recall, too, that in Thomas’s case his “Gladue report” was effectively a PSR. This appears to be the most common practice as there are very few *Gladue* court workers in the country as they are chronically underfunded. Where there are Gladue reporters they are stretched thin, leading to unreasonable wait times that end up extending the remanding of Aboriginal peoples while they wait for their sentencing. Note that there are no Gladue report programs in the Yukon, Nunavut, the Northwest Territories, Manitoba, Saskatchewan, New Brunswick, and Newfoundland and Labrador. In these places the task falls to probation services to conduct Gladue reports as add-ons to their PSRs. See Edwards,

practice, they write, is to cut and paste “generic references about Aboriginal people to a collection of general *Gladue* factors, or descriptions of problems in specific Aboriginal communities, from past report precedents and templates.”⁶⁷ It is not lost on us that this generic circulation of Aboriginal identifiers is a common occurrence in the courts, the “dark side” of what can happen in the courts between the shifting space between the substantiveness of materiality and social context.⁶⁸ A case in point is the precedent of accepting Aboriginal oral traditions as evidence in the courts in *R v Delgamuukw*, but the simultaneous tying of Aboriginal rights to “pre-contact” era, which effectively makes any “post-contact” relations immaterial and has the effect of affirming racialized stereotypes of Aboriginal peoples by freezing them in time.⁶⁹ Is a similar thing not happening with *Gladue*, whereby the materiality of Aboriginal distinctiveness in the courts is premised on a narrow racialized view of Aboriginal peoples that affirms stereotypical difference in a displaced understanding of dysfunction?⁷⁰

The critiques levied at *Gladue* thus go beyond simply the fact that such reports do not in fact address the “problem” of Indigenous overrepresentation as they were initially intended to do; they go to the performative and interpretive constructs of Aboriginality itself that are rehearsed and stumbled over by *Gladue*. It should not be lost upon us that one of the main reasons that *R v Gladue* was forced to be a test to the Criminal Code s.718.2(e) was because the provincial judge presiding over Jaime Gladue’s case dismissed this sentencing clause because he disputed that Gladue was even aboriginal because she lived in an urban milieu and had broken

“Why Gladue Has Not Lived up to Its Promise for Indigenous Justice: Across the Country, Gladue Rights for Indigenous Offenders Are Being Ignored, Underfunded or Flat-out Denied.”

⁶⁷ Parkes and Milward, “Gladue: Beyond Myth and Towards Implementation in Manitoba,” 90.

⁶⁸ Boyle and MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination,” 73.

⁶⁹ Boyle and MacCrimmon, 73. See also Borrows and Rotman.

⁷⁰ That is, is the dysfunction of colonial violence not displaced onto the bodies and cultures of Indigeneity as such?

her “cultural ties” with her home community.⁷¹ Legal scholar Brian Pfefferle has further reminded us that many judges continue to struggle with the “concept of Aboriginal identity,” particularly around phenotypical assumptions of race and whether one looks to be biologically Indigenous (read: has dark brown skin), confusions that can be traced back to the general mess created by Canada’s convoluted history of Indigenous assimilation and elimination through sexist ideologies of the Indian Act that have stripped Indigenous women and children of their Indian Status because of relations with white men and assumptions of blood dilution.⁷² Sometimes lawyers and judges have simply assumed that offenders are Aboriginal, the thinking being one of satisfying *Gladue* requirements rather than robustly outlining and considering the specific circumstances of each offender.⁷³ In many ways *Gladue* has empowered criminal courts to define the meaning of “Aboriginal,” and particularly through categories of injury.⁷⁴

This is seen in its most direct articulation when judges come to ascribe Aboriginal identity to offenders who do not specifically self-identify as Aboriginal, which can be fully accounted for through the logic of *Gladue* as its own colonial factor.⁷⁵ Legal scholars skirt

⁷¹ John Reilly, *Bad Judgment: The Myth of First Nations Equality and Judicial Independence in Canada* (Victoria, B.C.: Rocky Mountain Books, 2014), 56. Importantly, Gladue was not living in the milieu of rural-reserve poverty that characterize the conditions of Aboriginal peoples. This is yet another interesting case whereby conditions and experiences are conflated with a cultural identity.

⁷² Brian R. Pfefferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration,” *Manitoba Law Journal* 32, no. 2 (2008): 113–43. This is not to mention instances such as how the Sixties Scoop has alienated individuals from their original communities and identities as Indigenous peoples. Nevertheless, researchers like Pfefferle argue that there can be creative applications of *Gladue* in such complex scenarios and that, if someone is “ethnically and biologically descended from Aboriginal peoples” they are to be considered “Aboriginal” for purposes of *Gladue*. Indeed, he argues that what *Gladue* showed the courts was that “an Aboriginal offender need not be part of an Aboriginal community to be considered under section 718.2(e).” Pfefferle, 126–29. In this context it is absolutely appropriate to situate *Gladue* among the other Supreme Court cases that have decided on the meaning and parameters of Aboriginality, and we should consider it as another “test” for the Canadian government who uses the legal apparatus to struggle over the meanings of these legal definitions as they have very tangible consequences under treaty obligations and particularly for considerations of resource distribution. See *R v Daniels... R v Gladue* was yet another legal decision to decide on what Indigeneity is in Canada.

⁷³ Pfefferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration,” 129.

⁷⁴ Blackburn, “Culture Loss and Crumbling Skulls”; Roach, “Blaming the Victim.”

⁷⁵ For example, see *R v Laquette* 2015 MBQB 79. Here Judge Suche considered an offender who “does not consider himself [to be] Aboriginal” to be an “obvious example of such circumstances [of the impacts of colonization].” Judge Suche deduces the offender’s Aboriginal background through his parents, but it is the offender’s lack of

quickly passed this enormous ethical and political problem in their eagerness to problem-solve *Gladue*. As researcher, Pefferle, puts it: after determining who is Aboriginal, the next logical question and problem is *how does one give attention to the circumstances of aboriginal offenders?*⁷⁶ So, how does one give attention to an Aboriginal?

Consider the scandalous comments of an Ottawa Justice of the Peace whose address to an Aboriginal man achieved limited sensational attention in an Indigenous-focused news source when she told him she was not interested in his *Gladue* “sob story” and his attempt to gain “sympathy”:

...quite frankly, the Gladue thing, I am well aware of, you know, Aboriginal [sic] and, you know, some people do have for sure a harder life but in your particular case you are not the only one with that. You know there’s Caucasian, there’s black people, there’s people that come from war-torn countries, you know, that have been tortured and child soldiers. So a lot of people come with a lot of baggage, I am very sympathetic to that. But at one point you have to stop blaming others because they think that, you know, at the end of the day you have got to look at yourself in the mirror and you have got to say, ‘What is it that I can do to change this? And you know what? I had a really tough life so what is it that I can do not to inflict that on other people and maybe on children that I may have in the future?’ And I hope that you don’t because you are clearly not in a position to be a father to anybody.⁷⁷

More than simply minimizing the difference of Aboriginal peoples as a whiny cop-out, Justice of the Peace Girault articulates a distinct eugenicist argument that links her concerns with *Gladue* to the threatening specter of Indigenous reproductivity. She later elaborates on this *Gladue*-

connection to them and their home communities, and subsequent lack of identity and culture, that become the specific defining principles of *Gladue*, which ironically identify this young man as Aboriginal through negation and against his own judgment. Judge Suche’s actions were no doubt a reflection of good intentions and judiciousness, but the troubling ironies in which “Aboriginal” takes on meaning in the courts nevertheless must be pointed out here. Furthermore, what does it mean for this young man going forward to think of himself as Aboriginal simply by virtue of committing a crime? Just as civil courts and tort laws have created conditions for Aboriginal plaintiffs to litigate their identity and culture through the prism of injury, so too do criminal courts present a similar problematic in which Aboriginal identity is created through injury, tragedy, and crime. It only expands the associations of dysfunctionality.

⁷⁶ Pefferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration,” 129.

⁷⁷ Jackson, “Ottawa Judge Tells Ojibway Man She Doesn’t Want to Hear Another Sob Story.”

eugenicist entanglement to situate the crime of this Aboriginal man within her impressions of his appearance and general phenotype:

So in this particular case, on this case only, does it call out for detention? Absolutely not. I mean half of these charges the Crown won't even be able to prove. I am not even sure they will be able to prove the alcohol now that they say that because, you know, you come across the way you talk it almost seems like you would be someone who is under the influence of some sort, I think that is just the way you talk (Ibid.).

This racial triangulation of Indigeneity, crime, and alcohol is nothing new in Canada, and the specific localization of this racialization in phenotypical and eugenicist concerns of reproductive futurity have featured prominently in epidemiological portraits and concerns of Aboriginal bodies and cultures as inherently sick and dysfunctional.⁷⁸ The resentment toward Indigenous offenders and their claims to *Gladue* is equally familiar in right-of-center screeds that accuse *Gladue* and *Ipeelee* as being exemplars of unequal treatments based on race. This was precisely the point of conservative commentator, Jonathan Kay, when he charged the ruling of *R v Ipeelee* as bearing the incredibly naïve social justice belief that “natives somehow can be deprogrammed from crime if they are permitted to reconnect with their communities in a positive way.”⁷⁹ Kay was particularly incensed because he saw “little hope of any kind of “rehabilitation”” for the two Aboriginal offenders featured in *R v Ipeelee*. He steered clear of any discussion of colonialism but did mention that these two men didn't stand a chance in their lives with alcoholic mothers

⁷⁸ "There is an equation of being drunk and being an Indian and in prison ... [This stereotype] reflects a view of native people as uncivilized and without a coherent social or moral order ... [I]t prevents us from seeing native people as equals. The fact that the stereotypical view of native people no longer is reflected in official government policy does not negate its power in the popular imagination and its influence in shaping decisions of the police." Michael Jackson, "Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release," *U.B.C. Law Review* 23, no. 2 (1989): 218. See also Mary-Ellen Kelm, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia, 1900-50* (Vancouver: UBC Press, 1998); James Waldram, *Revenge of the Windigo: The Construction of the Mind and Mental Health of North American Aboriginal Peoples* (Toronto: University of Toronto Press, Scholarly Publishing Division, 2004).

⁷⁹ Kay, "Jonathan Kay: A Supreme Court Dissenter Gets It Right on Violent Aboriginal Criminals."

and devastating poverty, and that they were not born but “became monsters.” Ultimately, Kay argued, *Gladue* and *Ipeelee* were nothing but examples of left-wing guilt and an attempt to appease the Aboriginal interest group, who were so blinded by their own social justice warrior mentality that they missed how these men were “lifelong addicts who have sadism programmed into their tragically wounded souls.”⁸⁰ In these examples we see how attention is paid to Aboriginal offenders by a courtroom spectacle of wounding and tragedy.

As sentencing judges consider how to give appropriate attention to the circumstances of Aboriginal offenders, they are inevitably caught within a conflicting space of extreme racist beliefs and hysterical calls for more retributive punishments for Indigenous offenders (cloaked, ironically, within calls for racial equality) and a programmatic attempt to account for racist discrimination in the justice system. As Pfefferle points out, for the most part, judges fail at this basic duty. Particularly, Pfefferle laments how case law has narrowed the factors that should be accounted for in section 718.2(e), where many judges have failed to accurately account for the “root” factors or causes of Aboriginal criminal activity because this would create “self-reinforcing spirals.”⁸¹ So, for example, judges have worried that if aggravated assault is itself a common occurrence in an Aboriginal community, for “root factors” related to “colonialism,” then wouldn’t this mean that aggravated assault would effectively become a mitigating factor for Aboriginal offenders in itself? For Pfefferle, this indicates that there is a profound confusion

⁸⁰ Central to Kay’s argument was his agreement with the sole dissenting opinion made by Justice J. Rothstein in *R v Ipeelee*. She argued against the majority position on the grounds that in her opinion Parliament has been clear that, s.718.2(e) notwithstanding, the “protection of society is the paramount consideration” in all sentencing principles. In cases of Long-Term Supervision Orders (LTSO) (a designation that distinguishes dangerous offenders who are incarcerated indefinitely, and dangerous offenders who present the “possibility for eventual control” of the offender in the community given their high-risk of reoffending) for Aboriginal offenders it must be principles of deterrence and denunciation and separation that are emphasized over rehabilitation for the simple reason of the safety of society (*R v Ipeelee*, para 100, 117). – she further argued that rehabilitation was a moot point because most Aboriginal communities do not have the capacity for necessary reintegration programs.

⁸¹ Pfefferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration,” 135.

between the distinctions of *Gladue* as a different approach and *Gladue* as leading to different results for Aboriginal offenders. Courts should rather, argues Pfefferle, be willing to acknowledge that the effects of the “root” factors outlined in *Gladue* are expansive and can indeed “create other relevant conditions [to be considered as *Gladue* factors].”⁸² This is yet another moment where the causal becomes the effect, as Pfefferle agrees that if aggravated assault is a common occurrence in an Aboriginal community, as long as it can be narrated within the genealogical form of a *Gladue* factor – that is, as long as it can be shown to be linked in some way to these deep background or systemic factors – then it is, effectively, a mitigating factor for Aboriginal offenders. And the result, as always, is not a focus or understanding of systemic, or the colonial, but the fundamentally dysfunctional condition of Aboriginal life.

To be clear, all of this critical analysis of *Gladue* and its application emerges from the central problem that *Gladue* has done nothing to address its primary concern of gross overrepresentation of Indigenous offenders. In fact, in the decade after *Gladue* was ruled in 1999, its sibling Supreme Court case ruling of *R v Ipeelee*, in 2012, claimed that “the overrepresentation of Aboriginal people in the criminal justice system is worse than ever,” with steady increases in numbers even as prisons recorded overall declines in numbers.⁸³ Pfefferle’s optimistic line of thought on the proper mobilization of *Gladue* was itself a foreshadowing of the ruling of *R v Ipeelee* in 2012, which claimed that the ruling of *Gladue* had not been “universally well received,” but more importantly that it had been fundamentally misunderstood and misapplied.⁸⁴ Academics and researchers have continued to suggest that a more systematic

⁸² Pfefferle, 135. This is a perfect illustration of how judges, and Pfefferle, confuse “root factors” and “systemic factors” with a less capacious and more genealogically precise “background factors” that isolate on the “conditions” of a specific individual; it also shows how their investigations of the “root” causes are limited more to an affirmation of the assumption of general Indigenous dysfunction.

⁸³ *R v Ipeelee*, para 62.

⁸⁴ *R v Ipeelee*, paras 63, 64. In a section titled “Making sense of Aboriginal sentencing, *Ipeelee* argues that there are three main faulty criticisms of *Gladue*: 1) that sentencing is not an appropriate means of addressing

implementation of *Gladue* is required, and a more rigorous engagement with its true principles of dealing with systemic overrepresentation is required. As Parkes and Milward put it, a “more fulsome investigation and interviewing process” is required to capture the specificity of the Aboriginal defendant before the court, as well as to determine “specific culturally-based resources that may be available for the accused.”⁸⁵ Yet when we consider the breadth and depth in scope of the reports, it does not appear there is any lack of specificity in considering an Aboriginal life. As one Aboriginal offender described his experience with Gladue report writers, “They just told me...the more in-depth I get, the more I let them know what I’ve been through, the more they’ll understand who I am.”⁸⁶

The other primary critique is that *Gladue* cases are not emphasized enough, particularly in cases of violent crimes, “due to the nature of the offence or even where the individual has been declared a long-term offender” (Ibid., 100). Yet these critiques fall back on themselves as researchers try not to step on the feet of judges. Parkes and Milward suggest, ultimately, that they are “not arguing that the sentences meted out in the [example cases of *Gladue*]... are necessarily too high or inappropriate,” and that they recognize the “discretionary nature of

overrepresentation; 2) that *Gladue* is essentially a “race-based discount” for Aboriginal offenders; 3) that *Gladue* is special treatment for Aboriginal offenders and is thus principally unfair in the eyes of the law. All of these *Ipeelee* finds to be rooted in fundamental misunderstandings of the operation of s.718.2(e) of the *Criminal Code*, and, thus the ruling of *Gladue* itself. See para 64.

⁸⁵ Parkes and Milward, 90. Note that Parkes and Milward use the term “Aboriginal defendant,” while “offender” is more appropriate given that *Gladue* is fundamentally a ruling on sentencing and, thus, guilt is already determined. It is possible to imagine how legal discourse could maintain this terminology, however, as a sentencing hearing still requires all the normal fixtures of a trial, including Crown and defence councils. As is typical in a sentencing hearing, determinations of moral culpability have to be made, as was clear in Thomas’s case, thus providing some substantial element of “defence.” The subtle difference between these word usages suggest interesting implications, however, particularly in the question of why *Gladue* ‘factors’ should not be viable in the actual defense of an Aboriginal defendant, particularly in a case like Thomas’s where the fine details that were being decided was whether Thomas had grounds for self-defence and his position as a targeted racial minority was evidently on display, not to mention the documented history in which young Indigenous men, in particular, have been treated in similar disposable manners on the outskirts of prairie cities by police. See Wright, “Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild.”

⁸⁶ Edwards, “Why Gladue Has Not Lived up to Its Promise for Indigenous Justice: Across the Country, Gladue Rights for Indigenous Offenders Are Being Ignored, Underfunded or Flat-out Denied.”

sentencing (as well as constraints posed by legislation or appellate review)” and the many other factors that should be considered by a judge. “However,” they argue, “we are suggesting that *Gladue* and its principles may be given short-shrift in cases involving serious crimes such as offences of violence” (Ibid., 100). It is important to be clear about what they are really asking here. They recognize that a judge probably cannot adjust sentences very much for serious crimes, yet they want judges to read *Gladue* reports more closely. In other words, between these various critiques of specificity and emphasis, then, what is being called for is simply more *consideration* or *attention* to *Gladue*. But we have to ask, what is the point of this emphasis of *Gladue* consideration? What does it do beyond “explain” an Aboriginal person, making their lives naked to the world, to be endlessly rehearsed by courts, media, and everyday talk? More importantly, what does this rehearsal do for the courts, and for the general public? The principles of *Gladue* are clear: we must try to understand this person’s history as a mitigating factor for their crime(s). Yet in this ever-expansive quest to get the depths of a life, or a community, of piling on more and more information, do we really ever get to truly understand the crime, or even the person? Is it possible for *Gladue* to deliver on these promises? I would suggest it is no more possible to *explain* or *understand* an Indigenous person’s crime than it is anyone else, no matter how much specific or generalized details one has on their life. This inevitably begs the question: is *Gladue* merely an impotent legal procedure to make it seem that Indigenous conditions of overrepresentation are being taken seriously? And if the result of this gesture is to create more capacity for the spectacle of Indigenous injury, can we begin to contemplate perhaps other motivations that lead to, or even outcomes that derive from, Canada’s insistence on *Gladue* reports?

The tricky math of sentencing; or, storying the Aboriginal offender

In an interesting moment during Thomas's sentencing hearing Chief Justice Joyal repeatedly pushed back on the Crown's deposition, presented by Paul Girdlestone, because of what Joyal perceived as a contradiction in the reasoning of the Crown and, particularly, their suggestion of time that Thomas should serve in prison before being eligible for parole. There were several problems with the math that the Crown was suggesting, particularly around issues in which Fraser's behavior challenged certain aggravating factors, as well as Thomas's own aggravating factors of a violent criminal past and with the joint *Gladue* and its factors, primarily FASD, all balanced out to a 12-year recommendation. Girdlestone began his deposition by highlighting the fact that Fraser's family and many colleagues were in the galleys, and that this horrible crime had had such terrible effects, which were attested to in several victim impact statements. Joyal interrupted him to check the Crown's use of the emotional presence of Fraser's community, acknowledging that this situation was no-doubt terrible and unbelievably difficult for all involved, but then asked for clarification on what he said was a "simple" confusion: how could the Crown suggest only 12-years when the jury had found Thomas to be guilty of second-degree murder and, thus, explicitly denied that intoxication or self-defence were applicable to these determinations of Thomas's actions?⁸⁷ Pardoning himself, Girdlestone continued by listing several legal precedents that had ruled harshly on such similar offenders who assaulted or murdered public service workers, and which suggested, as a matter of the principle of deterrence, that Thomas's actions against Fraser constituted an aggravating factor by virtue of Fraser's public service. Girdlestone then moved on to reading a long list of Thomas's past violent criminal offenses, including past assault charges that involved using a knife, uttering threats,

⁸⁷ Recall that in order for Thomas to be charged with second-degree murder the jury had to answer in the affirmative that the Crown had proven beyond reasonable doubt these three conditions: Thomas's act was unlawful; he had the state of mind for murder; and Fraser did not provoke Thomas's actions.

robbery (which came with a 10-year weapon prohibition clause), domestic assault, many entries with failures to comply with probation orders. He then referenced the “*Gladue* report” which contained testimony from a CFS worker who suggested that Thomas’s “weapon of choice” was a knife. Further details were stacked on, which included records that Thomas refused to complete any of his past court mandated programming for substance abuse. All of these details were intended to emphasize that Thomas “presents a danger to society.”

The issue of a knife came up again and again, especially later when Girdlestone outlined the “nature of the offense,” and characterized Thomas’s presenting of a knife “instantly” upon conflict with Fraser, which he claimed that the jury had agreed upon based on their verdict (and which Judge Joyal would later confirm as a ‘fact’ in this case). He included details of the stab wounds, which spoke to the violent nature of the case. And, finally, as he narrated the details of this offense, he was forced to comment on the moment of conflict between Fraser and Thomas, on what precipitated the event. Here he struggled to detail Fraser’s actions, as they were the initial points of violent contact. “The motivation for the stabbing,” Girdlestone suggested, “appears to be anger for being ejected from the bus.” But the “most egregious fact,” he argued, was that Fraser was a public worker whose very work as a driver in the middle of the night made vulnerable and left him with no support. Joyal interrupted to ask how he was to consider the “imprudence of Fraser” who chose to precipitate things in a physical way, operating “*prima facie*” outside of the law, whose actions many others might not have taken. He quickly clarified that this in no way justified Thomas’s violence and deadly response, but wondered if Fraser’s actions nullified the Crown’s argument of the aggravating factor (that Fraser was a public worker)? The two went back and forth for several minutes, with Girdlestone suggesting that Fraser’s actions reduced Thomas’s culpability but did not diminish the aggravating factor, a

confusing statement that he was not able to adequately clarify for Joyal who insisted on it. Girdlestone continued to trail off into stories of how horrible this had been for transit drivers, but Joyal would then call him back to his question and refused to let it rest. Eventually, in a dejected manner, Girdlestone accepted that Fraser's actions "precipitated the event" of his death, and he even cited defense council Evan Roitenberg's summation during the preceding trial that no transit driver has the authority to physically expel anyone from a bus.

In that moment of the Crown's concession, it was accepted, *prima facie*, that Fraser "precipitated" the violent encounter that night, according to Judge Joyal's characterization. Yet this concession, while providing a de facto defense of Thomas, was ultimately meaningless for him as the jury had, Joyal commented, "quite properly dismissed self-defence" as a viable argument.⁸⁸ So what was all of this about? What did any of this painful rehearsal of Fraser's complicity matter? Why did Joyal force the clarification that Fraser's actions were "imprudent" and "excessive," that he was acting beyond his duties as a public transit operator. Why did he put on record that Fraser's actions raised "uncomfortable" questions, such as why did Fraser so aggressively remove accused from bus? Or, why did he not simply close the door once he removed the accused? Joyal noted, in this rhetorical commentary, that Fraser could have called for support. Ultimately, he agreed that Fraser thus "precipitated" the event, and that his actions dramatically reduced the most aggravating factor in this case, that Thomas killed a public worker. I was stunned. Joyal had given a more robust accounting of Fraser's culpability than even Thomas's own lawyer had. He had even presented a more explicit case for self-defence, I thought. Yet this all seemed so profoundly moot: Thomas had already been found guilty, so what good was any of this now?

⁸⁸ Joyal, Thomas Sentencing Hearing, August 7, 2019.

I quickly realized that these rehearsals of Fraser's imprudent behaviors were required not so much to defend Thomas as to come up with the most appropriate condemnation of him. In other words, to square the math and make sense of the recommendation of 12 years before Thomas could be considered for parole. Joyal recounted the Crown's extensive listing of Thomas's past violent offenses, both outside and inside of jail, all of which were aggravating factors, and so asked in an ironic gesture: why shouldn't the sentence be, rather, 25 years?⁸⁹ Furthermore, argued Joyal, he was especially confused with the Crown's math of twelve years, especially with *Gladue* being taken into the equation.

Up to this point, the Crown had responded to Joyal's prompts with persistent reference to a "complex" or "matrix" of factors that went into their calculation. They intimated several times that there were *Gladue* factors to consider, which provided some answers to the balance sheet by way of mitigation. Importantly, *Gladue* was only a word, an inference that was expected to make sense of these troubles the judge was having with the cold hard facts of the calculation. But Joyal, increasingly visibly annoyed, did not budge from his query and castigated the Crown for their lack of rigorous explanation. I very quickly realized that Joyal's impatience was sourced in a demand that the Crown get on with it and lay out the *Gladue* factors. As I listened to this increasingly tense exchange, I wrote in my notes, "It's as if he [Joyal] is demanding an account of T's dysfunction!"⁹⁰ My suspicion seemed to be confirmed as the Crown slowly received the

⁸⁹ A second-degree murder charge comes with a "life sentence," which can be no longer than 25 years in prison, but no less than 10 years served in prison. This sentencing hearing was precisely to determine the amount of years in which Thomas would have to serve *before he was eligible* for parole. Thus, the joint recommendation of 12 years by both the Crown and defense are not guarantees that Thomas will be let out at that time, and he could serve the whole 25 years if he is not found *eligible* after 12 years or before his 25 year sentence. He will be on parole for the rest of his life, however. Hence the term applied to people who receive such sentences as "lifers" even after they are let out of the confines of the prison.

⁹⁰ Recall that I was listening to a recording of this exchange in the media room of the law courts that is typically reserved for reporters to listen to court proceedings.

message and stated in a dull tone that sounded like another resentful admission of defeat: “We acknowledge that Gladue is at play [in our recommendation].”

The Crown has historically fought against the inclusion of *Gladue* reports along a variety of grounds that have included both questioning whether one is actually Aboriginal or, when this was accepted by the courts, contesting the causal connection between one’s actions and any “Aboriginal-specific” background factors.⁹¹ *Gladue* continues to be contested in a variety of ways, and is implemented along uneven and contradictory paths by provincial courts. The Crown did not contest *Gladue* in this instance, but in their stubborn effort to refuse its articulation to Joyal the Crown made their reservations known. Indeed, Girdlestone said plainly to Joyal that while he admitted “there are significant Gladue factors that played on Thomas’s actions,” it was the Crown’s belief that Thomas’s sentence should be determined by his actions alone.

It was as though the Crown expected the mere mention of *Gladue* to make sense of their math, and it was clear that they did not want to spend much time outlining the actual substance of the pre-sentence report that was dressed up like a *Gladue* report. But Joyal demanded it, citing again his confusion of whether Fraser’s actions were aggravating factors or not, how *Gladue* made any difference for Thomas given his violent history that was itself a set of aggravating factors. Finally, Girdlestone began to detail the “significant Gladue factors,” of which Thomas’s FASD and intellectual delays and “extremely low IQ” (“in the range of 47”) were the first factors listed. These conditions, the Crown admitted, clearly indicated that “Thomas has impulse control issues” and that he struggles with considering the consequences of his actions or thinking about the future, facts that were included in the *Gladue* report by testimonies from social workers who had experience with Thomas in the past. Joyal continued to push back with reference to

⁹¹ Pfeifferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration,” 128.

Thomas's violent history, which did not seem to square with the Crown's rather pitiful elaboration of *Gladue*. The calculation of 12 years should be higher, Joyal continued to insist. The Crown took another crack and summarized the event in which Thomas was initially respectful and that Fraser precipitated violence with aggressive physical contact, and then said that the *Gladue* factors add "complications" to the calculation of time before eligible parole because they "dilute" his moral culpability.⁹² Joyal, who was becoming visibly impatient and irritated, interrupted the Crown with a raised his voice and demanded that Girdlestone tell him, "how!" How does *Gladue* dilute the aggravating factor, especially for an offender who is violent, he wanted to know? Joyal seemed to be recognizing the implicit contradiction between the jury's determination that denied Thomas's self-defence arguments on grounds that he was not overly intoxicated, was of sound mind, and was, ultimately, an average citizen, as per Joyal's decision-tree instructions that he presented to them before they adjourned to deliberate Thomas's future.⁹³ He described this in terms to the Crown that he was "leave[ing] the court in a difficult position" because it is simply difficult to calculate these mitigating factors with all of the aggravating factors.

Finally, the Crown dug in, listing as many of the details of the *Gladue* report as he could. He discussed Shamattawa, its poverty, and the systemic abuse of solvents on the reserve; he described Thomas's mother and father who were "clearly affected by colonization."⁹⁴ Together, "these factors tied" Thomas from restraining himself. In further allusions to the specific factor of

⁹² The irony cannot be overstated here that the Crown was ultimately forced to take a position that benefited Thomas, which they adamantly did not want to do for reasons of legalistic principle, but perhaps more so because Fraser's family and other bus drivers sat in the gallery.

⁹³ Joyal also made a point of stating at least twice during the two days of sentencing hearings that he agreed with these determinations by the jury and that they were appropriate conclusions to draw from the evidence submitted to the courts.

⁹⁴ Importantly, Girdlestone provided no descriptive account or definition of "colonization." Instead, colonization subtly, but causally, blended in with a further factor, that Thomas's mother, who was "affected by colonization," subsequently damaged Thomas with his FASD because of her struggles with alcohol and drugs.

FASD, Girdlestone summarized that Thomas was tragically unable to communicate feelings when he was “ejected” from the bus, which was compounded by a related “hair trigger anger response.” Girdlestone concluded this explanation of Thomas’s profound lack of control and restraint with the words, “I acknowledge that Colonialism has impacted this offender and does impact his behavior.”

Joyal, exasperated by his repeated challenge that went unsatisfactorily responded to, finally dismissed the matter and allowed the Crown to conclude and ordered the reading of victim impact statements. After a short lunch break, the defense, led by Ted Mariash, was then to present their arguments, but with a warning from Joyal that he was suspicious of the joint-recommendation of 12-years. What was interesting was precisely how much more well prepared the defense seemed to be in this scenario, a scenario that was reversed from that of the trial.⁹⁵ They began by acknowledging the seriousness and “brutal” nature of the crime and that it would be hard to justify mitigating factors in the circumstances. But piece by piece they disputed the most aggravating factors listed by the Crown, including the amount of stab wounds, which they corrected from the Crown’s account, that there was no evidence a knife was immediately presented or in possession of Thomas,⁹⁶ and that Thomas was civil, and presented as scared and confused and was asking for help; and that Fraser precipitated violence. Marish insisted also on detailing to Joyal that Fraser put Thomas in a choke hold when Joyal described Fraser as “forcibly eject[ing] the patron.” They further detailed Fraser’s actions after Thomas left the bus (in which he pursued him) as blatantly rebutting the Crown’s claim that Fraser’s public position constituted Thomas’s actions as an aggravating factor. Joyal agreed with all of this, but still

⁹⁵ Recall in previous chapter how the Crown’s strategy was meticulously prepared and presented to the jury where Thomas’s defense seemed woefully unprepared to the point of negligence.

⁹⁶ Again, another important factor of the case. Ultimately, Joyal agreed with the Crown’s position that Thomas had a knife and “would have presented it quickly” in the altercation.

wondered about the “incongruity” of the seriousness of the factors and the twelve-year recommendation. As if on cue, Joyal’s prompting of explaining the math led the defense into a long and storied account of the Gladue factors that were “very significant” in this case.

As we saw at the beginning of this chapter, Mariash began his story of Thomas on the reserve of Shamattawa First Nation, a space of absolute destitution and depravity and a place “unlike any other place in Canada.” He described it as plagued by substance abuse, suicide, violence and general dysfunction where people “don’t want to live so much.” He performed moral outrage at the domestic violence and the addictions, which were chained along in intergenerational accounts of Thomas’s parents and grandparents who had gone to Residential School, and how FASD was a direct outcome of this. “No wonder he struggled in school!” or that Thomas “bounced between [foster] households,” Mariash argued. For him, Thomas’s problems were “deeply embedded in his community.” This was nothing short than the “clearest explanation of how the implementation of Indian Act has contributed to overrepresentation of Indigenous peoples in our jails.” Even Thomas’s experience in CFS was meant to make sense of this historical-genealogical claim, an experience of loss of family that ultimately turned him to the streets where he was not so capable, because of his FASD and low IQ, which made him dually susceptible to being victimized. With that, Mariash argued that there was a “wealth of evidence in *Gladue* to suggest why Brian would act with such devastating violence” and that “*Gladue* factors have a direct causal relation to violence in this case.”

Unlike Joyal’s response to the Crown, he seemed pleased with Mariash’s account and commended the logic presented by the latter as cogent and well argued. He understood how the defense got to twelve years, but he took this opportunity to castigate the Crown once again, suggesting that he thought there was still too much “rhetoric” in the Crown’s position that

“makes it difficult for the public to understand [their position].” The only real difference in content that I could discern between the Crown and defense were in minor details already mentioned, otherwise all of the main “brutal” nature of this event and Thomas’s violent past were agreed upon whole heartedly and they both ultimately listed the same *Gladue* factors in their respective speeches. The only difference, that I could discern, was that Mariash packaged it in a much more compelling narrative that emphasized the genealogical trajectory and thus the spirit of *Gladue* – that is, Mariash stuck to the spirit of *Gladue* because he *explained* Thomas better, dug more deeply in to his life for the court to understand his specificity in a neat narrative. Mariash’s narrative and suggestions of the “wealth of evidence” and the “direct causal connections” between *Gladue* factors and his client’s criminal behavior, however, were no more logical or remotely proven than those “well known” systemic factors that figure so prominently to “contribute to a higher incidence of crime and incarceration” for Aboriginal peoples as suggested in *Gladue* itself.⁹⁷ Other than Mariash’s dedicated faithfulness to this faulty *Gladue* logic, it is not at all clear what would have separated his argument from that of the Crown’s or made his argument more “cogent” and compelling to Joyal.

Joyal ultimately adjourned the sentencing hearing proceedings to pick up later in the summer because he demanded that the Crown “do better” and submit written statements that provided a more robust account of their math. More appropriately, I thought, Joyal simply wanted a better *Gladue* story. Thomas’s sentence would have to wait until then. But when Joyal finally gave his reasons for his sentence, he accepted the generalized effects of Thomas’s horrific life and related deficiencies, but ultimately denied that these factors could bear in any considerable way on his legal duties to balance other sentencing principles (like deterrence,

⁹⁷ *R v Gladue*, para 67

denunciation, and separation). In other words, he denied the neat trajectory between cause and effect implicated in this *Gladue* story. And he did so in a rigorous legal argument. By citing a Manitoba Court of Appeal case in which an emphasis on the retributive principles of deterrence, denunciation, and separation were justified even in the face of restraint demanded by s.718.2(e), “particularly for Aboriginal peoples,” and affirmed in *R v Gladue* and *R v Ipeelee*, we see how sentencing judges have a great deal of discretionary power where the principles of *Gladue* become effectively meaningless beyond a ritualized rehearsal of gross Indigenous dysfunction. Was it truly the math that Joyal was concerned with, or was it the need for a story that he was demanding of the Crown?

Joyal’s Decision

The court convened again on August 7, 2019. Joyal began his statements by noting he received updated arguments from Mr. Girdlestone that clarified problematic aspects of his arguments. He then dismissed that the notion of a “joint recommendation” of twelve years by both Crown and defense was a misnomer, and that the counsels had both arrived at this “common recommendation” instead by coincidence.

Joyal declared that his task was simple in a way, that under section 235 of the *Criminal Code*, anyone who commits a first- or second-degree murder is guilty of an indictable offence and will be sentenced to life in prison. Joyal simply had to determine when Thomas would be eligible for parole. It was much more complex, however, as there was no “exact science” to this procedure and there is a broad range in which determinations of moral culpability can be figured. To break it down, Joyal had to individualize this case based on 1) character of the accused, 2) nature of the offense, and 3) surrounding circumstances. The sentencing principle of

denunciation, he suggested, was a “big factor” for his thinking, while the principle of rehabilitation “must be deemphasized” in this case, but nevertheless considered if only minimally. So too would mitigating and aggravating factors be dealt with individually, which included a consideration of *Gladue* when analyzing the specific facts of this case.

Thomas’s character was, expectedly, described through a long criminal record list of violent assaults, threats, failures to comply, in addition to violence in custody. Joyal felt compelled to note that Thomas was simply unable to control hair-trigger temper. In addition, Thomas had also been “uninterested or unable” to address anger management or addiction counselling in the past and, because of this, remained a danger to society. Furthermore, Thomas did not appear to understand the gravity of his offense, an inference that was not presented with any evidence, only that he has a low IQ. Together, this speculative conflation of factors – either of his lack of will or “interest” or his intellectual inability – all added up to a potential danger to society. Thomas’s danger was of either an intentional form or an unintentional by-product of his intelligence. Either way, it all pointed Joyal in one clear direction, that Thomas “does not present as a strong viable candidate for rehabilitation.” He also suggested that this inability to foreground rehabilitation as a guiding principle would come up again, and be explained, when he would discuss the *Gladue* factors, an ironic statement given that *Gladue* is, as we have seen, nothing if not a compulsion on the court to consider all other options than imprisonment and to consider rehabilitative routes, *especially for Aboriginal offenders*. Before turning to this contradiction, however, it is worth noting the curious disavowal of FASD in Joyal’s characterization of Thomas

for the ways in which it functions to affirm assumptions of intent or ability, and how it might be reflective of a much thornier legal problem of fitness.⁹⁸

For it has been acknowledged by many scholars and legal experts that FASD implies a much more global problematic of executive functioning and so makes the consideration of one's judgement a tricky issue for the whole legal system, but particularly for sentencing judges.⁹⁹ Indeed, FASD has been used as a means of declaring some individuals not fit to stand trial, or has been used to claim a not criminally responsible by reason of mental disorder defense, though only in a select few cases for either.¹⁰⁰ In any case, however, this is a moot point as these are issues of defense, not of sentencing, which is perhaps reflective of the more general predicament that Joyal is in, where it had already been accepted by the jury that Thomas was of sound mind and reflective of an ordinary and average citizen for purposes of determining his responsibility for murder. Joyal's task was, rather, determining a fit sentence. In order to do this Joyal had to measure aggravating and mitigating factors within an individualizing procedure that took into account character, nature of offense, and the surrounding circumstances. Thus far, it seemed that what has otherwise been treated as a *Gladue* factor of FASD, Thomas's low IQ, was being used as an aggravating factor, affirmative of Joyal's emphasis on denunciation and de-emphasis on rehabilitation.

Next Joyal turned to the nature of the offense, where he reiterated the Crown's position of Thomas's possession of a knife, that it would have been used immediately in the physical conflict, that Fraser could not have known that Thomas possessed a knife, all of which are

⁹⁸ Joyal notably breaks with the otherwise conventional association of FASD with Thomas's IQ that had previously been the norm in the court as described by both Crown and defense counsels, a norm that Joyal would later return to when characterizing Thomas's FASD within an account of his low IQ and low verbal functioning.

⁹⁹ Gagnier, Moore, and Green, "A Need for Closer Examination of FASD by the Criminal Justice System."

¹⁰⁰ See Gagnier et al., 433. Relevant cases: (note 79-80 and 82-84).

aggravating factors for Thomas's actions. Even Thomas's impulsivity, which was also only previously linked to FASD in past references by Crown and defense, was now an aggravating factor for Joyal who de-linked it from FASD. The only benefit given to the calculations against Thomas in this portion of Joyal's statement was that Fraser did indeed act imprudently and the Crown's claim that Thomas's killing of a public worker was an aggravating factor was "dramatically reduced" given Fraser's actions that went above and beyond his responsibilities and which were centrally implicated in the precipitation of violence.

Finally, in the surrounding circumstances, Joyal turned to the *Gladue* factors. He listed the many factors of community dysfunction, family breakdown, Thomas's genealogy of neglect and addiction through his mother, which lead to his becoming a permanent ward, his own substance abuse issues, and most importantly, his diagnosis of FAS and ARND in 2005, which Joyal referred to in connection with Thomas's low IQ "in the range of 47" and his extremely low verbal functioning.¹⁰¹ When considering these factors, Joyal said, they "can have an impact on how principles of deterrence and denunciation are considered," as well as having impacts on determining one's moral culpability. Joyal cautioned the court that this was not so simple, however, and cited *R v Ipeelee*, to note that there are significant criticisms of *Gladue* in which Indigenous offenders are simply given a 'pass' and effectively given less time served than

¹⁰¹ This is a curious statement, as FAS and ARND are two very different diagnoses, notable because ARND is often diagnosed when one cannot be diagnosed with FAS, which is the original diagnosis and requires phenotypical dysmorphologies of cranial shapes and size, palpebral fissures of the eyes, consistency and shape of one's upper lip, etc. ARND is a diagnosis that addresses the influence of alcohol particularly on one's cognitive development as most FASD diagnoses are not of this original diagnostic category, often referred to as "full-blown FAS" to emphasize its obviousness (in facial and other physiognomic features) in addition to its severity (in terms of behavioral problems). One either has FAS or one of the more difficult to diagnose disorders, like ARND. One does not have both FAS and ARND as the cognitive symptoms of ARND would be included within the diagnosis of FAS. If one has FAS, by definition one does not "need" a diagnosis of ARND. Listing these separately as viable diagnoses casts a familiar shadow of doubt on the circumstances of Thomas's diagnosis with an FASD.

others.¹⁰² Joyal then went on to cite a Manitoba Court of Appeal (MBCA) case, *R v Anderson* (2018)— in which the higher court dismissed an appeal of an Indigenous offender, who basically claimed that their *Gladue* factors had not been robustly considered and subsequently led to a harsher sentence –as a precedent for how *Gladue* principles of restraint (ie. principles of rehabilitation, reintegration) could be held even in the face of an emphasis on retributive principles of deterrence, denunciation, and separation.¹⁰³ In other words, judges are still well within their right to consider the punitive aspects of sentencing, namely denunciation, deterrence, and separation, as significant positions for affirming the safety and values of society. Joyal cited a particular passage in *R v Anderson* to illustrate the central struggle faced by sentencing judges who are presented with “two traps” when considering an application of *Gladue* principles: “One is to automatically reduce a sentence or warranted period of incarceration simply because an offender is Indigenous without some principled reason. The other is to avoid the legal duty imposed by statute to apply *Gladue* principles robustly by taking too narrow an approach as to what *Gladue* factors have to be considered and weighed to arrive at a proportionate sentence or by foregoing a proper analysis altogether due to the severity of the crime.”¹⁰⁴ Among the several tests presented to the appeal in *R v Anderson*, it was whether the sentencing judge had abdicated his legal duty by neglecting to seriously engage with *Gladue* and a simultaneous over-emphasis of deterrence and denunciation in his judgment. In effect, *R v Anderson* was seeking to appeal

¹⁰² This paragraph of *Ipeelee* is precisely intended to dismiss this sentiment as a common ‘myth’ of *Gladue*. Joyal’s citation of it seems to be a miss reading and, as such, a re-iterating of this misleading myth. See *Ipeelee*, para 72.

¹⁰³ *R v Anderson*, No. AY17-30-08728 (MBCA April 19, 2018). Briefly, this case involved a young Aboriginal male offender (16 years old at time of crime event) who killed a 14-year-old girl who had a mental disability. The disability was a main factor in his crime as he was worried of the social consequences that would occur if she told community members about their sexual liaisons. He admittedly killed her to avoid such social pressures. He was able to hide his role in the crime that went unsolved for several years until police matched his DNA to the scene and he finally confessed. At issue in this appeal was whether the sentencing judge paid enough attention to *Gladue* factors in his sanction that included an adult prison sentence. His appeal was denied for reasons that will be explored.

¹⁰⁴ *R v Anderson*, No. AY17-30-08728 (MBCA April 19, 2018), para 63.

the length of sentence on these grounds that a proper assessment of *Gladue* would lead to a lower sentence. This reason appealed to Joyal because it ultimately dismissed this appeal, and so it is worthwhile to see how the appeal judge reasoned that *Gladue* was treated in fairness in order to see how Joyal then deploys it in his own diminishing of *Gladue* in his sentencing reasoning.

R v Anderson presented several particular anomalies. The first is that the young offender was described by forensic psychologists as possessing average cognitive abilities and intelligence and that he lived an otherwise healthy and normal life and was a good candidate for rehabilitation as such. In addition, however, was how *Gladue* factored in this case as relevant at all given these circumstances, and how, particularly, they thus featured as a measure of normality. The young offender's own lawyers presented ambiguity between themselves in their respective stances on *Gladue*, one saying that "there aren't specific *Gladue* factors as such," and the other one suggesting there were factors and thus imploring the sentencing judge that he had an obligation to apply them but adding that "the seriousness of the crime certainly has impact as to how much those factors will take play in [the] sentence."¹⁰⁵ For his own part, the sentencing judge claimed that because of the offender's cognitive abilities and his overall resolve to hide his criminal acts from his community for several years and avoid legal sanction that the young offender could not claim diminished moral culpability. "Up until the time of the offence, he was a fairly average mid-teenage boy who did well enough in school, was interested in sports, had a part-time job and had friends and a connection to the community..." "[h]e did not have any emotional, cognitive, learning or psychological issues. Nor were alcohol or drugs an issue for him." The original sentencing judge summarized: "*Gladue* factors are notionally relevant here. However, considering his upbringing, the absence of any impact of his aboriginal heritage to him

¹⁰⁵ Ibid., para 40. Emphases in original.

or this crime, and the grave nature of the murder, it would defy common sense here to assess him or his blameworthiness through the *Gladue* lens.”¹⁰⁶

The appeal judge found this sentencing judge’s language to be “inelegant and unfortunate” (R v Anderson 2018 para 54) and noted that s.718.2(e), *Gladue*, and *Ipeelee* have all affirmed to sentencing judges that they have a “legal duty in every case involving an Indigenous offender to alter their method of analysis in the assessment of moral culpability in order to achieve a truly fit and proper sentence...”¹⁰⁷ Ultimately, however, the appeal judge said that the sentencing judge’s language amounted to nothing more than an “awkward” mistake, and therefore, not an indication that he had erred in principle by not considering *Gladue*. Ultimately, the appeal court affirmed that the sentencing judge was correct in assuming that *Gladue* factors did not play a “significant role” in this case, leaning on the original work of the forensic psychologists to highlight that the young offender was “someone without emotional, psychological or cognitive problems or of having suffered “significant” trauma as a child” (R v Anderson, para 69). In addition to relating *Gladue* factors explicitly to normative notions of cognitive, emotional and psychological functioning, the court of appeal judge implied that trauma (specifically “significant trauma”) was a common factor of *Gladue*. Despite acknowledging that this young offender had not suffered from these typical *Gladue* factors, as his cognitive and emotional health was normative, he went to confusingly locate this young offender within a broader matrix of associations of “intergenerational disadvantages” that had been noted on the offender’s mother’s side of the family. Specifically, he took “judicial notice of two facts”: “many Indigenous peoples have suffered dislocation and loss of traditional ways of

¹⁰⁶ Ibid., para 42. Emphasis in original.

¹⁰⁷ Ibid., para 57.

life” because of damming and flooding related to hydro development; and that residential schools (of which the defendant’s grandmother attended, though denied that she had suffered abuse there) have “negatively contributed to the loss of culture for Indigenous people. It is one of the legacies of colonial thinking” (para 70). He also clarified what he meant by “colonial thinking”: “Today, the negative effects of residential schools are seen on a daily basis in the civil, family and criminal courts in Manitoba” (para 70). We notice first how the “negative effects” of “colonial thinking” are not explained or clarified beyond a gesture of how this judge personally *sees* them; namely, the flooding of the criminal and family courts with Indigenous criminals and litigants. It is not clear if the judge is sympathetic or annoyed with these Indigenous peoples overrunning his courts, but even less clear is how “colonial thinking” caused them to get there in the first place. Most bizarrely, however, is how all of this non-descriptive blabber is merely fodder for the larger point this judge is trying to make, which is to acknowledge that his family has been caught within the overwhelming condition of “intergenerational disadvantages” of colonial history, yet he himself is, miraculously, untouched by these disadvantages. In a sense, we see how the lack of conceptual ties and rigorous empirical understanding between the cause and effect of “colonial thinking” are directly made to bear on Indigenous peoples, of which this young offender’s family is certainly caught within, yet the offender himself is, miraculously and without explanation, unaffected. This is not to ignore the very clear disavowal required by the judge to make such statements, however. For he goes on to accept, *prima facie*, that this young offender has indeed suffered the “indirect consequence of these historical disadvantages on the maternal side of the young person’s family has contributed to him losing his Indigenous identity and culture, and it also impacted his mother’s ability to parent him due to her severe substance-abuse problem” (para 71). In other words, there is a

general level of suffering and dysfunction that is accepted. The only catch is that it means nothing as far as the court's determination or a 'fit' sentence is concerned. Ultimately, "[d]espite these challenges" of the indirect consequences and historical challenges that emerge from colonialism, "the young person was a fairly typical healthy 16 year old [and]... as such, he made the intentional decision to kill a vulnerable person in brute fashion and cover it up successfully for a lengthy period of time..." (para 73). Very clearly, then, *Gladue* did nothing but affirm the figuration of Aboriginal dysfunctionality by demonstrating that this offender was "fairly typical," and thus atypical or an exception from the norm of Aboriginal degeneration.

If Indigenous dysfunction is so breathlessly incorporated into the mundane procedures and thinking of the courts, we must also investigate how these rote legal procedures and modalities of thinking are made possible through the very general epistemological impasses of causality and proof that so often become the source materials or productive energies for prosecuting Indigeneity, as well as under the mythology of 'public safety' that so often comes to serve as a specific, though utterly abstracted, tool of measuring Indigenous dysfunction.

Tied in some way...

The hitch in *R v Anderson*, and the reason that it appealed to Joyal as a test case of the sentencing principles of restraint in the face of *Gladue* principles of rehabilitation, is that it operated in a double gap between the epistemological assumptions of the nature of "colonial thinking" and its many affects (both of which are vague and undefined) on Aboriginal offenders, on the one hand, and the legal problematic in which this epistemological gap is expressed and given meaning via the hard problem of proof. This is a problem that both *Gladue* and *Ipeelee*, and other court decisions (*R v Collins*, ONCA, 2011), have addressed as an unfair burden of

proof on Aboriginal offenders that should not be assumed for the very simple reason that such proof cannot be demonstrated with any certainty.¹⁰⁸ Citing the *Aboriginal Justice Inquiry, R v Ipeelee* summarizes the problem thusly: in general, it is nearly impossible for a court to “draw a simple and direct correlation” between the systemic factors of discrimination, cultural oppression, or even process of the loss of self-government, and the “events which lead an individual Aboriginal person to commit a crime or to become incarcerated.”¹⁰⁹ Furthermore, *Ipeelee* argues, s.718.2(e) of the *Criminal Code* simply “does not logically require such a connection” between an Aboriginal offender’s circumstances and his offending.¹¹⁰ The deciding judge of *R v Anderson* was well aware of this clause that called for *judicial notice* in the face of the impossible burden of drawing a causal connection between an offenders actions and the complex systemic factors of colonial history that are said to impact them, but nevertheless found conceptual wiggle room to maneuver around this requirement by citing none other than *Ipeelee* itself. For in the very same paragraph, *Ipeelee* makes a dramatic and ambivalent turn: “Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be *tied in some way* to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.”¹¹¹ With one hand *Ipeelee* affirmed that the spirit of *Gladue* means that Aboriginal defenders do not need to bear the burden of proof of causality between their life or genealogical circumstances and their offences, and with another it

¹⁰⁸ R v Ipeelee, para 82.

¹⁰⁹ R v Ipeelee, para 83. Cite AJI, p. 86. See also *R v Gladue*, para 69.

¹¹⁰ R v Ipeelee, para 83.

¹¹¹ R v Ipeelee, para 83. Emphasis mine.

stated that there needs to be some “unique circumstance” that can be *tied in some way* with the particular offender and thus make sense of their culpability. Rather than clarifying the problematic of the burden of proof, then, *Ipeelee* simply restated and rearticulated the central contradiction that began in s.718.2(e) of the Criminal Code and that was attempted to be clarified in *Gladue*; where the realization of overrepresentation of Aboriginal peoples in prisons was tied to colonialism (though with extremely vague rhetoric and even thinner conceptual understanding) and whereby alternative sentencing protocols, determined by virtue of one being Aboriginal, was meant to provide an equalizing force to this enormously complex problem. Furthermore, because of the vagueness of concept and understanding of this causal relationship that was meant to tie overrepresentation to sentencing itself, the Criminal Code, *Gladue*, and then *Ipeelee* simply rehashed this gap of reason by begging the question of how one can legally take notice of ‘colonialism’ by establishing a causal connection between Aboriginal disadvantage and Aboriginal crime. *R v Anderson*, and, subsequently, Judge Joyal, ultimately pick up on this ambiguity and used it to affirm a prioritization of principles of denunciation and deterrence (and ultimately a lengthy sentence of separation from society) over rehabilitation or reintegration. *Gladue* appears to not only rehash Indigenous dysfunction, but enable enough flexibilities for the material incarceration of Indigenous peoples.

It is important to note that it is the precise ambivalence of this foregoing dynamic of proof at the heart of *Gladue* that gives the judge of *R v Anderson* and judge Joyal in Thomas’s case the ironic capacity to both accept and deny, or more appropriately, emphasize or deemphasize, *Gladue* factors in their reasonings. The striking inversion of how a *tie* is imagined and mobilized in these two cases is worthy of note. Namely, as we have seen, *R v Anderson* was not satisfied that *Gladue* factors did “[tie] in some way” the young offender to committing his

crime of murder, and *Gladue* factors were raised to merely separate this young offender from, and thus affirm, the norm of Indigenous dysfunction.¹¹² While the young offender was denied appeal of a lesser sanction, his original sentence was deemed to be “fit” precisely because his moral culpability was considered to be within normal parameters. And, indeed, because of this he demonstrated “excellent prospects for rehabilitation and safe reintegration into society,” which ironically became the grounds for de-emphasizing the rehabilitation modality of *Gladue* and emphasizing retributive principles of deterrence and denunciation.¹¹³ In the case of Thomas, on the other hand, Joyal in fact accepted that Thomas’s *Gladue* factors adequately explained that he was “tied” from restraining himself – and recall that it was the Crown who introduced this language of the ‘tie’. Yet it was these very links between these *Gladue* factors of FASD, anger problems, and a generalized aura of Indigenous dysfunction and his crimes that made Thomas, according to Joyal, an unlikely “candidate for rehabilitation” and thus required a stronger emphasis on principles of retribution and restraint in Joyal’s final sentence determination. As Joyal summarized his opinion and decision-making process, “*Gladue* can help us understand, but in no way does it absolve Thomas of his actions.” Thomas is understood, and it is in this understanding in which the recognition of his perceived danger to society is born. Joyal thus borrows reasoning from *R v Anderson*, a case that denies a tie to colonial harm, or ‘*Gladue factors*,’ in order to justify harsher punishment of an Indigenous offender, in order to justify his own harsh punishment of an Indigenous offender with whom he readily admits has a tie to the *Gladue* factors of colonialism.

¹¹² R v Anderson, No. AY17-30–08728 (MBCA April 19, 2018), para 74.

¹¹³ R v Anderson, para 106.

So even when *Gladue* can be “tied in some way” to the behaviors and crimes of an Aboriginal defender, the test for whether a judge has erred in their balancing of retributive principles of denunciation and deterrence with those of rehabilitation and reintegration is in no way obvious and is still left to a high degree of discretionary power of judges, despite, or perhaps in spite, of the very ambiguity offered by *Ipeelee*’s affirmation of “ties”. The absurdity of these capacious legal definitions is highlighted by the punitive sentence recently handed down to an Indigenous man in Winnipeg who was charged with stealing alcohol from several liquor stores.¹¹⁴ Provincial Court judge Sandra Chapman said that there were “two schools of thought on how to respond to Liquor Mart thefts: either locking people up to protect society or putting resources in place to help people living with addiction.” She recognized that this man’s actions were clearly related to his addiction, which was itself “a result of a lot of difficulties you had in your upbringing,” and even characterized the severity of his crimes as diminished by his mental health issues, and in comparison with the typical demographic and trend in which young people were orchestrating massive mob thefts from the stores for purposes of partying. “Really, we’re talking about stealing some bottles of liquor to drink,” judge Chapman said. Yet Chapman refused to be swayed by her own recognition of distinction here and explained that it was irresponsible to continue being lenient on individuals in such cases. And she situated her decision explicitly

¹¹⁴ Josh Crabb, “Winnipeg Man Receives Jail Time for Six Separate Liquor Mart Thefts,” *CTV News*, December 2, 2019, https://beta.ctvnews.ca/local/winnipeg/2019/12/2/1_4712073.html. Liquor Mart thefts had become a much discussed topic of panic and fear in Winnipeg in 2019, particularly as a trope of Aboriginal youth delinquency, and this man’s sentence came one day before the Province of Manitoba launched a new public safety initiative called “Operation Safe Streets” that provided additional resources for investigating, apprehending and prosecuting repeat offenders, including a special prosecutor to deal exclusively with Liquor Mart thefts and coordinated efforts between police, Liquor Marts and prosecutors “that aims to help Crown attorneys effectively prosecute repeat offenders”. For a journalistic contextualization of this public scare and its socio-political layers of anti-Indigenous policy and sentiment and the particular salience of alcohol and Indigeneity in this case, see James Wilt, “Tracing the Geography of Canada’s Racist Liquor Control Policies: Alcohol Control Measures Have Evolved over Time to Maintain the Oppression and Exploitation of Indigenous People,” *Canadian Dimension*, August 10, 2020, <https://canadiandimension.com/articles/view/tracing-the-geography-of-canadas-racist-liquor-control-policies>. For academic context to these issues in a slightly different geographical and historical milieu, see Mawani, “In between and out of Place.”

within a consideration of public opinion and thus evoked that common abstraction that comes to stand in as a measurement of such Indigenous dysfunction. Specifically, Chapman said that taking the path of a rehabilitative sentence would be sending the wrong message and that, consequently, a jail sentence was appropriate. Crown attorney James Wall reiterated this position that there was “a high public interest” in this case and that “sending a message to thieves” and “to society” was of paramount concern to acknowledge that “we are taking it seriously and something is being done.” It was clear that, even though this Indigenous man was not a representative of the typical threat in the liquor store raids, he was nevertheless being sacrificed as a means of staving off the growing anger and hatred that was growing in the city, and in particular the vigilante mobs that were coming to take a stand and draw a barely veiled racial line in the sand of this phenomenon that so profoundly evoked a sense of fear and hatred of Indigenous youth.

It is important to note how *Gladue* was evoked in this case to contextualize these multiple dynamics of race and racialization. For this man’s defense lawyer, Laura Robinson, explicitly informed the court that while she was not requesting a formal *Gladue* report, noted that “there are Gladue factors the court should know about,” a declaration that betrayed the informal quality in which *Gladue* trades as a racializing trope of Indigeneity. But what were these factors? For starters, Robinson noted that this man had been diagnosed with FASD. She then noted that he was physically abused by his mother as a child and ended up in the care of child welfare at the age of 11. And, also, his grandparents “attended residential schools.” Most shockingly of all, however, was a recounting of more recent events in which this man had suffered the great tragedy of losing three of his eight children, of which we were informed that one daughter was murdered, and a son was killed by a drunk off-duty police officer. By listing these losses,

defense lawyer Robinson created a direct ‘tie’ between the conditions of colonialism, the *Gladue* factors, and the very real consequences on Indigenous life in Canada. Indeed, these particular losses demonstrate the very real conditions in which an Indigenous parent can lose three of his eight children to all manners of death, including murder and police brutality. And while this reality, these conditions of death, are absolutely not atypical to Indigenous families in Winnipeg and beyond, the two deaths that Robinson details bear a striking resemblance to forms of Indigenous death that are increasingly legible in Canada and, even more profoundly because such similar qualities of deaths have been at the forefront of generating public inquiries in Manitoba, specifically.¹¹⁵ Robinson thus created an implicit ‘tie’ between this man’s *Gladue* factors of poverty, neglect and abuse, both in the realm of the Residential Schools and the domestic scene, but more importantly she also created a direct tie to how these “factors” implicate not only the mental health or behaviors of this man but the life chances and conditions of possibility for his children, thus making an implicit ‘intergenerational’ argument.

The implicitness of her arguments – that is, that they could be legible at all – is entirely related to the fact that Robinson did not request an “official *Gladue* report.” For she did not have to even explain these extreme conditions in which Indigenous women and nonbinary peoples are twelve times more likely to experience violence than non-Indigenous women, and that homicide rates for Indigenous women are seven times higher than for non-Indigenous women. Such figures and statistics were being regularly reported on by the then recent release of the MMIWG report. Even the death of this man’s son at the hands of a drunk officer did not need explicit

¹¹⁵ I am thinking here specifically of *The Aboriginal Justice Inquiry* and the *Missing and Murdered Indigenous Women and Girls Report (MMIWG)*. The former was launched because of growing tensions between the Aboriginal and non-Aboriginal communities, and the particular cases of injustice including the murder of Aboriginal leader J.J. Harper by a white police officer in Winnipeg, and the brutal rape and killing of Helen Betty Osborne in The Pas, Manitoba. The MMIWG was launched because of the gruesome murder of the Ojibwe child, Tina Fontaine, whose remains were found dumped in the Red River.

comment by the lawyer as this too is a well-known phenomenon in Winnipeg, particularly, where the murder of J.J. Harper by Constable Cross, and the subsequent coverup by the Winnipeg Police Service, led to the launching of the AJI in 1988.¹¹⁶ Despite all of this overwhelming data of *Gladue* factors, however, of the clear “ties” between this man’s addictions and his life of suffering “caused by his upbringing” and subsequent losses, it is absolutely stunning that the agreed upon message to be sent out about this case by Crown and judge was to be a warning for others thinking about stealing bottles of alcohol.

But again, perhaps it is the implicitness of this account that deserves our scrutiny, for it is here where lawyers and judges always seem to lack the distinct ability, or sensibility, to actually trace the “ties” that is so concerning. Instead of tracing the “ties,” the effects are always made to stand over the cause. This man’s life story is turned into check boxes of abuse, poverty, Residential Schools, addiction, and, ultimately, murdered children, something we’ve all come to know but have no real interest in understanding. But, it is not simply a lack of imagination, or an inability to make such connections or *ties*, that is at fault here. There is also a profound spectre of “public safety” that came to play a significant role. We see quite clearly in this case is how

¹¹⁶ Robinson did not name the police officer, Const. Justice Holz, who had run over this man’s son, Cody Severight, while drunk and then subsequently abandoned the scene of the crime. And she did not note that Holz had been found guilty of dangerous driving a couple of months prior to her client’s court appearance, perhaps because she did not know much about the case given the highly secretive and questionable nature in which it had been investigated and subsequently tucked away in a plea deal. This incident of police corruption bears striking and uncanny similarity to the death of this man’s son. The elements of the case in which a drunk officer killed an Indigenous man, drove away, and then was covered for by his colleagues in a delayed administration of breathalyzer test and subsequent silencing of details and public scrutiny by the Winnipeg Police Service demonstrate a blatant hypocrisy of the justice system and its enforcement, which was a sentiment expressed loud and clear in the immediate aftermath of Cody Severight’s death as several other police officers were receiving weak sentences for drunk driving. Note also that Const. Justice Holz’s guilty plea was to a charge of “dangerous driving causing death” and not to “impaired driving causing death,” and that his other serious charge of “failure to stop at the scene of a fatal accident” was stayed as well. See Kristin Annable and 2018, “Winnipeg Police Officer Acquitted on Impaired Driving Charge,” *CBC News*, August 9, 2018, <https://www.cbc.ca/news/canada/manitoba/winnipeg-police-impaired-aquitted-1.4780009>. Ryan Thorpe, “Key Details Concealed about Officer Who Killed Pedestrian,” *Winnipeg Free Press*, August 25, 2020, sec. Local, <https://www.winnipegfreepress.com/local/key-details-concealed-about-officer-who-killed-pedestrian-572222152.html>.

“public safety” is evoked to affirm the principle of denunciation and to affirm public values about crime and punishment. As the Crown put it, the harsh penalties they sought in this case, and which were ultimately handed down by the judge, were to show that “we are taking it seriously, and something is being done.” “Public safety,” then, becomes a primary vector through which *Gladue* and its obligatory consideration of “systemic factors” can be watered down, misconstrued, and even flat out ignored. *R v Anderson* demonstrated an identical feature of pitting public safety (and values) against a consideration of rehabilitation that was, recall, acknowledged by the judge, psychologists, and even a probation officer, to be a reasonable outcome for the young defendant.

Conclusion

Ultimately, Joyal lauded the *R v Anderson* case as one that demonstrated that the courts could demonstrate restraint of judicial mandate within the face of *Gladue* that either traps one into automatically giving a reduced sentence simply due to one’s Aboriginal-ness, or not robustly considering *Gladue* at all.¹¹⁷ Rather than evoking *restraint* as a principle of sentencing, then, Joyal commented on the judiciousness of *R v Anderson* to robustly consider *Gladue* and thus fulfill its obligation while not succumbing to extra-judicial pressures to grant leniency that is not warranted within the letter of the law. Restraint is thus evoked with the implication that judges should only stick to the letter of the law, a claim to judiciousness that is challenged by the preceding analysis that pokes holes in the interpretations and justifications that are not at all as straight forward or reasoned as the judges claim that they are. It is similar to our consideration of the Liquor Mart theft and the harsh sanctions accepted by both Crown (who requested a sentence

¹¹⁷ *R v Anderson* explicitly refers to the “principle of restraint” as one of rehabilitation and part and parcel of *Gladue* in para 101. The judge does not actively refer to his decisions in dismissing *Gladue* as a quality of “restraint,” but Joyal does refer to this case as testing both the court’s ability to test and exercise judicial restraint even as it tests and exercises *Gladue* factors, which are also characterized as “restraint” vis a vis sentencing.

of 135-days in jail) and judge, determinations that were not even directly related to the crime or judicious contemplations of the law but were more related to public perceptions of crime. In that case we saw that the judge consciously betrayed her own obligations to consider all other measures than incarceration, not to mention her oath to the principle of justice, when she abandoned her clear recognition that this defendant's addictions were central in this case, that they presented an obvious connection to an otherwise non-violent and harmless crime, and which, most importantly, provided an obvious alternative sentencing process of rehabilitation.¹¹⁸

It is precisely this site of the "obvious," then, that an analysis of *Gladue* and FASD and the broader mechanisms of Indigenous (in)justice need to be focused. For, as we have seen, there are a variety of ways for judges to interpret and justify their way through *Gladue* in ways that favor their particular views on crime and punishment. Rather than through reasoned debate or theoretical interpretations, then, it is the site of the obvious that requires our analytical attention. This is the site where competing values and assumptions chart out space alongside of statutes, codes, and precedents, all of which is smoothed out, or "tied in some way," through the power of discretion, by judge, jury, lawyer, reporter, or academic observer. It is this site of discretion where judges can either err or succeed in their duties to robustly consider *Gladue*. It is in the vastness of this discretionary space where prejudicial habits are given their greatest powers, invisible as they are through the trick of claim to reason and judiciousness. We see that, despite the inherent violence to the flattening finality of all judicial judgment and enforcements of Law, no matter how noble and enlightened they may be, that it is within this fungible and mystical space of discretion where specific and contextualized violences sprout, grow, and entrench

¹¹⁸ In this breach of legal reasoning from the code of law to social impressions, we might construe these actions by lawyers and the judge as legalistic, but not, as other legal scholars have argued, as affirmations of the universal values of justness that the discipline of law demands. Boyle and MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination," 60.

themselves in the depths of the social psyche. It is here where Thomas and so many others receive their punishments even as they are approached, or treated, or considered, through a prism that is meant to take into account their distinctiveness. It is here where this distinctiveness is universalized, assumed, and where the meaning of cause and effect is blurred, or flipped. It was *Anderson's* abnormal normality (as an Indigenous person with reasonably healthy life prospects) that justified his lengthy and 'fit' sentence, while it was Thomas's normal abnormality as an Indigenous person that justified his lengthy sentence. In both scenarios, it is *Gladue* that untangles this seeming paradox through its function of rehearsing and testing a generalized Indigenous dysfunction. To return to Foucault, then, if *Gladue* is a biographical knowledge and technique of power, a "punitive technique," it is revealed to be less of a remedial tool for addressing overincarceration, or even a correcting tool for Indigenous criminality.¹¹⁹ What we have here seems to be, rather, a discursive formation in which the goal is not to correct, or discipline, but to systematically render Indigeneity as an abnormal standard of dysfunctionality. It is a technique of apprehension that informs the reason of Law, its discretionary considerations, and the patterns of seeing and performative repertoires that take place in the judicial setting; all of which results in an habitual embodiment of enforcing punitive measures for Indigenous defendants, of justifying their incarceration by making them constitutionally incarcerable.

What are we to make of the claims, then, by legal scholars that *Gladue* has been misinterpreted as a different approach or method for Aboriginal offenders, and misapplied simply as leading to different, and thus unequal, outcomes for Aboriginal offenders? Do we, as Pfefferle and others suggest, need to make more rigorous and capacious efforts to connect the dots between the systemic "root" factors of Aboriginal experiences (or perspectives) of

¹¹⁹ Foucault, *Discipline & Punish*, 252.

discrimination and the “other relevant conditions” they can create, such as the example of widespread aggravated assault?¹²⁰ I submit this is a senseless trick we are playing on ourselves at the expense of Indigenous life, for the only complexity or specificity we seem to be able to offer through *Gladue* is the abysmal and degraded and dysfunctional conditions of Indigenous life. In our quest to *explain* Indigenous crime we inevitably come to justify political phenomenon like overrepresentation. Rather than systematic accounting of ongoing structures of colonial violence, let alone even recognizing the experience of Indigenous oppression, we create new institutionally mandated conceptual space for deleterious definitions of what it means to be Aboriginal. Our legal-genealogical methodology of explaining behavior through an interrogation of heritage, tradition, and ethnic ‘perspective’ has opened new doors for conflating these cultural concepts with bodily understandings of disability and dysfunction. FASD is precisely the capacious specificity that Pfefferle and so many others demand of *Gladue*. Rather than critiquing the failure of *Gladue*, I acknowledge its comfortable adoption of FASD as a common “factor” as a sign of its absolute success. For it is now possible to list FASD within the ever growing chain of signification – alongside “colonialism,” “Indian Act,” and “Residential Schools” – that become cunning signifiers of Indigenous dysfunction and not colonial violence. In this story, Thomas cannot be redeemed; but the goodness of colonial courts and Canada can.

¹²⁰ Pfefferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration,” 135.

Spider Teaching #2

“...maybe he went for a walk and couldn't find his way back.” For over ten years Deborah has been saying this about her son, Waylon. I first learned of Waylon while walking with Deborah for a few kilometers on highway 6 on her journey from Lake St. Martin First Nation to Winnipeg, a 260KM trip she now does every May on Waylon’s birthday. She walks to remember Waylon, but also in the hopes that seeing her broken, but indomitable, heart might provoke a change in someone else’s, that *someone who knows something* might finally come forward. In a way, Deborah knows that her son is gone, she just wants to know where to. When the province intentionally flooded Lake St. Martin in 2011 in order to protect farmland in the south, it seemed that any chance of finding Waylon had been washed away with the reserve, much like the many St. Martin residents who were abandoned into Winnipeg, lost, with no way of returning home. If Waylon had been murdered and buried underneath the school, or down Waterhen road, now she would never know. She tried to ignore these morbid rumors, but the flood marked a convergence, a bursting of boundaries between world(s) and concept(s). An “ugly feeling” took over her thoughts and emotions - from where? - and she lashed out with anger and blame. Why hadn’t *they* protected Waylon? *Who?* Those who last saw him? The government that flooded her reserve? Time has tempered this anger, but Deborah remains in the impossible position of not wanting to accuse anyone (preferring to let God sort it out) while also not knowing who she can trust. *Someone knows something* about what happened to Waylon, where his bones lie. The thought festers, tracing a sickening loop of disbelief, an impossibility of knowing, a ground that has been washed away, carrying with it bones and secrets.

Deborah’s cousin had been missing for seven years after Waylon went missing before her skull was found buried in a basement. Now she was caught in this impossible horror of waiting and disbelief again, like so many others, worried what would happen when his remains were found, if they would be found, and holding out for the relief that could bring. Her other son, Mason, died almost a year to the day after I first met Deborah, walking for Waylon. As devastating as it was, Billy told me that Mason’s death also brought Deborah relief. “At least now she has one dead son,” he said. At least now she had someone she could bury.

Chapter 5: In-between Justice FASD Beyond the Court Walls

On September 6, 2019, the Canadian government publicly announced an award of \$1 million to the University of Regina for the development of a program titled *Navigator-Advocates: Integrated Supports for Justice-Involved Indigenous Youth and Adults with FASD*. Liberal Minister of Public Safety, Ralph Goodale, described the intention of the program as to “reverse Indigenous overrepresentation in Canada’s criminal justice system by supporting culturally-relevant interventions by community-based organizations.”¹ The painful rhetoric of a politician glossing the massive political problem of overrepresentation within the discourse of culturally appropriate interventions was countered by a more directly political statement by the program director and anthropologist, Michelle Stewart. According to Stewart, this program was born out of the colonial critique of Canada in the *Truth and Reconciliation Commission of Canada*, and particularly out of its Calls to Action that invited governments and citizens to address the legacy of colonialism with concrete change. *Navigator-Advocates* emerged directly out of Call to Action #34 of the TRC, which called on all levels of government “to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD).” Stewart described this Call as a direct “invitation to rethink how justice is done in Canada.”²

Between these two different forms of political speak and the values of equality, justice, and cultural sensitivity that they propose, we can notice a concerning set of conceptual slippages

¹ Krista Baliko, “U of R Project Responds to TRC Call to Action to Address Needs of Offenders with FASD | Communications and Marketing, University of Regina,” University of Regina, September 6, 2019, <https://www.uregina.ca/external/communications/feature-stories/current/2019/09-06.html>.

² Baliko.

and associated explanations that echo the problematic of *Gladue* that we saw in the last chapter. The first is a structural-temporal point. Just as *Gladue* has been noted to be woefully ineffective as a strategy of intervention as it comes too late in the justice process to have any meaningful impact on the complex problem of overrepresentation, so too does *Navigator-Advocates* repeat a similar flaw of being too-late as this is a program for intervening with “justice involved” Indigenous youth. The more substantial similarity, however, is how this program veers toward the problematic form of representation of *Gladue* as it exceptionalizes Indigenous criminality and incarceration with allusions to a more culturally appropriate form of incarceration. Indeed, does this program not risk a similar rehearsal of Indigenous dysfunction and, concomitantly, risk substantiating the growing racialized and racist explanations of Indigenous overrepresentation as a matter of cultural difference? On this front, we notice a slight difference from *Gladue*, noted in the odd slippages made between the title of the program and Goodale’s gloss of it. For not only does Goodale *culturalize* the political problem of Indigenous overrepresentation as based on a lack of “culturally-relevant interventions” in the justice system; he has also made this cultural problematic conceptually synonymous with the problematic of FASD, a congenital association in which culture and biology become particularly indistinguishable. Are Indigenous peoples locked up at grossly disproportionate rates because of a lack of cultural sensitivity, or are Indigenous peoples locked up because they have disproportionate rates of neurocognitive deficits? That Goodale does not appear to appreciate the contradiction suggests it is both.

For Goodale there is no clear distinction to be made between his government’s role in reversing Indigenous overrepresentation in the criminal justice system and this program that will, in his words, “increase FASD-affected Indigenous offenders’ level of engagement and understanding of the system and of their disability, helping reduce their contact with the criminal

justice system and make our communities safer.” Between his statements there is no discernible difference between providing culturally- and FASD-relevant services to address the problem of over incarceration and representation. And for Stewart’s part, she qualifies that her program intends to “rethink how justice is done in Canada” by “demonstrat[ing] that person-centred and proactive supports can help achieve better justice outcomes for Indigenous individuals in the justice system with FASD.” Why are these laudatory goals uniquely relevant to Indigenous peoples? And why do Indigenous individuals have to be further classified or hyphenated as having FASD before they get “person-centered” help? Is this not similar to the dramatic and peculiar slippage that occurred in the original parliamentary debates about general mass incarceration in Canada, which quickly became a narrowed concern about the specific (though undoubtably important) problematic of Indigenous overrepresentation in prisons?³ What is it that permits us to make such leaps, or reductions, toward the specificity of Indigeneity? And how have we incorporated such ambivalence between Indigeneity and FASD in our projects of intervening in Canada’s clear systemic racism towards Indigenous peoples? My thesis is that these ambiguities are precisely the ways in which we ignore the colonial origins of law, and by extension, settler justice -- while feeling that we are addressing big issues in the form of re-thinking “how justice is done in Canada.” In this way, such conceptual slippages amount to what Lakota scholar, Elizabeth Cook-Lynn, called (in 1981) “Anti Indianism.”⁴

³ Recall the important context and history provided by *R v Gladue* in which Indigenous overrepresentation emerged out of a broader debate about mass incarceration that was seen as a shameful stain on Canada’s international reputation. See *Gladue*.

⁴ Anti-Indianism is a genre, a trope, and an ethos of forgetting, either wilful or ignorant, that permits the history and the structures of imperialism and colonization to be assumed as absolute fact, and one that pervades literature, art, and colonial legislative policy alike. Central to the tactics of Anti-Indianism is the failure to contextualize history honestly, and especially “the *use and misuse* of historical events of Indian life and experience in order to blame, denigrate, shame, or dehumanize Indians.” The perpetual reference to the colonial in *Gladue*, and in such programs as *Navigators*, is an enactment of this cunning misuse of history to attribute blame within Indigenous culture and biology. While I no doubt believe that Stewart and others have good intentions in their hearts, it is the failure to contextualize the colonial history and structures of the criminal justice system and the subsequent re-affirmation of

These conflations of FASD and Indigenous crime and the explanatory value they possess to shift our thinking on overrepresentation are repeated dutifully by members of the press who champion this program along the rhetorical lines offered by both Goodale and Stewart. Take the title of a story written by reporter Tyler Braat: “Feds announce almost \$1M for project supporting indigenous people in the justice system.”⁵ The title does not even make mention of FASD, reducing the concept simply to that of supporting Indigenous people. It takes Braat a few paragraphs to get to FASD, as he spends time first rehearsing the devastating statistics of Indigenous overrepresentation in the prison system and concomitant tropes of Indigenous suffering. He then turns to descriptions of the prevalence of FASD among prison populations, which he suggests is approximately 30 percent of the population, but without any direct evidence to support this claim. This framing of the issue is thus structured by the same conceptual ambivalence as that proffered by Goodale and Stewart, and we see how Braat thus primes his readers to make the association that FASD as an Indigenous problem, and, circuitously, to affirm the phenomenon of Indigenous mass incarceration as a product of FASD. Most peculiarly, however, is the demonstrably erroneous data that can then be found in Braat’s claims. Namely, he claims that “60 percent of FASD-affected individuals come into contact with the justice system,” presumably a reference to the *ur*study of streissguth et al. (1996) addressed in the introduction.⁶ Despite our misgivings about this study and the ways its dubious conclusions have circulated like wildfire throughout North America, and specifically Canada, however, the hyper-link provided to cite this figure leads to an article that significantly contradicts the claim. Written

Canadian justice, that simply requires tweaking that coopts their intentions within an Anti-Indian structure. Cook-Lynn, “Anti-Indianism in Art and Literature Is Not Just a Trope.”

⁵ Taylor Braat, “Feds Announce Almost \$1M for Project Supporting Indigenous People in Justice System,” *Global News*, September 6, 2019, <https://globalnews.ca/news/5868422/feds-announce-almost-1m-for-u-of-r-lead-project-aiming-to-lower-indigenous-population-in-justice-system/>.

⁶ Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE).”

by a colleague of Braat's at *Global News*, the cited article discusses the problematic of how FASD is largely neglected in prisons, but it reduces the extent of this problem by citing that "[r]esearch has shown more than 99 per cent of those who have FASD have not had any trouble with the law."⁷ So either 60 percent of individuals with FASD come into contact with the justice system or 99 percent of individuals with FASD do *not* come into contact with the system. How could such a drastically and demonstrably falsifiable claim be made by Braat? Did he simply misread the article of his colleague? Or, perhaps, did his colleague make a typo to a figure that they had shared with one another previously? Maybe, too, Goodale and Stewart are simply misspeaking or are being misconstrued by reporters. Surely their intentions are pure, and they do not mean to suggest that FASD is an Indigenous problem, and certainly they do not mean to provide a new framework to explain Indigenous overincarceration that inadvertently justifies this problematic as emic to Indigenous life? If such cases were unique, we could perhaps be more generous in our analysis, but as this chapter will show there is a very distinct epistemological form in which the empirical realities of FASD - including cases of contradicting, or, simply, absent empirical data - are repeatedly presumed and manipulated to support a broadly held belief about FASD as an Indigenous problem.

Because of the nature of these stubborn beliefs of FASD and Indigeneity, which can be, as we've seen, significantly challenged if not directly refuted by the empirical data drawn upon to make such claims, I have found certain ethnographic-theoretical accounts of the belief formations that inform institutions of witchcraft to be a useful heuristic for understanding this dynamic. As James Siegel and other anthropologists of witchcraft, sorcery, or magic, have argued, such places of magical belief, or belief in magical forces, are expressions of response to

⁷ Meaghan Craig, "Treating Inmates Diagnosed with FASD," *Global News*, August 24, 2018, <https://globalnews.ca/news/4408870/inmates-fasd/>.

an originary aporia, or a fundamental impasse between the empirical and transcendental.⁸ For Siegel, this impasse is a site of power, one that is found most commonly and directly in the prejudicial capacity of language to infinitely conjoin – words, concepts, references – and make new associations and claims on the world even as it evades and overcomes the world that it references and makes claims upon.⁹ I argue that the problem of FASD and Indigeneity is an expression of this universal epistemological conundrum. This link, or conjoining, of FASD and Indigeneity is based upon empirical reference to the world through everyday problematics and questions – like, *why are so many Indigenous peoples in jail?* – even as it prejudicially bypasses the lack of empirical veracity of FASD while ignoring other plausible paths of analysis and theorization. We will thus see how the link of FASD and Indigeneity requires a prior bypass of the empirical realm, where FASD is linked to crime and criminality. It is this institutional site of contemplating crime and the criminal (or, delinquency in general) where the *a priori* form of knowledge of FASD becomes a social form of belief and where diverse actors – like researchers, community workers, politicians, lawyers and judges, to name a few – are facilitated to know that FASD is an Indigenous problem and that Indigenous peoples *must* have FASD because they are so overrepresented in the criminal justice system.

⁸ See Siegel, *Naming the Witch*; Nils Bubandt, *The Empty Seashell: Witchcraft and Doubt on an Indonesian Island* (Ithaca: Cornell University Press, 2014). Michael Taussig offers an alternative view on the epistemological form of magical belief by way of sorcery and shamanism, one that offers different ontological implications for how believing while doubting is central to a shamanistic learning process where the continuous oscillation without resolution is crucial. Taussig argues in this cultural milieu of shamanism that magical mimesis not simply a practice of becoming other but an expression of “becoming becoming itself.” See Michael Taussig, “Viscerality, Faith, and Skepticism: Another Theory of Magic,” *HAU: Journal of Ethnographic Theory* 6, no. 3 (December 1, 2016): 453–83.

⁹ Siegel, *Naming the Witch*, 47. By beginning this exploration within the Kantian conundrum of the impasse of the empirical and the transcendental, and the respective epistemological frameworks of synthetic and analytic judgments, Siegel repeats Kant’s neat heuristic of a person counting on one’s fingers to verify the truth of arithmetic, demonstrating the endless tension between rational belief and empirical-experiential intuition (33).

If the magical conjoining of Indigeneity and FASD is used to affirm an *a priori* belief, often in the face of incredible or a complete lack of empirical facts, it is the temporality of this fetishistic structure – of the *already known diagnosis of FASD* – this is equally important for understanding how this chapter fits into the linear trajectory of chapters that have preceded it. This is the last chapter in the linear trajectory of criminal justice process, from arrest and accusation, to trial, to sentencing, and now to the ethical-legal time of the *after* punishment. Rather than a concluding phase in a linear trajectory, however, it is more appropriate to conceptualize this phase as a link that makes this trajectory properly circular. Indeed, as much as this is an *after*, in that it is subsequent to one's sentence, it is equally a maker of the social political time of the *before* of one's capture in the criminal justice process. It is in this circular time and space that so many Indigenous peoples are made to wait in, or are returned to. It is the time of endless transition of foster homes, say, in which Thomas's life was always on hold, or forced to start over. And just as this marked Thomas's temporal relationship with the criminal justice system *before* Fraser's death, it was also littered with many other events that came to mark his extensive criminal record. Which is to say, there is no clear demarcation for Thomas of a before or after, only a perpetual *in* or an *in-between* the criminal justice system. Similarly, we cannot exactly determine when Thomas will be released from prison, only to say that he will be in there at least twelve years, and at most for twenty-five years, but we can predict with (an almost magical) certainty what his life will be like for him when he is released. More waiting. This is the temporal aspect of life that is disavowed by the temporal structure of the *already known* FASD diagnosis of Indigenous peoples, as well as the fetishistic structure that conjoins Indigeneity, FASD, and criminality.

This chapter is just as much a beginning as it is a concluding chapter. In it we will continue the temporal analysis of the different moments or stages of entanglement of Indigeneity and FASD in the criminal justice system by showing how it actually constitutes a repetitive loop, a return, or, as I have come to think of it this liminal and cyclical space, an *in-between*. If it was a tragic *understanding* of Thomas (as Indigenous and neurocognitively damaged) that characterized the entanglement of Indigeneity and FASD in the post-trial/sentencing phase, a complete lack of such contextual understanding that informed the trial/judgment phase of determining the *truth* of his crimes; and a paranoia or fear of these contexts that were hyper-accentuated in the characterization the offense/arrest and accusatory phase as the public sought to make sense of Thomas's crime, we now enter into a particularly ambivalent phase of urgency and hopelessness, where preventative action is based on a predictive assumption of Indigenous dysfunction that characterizes the cyclical space of the after release as much as the before negative contact with the system. Particularly, I will analyze how an entanglement of Indigeneity and FASD is sustained in this inter-carceral time and space through the research and advocacy world of FASD that is increasingly articulating the need for political-temporal efforts of prevention and intervention. This is where the fetishistic temporal structure and the institutional magical form come into clear contact as these advocates and researchers are actively engaged with the everyday operations and, primarily, the ethical and moral considerations of the criminal justice system. Recognizing the hopelessness of cases like Thomas's, and how judges like Joyal are sometimes thought to be themselves victims of this hopeless fate of FASD (what else could he do for a murder charge beyond temporarily "understand" it, after all?), many advocates and researchers are now attempting to redirect the distribution of resources for understanding FASD as a problem in the justice system from an emphasis on the after arrest or negative contact with

the system to raising awareness and understanding “the appropriate responses necessary to reduce the pervasiveness of this disorder in this setting.”¹⁰ The concern with such preventative orientations is that they are still fully entrenched in a paradigm of alleged prevalence of FASD in the justice system, or in other problem areas such as the child welfare system.¹¹ That is, there is an *a priori* judgment of FASD, an assumption that Indigenous peoples *already have, or must have*, FASD, which only permits conceptual and material dynamics in which Indigenous peoples can continually be trapped by the justice system because they are already trapped within the disorder. Even in the realm of prevention we have thus not escaped the central problematic of judgment in the world of FASD. The most confounding question of how one actually knows that another has FASD passes through only slightly different orientations of judicial, sociological, and scientific infrastructures. Instead, the pressing questions are, how do we intervene if we do not have generalized diagnostic testing, for instance? How do we target those populations most “at risk” of justice system encounter if we cannot adequately screen for them in the first place? How should a police officer take into account the FASD of an individual so as to avoid the human rights horrors of subjecting this person to a normative justice system? In all of these ethically framed questions, the most glaring problematic is utterly expunged. How are any of these actors – researchers, advocates, or police officers – to know if the people have FASD in the first place? This chapter examines how the ethical imperative of urgent intervention, even prevention, bypasses this empirical quandary.

¹⁰ Svetlana Popova et al., “Fetal Alcohol Spectrum Disorder Prevalence Estimates in Correctional Systems: A Systematic Literature Review,” *Canadian Journal of Public Health* 102, no. 5 (September 1, 2011): 339.

¹¹ Today FASD is known colloquially and technically as a “hidden disability,” which is presented as a condition that lurks around every corner. Welch, “The Face of FASD.” In the child welfare system, there are prominent adoptive parent advocates who profess that FASD is the leading cause of adoption breakdowns, for instance. Adams, *Our Son a Stranger*.

We all know...

“We all know [my client] has FASD but he has not been formerly diagnosed,” said defense lawyer, Wendy Martin White, in a CBC article on the troubling lack of services for offenders with FASD in correctional facilities.¹² This is a very common remark within the FASD world of advocacy, and one that I heard repeatedly in my work on FASD in the justice system. I had known of White in my work with people at Fresh Start, a non-profit program that took contracts from provincial funding sources to work with various “participants” who had FASD, most of whom were justice-involved. She had even represented some of the participants that I worked with. But in my time as an outreach worker as I assisted participants and helped them to “navigate” the complexities of the multiple systems they were caught within, from social services to probations, to welfare and medical appointments, Martin White and I never met.¹³ White was alerting the public to a general problem she had identified, not only that her client had FASD, but that the justice system was being overrun by people just like him and the system was woefully unprepared to deal with their unique clients. White was alerting the public to the “invisible epidemic,” a trope that is often used to describe how difficult it is to diagnose FASD because of how individuals can ‘blend’ in and appear normal, but which now informs the problem of how this invisible disorder is infiltrating and overwhelming the justice system itself.¹⁴ If the outcomes of FASD in everyday life are bad enough, the outcomes of misdiagnosing individuals in the justice system are even more horrendous. “We need to adjust our expectations

¹² Defense lawyer, Wendy Martin White. Quoted in Kelly Malone, “‘Very Little Is Actually Being Done’: Corrections Canada Funded Just 7 FASD Assessments Last Year,” *CBC News*, October 28, 2017, <http://www.cbc.ca/news/canada/manitoba/csc-fasd-7-tests-1.4374337>.

¹³ Martin White had been recommended to me by colleagues who were aware of my research, most of whom suggested that she would be a knowledgeable source because of her advocacy work on FASD in the legal realm. Because of scheduling and other demands of my fieldwork, however, I never did get around to scheduling an interview with her.

¹⁴ “FASD: The Hidden Disability”; Welch, “The Face of FASD”; Kelly Malone, “Without Screening or Supports, Offenders with FASD Face Revolving Door of Justice: TRC Called for Reforms to Address Needs of Offenders with FASD, and for Prevention to Be Made a Priority,” *CBC News*, March 19, 2018.

of his abilities,” White summarized of her client, noting that he does not learn the same and will only continue to return before the courts unless we fundamentally change the way we treat people like him.

These arguments make a certain common sense at one level – for shouldn’t we be mindful of how we might be punishing people for things they cannot understand or intend to be crimes? As Michelle Stewart has summarized the ethical and legal complexity that FASD presents to the justice system, we need “a justice system that understands this person might not actually be purposefully doing the acts that they appear to be doing”.¹⁵ Even worse is if we are punishing people for crimes they did not commit, for individuals with FASD are said to regularly agree to things they do not understand, including pleading guilty without understanding the consequences.¹⁶ But there is something strange in the way this more abstract, and perhaps even emotional, appeal to justice is connected to the concrete reality, specifically for how it precludes us from asking a very central, but somehow not obvious, question: *how does Martin White know her client has FASD?* Well, for one, he “shows clear cognitive disabilities.” This she gleans from her own assessment of whether her client can understand the materials that she gives him for review.¹⁷ Because he struggled to read the highly specialized language of legal court documents,

¹⁵ Anthropologist and criminal justice professor, Michelle Stewart, discussing the ethical and legal complexities of how to think about individuals with FASD who commit crimes, quoted in McEachern 2015.

¹⁶ Malone CBC March 19, 2018 “Without screening or supports, offenders with FASD face revolving door of justice,” CBC News March 19, 2018.

I have been witness to several occasions of individuals ‘pleading’ to crimes they say they have not committed in order to simply speed up the notoriously slow justice process that would otherwise consume them. There is no shortage of problems with the system, but I would only suggest that comprehension is not the only problem here.

¹⁷ It bears noting that the history of Indigenous-settler relations in Canada have been defined by the systematic and genocidal policy of Residential Schools that was an education in assimilation (of ‘killing the Indian in the child’) as well as a simultaneous legacy of abrogating Treaty obligations for developing schools on reserves. As a structure of the settler colonial state, Indigenous children today continue to have less access to education and suffer from chronic underfunding in schools. As such, if you are an indigenous person, as White identifies her client in this story, you are significantly less likely to have an adequate education due to systemic factors of anti-Indigenous racism. See “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” 61.

or perhaps he struggled to understand the highly ritualized dynamics of the court room, Martin White assumed that this indicated her client had “clear cognitive disabilities,” rather than, say, a lack of education. Most importantly, however, White leaned on a “confirmation from his birth mother that she was drinking while pregnant” to prove that her client has FASD. We have already seen how such ‘confirmations of PAE (prenatal alcohol exposure)’ are steeped in a social and political milieu of interpretation and assumption that both accentuate and disavow scientific uncertainties. And we note that here, Martin White cites this vaguely diagnostic criteria as explicitly external to any clinical assessment. Given the general hermeneutic of suspicion that surrounds the testimony of family members around the mother’s drinking, and the well documented phenomenon of shame and stigma on a mother to self-declare PAE that often necessitates other external, but rigorously validated, ‘sources’ of confirmation, it is interesting that Martin White does not suspect this mother’s testimony but parades it as absolute, uncontestable fact. It does not occur to her, for instance, that this mother could be stretching her own truth for the benefit of her son who now faces serious criminal charges, that FASD might be able to get him some access to additional resources that could possibly benefit him in this tough situation. Such complexities are inconceivable in the tactical frameworks of defense lawyers and court adjudication. Nevertheless, focusing on the extra-clinical framework of this diagnosis that is made by Martin White, what is most important to emphasize is that her claims are not delegitimized because of a lack of an official clinical assessment and the stamp of medical authority. In fact, that such claims are beyond rebuke is partially her point: that Martin White’s client has not been able to get an official diagnosis is the real problem, and that we don’t know for sure if he actually has an FASD makes our treatment of him a cruel and unusual punishment,

a form of mistreatment that will inevitably perpetuate the cyclical enactment of his crimes and incarcerations.

That White has had to bear the hat of a clinician and determine whether her client has FASD is not a problem but an identification of the problem. Thus, we see how the hermeneutic of the FASD diagnosis is circular as it remains an obvious and true interpretation precisely for the ways that it refers to the problem of a lack of official diagnoses of FASD. This is never so clear as in Martin White's startling claim that "up to 60 percent of her clients are either confirmed to have, or suspected of having, fetal alcohol spectrum disorder."¹⁸ How many are confirmed or suspected is beside the point here. Such statements simply affirm an overwhelming problem of FASD by conjoining the confirmed and the suspected, itself a play on the space between fact and belief. The theme of the suspected is also remarkably flexible as a metaphor for both a medical diagnosis and as a legal term for a defendant. Let's keep this conjoining in mind as we turn to an ethnographic encounter of the everyday work I did with individuals who were said to have FASD in order to see how this suspicion operates in other extra-judicial contexts. The man we will encounter, James, could very well be Brian Thomas, stuck in that *in-between* state.

The boundaries of knowing FASD – The Case (file) of James

I had been working with James for about one year in a relationship that was both formal and informal. Formal because our relationship was one of "outreach worker" and "participant," and James had previously been a participant at our organization, Fresh Start, which made

¹⁸ This claim can be found in multiple locations. See Kelly Malone, "Very Little Is Actually Being Done': Corrections Canada Funded Just 7 FASD Assessments Last Year," *CBC News*, October 28, 2017, <http://www.cbc.ca/news/canada/manitoba/csc-fasd-7-tests-1.4374337>. See also Malone, "Without screening or supports, offenders with FASD face revolving door of justice," *CBC News* March 19, 2018.

launching our relationship seamless process. Informal because he did not actually have the provincial funding to consummate this union. In other words, I was not being paid to work for James. This provided certain flexibilities, while it hardened and emphasized other limitations. The subject of James's FASD diagnosis was also a grey zone that implicated the boundaries of this in/formal relationship. He claimed that he did not have FASD, which I had good reason to believe.¹⁹ How then did he get funding to join our program previously?

James was not unique. I had long been aware of the murky diagnostic status of so many participants that I worked with at Fresh Start. In so many case files I had read conflicting, contradicting, or simply absent documentation of official FASD diagnoses. My daily notebooks were full of the scribbles of second-hand accounts that were passed on to me in interviews and casual conversations that affirmed this to be a daily part of the FASD world – for example, the winks and nods between social workers and clinicians as youth were 'bumped' over the diagnostic scales during clinical assessments, all in order to ensure that they would be at least eligible for extra FASD supports.²⁰ Even at Fresh Start, it was a publicly held secret that official FASD diagnoses were not strictly required to participate in our program. In addition to being aware of several participants with highly dubious diagnoses I also was witness to a process in which participants were brought into our program who explicitly had no diagnosis.²¹ Caroline

¹⁹ I had read his case file at our agency and found a psychological assessment from his youth that stated in no uncertain terms that he was not a candidate for FASD, but that he did have other mental health issues, including prescriptions of depression and attachment issues. Such prescriptive work was equally vague and suspect to me for reasons that go beyond the bounds of this dissertation. The medical formalization of these diagnoses, and how they are traded between medical/psychological professionals and social work professionals deserves its own dedicated analysis and is beyond the scope of this chapter.

²⁰ I had heard several such stories while in the field from colleagues at Fresh Start, as well as other community workers. It was a favorite story to recount by one of my good friends, Billy, who proved to have an exceptional 'ethnographic eye' for precisely the questions that I had been asking.

²¹ I was also, for a short time, connected with a tentative 'participant' who had family connections to our program director. My job was to help him get access to services, and it was obvious – if I can borrow and invert this lay-diagnostic term that littered my fieldwork – that he did not have FASD. What was tragically obvious, though, was that he needed help. He was homeless and suffering from a terrible addiction. Our program was simply a means of distributing resources to an under resourced population. This is a perfect example of the 'flexibility' offered by my

Tait has argued that one of the quickest ways that FASD gets attached to Indigenous communities is because the diagnostic and medical discourse usually comes with resources and dollar signs attached to it. Various Indigenous communities might thus embrace this medico-legal framework as a “pragmatic response to pressures brought on by chronic under-resourcing of local and regional health care services” in Indigenous country.²²

My colleagues and managers in the non-profit world navigated this public secret with varying senses of skepticism and altruism, with most accepting that while it was probably true that many participants did not have a diagnosis, it was perhaps a necessary oversight as we were providing these participants with at least some resources they would otherwise not have access to. Although I knew this to be true, it was only partially true. And it came with significant strings attached. FASD was indeed a disability that could get one a few extra dollars on their welfare cheques. But one often really had to fight for it, and take on this label in more ways than one, as we will see below. FASD could give certain people access to certain people like me, whose job it was to help them navigate a particular world that consisted of social workers and welfare workers, medical professionals, legal professionals of all sorts, including lawyers, judges, probation officers - an excruciatingly complex and convoluted world of arbitrary rules, paper work, surly and capricious attitudes.²³ I provided people with a car to get to appointments, helped them keep track of appointments, helped them manage money and strategically spread out their pittance of welfare rations. I visited people in jail, communicated messages to their families. I helped them get new housing after they were evicted. I never thought that our participants

job as I worked in the murky zone of FASD diagnoses.

²² Tait, “Simmering Outrage During an ‘Epidemic’ of Fetal Alcohol Syndrome,” 75.

²³ Consider one common example of arbitrarily harmful rules: the probation order to reside in your residence. This rule is reflexively added to probation orders, even for people who are homeless, living on the streets, or are “precariously housed,” meaning they are forced to couch surf. Being caught at an address not listed on one’s probation order, even if that is where they are living out of survival, is enough to send them back to jail, to accumulate more charges and longer sentences and further probation orders.

couldn't do these things on their own, it's just that it is all so exhausting. Despite my position, I saw my job less as an FASD worker and more as a diplomatic figure whose job was to not simply help people navigate a very specific bureaucratic world and the many roadblocks that it manifests, but to mediate contentious relationships with various social workers and probation officers who seemed to regularly forget that their job was to work in the "best interests" of their clients. Housing was a common site for this as I often had to present arguments to provincial funders for why it did not make sense to take away housing from someone because they were temporarily in jail. Similarly, I was an intermediary for receiving calls from angry landlords late at night who were threatening to evict a participant because of noise complaints.

All of this is to say that I believe there was value in my work, and I believe the participants found value in it too. But this value emerged not because of FASD, but because of a much broader landscape of poverty, and in the name of "intervention," or even "prevention," precipitated a landscape of diagnoses that has become a new norm for accessing services while, I argue, normalizing deprivation elsewhere that cannot be *tied* to this deprivation in some way. I was part of a system of re-distributing resources, but within the narrow confines of the medicalization of poverty and suffering.

It was also part of an anti-Indigenous racialization of this poverty, self-evident if one were to simply note the glaring coincidence that all of our participants at Fresh Start were Indigenous. We were not an "Indigenous FASD community outreach program." In interviews and conversations with my colleagues they recognized the troubling optics of this, but ultimately it was tolerable under the guise of our program being a means of resource redistribution.²⁴ Just as

²⁴ During official group interviews I put these questions to all of my colleagues. Some maintained that there were real cognitive differences in some of our participants, with diagnosis or not, but most agreed that there was something strange about this grey area. Most articulated the outreach program as a particular mix of providing assistance to individuals with a cognitive disability and getting resources to a chronically under resourced

I questioned in the opening of this chapter about the efforts of federal minister Goodale to create a new slate of redistribution of resources for “justice involved” Indigenous peoples, but only if it could be issued under a sign that conflated Indigeneity and FASD, my question here was very much the same: I wanted to know what it meant that we were so willing to attach a diagnosis as the norm for accessing resources and services, and what organizing effects this has on thinking and addressing deprivation outside of the categorizing sphere of the ‘disorder.’

James shared many of my interests and ponderings about the racializing effects of FASD, and we would talk about such things often, but with different approaches. James was often eager to entertain my questions and confusions of *where exactly did this label of FASD come from*, and *how had it come to stick to him?* I sometimes thought that James took some deep pleasure in watching me obsess over this mystery, bobbing in with the occasional nod or agreement, but otherwise treating the conversation with a characteristically coy indifference. In contrast to my need for firm answers, James toed a different line of motivations and uncertainties that required a very strategic balance. While he resented the label of FASD, he also knew that it could open a limited number of doors for him, if only a crack. Indeed, his relationship with me was dependent on the label of FASD, and the ambivalence was to his benefit, for even suspicion of his diagnosis permitted him to glide under the radar. This became forcefully clear to me one day when I was broaching this topic with him, suggesting that I could finally get to the bottom of things, if only he would sign a form for me to gain access to his case file at the FASD center, if there in fact was one to be retrieved. At first, he simply ignored my questions, and mumbled vague expressions of disinterest. I persisted, however, explaining that this might shed clues on our

population. There was generally less comfortable acknowledgement of the connections between these qualities and the fact that we served an almost exclusively Indigenous population, but most of my colleagues could see the broad strokes of these implications.

shared interest of why it seems so easy to attach FASD to Indigenous peoples. My enthusiasm only seemed to agitate James and he finally screamed “No!” As this word reverberated through his body, shaking loose the long ash of a cigarette that he’d been treating with indifference over his chest, James’s firm boundary illuminated the complex and delicate set of negotiations that my questions posed a threat to. “Just leave it alone!” he barked. Of course, I would never have ‘outed’ James if I’d found some proof of his lack of diagnosis, but the prospect of a certain or final answer would only potentially serve to make the rest of his life even more uncertain. James’s forceful boundary made me aware of how careless I was being with something so sensitive and intimately bound to one’s life. It was a heavy reminder that trying to understand the racialized landscape of FASD is more than an intellectual exercise and that even if much of the diagnostic certainty of this disorder emerges from phantoms and is ultimately a castle made of sand, it nonetheless coordinates an ongoing redistribution of the material world and people must still find ways to navigate its effects. As James Siegel notes of the institutionalization of witchcraft, “It derived primarily from the ability to establish a connection between a word, “witch,” and an agreed on limit beyond which one knew nothing but which was believed to be the source of something that inflected that world.”²⁵

If James shows us how the uncertainty of an FASD diagnosis becomes productive in the material world, it is the stakes of his life and so many others that return us to the fundamentally political core of the epistemological problem at the root of the FASD diagnosis and its mobilization in the world. That is to say, despite the nagging doubt of James’s diagnosis it still persists as a certainty and is otherwise affirmed to exist. My very role as a community outreach worker of an FASD program was an affirmation of the ‘existence’ of James’s FASD (as well as

²⁵ Siegel, *Naming the Witch*, 103.

every one of the other participants I worked for). But just as my doubt had no real effect on the conditions that made it possible for James to become intelligible as a recipient in need of resources based on the coordination of his disordered body, I maintain that there is a deeper level at which this dialectic of doubt and certainty operates.

We've already seen how Martin White's affirmation that "everyone knows" her client has FASD was distributed across a spectrum of "confirmed" and "suspected" diagnoses. Yet if we look even closer we see that this declaration of certainty is further located within a profound indeterminacy, marked most notably by the rhetorical conjunction of a "but" used by the reporter, Kelly Malone, when contextualizing the political urgency of this singular case of Martin White's defendant. Namely, Kelly Malone says, "This young man is part of a problem everyone knows Canada's corrections system faces—*but* no one is sure just how big the problem is thanks to under-diagnosis."²⁶ The paradoxical staging of certainty and doubt is startling simply for how clear and obvious it is here. We know (that this client has FASD, that it is a huge epidemiological-legal problem), we just don't have the facts (of how big the problem is, or who might actually have it). The epistemological gap between "confirmed" and "suspected" diagnoses is further reified here, but by being so represented it paradoxically makes the dialectic of (un)certainty even more pronounced and thus vulnerable. The question is, how can such things be said? What permits a traversal of this gap between the transcendental heights of reason and belief (*we know*) and the ground(lessness) of empirical fact (*but we can't actually prove it*)? It will be argued by critics of my position that this move is reasonable and is based on data that permits such a scientific prediction. Indeed, this is at the heart of Malone's claim, and she cites a well-known, but preliminary, study conducted by prominent FASD researchers to create a

²⁶ Kelly Malone, "'Very Little Is Actually Being Done': Corrections Canada Funded Just 7 FASD Assessments Last Year," *CBC News*, October 28, 2017, <http://www.cbc.ca/news/canada/manitoba/csc-fasd-7-tests-1.4374337>.

screening tool for FASD in prison population, to make it. As she glosses this study and its preliminary demographic findings, “up to a quarter of inmates in federal corrections could have FASD.” As we will see, Malone mischaracterizes and stretches the claims made by this research, but this is enabled by the shared epistemological form in which FASD is treated as an *a priori* judgment by both journalist and researcher, one that enables a traversing of gaps between reason and the empirical.

Research Gaps

Malone draws on the work of Patricia MacPherson, Albert Chudley, and Brian Grant in a pioneering study of FASD screening at a federal corrections facility in Manitoba in 2011.²⁷ The purpose of the study was to create a viable screening tool for FASD that could then be used by corrections in order to determine prevalence estimates of FASD in the prison population. The study was not, therefore, intended as a prevalence study, but as a study in the development of a tool that could generate prevalence estimates in the future. This screening tool for establishing prevalence rates of FASD is necessary, the authors argue, in order to justify additional resources for corrections that could be directed towards the FASD population and thus “ensure this group of offenders receive effective services to address their unique needs.”²⁸ The authors were explicit that such a screening tool “can not determine if an offender has an FASD” but only to “determine if an offender is *at risk* for having an FASD.”²⁹ Such screenings would ultimately have to be accompanied by medical assessments, the authors note, in order “to avoid the possibility of labeling someone with an FASD who does not have the disorder” (Ibid.).

²⁷ MacPherson, Chudley, and Grant, “Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalence, Screening and Characteristics.”

²⁸ MacPherson, Chudley, and Grant, 7.

²⁹ MacPherson, Chudley, and Grant, 68. Emphasis added.

Furthermore, the authors warn that the validity of their tool and its accuracy would ultimately have to be confirmed by future studies. So, to take stock: this study was only a preliminary effort to create a screening tool for predicting FASD in prisoners. It was not a prevalence study, but a study to create a tool that could be used in efforts to determine prevalence in the future in order to more efficiently direct prisoners to official diagnostic procedures. The authors explicitly cautioned against extrapolating their demographic findings more broadly to other prison settings.

Despite these warnings of extrapolating the data of this study, and particularly in drawing conclusions, or correlations, between rates of FASD in prison populations, this is precisely what reporter Kelly Malone did. The study claimed its screening tool determined that 10% of their sample prison population were deemed to be “at risk of having FASD” and another 15% met some of the diagnostic criteria established by their screening tool but ultimately could not be deemed with certainty to be at risk.³⁰ Malone, in turn, framed the research as suggesting that “up to a quarter of inmates in federal corrections could have FASD,” clarifying for her reader that “10 percent of participants *had* FASD, another 15 percent met some of the criteria.”³¹ Malone thus discounts every methodological and theoretical warning of the study, neglecting to inform her audience about the very nature of the screening tool was to be a preliminary assessment of “risk” and not a diagnosis as such, that this research is still nascent and yet to be affirmed and

³⁰ MacPherson, Chudley, and Grant, 69. The sample for the study was n=95. Thus 9 people were screened as being at high-risk, ie ‘diagnosed,’ as having FASD. 14 study participants were found to have an “uncertain” ‘diagnosis’ because of a general lack of information to either confirm or rule out a diagnosis. Interestingly, the researchers broke this “uncertain” group into two sub-groups along the axis of alcohol confirmations: an Alcohol Confirmed (AC) group and an Alcohol Unconfirmed (AU) group. There were equal numbers in both of these sub-groups, with 7 AC and 7 AU participants, equating to 15.4% of the overall study sample. See *Ibid.*, 26-27.

³¹ Malone adds a culturally thick reference to counter her already downplayed sense of uncertainty by evoking the trope of maternal drinking. Namely, she suggests that these missing data points are, “such as maternal confirmation of drinking during pregnancy.” This is misleading as far as the study itself accounts for this, with only half of the “uncertain” participants not having confirmation of alcohol. The conditionality of Malone’s “could have” is thus in reference to the latter category of study participants who “met some of the criteria” and thus could not be said with authority to have FASD, and not as a cautionary explication of the preliminary finds of the research itself. Again, recall that these numbers are not diagnoses as such but predictors of “risk” of FASD.

reproduced by other studies, and, most importantly, that the authors had explicitly warned of the need for medically and scientifically verified assessments to avoid the possibility of erroneously labeling someone with an FASD. Instead, Malone presents this data *as if* one quarter of the prison population in Canada has FASD. Or, in the words of White, 10% are confirmed while 15% are suspected of having FASD. Within this diagnostic imaginary Malone shows how easy it is to collapse *risk* with the *known*, and alerts us to a sort of algorithmic construction or mode of thinking in which risk determines diagnosis in advance.

This tension or slippage between belief and fact, of the *suspected* and the *confirmed*, goes beyond a simple problem of a mistranslation of scientific data to a popular readership, however. In fact, the authors of this study of an FASD screening tool for prison populations reproduce a very similar kind of circular reasoning in their study that harmonizes with that of Martin White and Malone who know there is a problem but are just not sure how big it is. Malone draws on the study of MacPherson, Chudley, and Grant to make a claim about prevalence, yet these authors are clear that they are trying to develop a screening tool that is “key to establishing prevalence estimates.” That is, they are also trying to figure out “just how big the problem is.” The reasoning is remarkably similar to that of Malone. Namely, knowing more about prevalence rates will enable a more efficient distribution of resources to “ensure this group of offenders receive effective services to address their unique needs.”³² Yet we are still left to ask, what permits such a study in the first place? Where does the certainty, if not hypothesis, of high prevalence rates of FASD in prison populations come from? How is the ‘problem’ known to exist at all?

As we noted in the introduction on the history of the Manitoba FASD Youth Justice Program (MBFASDYJP), knowledge of such ‘problems’ are caught within a circular reasoning

³² MacPherson, Chudley, and Grant, “Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalence, Screening and Characteristics,” 7.

and set of confluences of “success” and “proof.” Namely, the MBFASDYJP assumed that there existed high rates of prevalence of FASD, based on the highly speculative if not dubious accounts of one primary (*ur*)research study (Streissguth et al., 1996), then launched a program whose “success” was equated with affirming that there were youths with FASD, which then came to serve as a notion of solving this problem. Curiously, and to the best of my knowledge, no statistics of lower recidivism rates have ever been presented to demonstrate this program’s success, which might show an actual improvement in the lives of the youth who went through this programming (if only because they would not have to live as incarcerated beings). Instead, “success” was measured as the simple ability of being able to “confirm... the initial concerns that gave rise to the program,” which was, as we have already noted, that there was a “knowledge gap” in the system that did not know just how many youths with FASD were in the justice system.³³ This is a circle of confirming fears, which has perversely been concocted as a “success” or “proof” of concept.

These same circular and recursive features of reasoning are prevalent in the MacPherson et al. study, particularly in the way that they justify the motivating impulse of their study that there is “good evidence” to suggest that assessing and diagnosing FASD in the prison population leads to better outcomes, which are articulated as mode of the preventative in terms of recidivism. As they define the stakes of their study, “It is important for correctional jurisdictions to determine the prevalence of offenders with an FASD to better assist them while incarcerated and while released to the community to prevent re-offending by this population.”³⁴ This is effectively the same argument presented by anyone who argues for FASD to be considered in courts, such as lawyer Martin White and reporter Malone. Martin White argues that we need to

³³ Harvie, Longstaffe, and Chudley, “The Manitoba FASD Youth Justice Program,” 225.

³⁴ MacPherson et al., iv, 2, 7.

“start looking at things differently—starting with getting people diagnosed,” which is “crucial to properly dealing with the individual [with FASD].”³⁵ The only problem with these claims is that no one seems to know what this “dealing with the individual” actually means. Or, at the very least, it is simply assumed that knowing one has FASD somehow leads to effective “treatment” and thus leads to natural “good outcomes.” In referencing this study, one of its researchers, Dr. Chudley, repeated to the press that “We think that there is good evidence that when they [individuals with FASD] get the help and the support, reoffending drops.”³⁶ Yet no evidence is ever explicitly or clearly stated, anywhere.

MacPherson et al. are trapped within the same cannon as those of the MBFASDYJP, of whom Dr. Chudley was a principle architect, it bears re-mentioning. They simply cite research that “suggests individuals with FASD are at an increased risk of coming in contact with the justice system,” of whom Streissguth et al. are the originary researchers, in order to claim that diagnosing individuals with FASD will lead to better outcomes, including not being (re)caught within the legal system.³⁷ Even if we stick to the text and research of Streissguth et al., never do the latter make an argument that prisoners should be diagnosed as a means of helping them. Prisoners with FASD are not on their radar. Children who might become prisoners someday are on their radar. In fact, their point is that early *childhood diagnosis* is a strong *protective factor* for all “secondary disabilities,” namely because an “early diagnosis may help the family better understand the root of their child’s developmental delays and behavioral problems and empower the family to advocate for appropriate services particularly in the crucial first years at school.”³⁸

³⁵ Malone, “‘Very Little Is Actually Being Done’: Corrections Canada Funded Just 7 FASD Assessments Last Year.”

³⁶ Malone.

³⁷ MacPherson, Chudley, and Grant, “Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalence, Screening and Characteristics,” 2. Emphasis added.

³⁸ Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE),” 64.

Furthermore, beyond diagnosis, most of the “protective factors” that they advocate for are things like ensuring that children with FASD are placed in “stable long lasting and nurturant homes of “good quality”” and improving living conditions for children who are living in conditions of poverty (Ibid.). There is a disconnect here between the domestic and carceral spheres, and MacPherson et al. and reporters like Malone are simply translating across this vast socio-political boundary with reckless disregard.

When reading Streissguth et al. my worry has always been that their recommendations for implementing more “protective factors” like good homes and amelioration of oppressive conditions of poverty would only lead to increased surveillance of impoverished and racialized families. And it appears that my fears are being confirmed and that this is surveillance ethic is precisely how their work is made intelligible and useful to research in the carceral context. Only now, once FASD has been translated into this carceral sphere, it loses any of that domestic language of stability and nurturance. Instead, FASD seems to be merely a way of marking mental disability. The implicit argument seems to be along the lines of the Canadian Bar Association, who wrote an open letter to the criminal justice system a decade ago criticizing it for the way that it treats individuals with FASD within the framework of the system’s “normative assumptions” that implies that individuals with FASD can act like everyone else and make informed, voluntary decisions, as well as learn from their own behaviors and experiences.³⁹ Indeed, it appears that the only way that the work of MacPherson et al. can become meaningful, the only actual or practical programming that can be implemented by way of helping or supporting FASD inmates to achieve better outcomes, is by making FASD programming “culturally appropriate” for the Aboriginal inmates that it “particularly” affects.⁴⁰ I have yet to

³⁹Canadian Bar Association, “Fetal Alcohol Spectrum Disorder in the Criminal Justice System.”

⁴⁰ Wesley, “Marginalized: The Aboriginal Women’s Experience in Federal Corrections,” 37.

see a single other proposal that actually implements meaningful FASD “supports” in a prison setting that is not somehow attached to this script of the “culturally appropriate,” which not only implicitly links all of this work and advocacy to the underlying anti-Indigenous message that FASD is an Indian problem, but recirculates all of the energies of this faux research-advocacy industry within a reformist and racialized mentality that distinctly neglects a critical analyses of the violent structure of the prison system in favor of a reified concept of crime as a racial issue.

What is even more peculiar about this logical sequence of reasoning, which approaches the syllogistic structure of a tautology – namely, getting prisoners diagnosed will help them because getting diagnosed will help them get the “help and support” they need that will inevitably help them to stop reoffending – is not simply that there is no “good evidence” ever cited to back up these claims that “reoffending drops” with diagnosis; more concerning still is how any gestures they do try to make toward evidence is involved in a peculiar temporal reconfiguration and conflation of the factual now and the predictive outcome. Specifically, the researchers use their own preliminary *predictive* findings to make claims on the empirical now. That is, the research anticipates a virtual model of outcomes that have yet to occur, but which are anticipated based on actuarial modeling used by the prison system itself to predict recidivism – the statistical likelihood to reoffend in which offenders are measured. For one, they notice a slight difference in a metric of “risk to reoffend” between those offenders who agreed to participate in the study, those who refused to participate, and those who prematurely withdrew from the study.⁴¹ The implication is that, because those who participated in their study *would have been* detected to have *risk* of an FASD diagnosis and then, presumably, *would have gotten*

⁴¹ Those who participated were 30.5% likely to reoffend; those who refused were 48.2% likely to re-offend, and those who withdrew were 63.6% likely to re-offend. These samples were of 95, 11, and 54 people, respectively. See MacPherson et al., 25.

adequate treatment that *would made them* less likely to engage in recidivistic behaviors. Such a curious temporality, for it is entirely a prediction and is based on a loose correlation between their own preliminary findings of FASD risk and the in-house tools used by corrections to measure recidivism risk. So, they argue that their findings of risk of FASD correlate with the findings of Corrections Canada that predict recidivism, and thus extrapolate that those with FASD tend to measure poorly in the amounts of overall offences, rates of recidivism and the frequency in which they re-offended, and their overall tendency to be incarcerated for crimes of a violent nature. Not only is their study on prevalence made possible by weak empirical grounds for assuming prevalence, the research also self-justifies itself in an anticipatory mode of crime to suggest that prevalence exists in the now.

It is worth taking a quick look at the tools used by the prisons to make their determinations of risk. First, we note that the method and tool for measuring the “likelihood” to reoffend is garnered by the prison’s own “Offender Management System,” an electronic administrative database used by Corrections Canada to maintain all offender records. This tool, the researchers describe, provides an Offender Intake Assessment (OIA) of every single offender, which is conducted by a parole officer (PO). The PO conducts a series of interviews with the offender as well as “in-depth analyses of information from collateral sources, such as police agencies, family members, and professionals from other jurisdictions as well as analysis of validated and normal assessment tools.”⁴² There are several different assessment tools that intersect and inform one another, such as the ‘Static Factor Analysis’ that generates a rating based on measurements of data from a Criminal History Record that “investigates significant factors related to the offenders involvement with the criminal justice system,” or an Offence Severity Record that “measures the

⁴² MacPherson, Chudley, and Grant, “Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalence, Screening and Characteristics,” 19.

nature and degree of psychological and physical harm inflicted on the victim(s) and on society.⁴³ These tools are basically questionnaires that are constituted by a “number of dichotomous yes/no responses,” where each “yes” increases the amount of criminal risk attributed to the offender relative to the category of assessment the PO is measuring (Ibid). It is hard to assess the validity of these assessment tools and questionnaires as they are not published by the researchers and are not available to the public, and we are left wondering about how such a thing as “victim harm” could be quantified. One could further question the methodological efficacy, not to mention implications, of digitizing the complexities of an offender’s life through a “yes or no” questionnaire. And this is to say nothing of the narrow training of POs who administer these questionnaires, who are not researchers, but guards who are effectively in an adversarial relationship with their prisoners. And it is also to say nothing about how such questionnaires are built on an actuarial foundation that operates in measuring and calculating/predicting “risk” that very easily becomes a “proxy for race.”⁴⁴ As far as our immediate concerns with how these methodological and conceptual approaches measure and think preventative “outcome,” however, we are confronted by the fact that this data reinscribes the circular paradox we are addressing. Namely, as hypothetical and entirely *predictive* ratings, and not records of actual re-offense, how could this data be used to rigorously support the claim of MacPherson et al. that catching FASD

⁴³ There is also a Sex Offense History, which “looks at the nature and extent of sexual offending, if any, and the amount of victim harm.” MacPherson, Chudley, and Grant, “Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalence, Screening and Characteristics,” 19.

⁴⁴ Harcourt, “Risk as a Proxy for Race.” The Supreme Court of Canada recently ruled on the implicit biases contained within risk assessments used by parole boards that are said to be implicitly prejudicial to indigenous offenders. See *Ewert v. Canada*. For more on the critique of predictive models and the broader rise of actuarial logics in the legal and correctional systems of Western societies, see Bernard E. Harcourt, “Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age” (Criminal Justice Roundtable, Harvard Law School, May 13, 2005).

in prisons leads to better outcomes for prisoners?⁴⁵ They are not measuring outcomes, they are predicting what they think will be the likely, statistical, outcomes. This is an even further virtualization of the already perverse recursive logic that pervades the thinking and analysis of this study and so many others, where prevalence of FASD is assumed while trying to prove its existence in order to determine just how prevalent it is in order to then address the problem of prevalence.

The magic of prejudice

In the end, the “statistical outcomes” that demonstrated the success of the MBFASDYJP were statistics that had nothing to do with improvements in the lives of the youth who were being recruited into this mass diagnosis procedure, or even in demonstrations of reduced recidivism rates. Instead, they had everything to do with “confirming the initial concerns which gave rise to the program.” In short, because the program feared a gap in knowledge about the unknown amount of FASD diagnoses in the youth corrections system, this was confirmed when 73 of its 385 referrals (as of 2011) were diagnosed with an FASD (nine with pFAS and 64 with ARND).⁴⁶ It is the same peculiar logic that we see in the work of MacPherson et al. who acknowledged that the number of inmates in Canadian prisons with FASD was unknown but could be persuaded nonetheless with a conjunctive affirmation: “*however* research suggests

⁴⁵ And let us not forget how the retroactive temporality of the justifications for this intervention are related to the predicate of Indigenous overincarceration that justifies FASD interventions, noted in the intro. Indeed, this is a recursive form of staging Indigenous life as already bad, dysfunctional, in need of help/services/intervention.

⁴⁶ Harvie, Longstaffe, and Chudley, “The Manitoba FASD Youth Justice Program,” 225. In a more recent accounting of the numbers, in 2018, there were 1048 referrals made to the MBFASDYJP, with 234 diagnoses and another 94 youth on the waitlist for assessment. It is notable that of the 1048 referrals, only 332 were assessed. 417 youth referred were removed from the waitlist because they were found to have a prior diagnosis of FASD, refused the assessment, or because they turned 18 and were thus ineligible for further assessment under the conditions of Youth Justice legislation. Another 205 youth were found to have no PAE and so did not proceed with assessment. See Longstaffe et al., “The Manitoba Youth Justice Program,” 264.

individuals with FASD are at an increased risk of coming in contact with the justice system.”⁴⁷ Within this “however” lies a reiterative and circular citation of research that goes back to the pioneering work of Ann Streissguth and several of her colleagues who have claimed, and continue to claim, that there is a direct correlation between FASD and ‘trouble with the law,’ and that criminal behavior is indeed a “secondary disability” of FASD.⁴⁸ “However” thus points to a problematic set of claims from an originary research project that deploys probabilistic language of risk and the “likelihood” of criminal behavior. But as this research is used to extrapolate data estimates in radically different contexts, there is something fetishistic about this citational practice as well. For one, it is already a probabilistic conceptualization that mediates the rational with the empirical, a likelihood of criminal behavior that mediates across this chasm and permits one to assume the existence of FASD by virtue of the reality of crime as such. We are dealing with a stronger set of claims here than those mobilized by statistical perception, which, by themselves, cannot broach this gap on their own and make sense in the everyday. Something else is required for actors like lawyer Martin White to claim that “we all know.” It is the same force that permits all of these researchers to assume with such conviction that there is a problem to be studied in the first place, and that their studies and projects will simply confirm their already known hypotheses; their own lack of empirical grounding mediated by the graceful conjoining power of a copula like word, “however,” that forges connections of belief in the prevalence of FASD in the midst of its empirical negation. Rather than claims of empirical truth, these forms

⁴⁷ MacPherson, Chudley, and Grant, “Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalence, Screening and Characteristics,” 2. Emphasis added.

⁴⁸ Streissguth et al., “Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE).” For instance, Burd et al. have glossed the work of Streissguth et al. to suggest that up to 60% of the prison population might be affected by FASD. Burd et al., “Fetal Alcohol Spectrum Disorder as a Marker for Increased Risk of Involvement with Correction Systems,” 563.

strike me as closer in kind and form to suspicious accusations: Their *must* be a large number of prisoners with FASD.

“However” is more than a conjunctive or conjoining, copula-like, word; it announces a gap, and so is also a hinge on which we can see people articulate their belief. It embraces, and is braced by, the tension that constitutes this gap. And out of this tension emerges a demand for a demonstration in the world. As noted in the introduction, this epistemological quandary is emblematic of the unique structure of prejudice, that inherent power of language to articulate, to conjoin without reference to the world, and which is central to magical judgments that are rarely contradicted by evidence.⁴⁹ “Without prejudice, there is no magic, only disputable fact.”⁵⁰ The *a priori* belief of FASD is similar to a magical belief in the same way that it constantly demands recourse to the empirical, and is implicated in making distinct claims on the world, yet cannot be disconfirmed (or affirmed) by evidence.⁵¹ The naming of a witch is always provoked by a need to explain concrete conditions: like a relative who becomes inexplicably sick, or an accident whose timing requires an explanation. In the famous case examined by E. E. Evans-Pritchard, it is all well to say that termites caused the collapse of an awning, but it requires further analysis beyond coincidence to answer why it was that precise moment that it collapsed when people were under it? We might consider our concrete terms here as the condition of mass incarceration. *Why are* all of those people in jail, after all? And, furthermore, why are so many of them Indigenous? Just as a ‘witch’ names an agreed upon “limit beyond which one knew nothing but which was believed to be the source of something that inflected that world” for the Azande (103), so too ‘FASD’ indexes a similar beyond. It is what drives Streissguth et al. to look beyond the

⁴⁹ Siegel, *Naming the Witch*, 34.

⁵⁰ Siegel, 47.

⁵¹ Siegel, 33.

“universal protective factors” (like stable homes and protection from domestic violence) that decrease the likelihood of criminogenic behaviors in favor of emphasizing the “intrinsic” features of FASD that become a causal factor for crime. This intrinsic-ness haunts the FASD world, always intimating at a biological finality, yet never actually demonstrating such biological damage except through mediated processes of subjective testing of one’s brain domains or, perhaps, measuring the definition of the philtrum of one’s upper lip, which is said to be a symptom, and thus a predictor, of Fetal Alcohol related damage. One of the most profound images of the FASD world – the juxtaposition of the so-called “FAS brain” and the “normal brain” (see figure) – demonstrates this problematic attachment to the intrinsic. Such brains were claimed to be inside every child with FAS, a confident claim and reference to their profound brain damage. And, specifically, it was said that the “FAS face” was a symptom that could be read as a way of “predicting the brain.” But even Dr. Clarren Sterling, one of the most pre-eminent clinical psychologists of the FASD research world, gave up years ago the dissection of individuals with FAS to harvest and study their brains because there was very rarely any correlation between brain shape, or general appearance, and a diagnosis of FAS. Simply put, no clear scientific causality between FAS and brain malformation could be determined. Even despite this scientific failure, however, Clarren still maintains to this day that the image of the brain is useful as a visual metaphor because “it did teach us a critical lesson in what alcohol did to the brain, and those lessons have been true for 25 years.”⁵²

⁵²See Sterling Clarren, “Keynote Address” (Keynote Address, 2002 Prairie Northern Conference on Fetal Alcohol Syndrome, Whitehorse, Yukon, May 8, 2002), <http://come-over.to/FAS/Whitehorse/WhitehorseArticleSC1.htm>. It should also be noted that Michael Dorris donated his dead son Abel’s brain to Clarren. It is not clear what ever happened to Abel’s brain. See Stange, “The Broken Self: Fetal Alcohol Syndrome and Native American Selfhood.”

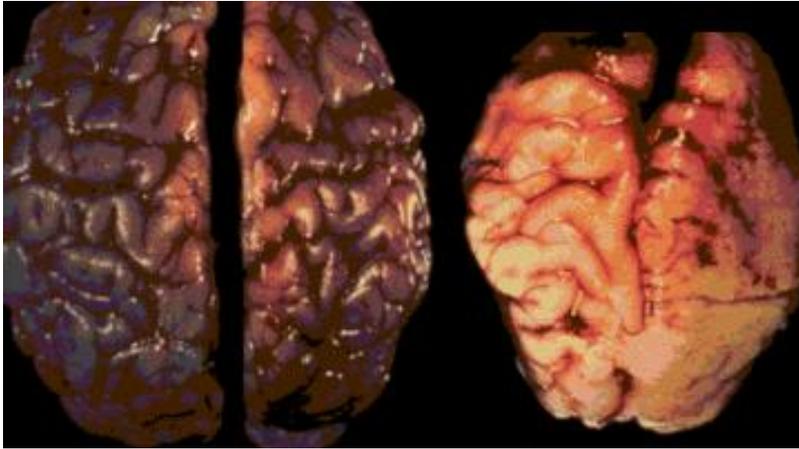


Figure 11 - Comparing "normal" and "FAS brains," respectively. Photo originally provided by Dr. Sterling Clarren and circulated widely on the internet and within numerous FASD networks. See, for example, its reproduction by Teresa Kellerman at <http://come-over.to/FAS/PDF/FASbrainColor.pdf>

Such examples show us the collective and social nature of such beliefs, however, and thus, the institutional form that is central to Siegel's analysis of witchcraft. For 'witch' is more than a word, but is a "wedding of a word to a source of knowledge." And Streissguth and her psychologist colleagues are not so different than the oracle in Siegel's analysis, those 'others' who possess the knowledge needed in order for us to displace, and thus "dissolve," the uncanny register of the power of prejudice and know that its "provenance is not within me, but in someone or something from a distant place."⁵³ The trick of institutionalizing witchcraft is that it is given a place in the social even while it is kept apart from normality. It's a means of "locking it up, as one might do to someone disturbed. Not at all to cure it, but to make it capable of being released in order to roam society once more. Thus, witchcraft replaced another fear which lacked a name and hence a means of response."⁵⁴ FASD is analogous as a mode of response to such aporetic conditions that fascinate us in modes of fright, anxiety and deep discomfort. Even as we contain and identify FASD, it is always through a negation and, thus, has a spectral quality. In a

⁵³ Siegel, *Naming the Witch*, 107.

⁵⁴ Siegel, 106.

place like Winnipeg, it is regularly talked about in medically authorized language as a threatening “invisible disorder” that might be lurking next to you in a doctor’s office or on the school bus.⁵⁵ It explains even as it generates more possible speculation and anxiety. “Maybe you sat next to someone with it at the doctor’s office. Your daughter or son might have a classmate with it. If you’re a foster parent, odds are any child who walks through your door will have it.”⁵⁶ As researchers continue to develop the knowledge of FASD we are confronted by a contradictory scenario of being more confident that it is being contained while growing more anxious that it is potentially everywhere.

It is no coincidence that FASD has been tied to crime, as that condition that we continually seek to explain and subject to our statistical and social science modalities in order to find patterns. Yet crime is nothing if not a singular act, one that is enacted in a complexity that is loosely organized by prevailing conditions – of poverty, for example – while requiring the singularly formed set of judgments and interpretive apparatuses of the individual that can never be statistically rendered or predicted. In this way, crime is a possibility that exists in that gap between the individual and the social, one that thereby threatens our sensibilities and which we seek to push away. FASD gives us a means of doing so. And, as we have seen with the MBFASDYJP, it literally gives us the capacity of “locking it up,” and thus acts as a means of response to an unknown.⁵⁷ As lawyers like Martin White continue to emphasize their certain knowledge that her Indigenous clients have FASD while not having the proof, and thus calls on

⁵⁵ As Winnipeg Free Press reporter, Mary Agnes Welch, summarizes the hidden disability: “Most kids with FASD look normal, making it an invisible problem.” Welch, “The Face of FASD.”

⁵⁶ Sanders, Welch, and Rabson, “When Drink Destroys.”

⁵⁷ Siegel, *Naming the Witch*, 103, 106. And even after jail. Part of the MBFASDYJP mandate is to connect youth with ‘resources’ and support beyond their incarceration. My job as a community outreach worker is one example of those ‘resources,’ and I am encouraging us to think of this as a broader tactic of surveillance and containment.

the system to provide services to give this proof, we are witness to the performance of a prejudicial magical belief in a direct correlation between FASD and crime.

Yet as FASD gives us a means of answering this aporia, we must also wonder what it is conjuring away? As we will see, FASD makes it possible to ignore the violence of the state, whose systematic deprivation of services and resources to certain communities is replaced by investments in carceral and carceral-like infrastructures. As we will see, the criminological discourse of FASD piggybacks on pre-existing infrastructures that target Indigenous communities (namely, the *Gladue* system covered in the previous chapter), which gives us an understanding of how FASD allows us to conjure away a critique of the carceral state and instead argue for more resources to facilitate the right kinds of incarceration for Indigenous life.

Evidence may be presumed

Consider the drafting of the FASD private members bills by Conservative and Liberal Members of Canada's parliament.⁵⁸ In the name of intervening in the unjust conditions of cycling individuals with FASD through the criminal justice system, these bills picked up where *Gladue* left off as they sought to add a further amendment to section 718.2 of the Criminal Code.⁵⁹ Briefly, the bills sought to create a legal definition for FASD and create clear guidelines for

⁵⁸ In 2014 Conservative MP of Yukon, Ryan Leef, introduced private member Bill C-583. In 2016 Liberal MP of the same riding of the Yukon introduced Bill C-235. It is interesting to note that these bills were virtually identical in spirit and intention – to amend the criminal code to legally define FASD that would allow the courts to consider the disorder as a mitigating factor, and to enable the courts to order assessments. Differences between these bills were only minor, almost imperceptible, differences in wording. To avoid confusion in citation, in what follows, I will only be referring to the Bill C-583 that was presented by Conservative MP, Ryan Leef. Leef, BILL C-583 An Act to amend the Criminal Code (fetal alcohol spectrum disorder); Bagnell, Bill C-235 An Act to amend the Criminal Code and the Corrections and Conditional Release Act (fetal alcohol disorder).

⁵⁹ Recall from the last chapter that this is the section of the Criminal Code where exceptions of Indigenous difference were embedded into Canadian law as s.718.2(e), namely by way of requiring sentencing judges to factor in the backgrounds of Aboriginal peoples into their sentencing decisions. Most interestingly, the main amendment to the Criminal Code presented by this bill would have created a subsection, “(f),” creating a direct link between Indigeneity and FASD even if only through the legislative seriality of codes that make Indigeneity and then FASD exceptional qualities to consider in sentencing.

considering FASD as a mitigating factor in the courts.⁶⁰ In parliamentary debate, Ryan Leef announced to his colleagues that the other main feature of his bill was to insert an amendment into the Code that would “allow the court to order assessments where they have reasonable grounds or evidence to believe that FASD may be present in an accused, and that it contributed to the offence or criminal conduct.”⁶¹ These bills sought to solve the central problem presented by lawyer Wendy White – that “everyone knows” her client(s) have FASD but that there is no proof – by granting the courts the legal right to order assessments. But like White it also is steeped in the language of belief. For it stipulates that these ordered assessments can only be issued “if the court *believes* a medical, psychological or psychiatric assessment in respect of the accused is necessary for a purpose of [considerations of appropriate sentencing and post-trial conditions]... and the court has reasonable grounds to *believe* that the accused may be suffering from FASD or a similar mental disorder or disability.”⁶² Notably, this bill does not define what “reasonable grounds” are for believing that an accused may have FASD. It does provide some important clues as to where these legal beliefs, or suspicions, come from, however.

Namely, the bill accounted for one of the most common stumbling blocks in the FASD assessment and diagnoses: confirmation of maternal pre-natal alcohol exposure (PAE).⁶³ Ryan Leef’s private members bill accounted for this troubling condition of uncertainty in a section sub-titled as “Evidence may be presumed.” It reads like this: “If the court is satisfied that there is good reason the evidence of alcohol consumption by an individual’s mother while she was

⁶⁰ Specifically, if there is “evidence that an offender suffers from FASD” and, “in the court’s opinion, the condition was relevant or contributed to the commission of the offence,” the condition “shall be deemed to be a mitigating factor if it impairs the offender’s ability (i) to make judgments, (ii) to foresee and understand the consequences or risks of his or her actions, (iii) to control impulse behaviour, or (iv) to internally modify the control of his or her behaviour.” Leef, BILL C-583 An Act to amend the Criminal Code (fetal alcohol spectrum disorder).

⁶¹ Leef.

⁶² Leef, BILL C-583 An Act to amend the Criminal Code (fetal alcohol spectrum disorder). Emphasis added.

⁶³ And recall our discussion above regarding my ethnographic observations with a local FASD pre-assessment team that showed me just how determining PAE can be so problematic. See chapter 1.

pregnant with the individual is not available, such as in circumstances in which the mother has died or cannot be identified or found, the cause of the FASD may be presumed to be the maternal consumption of alcohol.”⁶⁴ What exactly satisfies “good reason” for the courts is, again, not defined, which gives these bills an even greater capacity than the hazy features of clinical teams - such as their constant confrontation with rumor, or complex family dynamics that confront them with different and contradictory stories of PAE - to exercise the power of decision about alcohol confirmations. Doubt is legally mandated away as evidence is forced within the categorical absurdity of presumption. Where the clinical assessment teams are sometimes caught up in the shaky ethical ground of rumor and other forms of suspicion of PAE, the courts may bypass this altogether. It simply gives a legal definition, and justification, of this social process: FASD may be presumed.

This is such a clear example of how the empirical world of FASD is constantly made exceptional under an overwhelming belief in its existence. As a legal reification of the social dynamic of diagnosis, it also prompts us to return to our thinking about the ways that individuals enact these social suspicions through their own sensorial and narrative structures. What prompts these beliefs? How does a suspicion, or speculation, of FASD become recognized as, or confused with, evidence? This is where we can gather a better sense of the broader conditions in which the *a priori* judgment of FASD is maintained in the world not as contradiction but as expression of certainty.

⁶⁴ Leef, BILL C-583 An Act to amend the Criminal Code (fetal alcohol spectrum disorder).

Cop knowledge

Consider the research of anthropologist Michelle Stewart and her efforts to create more effective and ethically mandated training module for police officers in their encounters with individuals with FASD.⁶⁵ This article is reflective of the most common trope of education and awareness in the FASD research and advocacy world where it is suggested that the problems associated with FASD – whether general social stigma, or more systemic issues like the so-called prevalence of FASD in the prison system – all stem back to a lack of knowledge and awareness of FASD by society and its institutions and leaders. For example, a growing number of intervention programs pertaining to FASD in the criminal justice system argue that training about FASD is the first line of attack in ensuring higher levels of care and safety for offenders, for preventing the “revolving door” phenomenon of repeat offenders whose diagnoses go unnoticed, ensuring that special needs are considered in the sentencing of individuals with FASD, as well as training police officers to ensure “a more sensitive response to victims, accused persons, and witnesses with FASD.”⁶⁶ For her part, Stewart argues that the marginalization of individuals with FASD in the justice system comes down to how such individuals “are understood in the criminal justice system.”⁶⁷ By conducting interviews with police officers on their knowledge and experiences with FASD Stewart concludes that “In the absence of formal training and in light of ongoing and sustained contact with troubled clients, police are left to navigate the terrain of brain injury [FASD] with limited resources.”⁶⁸ On the face of it, these seem like perfectly reasonable goals, much like the calls made by lawyer White. But the problem with this approach is that these ethical demands simply ignore the

⁶⁵ Stewart, “FASD & Justice.” Recall that Stewart is also the director of the *Navigator-Advocate* program introduced in the opening of this chapter.

⁶⁶ Gagnier, Moore, and Green, “A Need for Closer Examination of FASD by the Criminal Justice System,” 434.

⁶⁷ Stewart, “FASD & Justice,” 192.

⁶⁸ Stewart, 198.

epistemological problematic. Particularly, in her research of police officers' perceptions of FASD Stewart does not put any analytical pressure on how police officers are claimed to even know, or see, about FASD in the first place. As she quotes one officer, "I think a majority of our clients suffer from FASD whether they know it or they don't" (197). How is it that an officer knows how to diagnose, and recognize, an FASD, at all, let alone in cases where the individual alleged to have an FASD does not know it?

Unfortunately, Stewart does not ask these questions; her focus is on giving police more information so as to influence the treatment of individuals with FASD, not on understanding the social sphere of the diagnostic in which police know and identify FASD. The closest that Stewart comes to posing these kinds of questions is in the diplomatic way in which she challenges the overall literacy that officers have when it comes to FASD. They might know a lot about FASD, and are aware that is a significant issue in their career, but Stewart's concern is that this knowledge is not enough, or is not accurate enough; it needs to be accentuated and, in most cases, corrected, in order to be more ethical. The actual act of assessing individuals with FASD, and whether this is legitimate, is not to be examined outright. This often leads to Stewart lending police unnecessary euphemisms that cover for their arrogant and bullish, if not explicitly violent, behaviors towards people they encounter on the frontlines. For instance, she quotes one officer who describes his negative impressions about FASD, which is a factor of its assumed pervasiveness and the sense that it is an incorrigible disorder that is related to crime: "you tend to get the *understanding or belief* that they are suffering from FASD and it becomes very negative. Oh that "FASD bastard" or whatever."⁶⁹ For the most part, Stewart maintains analytical focus on these negative "understandings," as something that, rightfully, requires an intervention or a

⁶⁹ Stewart, 198. Emphasis added.

correction, as they so often lead to tragic outcomes. Quite simply, Stewart argues that even though police tend to recognize that a person has FASD, it only adds to their negative interpretations of the person rather than provide them with a reasonable framework for understanding that, as Stewart puts it elsewhere, “this person might not actually be purposefully doing the acts that they *appear* to be doing.”⁷⁰ That is, they do not understand that FASD impacts one’s cognitive functioning, and that their actions may not be accurate expressions of intent or will, or even of their character.

Stewart lists a common set of characteristics of FASD and how the disorder puts individuals at a particular disadvantage in the justice system, all of which police officers tend to misunderstand: People with FASD have a desire to please people in authority; they have an inability to understand abstract concepts; they tend to confabulate stories to compensate for poor memories; because they struggle with consequential thinking they are more likely to take blame quickly, even if they are not responsible, simply to ‘get out of the situation and go home’; and they are highly vulnerable to being victimized by accomplices who use plea bargaining.⁷¹ Thus, more training is in order: “Without training to recognize these characteristics, officers may inadvertently *attribute guilt* to an individual because they cannot recognize the characteristics of the disorder—this misunderstanding might limit their critical capacity to also recognize victimization.”⁷²

True to the suspicious hermeneutic of the *invisible disorder*, it is as though FASD presents a unique challenge to the world of appearances, particularly for police officers and other front line justice workers. They simply do not have the appropriate *understanding*, the right set

⁷⁰ Stewart quoted in McEachern, “Researchers Discuss FASD and Criminal Justice.” Emphasis added.

⁷¹ Stewart, 202; see also Fast and Conry 2004, 163.

⁷² Stewart, 203, emphasis added.

or amount of knowledge of the *characteristics*, of FASD to treat it with the ethical consideration that it deserves. But this opens more questions than it resolves. For what is it that police think they are seeing when they see an individual with FASD? What knowledge is required in order for a police officer to not call them “bastards”? What knowledge will help an officer abandon their assumptions that these individuals are out to get them somehow? Is it simply a matter of having *false* knowledge or “understandings”? Furthermore, is it the job of a police officer to attribute guilt? This reveals a deeper truth to this line of reasoning, where the attribution of guilt is subject to the simple procedure of accumulating more knowledge. Yet the language betrays itself, for *attribution* is still a process of interpretation, not a distribution of fact. Nothing goes without saying, but apparently it does. This contradiction is found in the officer’s own ambiguous claim that it is an “understanding or belief,” an ambiguity that goes without any comment by Stewart. Ignoring this crucial difference in language allows Stewart to similarly neglect the immediate transition that is made from this ambiguous “understanding or belief” to projecting the accusation of “that “FASD bastard” or whatever.”

While the emphasis on training of police officers to recognize FASD is rooted, no doubt, in Stewart’s intentions of helping people with FASD, this narrow ethical focus as knowledge acquisition and its concomitant scant theorization of representation leads to a deeper analytical flaw in which deeper structural forms are imperceptible to the author. Not only is it a missed opportunity to theorize how and why officers might be able to move from a deep appreciation of FASD in their work, and even an acknowledgement of their shortcomings,⁷³ to accusations of those “FASD bastards;” Stewart also misses some other key moments to analyze the broader

⁷³ According to Stewart, officers were quite aware that they needed to develop more patience with individuals with FASD, and the entire article is full of examples of officers expressing their desire to be more adequately trained on FASD.

political and social conditions of policing today and how this might play into the accusatory realm of the ‘understanding or belief’ of officers. For instance, officers regularly divulged to her that they were anxious and resentful about the perception of becoming social workers.⁷⁴ As Stewart notes, this is backed up by the criminological literature that demonstrates how the overwhelming majority of police work today is neither related to crime control or law enforcement and that most work is related to scenarios of ‘crisis management’ (194). This is reflective of a general political shift in late-twentieth century societies in which economic distributions create new, or accentuate old, social conditions of struggle in which police, and the carceral system more generally, are increasingly expected to manage.⁷⁵ Yet it is precisely these structural conditions and the remodification of relational dynamics between police and communities struggling with ‘crisis’ that goes unacknowledged in this article of Stewart’s in the name of developing new training techniques for a more ethical practice of policing. But what are these new training techniques that Stewart proposes?

As Stewart notes, police officers are almost unanimous in their preference for “hands on” training, and they express a deep suspicion for anything that might remotely resemble a “scholastic” approach (197, 199). Such intellectual approaches are far too abstract and unable to capture the true reality of officers’ lives and bears a striking thematic similarity to the suspicious contempt that officers cast to the fear of becoming social workers or mental health workers that could be analyzed for the specific gendered qualities of this line of demarcation.⁷⁶ But Stewart’s

⁷⁴ Stewart, “FASD & Justice,” 199.

⁷⁵ Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham London: Duke Univ Pr, 2009); Jackie Wang, *Carceral Capitalism*, Semiotext(e) Intervention Series 21 (South Pasadena, CA: Semiotext(e), 2018).

⁷⁶ For instance, there is an interesting theorization of the “frontline” by police officers that seems to be distinctly gendered in its connotations with violence, which becomes a necessary tool that others, such as social or mental health workers (who are typically imagined as ‘feminine professions’), simply do not understand. That is, social workers do not understand the ‘real’ world of violence that is always lurking, and thus always being deployed, by

focus is on the practical training that can be developed to most assist and accommodate these sentiments and conditions of the professional lives of officers. Stewart thus advocates for trainings that emphasize “non-clinical explanations... of what to expect,” where officers can be actively engaged in learning about FASD while developing new techniques for more ethically encountering offenders with FASD (199). This translates as learning more about how to recognize the behaviors of FASD: “With behaviors in mind, officers can *imagine* scenarios, or *draw on previous experiences*, and *rethink* the encounter if they *understand* a particular behavior is related to a disability rather than *evidence* of being openly defiant or aggressive.”⁷⁷ Incredibly, the categories of aggression or defiance are permitted to remain as objective conditions and go unquestioned. Instead, what concerns Stewart is how officers interpret these “behaviors.” Quite simply, a recalibration is in order to train officers to not see this as a matter of intention, and officers are presented with a cypher to detect the deeper problems of a disordered mind. So, how to train this hermeneutic of appearances?

Stewart suggests that “scenario-based trainings on FASD” are the best approach to give officers the “hands on” ethical recalibration they need, where, incredibly, professional actors could be hired to “portray a client in crisis” so that officers could “learn different strategies to assist that individual” (201). There are several highly problematic assumptions and implications of this proposed line of training. For one, I cannot even imagine how offensive it must be for someone with FASD to consider actors mimicking their disability for the benefit of training

police officers. Mental health is simply another modality of a potential threat that police need to learn how to deal with. It is interesting that Stewart largely situates herself within the broader criminological literature that is simply trying to adapt police officers to the changing realities of policing by not making them mental health workers, but “to help police be better equipped to do the work they were already doing at the front-line.” Stewart, “FASD & Justice,” 194.

⁷⁷ Stewart, 200, emphases added.

officers how to treat them better. It is not clear at all how such a “portrayal” of FASD would be learned and enacted either. Who would educate an actor on how to perform an “FASD diagnosis”? What, exactly, would they *enact*? Would it be based only on the “characteristics” of FASD, i.e. the alleged behaviors of FASD? What behaviours would be selected? How would an actor convey the distinct, and alleged, characteristic of how individuals with FASD typically want to please those in authority, or that they struggle with abstract concepts? What exactly would capture the FASD-ness of these characteristics? Not only does this strategy of portraying FASD risk a ballooning of problematic knowledge exchange and future ethical nightmares on the “frontlines” of policing, but it also betrays Stewart’s own expressed understanding of FASD as a highly complex and individualized disorder. As she puts it, “in the absence of formal training, police are not in a position to best understand these clients’ “issues” since FASD is experienced on a spectrum, and therefore “issues” are often changing. Therefore the “issues” for one person with FASD can be numerous and divergent.”⁷⁸ It is unclear how making rigid scripts of enacting an FASD diagnosis is going to help officers understand the highly singular and individualized expression of FASD.

Most problematic of all, however, is that this scripting and enacting of FASD as a model of training officers to respond better and more ethically to individuals with FASD simply assumes the position that police have some innate ability to diagnose FASD in the first place, and on the spot in a scene of crisis, no less. All that is needed is a slight recalibration between the causal factor of FASD as a damaged and disordered brain and how this gets translated as an ‘understanding or belief’ (and, recall that the difference between these psychic-social registers does not seem to matter) of the officer. The officer is encouraged to see the actions of his

⁷⁸ Stewart, “FASD & Justice,” 197.

“clients” not as motivated and intentional, but simply as chaotic expressions of biological brain damage. Nowhere is it explained why such a recalibration of understanding would prevent an officer to similarly conclude that this behavior equated to some kind of deviancy or even aggression. And, for that matter, it is an extremely bold assumption that such additions of knowledge would necessarily lead to more ethical approaches by police. All this model does is to implicitly generalize FASD as a condition of the “crisis” conditions that are said to define the professional lives of police. And, in this way, it is worth considering how Stewart’s recommended training modules might provide even more capacity for police to further reify the complex dynamics of associations they make of people they think to have FASD.

Despite Stewart’s better intentions in the FASD advocacy world, and indeed her highly critical and welcomed voice in conversations of police-Indigenous relations in Canada, I fear that her analysis comes uncomfortably close to affirming a more rigid understanding of FASD. To accentuate Stewart’s political impulses in other venues,⁷⁹ I find it appropriate, and an act of collegial solidarity, to inquire about the dark corners that her analysis and advocacy – as an instance of creating dignified conditions for individuals by educating front-line workers, particularly police, to *know more* about FASD – leaves, perhaps necessarily, in the shadows. Before recommending regimes of education pertaining to FASD, it might be better to first explore the highly dubious and recursive space of the lay diagnosis, and particularly how police officers continue to script their own understandings of FASD in real time at the frontlines. How

⁷⁹ It bears mention that Stewart is regularly regarded as a strong and critical voice of policing and is currently defending herself in a lawsuit of authors of a controversial book on policing that historicizes the Neil Stonechild inquiry and more or less exonerates police officers as victims. Stewart is alleged to have called the book “racist garbage” for the ways in which it whitewashes this history of extreme police brutality against Indigenous peoples. See https://fundrazr.com/61VfPe?ref=ab_75eUJGt9XcB75eUJGt9XcB.

can an officer know someone has FASD, and what makes them so certain about this “diagnosis”? Furthermore, what is accomplished or enabled by this diagnosis?

Stewart’s analysis actually provides us with rich data in which we can provide additional analytic and ethnographic moves in understanding this politicized terrain of the lay diagnosis at the contact point between police and Indigenous peoples. For one, Stewart provides data on how officers ‘see’ and intuit things like aggression and deviance in their ‘clients,’ and associate this to neuro-biological concepts of damage. Her analysis provides further clues about the institutional and cultural milieu of policing creates conditions for specific kinds of mediations of appearance. For instance, how a lay diagnosis by a police officer is implicated in a discourse of medicine and neuro-psychiatry, but also as a discourse of determining guilt. This is a highly specific condition of prejudice, and there is a rich literature for studying these kinds of complex dynamics at the site of race and law.⁸⁰ And Stewart even indirectly brings this critical apparatus into view and puts it into conversation with a critical analysis of medical discourse by referencing the groundbreaking work of anthropologist Michael Oldani, who argues that FASD is a *racially scripted* disorder that leads to different outcomes of care for Indigenous peoples in the medical and social welfare sectors.⁸¹ Stewart gestures to this work, and so tells us how an analysis of the racialization of FASD in the justice system might go, but her focus is, as already shown, more on a general, and thus flattened, “ethical” problem of the marginalization of FASD in the justice

⁸⁰ This was the subject of chapter 3 where I analyzed the ideological gaze that informed the (in)ability to see evidence of the surveillance footage of the encounter between Brian Thomas and Irvine Fraser on the bus. And I am reminded of the ideological analysis of racialized image making and seeing in the cases of Rodney King (Butler) or Trayvon Martin (Ralph), where video footages of these men were manipulated with primitive techniques of increasing or decreasing the frame rate in order to affirm and accentuate the threatening flesh of the black body. Such studies clearly articulate the embodiment of white supremacy collectively within the faculties of the senses as well as reason that expertly manipulates these feelings within legal discourse and procedure.

⁸¹ Oldani, “Uncanny Scripts: Understanding Pharmaceutical Emplotment in the Aboriginal Context.”

system. By focusing on the specific ethical problem of how police identify FASD we also discover that it is an incredibly important political problem too.

Oldani provides precise ethnographic data and descriptions on how doctors, school principals, and social workers interpret Indigeneity through “racial scripts” that produce Indigenous difference along modalities of geographical boundaries (urban children = civilized white, and rural children = chaotic and Indigenous); or through titillating fantasies and associated speculations of chaotic family lives of indigenous children (are the children being abused?). It is in these scripted narrative structures where Indigenous children are “emplotted” for pharmaceutical or social welfare intervention, but at base it is a modality of diagnostic intervention of the dysfunctionality of Indigenous life. Questions like *why is this child is so disruptive/hyper/mean?* or *why is this child always late for school?* are invited to be explained by recourse to these scripts of racialized damage and dysfunction. FASD is, as Oldani argues, one such modality in which a generalized dysfunction of Indigeneity is captured in a cultural-institutional formation of knowledge and sensibilities in which it makes sense to ask such questions of Indigenous children and, thus, diagnose them and mark them for increased intervention.

Within Stewart’s own research we can find several important social contexts whereby officers reveal important ethnographic data for understanding how FASD is a racialized object of knowledge and how it is circulated through various rituals and customs. For example, when officers casually discuss their ‘clients’ over coffee or in locker room talk, as these are the mundane social spaces where the “FASD bastard” trope takes root and is given meaning. These are the kinds of sites where we can ask more specific questions about how officers know that an

accused has FASD. What are the markings that officers see? In addition to making ethical corrections to the nature of the officer's associations, we can also examine how it is that these officers are making simultaneous associations of guilt, aggression, and defiance in the first place, and how and why are these associations made under the rubric of FASD?

However, such questions require us, I argue, to have an understanding of how FASD as racialized, and to acknowledge and document how FASD impacts Indigenous peoples. This changes drastically how we can then make interventions regarding how FASD is mobilized by the justice system. But as we have seen, the de-racialization of FASD in much of our analyses is a central part of the discourse of FASD, a magic-like trick that that informs the entirety of the discourse (in Canada, at least). As we have seen in other chapters, it is precisely the strategic manipulation of this racialization as (un)speakable in specific temporal-institutional forms where Indigeneity is made into a silent partner of the medico-legal discourse of FASD.⁸² In the intervention world of FASD and justice, Indigeneity is often only seen from skewed angles. A noteworthy example of this is how Stewart's research on cops and FASD has nothing to say about the particular role this profession plays in unethical treatment of Indigenous peoples in the justice system, but her work in the *Navigator-Advocate* program and the questions of FASD and justice are steeped entirely in the question of Indigeneity. We are thus not only talking about a racialized scripting at the frontline level of interaction between doctors or police officers and a certain sector of the public. As we move from analyses of lawyers and their clientele, to epidemiological research on prevalence, to research on the frontlines of policing, we see how FASD is subject to a form of power/knowledge that influences the very questions that can be asked, and which informs the sense in which political interventions can be imagined. Within the

⁸² Recall that we are addressing the temporal-institutional form of the "in-between" of the criminal justice process, that space-time after and before further incarceration.

gaps of this knowledge and intervention is the subject of Indigeneity and crime. The gap between Stewart's research on cops and her directing of the *Navigator-Advocate* program is suggestive of the ways in which Indigeneity is already presumed to be part of the problem of FASD. This is the parallel magic trick that goes hand in hand with conjoining FASD with crime.

If this is non-critical formulation informs how we view police officers and front-line law enforcement officials appropriating and operationalizing FASD, what does it look like on other non-judicial front lines, the places where *Navigator-Advocates* and other such Aboriginal- and FASD-sensitive programs are meant to intervene? To show this with ethnographic elaboration, and by way of conclusion, let us return to the story of James. He was precisely the recipient of a similar infrastructural program as *Navigator-Advocate*. How much did an FASD worker, like me, one who is Indigenous and could provide a *culturally- and FASD- informed approach*, help him to make “real-world change” in his life? At risk of a spoiler, but in the interest of wanting to make my point very clear: I strongly push back on the notion that cultural sensitivity and FASD-informed approaches make any meaningful difference in the lives of James and so many others. The needs and possibilities for meaningful change lie elsewhere – and to get to that elsewhere requires that we begin with politically informed positions that refuse accepting that the *problem* is neuro-biologically rooted in *individuals*, or that the *problem* is one of cultural mistranslation or ignorance or “insensitivity.” And even if these tropes of neuro-damaged delinquency and cultural appropriateness are rooted in *good intentions*, we will see shortly how they are equally susceptible to massively unethical and prejudicial frameworks; frameworks that I argue are infinitely more relevant and pertinent to understanding if we wish to ever make meaningful changes in the lives of people like James.

What are your goals?

James's social worker, Ken, is the epitome of the social workers who preside over Indigenous life in places like Winnipeg. I met Ken immediately after I met James. James had recruited me to help him get access to funding in the program that Ken worked at, which was one of the main provincial programs that outsourced work to Fresh Start. The mandate of Ken's program is to provide services to people with "a mental disorder or disability who pose a high risk to themselves or others," helping them to "live successfully in the community, while striving to ensure public and personal safety."⁸³ James and Ken knew each other well and, in fact, Ken had once been a group home worker at a home that James lived in during his early teens. The two joked about how 'crazy' things sometimes got in those days, and it was clear that James did not quite like Ken, but had no choice but to tolerate him now, in ways that differed slightly from the days that Ken ruled over James in the domestic sphere. Ken used to have control of when James was able to come and go from the house; now he had control over whether James could access certain community resources that was at times, we shall see, extra-legal if not explicitly illegal. James might have had to tolerate Ken in a different now, but this toleration only ever lasted for brief periods of time. In fact, the whole reason James and I were sitting in front of Ken on this day was to reinstate James to the funding of Ken's program that James had lost months prior when he refused Ken's demand that he get a psychological assessment. "No one has a right to fuck with my head," James told me in private, summarizing the reason for the ending of this

⁸³ Ken's program is funded by both the ministries of Families and Justice. Importantly, this program is a funding mechanism for people "who are not eligible for other existing services," a situation that occurs for a variety of reasons, but most significantly because their intellectual disabilities are not considered significant enough (generally measured by IQ scores, which must be below 70 to be eligible for the other main community program). Services in this program include "case management, consultation, funding support and resource development." Fresh Start is a non-profit organization that such provincial programs as Ken's regularly contract out to perform the daily "support and resource development" end of managing the "risk" of these individuals by providing a specific "FASD-centred" approach of community outreach.

In the interests of maintaining anonymity the name of this program has not been mentioned here. Similarly, all names of social workers and names of the patrons of services have been changed.

relationship. Such breaks were common for James, and he usually took the opportunity to travel. Sometimes hitchhiking out west, sometimes nowhere in particular, often to the reserves of his kin. Eventually James would return to Winnipeg and, by necessity, slowly enter back into relationship with this invasive system he so deplored – he needed housing, or at the very least, maybe he could get a room at the local Sally Ann.⁸⁴ James was in the midst of one of these reintegration process when he came to our holiday party at Fresh Start. My Program Director, Melanie, knew James quite well and, being quite familiar with my research and the fact that I was always eager to work with more people, suggested that I begin working with James “pro-bono” and help him to get him re-established with various systems in the city, like his EIA (social welfare), housing, and even helping him to meet with his probation officer that I learned James was freshly back in contact with now that he had returned.⁸⁵ The pattern was one that I would become very familiar with as participants lost provincial funding for any number of infractions, including refusals to participate in various programming, like anger-management or literacy programs, invasive inspections of their minds, or even going to jail. In some ways our program became caught in a loop of re-facilitating and re-connecting our participants to our program. My visit with James on this winter afternoon was thus an absolutely typical part of my job, even though James did not technically have “funding.” It was why we were there, after all, to get James hooked back up.

After questioning me and my intentions, and why James wanted me in the room, Ken finally sat down to get to business with James. The first thing he said to James was, “what are your goals?” The words seemed to suck the air out of the room, and James slumped in his chair,

⁸⁴ Refers to a Salvation Army homeless shelter.

⁸⁵ My research offered “flexibility” because my ethnographic research operated through the position of a community worker. I was thus not just an employee, and Melanie and others strategically utilized my dual labor positions to the benefit of the organization.

utterly exhausted by this uninspired and spiritless question.⁸⁶ Even though James had recruited me to join him in this meeting, knowing very well that I could offer a level of legitimacy to James' intentions of seeking resources, I was no match for Ken's spiritless and detached question: "what are your goals?"⁸⁷ As James sank in his chair, I saw a lifetime of this question take shape in his slumped shoulders and legs that sprawled casually and without purpose in front of him. "I don't know," he said quickly. How many thousands of times have well meaning, and not so well meaning, "workers" told James that if he just imagined a successful future, he could live a successful life? The ineffectual pep talks of my grade 5 gym teacher echoed in my head: "successful people create goals!"

Ken, a social worker by day, football coach by night, jumped up and clapped his hands and tried to cheer the visibly dejected James as best he could. Maybe "school is a goal?" Ken suggested. "You've mentioned before that you want to go back to school, didn't you?" James instinctively answered, "yeah sure." It seemed that Ken had planned this whole event in his head beforehand, as he responded almost immediately to James with a dull congratulatory remark about how "good" this goal was and then proceeded to instruct James on the next steps; it turned out James had some "homework" to do. Basically, after their meeting James was to go around to some schools and gather some literature on them, like pamphlets that described the programs and what not. Oddly, Ken did not even pretend that this was an informational exercise of reconnaissance. He simply wanted James to bring him pamphlets in order to prove that James had gone to these schools, the pamphlets being the spoils of a really dull scavenger hunt. 'How

⁸⁶ Stunning, but not surprising, this question puts linguistic boundaries around a very typical relationship dynamic between so many social workers and their clients. I witnessed numerous such scenes during my fieldwork of spiritless and burnt-out workers barely trying to conceal their pessimism and outright contempt for their "clients."

⁸⁷ My white appearance, education, and working knowledge of social service systems means that workers cannot typically dismiss me in the same way as they often dismiss James. James and the other participants I worked with knew this well and deployed me strategically for a variety of different purposes, a job I was happy to fulfill.

strange. Homework without even having to read,' I thought. Importantly, this was not a negotiable item for Ken. James had no choice but to participate in achieving this goal that Ken had just staged and coaxed out of him. To James's expressed displeasure about the pointlessness of this exercise, not to mention the difficulty he would have marching to all of the various schools without money for taxis or buses (and, do schools even have promotional pamphlets?), Ken responded with the equally staged comment that this act would demonstrate "buy in" on James's part. I came to recognize this phrase as a favorite among Ken's social worker colleagues, and a framing concept that mediated their relations with a clientele that was overwhelmingly Indigenous.

What did it mean though, "buy in"? It never was quite clear. Ken said that it was a way for James to show he was a "team player," as well as a way to "show respect." But the methods of showing this were absolutely arbitrary and enormously capricious. For instance, Ken tied this 'buy-in' to a weekly ritual in which James was to "check in" with Ken once a week on Wednesdays, somewhere between one and two o'clock in the afternoon. I drove James to the majority of these "check ins," and noted some peculiar and disturbing details of their meaning or purpose. For one, Ken typically would come out of his office only to wave James off and return to his nook on the other side of the bullet proof glass that separated the offices from the public at this provincial building.⁸⁸ As if this disciplining requirement wasn't insulting enough, Ken would frequently be missing and took no care to let us know beforehand.⁸⁹ And, keep in mind that these

⁸⁸ This building served as a welfare office and also housed certain members of the provincial program that Ken worked at, as well as other social workers from different programs. It was a notorious war zone, where welfare workers seemed to take great pleasure in antagonizing people looking for their welfare pittance. A guard sat perched at all times behind the glass, ready to expel anyone who crossed the line arbitrarily imposed by the workers.

⁸⁹ James had regular access to email in these days and communicated with his probation officer via this medium, for instance. Ken also had my personal phone number and called it on other occasions to inquire about James. Ken was able to take advantage of the resources that I provided for James, including my car that made getting to his office that was a 45-minute walk for James.

“check ins” were at the social welfare office on Main St. in the north end, where everyone must wait a requisite half hour before speaking to anyone at reception. A half an hour to be waved off is one thing. A half an hour to be told that the person you are waiting for is not even there is another story all together. “Buy in” in these scenarios was deeply related to an exercise of power in the requirement of waiting.⁹⁰ When James, or I, would ask Ken why James had to keep coming back like this, or what it all meant, Ken would answer pompously to James: “this is the carrot I have to put in front of you.” And whenever James would ask how much is enough, Ken would brush it off and tell him vague things like “we’re getting closer” and coach-like pep talks for him to “hang in there.” These were so many enactments of the future, foretold as an endless deferral.⁹¹

Obviously, James never did return with any brochures. It didn’t end this test-run with Ken, but it was ammo for him to later affirm that James was “not ready” and to keep stringing him along. Eventually the whole charade fell apart for an entirely predictable reason. One day Ken tentatively agreed to get James back on funding, the closest he’d ever come to ending this charade, but on the condition that James must “do therapy,” which involved getting a psychological assessment. Once again, Ken was told to fuck himself. Once again, the relationship went dormant. “No one gets to fuck with my head,” James repeated.

This analysis shows us the fluidity between FASD as a diagnosis of behavioral difference and the racialized presumption of brain damage, and the generalized need to diagnose and intervene in the psychological well-being of Indigenous peoples today. What is particularly interesting in the case of James, however, and extremely relevant to our analysis here, is that Ken

⁹⁰ Javier Auyero, “Patients of the State: An Ethnographic Account of People’s Waiting,” *Latin American Research Review* 46, no. 1 (2011): 5–29.

⁹¹ And, as such, they bore a specific, though inverse, relation to the anticipatory temporality of FASD as a threat always to come or as the disorder that is always already present.

was otherwise indifferent to any notion of James having an FASD. In fact, he didn't treat James like he had FASD at all, and his desire to peer into James's mind seems to have been dictated by the broader reflex of penetrating the Indigenous mind. Ken and his colleagues definitely assumed that James had FASD or some other kind of profound disorder – otherwise James would not have been eligible for this programming, which concerns itself with the risks to public safety posed by mental disabilities like FASD, in the first place – but Ken otherwise treated James as a hyper-capable individual and repeatedly tested his mite by ordering him to do things like making regular, but arbitrary, appointments; problem solving ridiculous tasks like finding a brochure for a public school; and just the basic assumption that James was capable of generating unlimited resources for himself to survive a homeless person. This is a stark difference from the approaches argued by FASD advocates, who emphasize the *lack* of capacity of individuals with FASD, that they cannot monitor their impulses and, most importantly, cannot think clearly or strategically about their futures. Of course, James was capable of all of doing all of the ridiculous things that Ken demanded of him, but this is the point: Ken recognized James's capacities, and they were ruthlessly exploited. Despite his engagement with a mental health public safety program that conceived of James within a categorization of risk to public safety by virtue of his alleged mental instability and unpredictability, James was still treated within the lens of politically and socially normative values of neoliberalism that demanded he exert his individual will and exercise responsibility in his choices and, ultimately, justify that he deserved the resources of the state that was taking care of him.⁹² People like Ken demonstrated their own allegiance to the codes of this neoliberal model and, that, in their day-to-day interactions with

⁹² Salmon, "Aboriginal Mothering, FASD Prevention and the Contestations of Neoliberal Citizenship"; Andrew Woolford and Amelia Curran, "Neoliberal Restructuring, Limited Autonomy, and Relational Distance in Manitoba's Nonprofit Field," *Critical Social Policy* 31, no. 4 (November 1, 2011): 583–606.

people like James it was less significant that they had FASD or any other mental or cognitive malady than they were rightfully subjugated to the demands of the state. In other words, it did not matter if James was indeed disabled, it mattered more that he was willing to submit to a psychological test and the concomitant storying of his life as one that is deeply pathological. So, would it be beneficial for Ken to take some training to become more FASD-informed in his approach? Perhaps, but to focus exclusively on that neglects the broader political conditions in which Ken is acting and in which James is trapped.

We see here how FASD, murky as it might be, becomes mobilized with different significance at different social locations. And this further helps us to interpret James's forceful "NO!" to me as I pried into his life and tried to generate proof or certainty about his diagnosis. For it was an attempt to maintain the strategic location that had been weaved for him, and the precarious position that he carved out for himself in these conditions. If "no" exercised a complex recognition of this system and his simultaneous refusal of its invasive qualities (of which my ethnographic persistence was certainly one) and his provisional embracing of it, his deflated "I don't know" to Ken conveyed a more pessimistic acceptance of this system. It was a strategic embracing of, and distancing from, of the faux-enthusiastic words of a mediocre social worker and the casual insults and indignities of his penetrating gaze that demanded full access to James' body and mind. It was a delicate strategic position that went on until it no longer could, abruptly ending with a well-meaning 'fuck off', only to resume several months later. This song and dance is descriptive of a general relational field in places like Winnipeg, where Indigenous peoples in poverty must constantly exert themselves and endure the state's representational demands and balance it with their own sense of self; where life depends on one's capacity to tolerate the general invasive indignities of workers like Ken. The rhythm of this relational field

depends on a host of personal and social resources that one can draw upon. FASD is one more field of strategic deployment and capitulation, that is rejected and accepted, imposed and assumed, in a constant back and forth of forces where Indigenous life must find breath.

If these rhythms are typical, to the point that they become mundane, in a sense, to the lives of people like James and so many other young men that I've worked with over the years, it is important to refuse this mundanity and acknowledge that innocuous as FASD might be seen in its strategic deployment by people like James, it is still a condition that is ultimately imposed on them. But this is only scratching the surface of the structural power dynamic at the heart of FASD. The arbitrariness of Ken's power moves, his explicit tying of assistance with a neoliberal valuation of deservingness that James had to show and adopt, and the delicate embrace of the FASD label were only a faint glimpse of the darkness of the scripts that constantly squeeze and contort James's body and life. Just as the gap of uncertainty between the belief and fact of FASD are magically held together, so too is there a dark gap, or systemic murk, that contains and holds together this system of "helping" and "caring," or "intervening." What does this darkness look like?

Several times I was witness to an unholy relationship between Ken and James's Employment and Income Assistance (EIA) worker, Sharon, who, because of their shared office space in the bullet-proof glass welfare office, were able to collude in extrajudicial regimes of punishment, which they regularly described as 'tough love,' with James. For several months, Sharron would hold James's EIA cheques hostage if James failed to meet with Ken at their pre-arranged "buy-in" meeting. When I attempted to flex some of my limited power in defense of James and ask how EIA was in any way related to James's relationship with Ken, who works for a Public Safety agency of the provincial government and has no formal connection to EIA other

than spatial proximity, Sharon would say it was not her problem and that it was a problem of the agency that Ken worked for. “Oh, so does this mean James is being funded by them now,” I would ask? “You have to ask Ken,” I was told. Of course, James hadn’t been accepted into Ken’s program, which made it even more maddening that she could honestly use this as an excuse to hold his funds – not only was there no formal, or legal, principal with which to exert this power, but it was built on another lie: James didn’t even have status in Ken’s program, so Ken didn’t have any right to even suggest such a conditional relationship with James’s life. It was one more way in which James was caught within an impossible temporality of perpetual deferral. When I pushed, however, Sharon had no choice to hand over James’s cheque. It was absolutely illegal to do otherwise. But she always found a way to give us the runaround and demand that we wait until the end of the day, knowing full well that James was absolutely homeless and destitute. This was clearly more than any kind of love or caring, even if it was considered to be “tough.” What benefit could come from withholding money from someone in poverty? What lessons was James supposed to learn?

Over time I was able to discern a distinct logic, and impressionistic sense, of what Sharon, Ken, and so many other social workers were up to as they treated their ‘clients’ with such hostility and disdain, but within a language of love and care. I watched their rationales fail and their emotions and affects flare, particularly their expressions of anger and disgust, all of which pointed me towards a disturbing sense of pleasure that informed all of this theatre of power. For when James would ask Sharon something simple, like why he couldn’t get his welfare cheques distributed monthly, as opposed to weekly, and with his own clear and sensible rationale for such a request, Sharon would remain stubbornly adamant in her denial, never with clear reasoning and only with angry outbursts that matched and sometimes exceeded those

outbursts of James.⁹³ Sharon insistently dismissed James's, and my, reasonable questions, always turning it back on James; It was for his *own good*, she said, because otherwise he would go spend it all on drugs and do "God knows what!" with it. There was thus always a distinct certainty that was framed by a putrid unknown.

On one particularly explosive, and thus telling, occasion, Sharon elaborated on what she meant by this often phrased, "God knows what," and described a fantasy in its horrid, but fascinating, detail: it was of James coming to her office in tatters, with filthy and ripped clothes and holes in his shoes, stinking of shit and crying and begging for more money. Even though Sharon fashioned herself as a motherly figure in this fantasy, providing care and love (even if "tough") to James, her attitude betrayed the ultimate paternalistic structure of this fantasy, with Sharon as a benevolent but capricious ruler. Furthermore, it betrayed itself in the fundamental insecurity at the heart of this fantasy, the fear of an unknown: what *did* James do with his money? Where *did* he spend his time? Such lack was always concealed with the accusatory mode that pre-emptively dismissed James's accounts as lies or attempts at deceit that would not fool her. The demands by Ken for James to be utterly transparent and amenable to the whims of the state were always accompanied by such modes of suspicion where he was constantly

⁹³ Most people I worked with like James received approximately \$70-\$100 per week through social welfare. James reasoned that if he wanted to buy a new pair of shoes he could not do so because his cheques were not enough. Rather than even considering the sad material shortfall of this situation, that buying new shoes would obviously prevent James from buying other necessities, like food, Sharon simply claimed that James would only have access to more drugs, and that morally she could not condone or allow that. Undeterred, James reasoned further that monthly cheques would be a win-win for both of them because Sharon obviously did not like seeing James, and so distributing his welfare payments monthly would spread out their encounters. Surprisingly, Sharon entertained this reason and claimed that "nothing would make me happier!" but Sharon remained obstinate in her refusal of James's request under the banner of doing it *for his own good*. Dictating the schedule of cheques was a clear site of control and power that I observed repeatedly in fieldwork, one that James very clearly articulated on many occasions to me, and which Sharon demonstrated quite explicitly too. His anger and occasional "out bursts" made sense to me. Sharon's took more in-depth thought and reflection – what could she possibly be so upset about? The bullet-proof glass began to make more and more sense as I thought about these dynamics. Not as a necessary protective shield to state workers, but as a sustaining justification of their hostile abuses of power. Despite being clear see-through, they did reflect back to these social workers a moral righteousness to their work that protected them from seeing the conditions of horror in which they presided over.

perceived as hiding something. This is the same dynamic that we witnessed in Stewart's study of creating more efficient trainings for police officers who both wanted to know more about FASD in order to be better equipped in the frontlines while also claiming that FASD was effectively a "get out of jail free card" for individuals, with the implication that FASD is but one big ruse intended to foil the work of police officers.⁹⁴ Even Irvine Fraser's dismissal of Brian Thomas on the bus was, as we have seen, predicated on some accusation of Thomas's apparent attempt to dupe him. As a justification for kicking Thomas off of the bus, he claimed that the latter was awake when his friends got off the bus so there was no reason for him to be unaware that he was now stranded at the last stop on the edge of town and with no way to get back.

The form of such suspicion is thus important to understand in depth, if only because it is so utterly pervasive. Sharon was so utterly loath to be duped by James, *again!* Such fantasies of shit and filth and cunning deceptions are common renderings of a fundamentally unknown world that can only be fantasized about. In these desperate attempts to know the dark places that James went when he left Sharon's office, or what evils he spent his money on, and what his *true* motivations were for getting more money, Sharon and so many others actively fill in an unknown with a libidinally charged darkness. And so she constructed her own fantastical scenarios of filth and shit and God knows what else, all the while taking enjoyment, I suspect, from transgressing, or transcending, the moral norms of decency in her abject treatment of James as she forced him, every week, to suffer her indignities.⁹⁵ The suspicious demand to know *from where does James*

⁹⁴ Stewart, "FASD & Justice," 198. Note the parallel critique often lobbed at *Gladue* as a similar "get out of jail free card" for Aboriginal offenders. *CITE*. And it is not lost on us that this same suspicion was directed towards the fear of being contained within the soft metaphoric of the feminine that is attached to social work and which police officers so readily dismiss.

⁹⁵ Psychoanalytic scholars have shown how central *jouissance* is to racializing structures and, particularly, how the *jouissance* is constituted in a dialectic relation to the social and the law, and achieving expression precisely in those moments of transgression of the law. See Sheldon George, "Jouissance and Discontent: A Meeting of Psychoanalysis, Race and American Slavery," *Psychoanalysis, Culture & Society* 23, no. 3 (September 1, 2018): 267–89; Hook, "Racism and Jouissance."

receive his enjoyment? provided the very fecund coordinates of squalor and deviousness in which Sharon and Ken could engage in their own debaucheries and illegalities, or transgressions, making questions of responsibility and punishment less about FASD than about the prejudicial frameworks in which they had come to understand and relate to people like James.

These are efforts to, allegedly, make James feel responsibility, but through a convoluted and irrational set of demands in which James is to take control of his life, while, it bears repeating, depriving him of the material means of doing so. Here the rationale of responsibility breaks down and becomes more directly punitive. Responsibility, goal setting, “buy in,” these are all motifs of upholding a law while providing room for these state workers to linger in a mode of cultural and institutionally-conditioned *jouissance*. Such are the perverse conditions in which FASD is known and in which Indigenous individuals are made to accord themselves with the state, whether in the justice system or beyond in ancillary systems like EIA or social worker offices. It is such conditions that permit the carceral system to transcend the walls of the courts and prisons. If FASD is really at the heart of how “to rethink how justice is done in Canada,”⁹⁶ this is where I believe we should begin. Any attempt to develop a more “ethical” justice system for Indigenous peoples or individuals with FASD that does not begin here is not ethically or politically meaningful. They may be forms of a “rethinking,” but not one that is to the benefit of Indigenous peoples. Working to build robust infrastructures with frontline workers to provide culturally- and FASD-informed approaches and advocacy to meet the needs of Indigenous and “justice affected” youth might lead to “real-world change in the lives of Indigenous people with FASD,” but I argue that it will be more of the same: just a little bit more efficient for the state.

⁹⁶ Michelle Stewart, quoted in Baliko, “U of R Project Responds to TRC Call to Action to Address Needs of Offenders with FASD | Communications and Marketing, University of Regina.”

Our efforts would be better spent imagining how we can dismantle the system, not contributing to its efficiency for apprehending and containing Indigenous life.

Conclusion: Troubled History, Hopeless Future

The obsessional dynamic of peering into the Indigenous mind and psyche has been a central tactic of the Canadian state as it tries to reshape and change Indigenous personhood and behavior. This project courses through the long history of settlement and runs a methodological gamut from saving (or harvesting) Indigenous souls in Residential Schools, to saving Indigenous peoples from trauma. Cree-Métis scholar Emma LaRocque argues that this logic and practice of changing Indigenous personhood has converted Indigenous critiques of dominant systems into psychological problems to be addressed in the therapist's office.¹ Athabaskan scholar Dian Million has charted a concise genealogical analysis of the ways that psychic domains of trauma have become a pervasive tool for robbing Indigenous peoples of political self-determination.² But as the state mobilizes trauma as a cultural condition that enables paternalistic state "care," the bio-cultural and psychic depths of FASD as a permanent disorder of brain damage should give us pause for how this regime of settler state political control seeps deeper inside of Indigenous life and does so with much darker implications.

In the midst of car theft explosion in Winnipeg in the late 2000s, a group of reporters published a sensational genealogical account of fourteen of Winnipeg's most notorious youth car thieves. Titled, "Chill. Kill. Thrill: A night in the life of Winnipeg's car-stealing subculture," it rehearsed many of the public sentiments of fear and anger that united the discourse of law and order with the medical discourse of FASD, much of which we have seen enacted repeatedly

¹ Emma LaRocque, "Re-Examining Culturally Appropriate Models," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997).

² Dian Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (Tucson: The University of Arizona Press, 2013). See also Joseph P. Gone, "Reconsidering American Indian Historical Trauma: Lessons from an Early Gros Ventre War Narrative - Joseph P. Gone, 2014," *Transcultural Psychiatry* 5, no. 3 (2014): 387-406.

throughout this dissertation.³ It is really hard to overestimate how much fear Winnipeggers were carrying in their daily lives during these times as they struggled to comprehend the meaning and purpose of the high-stakes game being played by Indigenous youth as they taunted police, tried to run over unsuspecting joggers, and ultimately killed innocent pedestrians and drivers who were caught in the unlucky position of being in the wrong place at the wrong time. The death of cab driver Tony Lanzellotti in 2008 was one of the central elements that informed the writing of the *Winnipeg Free Press* article, “Chill. Kill. Thrill,” as the youth profiled in this article were all joyriding in the SUV that caused his death.⁴ In the genealogical mapping of these youths, it was revealed that several of these youth were involved in other life-ending crashes, such as the stolen Hummer SUV that crushed Zezislaw Andrzejczak in his tiny Subaru Firefly one year prior.⁵ Dramatic and incredible as this repetitive manslaughter is, it was something else that pushed the reporters in their recounting of these events.

The eye-witness account of the crash that killed Lanzellotti given by a gas station attendant is demonstrative. The attendant told them of the disturbing and loud sound of the crash, and how he watched one of the youths, who had been violently expelled from the sunroof of the SUV that was travelling at almost 140 km/h when it struck the cab, somehow immediately stand up, looking a little bit disoriented, but otherwise unscathed, only to then be run down by another car that was attempting to avoid the wreckage. The gas station attendant described with astonishment how the youth still did not die. “He was crawling over the median. He was cold and shaking. He couldn’t breath.” But, “Again,” the reporters dramatically declared, “[he] stayed

³ McIntyre, Turner, and Owen, “Perspective: Chill. Thrill. Kill: A Night in the Life of Winnipeg’s Car-Stealing Subculture.”

⁴ McIntyre, Turner, and Owen.

⁵ Mike McIntyre, “Teen Pleads Guilty in Stolen-Vehicle Crash That Killed North End Man,” *Winnipeg Free Press*, June 12, 2010.

conscious.” Several other youths were badly injured, including the driver who was crumpled around the steering wheel and had to be rushed to the Children’s Hospital in critical condition. Another had serious arm and chest injuries, but was able to kick out a back window of the mangled SUV and flee the scene with two others who only had “bumps and bruises.” This injured teen was caught a day later and, similarly, rushed to the hospital in critical condition. Remarkably, all of the youth survived with relatively minor injuries, and all stayed conscious in the immediate aftermath of the crash. One of the girls broke her pelvis in the crash but was caught in another stolen car three weeks later while awaiting her sentencing. The reporters described her wheeling into the courtroom in a wheelchair and the Crown prosecutor “dryly” noting how “miraculous” her recovery had been that she could be so criminally active outside of the court with a shattered pelvis. Crown prosecutors, police, and reporters alike were simultaneously enraged and enthralled, as well as coyly irritated, by the ability of these youth to remain alive and relatively uninjured. It is as if these youth possessed a zombie-like capacity to hang on to life, or that their lives were driven by a singular and insatiable urge to commit crime and wreak havoc on social order. These impressions were contrasted sharply with the instantaneous and tragic death of Lanzellotti and the difficulties his patron had in clinging to life, and particularly the selfless act of this patron who attempted to pay his fare as paramedics struggled to keep him alive.

Something of a similar death-like drive was captured in the repetitive trope of laughter that haunts the reporters of this article. Several times they take liberties to imagine a demonic “whooping and laughing” that must have been fueling these crazed youth:

Elijah kept his foot to the floor and his passengers screamed with their glee and excitement. They had the sunroof open, even on a chilly March morning. Bill Robinson cranked up the radio. With the music blasting and the passengers whooping and laughing, and with the 14-year-old driver a bit high, a bit drunk and zipped on adrenaline, the

Avalanche made the street signs look like a deck of flip cards. [The streets of] Spence, Young, Langside and Furby whipped by in a blur. By Sherbrook [street], Elijah had the Avalanche doing 138 km/h.⁶

The troubling echoes of an indiscernible teenage enjoyment that carry through this article inevitably become the haunting and shrill laughter of one of the female *joyriders* that the reporters fixate on. As one of the members of the stolen SUV that took Lanzelloti's life, this young woman allegedly laughed in the faces of police when they told her Lanzelloti was dead. "I don't care that he's dead. People die everyday," she is reported to have said. If her laughter captured the horror of the unrepresentable, it was the sound that pointed to something more. This same youth was further 'caught' writing commentary about the crash on social media where she similarly dismissed the death while celebrating her own near-death adventure. "She was also seen smiling, laughing and twirling her hair," the reporters tell of the girl who seemed to enjoy provoking police officers and judges alike with her stunning and stylistic coldness and indifference to life. She became known in Winnipeg as the "laughing girl," a moniker which, in addition to expressing the disgust and ire she provoked in police, judges, and reporters, also marked a desperate attempt to try and identify and contain the disembodied voice whose enjoyment was unfathomable, and which seemed to speak through the other youth, making an impossible demand on the public. In contrast to Sgt. Safioles, who was quoted in the introduction as assessing a specific *lack* of a "little voice" in the back of these youths' heads, it seems more appropriate to suggest that it was an *excess* of a voice that simultaneously embodied and escaped these youth, and which in turn unsettled the police and public so much. A voice of radical disregard, one that cheered on chases with the police, the running over of rich joggers, or

⁶ McIntyre, Turner, and Owen, "Perspective: Chill. Thrill. Kill: A Night in the Life of Winnipeg's Car-Stealing Subculture."

ramming of police cruisers. A voice that cackled in the face of death, which was as indifferent as it was joyful as it was loathing.⁷

In this way, FASD can itself be seen as an attempt to diagnose and contain this excessive *voice* of the Indigenous. In the same article, the crime beat reporters of the *Winnipeg Free Press* engage in the regular lay-diagnostic acts we have seen repeatedly throughout this dissertation, but with an important additional set of remarks on the efficacy of the diagnosis that alerts us to the ultimate purposes of this medical assessment and a better understanding for why it is so readily attached to Indigenous bodies. One of the youths, who they identify as Dylan, is described to the public as such: “He’s probably got Fetal Alcohol Spectrum Disorder, judging by the way he looks and behaves. But his alcoholic mother won’t discuss her history, so he can’t be diagnosed and treated, not that there’s much medical science can do.” For the most part, this lay-diagnostic judgment ticks all the boxes of coding the Indigenous body as culturally and biologically dysfunctional with genealogical accounting of an irresponsible and alcoholic mother, a mother who is particularly difficult and has been “unwilling to work with child-welfare officials or even discuss her own history” in the efforts to diagnose her son. Furthermore, his

⁷ Two years after the publication of “Chill. Kill. Thrill,” reporter Mike McIntyre published some of the apologetic words written by the “laughing girl” in a letter that she addressed to the *Winnipeg Free Press*. Mike McIntyre, “She’s Not Laughing Anymore: Teen Involved in Crash That Killed Cabbie Tells Her Story,” *Winnipeg Free Press*, March 18, 2010, sec. Local, <http://www.winnipegfreepress.com/local/shes-not-laughing-anymore-88350287.html>. In this column, McIntyre mocks the youth’s claims at rehabilitating herself, noting how Crown prosecutors, her parents, and even the girl herself are ambivalent about these prospects. “Do you know how emotionally involved I am in this tragic disaster? ... I’ve said some stuff I shouldn’t of, but I’m still trying to take everything back. I’ve changed and even though I keep getting incarcerated there’s still a lot of things that I do differently.” Most galling to McIntyre is how she perceives this youth to still be blaming others for her problems. He quotes her again: “You guys won’t let anyone really forgive me. You guys continue to try and explain how I’m so unremorseful [sic], how I don’t care about anything that’s happened. Well you guys are wrong! I ain’t saying anything I did was right, though...I’m hoping you will let me move on with my life instead of making me feel like I’m trapped in this crisis that I’m already going to have to live with. I have feelings and a life to turn around, which you guys aren’t making any easier for me.” While McIntyre seems to be irritated by an incorrigible teen who is casting blame on others for her problems, it is unquestionable that the “laughing girl” is also turning the gaze around to the obsessive, possessive, and contagious energy of the media in sensationalizing the lives of her and her friends. Just as Sgt. Dennison had warned about the contagious effects of reporting on the crimes of these youth, who were allegedly spurred on to more violence by seeing representations of their violence, “laughing girl” seems to be showing how the media is equally spurred on by such violence and how the public seems to have an insatiable appetite for it.

FASD is clearly linked conceptually and syntactically with being “a Child and Family Services ward for the past several years.” These are all familiar tropes that we see again and again in the lay-diagnostic of FASD. Still, something is odd in how the reporters put all this emphasis in diagnosing Dylan with FASD and haranguing his mother when, by their own accounts, there is “not... much medical science can do” for him. It begs the question: what is a diagnosis for, and who does it benefit? The diagnosis of FASD is caught within a demand that is at once suggestive of some kind of cure, or at least a palliative intervention, but also caught within a discursive register of pessimism that goes far beyond the medical or even legal discourse of FASD. Such paradoxical descriptions give us important clues to a much broader dynamic of encounter with Indigeneity in which the FASD diagnosis is caught and mobilized.

The article is one long exposé on how to diagnosis an entire “subculture” of Indigenous youth as hopeless. Even in cases where certain youth could not fit into the classic “culture of poverty” narrative because they had “good parents” and a decent home life, or who cannot be pegged down as being obviously affected by FASD, it was still psychiatric explanation that came to comfort the reporters by way of an explanation for their behavior. One youth was described by his lawyer as “intelligent enough,” but he demonstrated certain “language issues” and seemed to lack self-control, which required him to have supervision lest he get into trouble. The Laughing Girl was one of these anomalies, whose parents were simply “at a loss to explain her continued shocking behavior.” What inevitably made sense to these parents, the reporters, and the courts, was an explanation given to them by a psychiatric report that “told the court” that her “behaviour may be the result of the suicide of her friend months earlier.” The same psychiatric report “found the girl is still blaming others” and even concluded that “the girl is likely just beginning a lengthy “catch and release” routine with the courts.” The doctor who administered this psych

assessment noted that just hours after being released on bail and entering a guilty plea she ran away from home and broke her curfew. Laughing Girl may not have the brain damage of the other youth who are suggested as having FASD, or the subtly conveyed intellectual disorders related to language comprehension and the inability to be disciplined by the educational system, but she haunts the public with perhaps even greater horror. In these conditions, the diagnostic procedure is used to contain the haunting of these youth. In a word, it gives us *permission* to write these youth off as doomed, and to justify an acceleration of tactics for containing the excess that their lives represent.

FASD not only gives us permission to accept the doomed lives of a specific “subculture” of Indigenous youth, however. It also permits us to accept the doomed future for Indigeneity more broadly. Dr. Ted Rosales, a prominent geneticist who specializes in FASD,⁸ has spoken openly about his fears that FASD presents to the “Aboriginal culture.” In a 2006 interview with journalist Marie Wadden of the *Toronto Star*, he claims that up to 35% of an Innu community in Labrador have FASD, a rate that he sees as close to the “tipping point for cultural destruction in another generation or two.”⁹ He clarifies what he means by the tipping point of cultural destruction: “If we don't act now we will end up with a lot of very dysfunctional individuals making decisions for their community, and because they are the majority, then things will really become very bleak for the community itself.” It is curious that his own accounts of the cultural are characterized by fantastical futurity that is more appropriately considered as directly political in nature, as he focuses on questions of governance and even democratic principles of majority

⁸ Rosales is a co-author of the Canadian Guidelines for Diagnosis, for example: Chudley et al., “Fetal Alcohol Spectrum Disorder.”

⁹ Wadden, “Troubled before They Were Born; Mothers’ Alcohol Abuse Leaves Scars Aboriginal Kids Face Consequences.”

rule. Quite directly, Rosales implicates a discourse of FASD in which a public health crisis is marked by the damaged brains of individuals who will necessarily translate as dysfunctional communal politics.

Even more curious than the horror of this anticipated political community is that Rosales' claims are not based on data that he has put to the test of peer-review publication in a medical journal. Indeed, it is consistent that the "data" for his speculations of public health as a futurity of political dystopia is garnered from his own personal proclivities and extra-professional interests. Specifically, his data comes from a hobbyist interest in Aboriginal culture. Specifically, he "spends some of his free time poring over portraits of Aboriginal people in museums and history books, looking for evidence of FASD in their past." Interestingly, the reporter, Wadden, suggests that Rosales has not been able to "find it [FASD]" in these pictures. "He looks closely at the space between the eyes; the upper lip and nose. People brain-damaged by intrauterine exposure to alcohol have characteristic facial conditions that Rosales can't find in the pictures he has examined." Somehow, he has discerned that the condition simply did not exist prior to the 1950s because "I've never seen an FASD face in the old pictures... I'm certain it wasn't a problem for Aboriginal people in the past." It is never mentioned by Wadden that Dr. Rosales is operating beyond his professional capacities or training, or that his hypothesis, if it can even be called as such, has never been tested by other scientists or professionals that span this multidisciplinary terrain. These are moments where the complexities of personal motivations and fantasies are disavowed as such and become the basis for so-called scientific inquiry and fact, and yet another instance of how outlandish claims about FASD become reputable as these conditions are translated-out during such mediation processes.

Some more words are in order, however, particularly for the methodology used by Dr. Rosales. For there is something striking about poring over portraits of Indigenous peoples in museum pictures, particularly as it re-doubles the aesthetic and political currents in which such photography was initially commissioned. Pioneering figures of American photography, like Edward Curtis, for instance, sought to define “real Indians” through romantically staged portraits that evoked and depicted a historical racial identity that ultimately served to facilitate settler claims to the land by emphasizing the myth of the once great, but now “vanishing Indian.”¹⁰ Once again we see how FASD facilitates the useful deed of representing Indigenous peoples as vanishing, as a “race for whom death is always imminent.”¹¹ As Dr. Rosales puts it bluntly: “If alcohol use during pregnancy is not stopped, the next generation will not have the brain capacity to appreciate their own culture as something they should be proud of.” It is remarkable how these temporal markers simply go without saying for Rosales. What happened in the 1950s that made alcohol so damaging for Indigenous communities? And why does the scourge of alcoholism, rampant the world around, seem to have such devastating impacts only on the “Aboriginal culture”? The professed concerns of Dr. Rosales are more appropriately seen as a tension of a repressed wish, a declaration of how the Indian continues to haunt the settler who can only imagine her as dead or dying. “You see how they have existed for a thousand and some years and then in a short period of time, 50 to 60 years, their whole culture and unique ways of life might go down the drain...” Most dramatically repressed in such declarations, however, is the role of states like Canada and the U.S. who have actively engaged in genocide to clear the Indian

¹⁰ Shannon Egan, “‘Yet in a Primitive Condition’: Edward S. Curtis’s North American Indian,” *American Art* 20, no. 3 (2006): 58–83; Brenda Vellino, “Restaging Indigenous—Settler Relations: Intercultural Theatre as Redress Rehearsal in Marie Clements’s and Rita Leistner’s *The Edward Curtis Project*,” *Theatre Research in Canada* 38, no. 1 (2017): 92–111.

¹¹ Razack, *Dying from Improvement*, 134–39.

from their homelands. Again, such complex histories of political violence are replaced by notions of individual responsibility that are paradoxically sublimated as cultural/collective conditions – for alcoholism is not here an individual problem, but a problem of entire culture. The “scientific” presentation of this set of arguments by a medical doctor gives further legitimacy to this disavowal of history, and presents further capacity for accentuating and revamping dated and prejudicial notions of race while downplaying the political conditions of racialization.

Dr. Rosales and so many other FASD researchers do the hard work of containing this haunting within the diagnostic criterion of FASD. As extreme as Rosales’s ideas of Indigeneity seems to be, it is disturbingly familiar to find similar ideas of how Indigenous culture is literally dying, or simply becoming more dysfunctional, under the weight of the medical disorder of alcohol-related brain damage. There is a common assumption that generations of Indigenous peoples are simply de-cultured zombie-like sacks of meat and bones. Consider, for instance, the op-ed exchange in the Winnipeg Free Press between a former provincial judge, Brian Giesbrecht, and two of Canada’s most decorated and well-known FASD researchers, Dr. Albert Chudley and Dr. Sally Longstaffe.¹² Particularly, the latter were responding to the racist tirades of the former, Giesbrecht, who regularly makes claims about how FASD is an “epidemic” in Canada that is uniquely Indigenous in formation.¹³ Drs. Chudley and Longstaffe started not by dismissing Giesbrecht’s claims as racist, but by disputing his knowledge and citing their own to suggest that

¹² Giesbrecht, “Inquiry Needed into Fetal Alcohol Syndrome”; Giesbrecht, “Battling the Bottle -- the Untold Story: First Nation Leaders Need to Move beyond Victimhood to Resolve Problems”; Chudley and Longstaffe, “Fetal Alcohol Syndrome a Complex Problem: Shame-and-Blame Approach Won’t Work.”

¹³ For a sampling of this racist nonsense, see Giesbrecht, “Inquiry Needed into Fetal Alcohol Syndrome”; Giesbrecht, “Battling the Bottle -- the Untold Story: First Nation Leaders Need to Move beyond Victimhood to Resolve Problems.”

FASD is not an Indigenous disorder but a universal one that applies to all ethnicities and all class demographics.¹⁴ As the common refrain goes, wherever there is alcohol, there is FASD. It was their specific attempt to dismiss his claim of prevalence rates of FASD in Indigenous communities that is most important to our discussion here, however. For as they put it, it is true that there is an elevated rate of FASD in Indigenous children that are diagnosed with the disorder, but, they argue, “this is, in large part, due to a bias in referral patterns.” They go on to describe what they mean by this bias:

We [the FASD clinic] are more likely to see the children referred by Child and Family Services agencies than at the request of birth parents. A high percentage of children in care in Manitoba are First Nations. There are very few Caucasian children referred to the diagnostic clinic. This is because those agencies are proactive in referring kids in care they *believe* are affected with FASD, which may not be top of mind for some physicians examining non-aboriginal children with similar symptoms. They may come up with a less inflammatory diagnosis [for these non-Aboriginal children], such as one connected to attention-deficit or learning disorders.¹⁵

To recall the theory of anthropologist Michael Oldani, this description of bias is almost a perfect account of what he calls “racial scripting,” where it is “top of mind” (or belief) for doctors and social workers to literally see Indigenous children as candidates for FASD, while non-Aboriginal children receive “less inflammatory” diagnoses like ADD for similar symptomologies.¹⁶

Furthermore, Chudley and Longstaffe note that this is for structural reasons, because the child welfare system is grossly overrepresented by Indigenous children, and because this is where most referrals come from, there is a natural selection bias that artificially overrepresents Indigenous children with the disorder. Having made this exceptional analysis of systemic racism

¹⁴ Chudley and Longstaffe, “Fetal Alcohol Syndrome a Complex Problem: Shame-and-Blame Approach Won’t Work.”

¹⁵ Chudley and Longstaffe, emphasis added.

¹⁶ Oldani, “Uncanny Scripts: Understanding Pharmaceutical Emplotment in the Aboriginal Context.”

in the diagnostic process, however, Chudley and Longstaffe immediately disavow it in the very next line of their text:

We need to recognize that several generations of First Nations, Inuit and Métis children have *suffered because of colonization*, residential-school trauma and discrimination. *This has resulted* in generations of poverty, mental-health issues and addiction disorders. These realities are a major reason that we see generations of affected children among our First Nations people.¹⁷

We thus have two diametrically opposed explanations for the overrepresentation of diagnoses of FASD in Indigenous children, one situated in a systemic analysis of institutionalized oppression that makes it possible to quite literally “see” FASD more readily in Aboriginal children; the other based on the concept of the intergenerational effects of colonization that lead to high rates of FASD in Aboriginal communities. The former points to how Aboriginal FASD is artificially maintained because of pre-existing inequalities in the Indigenous community; the latter gives this artificial representation substance by explaining that it is the “result” of the past. What is going on here? How can this blatant contradiction between describing *active* colonial violence and *historical* colonial violence be maintained?

This contradiction of “colonization” as both a causal, explanatory factor, and as a spectral ghost of an historical elsewhere, is reminiscent of the ways in which Brian Thomas’s *Gladue report* was used to “tie in some way” his horrendous genealogical story of experience with colonial violence (and, particularly his FASD) in a way that served as both a mediating and aggravating set of factors – as we have seen, he was both a victim who, in some ways, never stood a chance, as well as a perpetrator with a sadistically programmed soul. It is helpful to view the citation of colonization in such instances as a punctuation, a temporal marker that permits a

¹⁷ Chudley and Longstaffe, emphasis added.

very specific conceptual revisionism that is hegemonic in the settler state of Canada. Researchers regularly bend over backwards to argue that “[t]he impact of colonization of Aboriginal peoples is no doubt directly related to the high incidence of FAS/ARND among such communities,” even while emphasizing that FASD is not an “Aboriginal issue” and pointing out example after example of how most studies that link Indigeneity to FASD are flawed at the core of their design.¹⁸

Dene scholar Glen Coulthard notes this same structure of contradiction in the way that Canada’s former prime minister, Stephen Harper, could make an official apology to Indigenous survivors of the brutal colonial institution of the Residential Schools and then turn around and claim to an international group of politicians and businessmen that Canada was an attractive place to invest because it had “no history of colonialism” to muddy the waters.¹⁹ Coulthard’s analysis revolves explicitly around the contemporary approach to reconciliation that the Canadian state adopted after the release of the *Royal Commission on Aboriginal Peoples* (RCAP) in 1996. As a form of transitional justice meant to launch Canada and Aboriginal peoples into a new form of relationship based in equality and justice, Coulthard argues that the only thing the concept of reconciliation achieves is to ideologically manufacture the sense that some kind of transition has occurred, which subsequently allocates the abuses of settler colonialism to the dustbins of history (Ibid.). As an attempt to apply transitional justice mechanisms to

¹⁸ Chartrand and Forbes-Chilibeck, “The Sentencing of Offenders with Fetal Alcohol Syndrome,” 40–41. These authors cite Caroline Tait, for example, to make these cautionary warnings about associating FASD with Indigeneity, but such warnings remain trapped in footnotes that equate to pathetic gestures of being “culturally sensitive” in the usage of the language of Indigeneity and FASD. For instance, they warn readers against extrapolating data about Aboriginal people as a whole because there are “important distinctions between different Aboriginal communities,” yet they make no attempt at actually specify what Aboriginal communities their own study sample came from (ie. Ethnic band, like Swampy Cree, or political nation, such as Norway House Cree Nation). Their own research subjects remain uniformly “Aboriginal” people in the justice system who have FASD. See Ibid., 40.

¹⁹ Coulthard, *Red Skin, White Masks*, 108.

nontransitional circumstances, as he puts it, “reconciliation takes on a temporal character as the individual and collective process of overcoming the subsequent *legacy* of past abuse, not the abusive colonial structure itself” (Ibid., 108-09). Where Coulthard is interested in how Indigenous peoples who refuse to forgive and/or reconcile with their colonizer are cast as being stuck in the “psychological residue of this legacy,” commonly as angry or resentful subjects, this dissertation has been a meditation on how today this “residue” is considered to be a quite literal and permanent feature of many Indigenous peoples’ psychological and cerebral constitutions.

When we situate FASD as a *legacy* and suggest that it is the impact of Residential School that has “quite literally passed down from one generation to another,”²⁰ we make the colonial state’s arguments for them. Intergenerational trauma becomes less about colonial violence than it is about disavowing this force and localizing it within the bodies of Indigenous peoples and making Indigenous childbirth merely a congenital site of dysfunction. As Elizabeth Cook-Lynn defines anti-Indianism as the “*use and misuse* of historical events of Indian life and experience in order to blame, denigrate, shame, or dehumanize Indians,” this is Anti-Indianism in its most direct form.²¹ Instead of blatant racists like Giesbrecht making the calls, however, we have progressive leaders, academic researchers, and adoptive parent advocates who are taking up FASD as if it is a fundamental pillar to processes of *reconciliation*.

Indigenous peoples in Canada are caught in a cunning trap of knowledge production and reasoning; a trap in which their status as a social, political, and economic ‘problem’ to Canada is continually tinkered with and redefined so as to make sense of the physical presences and

²⁰ *The Final Report of the Truth and Reconciliation Commission of Canada*, 5, Canada's Residential Schools: The Legacy:8.

²¹ Cook-Lynn, “Anti-Indianism in Art and Literature Is Not Just a Trope,” 16.

disturbances of Indigenous bodies - on the streets of Winnipeg, in overcrowded prison cells, as they die in hospital waiting rooms with indifference, or continue to show up dead on the banks of the Red River. The flexible and ever-shifting boundaries of this ‘problem,’ which is so often phrased as a misunderstanding or a befuddlement – what drives these youth? Don’t these Indians realize they are destroying their culture? – always comes back to the root of an insatiable need to *understand* Indigenous peoples. As platitudes of reconciliation and nation-to-nation relations slide reflexively off the tongues of politicians, there is a sense that this ‘problem’ could be solved *if only we were more culturally sensitive; if we knew just a little bit more about the horrors of Residential Schools*. But such platitudes, as well-meaning or empty as they can be, are often couched within a deeper story that many Canadians tell themselves, which they learn throughout their lifetime in an infinite array of rituals – subtle comments made by one’s parents; news headlines that quietly echo in our subconscious thoughts; awkward silences across seminar tables; and on and on. *Indigenous peoples are damaged. Their trauma and pain might be due to colonial violence, but that is in the past and we all need to move forward*. FASD is one more nail on the lid of this coffin box of a future that the settler state has prepared for us.

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