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Alcoholism in the North: Conceptualizing the Agency in Crime

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About the author

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Abstract

This paper explores the nexus between alcoholism and crime in Nunavut through a post-colonial lens to suggest that the Nunavut Court of Justice is paradigmatic of some structural inequalities innate to the criminal justice system in Canada. I begin by unearthing the history of colonialism as it was experienced by the Inuit in Northern Quebec, the Northwest Territories and Nunavut. Second, I unpack the contemporary circumstances of alcoholism in the North and contend that these realities derive from a colonial history which has produced deepened cycles of abuse. Third, I engage with the relevant jurisprudence in Nunavut, particularly the landmark cases which revolve around alcoholism and domestic abuse, but also some of the pronouncements made concerning fetal alcohol spectrum disorder (FASD) as a potential mitigating factor in sentencing. Fourth, I consider questions of agency in the criminal law and whether our common assumptions of choice are sacrosanct in the context of Nunavut. My goal is to re-evaluate our conception of agency within a specific context and history.

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Introduction

There is no equivalent word in Inuktikut for what is known as a "criminal" in English. This is not to say that there is no conception of punishment or wrongdoing in Inuit culture. Nevertheless, it does means that the label was imposed externally via the criminal justice system. The term "crime" refers to "an act that law makes punishable; the breach of a legal duty treated as the subject matter of a criminal proceeding." This legal duty has a particular historical origin: "Understanding that the conception of Crime, as distinguished from that of Wrong or Tort and from that of Sin, involves the idea of injury to the State of collective community, we first find that the commonwealth… itself interposed directly…to avenge itself on the author of the evil [deed]." But what of the injustice perpetrated by the collective community against the individual author?

In this paper, I will begin to explore the previous question in the context of Nunavut. Specifically, I will explore the nexus between alcoholism and crime through a post-colonial lens and contend that the Nunavut Court of Justice is paradigmatic of structural inequalities inherent to the criminal justice system in Canada. I begin by first unearthing the history of colonialism as it was experienced by the Inuit in Northern Quebec, the Northwest Territories as well as Nunavut. Second, I investigate the contemporary circumstances of alcoholism in Nunavut and argue that these harsh realities derive from a colonial history which has produced deepened cycles of abuse. Accordingly, I rely on empirical data to emphasize the elevated rates of alcoholism in Nunavut which contribute to the vast overrepresentation of Inuit offenders at Baffin Correctional Centre. Third, I engage with the relevant jurisprudence in Nunavut, particularly the landmark cases revolving around alcoholism and domestic abuse, and also some of the pronouncements made concerning fetal alcohol spectrum disorders (FASD) as a possible mitigating factor in sentencing. Fourth, I contemplate questions of agency in the criminal law and whether common assumptions of reasonableness are actually tenable in the North. Concomitantly, I consider the *Daviault* defence of extreme intoxication and Parliament's response to the Supreme Court of Canada (SCC) in section 33.1 of the Criminal Code which terminates any defence of extreme intoxication where the offender's behaviour interferes or threatens to interfere with the bodily integrity of another. My overall aim in writing this paper is to unpack the idea that justice is something that happens to the Inuit rather than for them as a result of completely imposed circumstances in the North. Indeed, I try to illustrate that even a perfectly procedurally fair criminal justice system cannot correctly function when built on premises of agency that only go so far in recognizing history.

Situating Ourselves Within the Human Rights Discourse

Makau Mutua writes that the human rights movement is marred by a damning metaphor. Indeed, it "contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other. The savages-victims-saviors (SVS) construction is a three-dimensional compound metaphor in which each dimension is a metaphor in itself." Incidentally, this metaphor effectively captures the potential for re-victimization in the North. Saviours who instantly jump to the defence of Inuit women from the "oppression" of Inuit men risk enmeshing them in reinforced cycles of abuse where they remain victims of savage abusers. A more balanced perspective is required here, one which weighs the rights of all women while simultaneously recognizing and unearthing the modern institutional foundations of colonialism. As Mégret opines, "what made colonization possible was also in effect what made the exclusion of non-European peoples logical: these would be civilized by force if need be, while being denied the benefits of civilization on account of their 'non-civilization' [resulting in] a constant theme." The effects of this exclusion cannot be discounted and continue to shape relationships today.

David Kennedy correctly highlights that "human rights expresses the ideology, ethics, aesthetic sensibility and political practice of a particular Western eighteenth-through twentieth-century liberalism" which diminishes the potential of diverse and local conceptions of freedom. This is not to say that the human rights discourse is hopelessly deficient; it is to say that it should derive its strength from pluralism and empower domestic actors to shape their own unique ideals. In the North, this entails recognizing and working to overcome the lasting effects of colonialism. As former Supreme Court Justice Arbour contends, "the way out… is to opt for a more humble, 'micro' approach" by taking strides away from the hollow and superficial do-gooder morality; the activism which embraces the human rights discourse in order to affirm the moral superiority of a select group of advocates whose high-ground is constantly re-validated via "helping" others. This odious brand of false benevolence has poisoned and co-opted many human rights narratives. As a result, we need to remember that human rights provide a universal language which can be manipulated in the same way as other languages. At its very best, this common language provides an emancipatory diction which can be used to liberate and empower global citizens and actors. Conversely, at its very worse, it is a guise and subterfuge for neoliberal capital market interests seeking to entrench lucrative extractions while shrouding their interests in a facade of altruism.

Human rights work in Nunavut appears odd at first because we are hesitant to recognize the problems inside our own borders, even if the far North is a world apart for many Canadians. However, this ignores, for instance, the human rights violations at Baffin Correctional Centre which result from the

inadequacies of its physical structure, extreme overcrowding, inter alia. Beyond that, we see a glaring example of structural inequalities in the criminal justice system which has led to the over-incarceration of Inuit persons and disproportional rates of recidivism. The rights at stake are articles 1, 3, 5, 7 and 9 of the Universal Declaration of Human Rights. What is difficult to come to terms with here is that these violations manifest in our own backyard and the majority of the public—legal practitioners included—are all to oblivious to their existence. This is why understanding these problems in the vernacular of human rights becomes very crucial; we begin to comprehend that the wrongs we denounce abroad are replicated in our own society.

Part I: The Current Effects of Colonialism in the North

The presumption of reasonableness undergirding the criminal justice system does not adequately account for the long history of colonialism in Canada and its persistent effects today. The Truth and Reconciliation Commission of Canada (TRC)'s Inuit Sub-Commission asserted that the intergenerational effects of residential schools on the Inuit are still present in the territories. The hostel system established by Northern Affairs in the Northwest Territories in the mid-1950s did not restrict admission to First Nations students. Therefore, it was only then that large numbers of Inuit children began attending residential schools:

The impact of the schools on the Inuit was complex. Some children were sent to schools thousands of kilometres from their homes, and went years without seeing their parents. In other cases, parents who had previously been supporting themselves by following a seasonal cycle of land—and marine—based resource harvesting began settling in communities with hostels so as not to be separated from their children.

The per capita impact of the schools in the North is higher than anywhere else in Canada since indigenous people form the majority of the population in Nunavut and the Northwest Territories. Accordingly, there are numerous Survivors, as well as parents of Survivors, living there today. The aforementioned impacts include—but are not limited to—lower educational attainment.

The worst levels of educational success exist in communities with the highest percentages of descendants of residential school Survivors: Inuit and First Nations people living on reserves. The paucity of educational opportunities is evident from the very beginning with pre-schooling. The North lacks good-quality daycare and preschool spaces for early development. Furthermore, the infant mortality rates for Inuit children are between 1.7 to 4 times the non-Aboriginal rate. From 2004 to 2008, the age-specific mortality rate at ages one to nineteen in the Inuit territories was 188.0 deaths per 100,000 in comparison to the rate of 35.3 deaths

per 100,000 across Canada. The Inuit have a high school completion rate of 41% or less, in contrast to the Canadian average of approximately 85%, which has drastically constrained their employment and earning potential. In order to help bridge the increasing income and employment gap, "Aboriginal people need increased access to post-secondary education. Only 8.7% of First Nations people, 5.1% of Inuit, and 11.7% of Métis have a university degree, according to the 2011 census" which is very low.

Inuktikut, one of the principal Inuit languages, is under threat due to a lack of funding. Indeed, the total funding for Inuit language programs is deplorable when drawn in comparison. "The federal government provides support to the small minority of francophones in Nunavut in the amount of approximately $4,000 per individual annually. In contrast, funding to support Inuit-language initiatives is estimated at $44 per Inuk per year." This is a shameful juxtaposition. More bilingual educators, coupled with teaching and reading materials in Inuktikut, are needed.

The absence of educational opportunities is exacerbated by both abuse and alcoholism. Limited education, a history of abuse and alcohol addiction are common among Inuit offenders. For instance, in *R. v. Kayaitok*, the accused was a 37-year old Inuit male with a grade 5 education who had been sexually abused by a relative when he was a child and started drinking at age 12. He was convicted of second degree murder for stabbing the mother of his children to death. Drugs and alcohol are easy outlets to cope with the continuing effects of colonialism in Canada. "The reality in Nunavut is that many forms of remedial counselling and treatment are not available in the communities. Specialized training is needed to address sexual offending, domestic violence, mental health issues, and drug and alcohol dependencies" which inevitably continue to persist. Sadly, across Canada, First Nations people are six times more likely than the general population to suffer alcohol-related deaths and also three times more likely to suffer drug-induced deaths. The suicide rate among First Nation communities is about twice that of the general population. For Inuit, the rate is significantly higher: six to eleven times the rate of the general population. These current effects of colonialism must be contextualized before explicitly addressing agency.

The Introduction of Alcohol in the North

Alcohol is common to most cultures around the world in spiritual life and social relations. However, it was not a part of Inuit life prior to its introduction via European-Canadian settlers. Alcohol was first brought into the Canadian Arctic by European explorers and whalers through bartering, but its full introduction into the everyday life of the Inuit population did not occur until settlements and military programs were established in the 1950s and it became more available. Qallunaat ("non-Inuit persons")

introduced alcohol to the Inuit as a medium to barter initially, then as an attempt to acculturate them which has resulted in deepened cycles of addiction today.

The initial bartering of alcohol began in 1771 in the early contact period when traders taught Inuit home brewing techniques and gave them liquor in exchange for their cooperation. This was accompanied by sexual and economic exploitation along with disease transmission. Consequently, the result has been cycles of uncontrolled drunkenness, violence and murder, accompanied by previously unknown diseases which have heavily reduced the Inuit population. The arrival of Europeans marked the beginnings of cyclical trauma which would begin to spiral.

Prohibitions on alcohol were enacted in settlement life but the Distant Early Warning (DEW) Line brought workers from Canada and the U.S. in 1954 who had consumption permits. Though the Northwest Territories (NWT) Liquor Ordinance forbade the sale of alcohol to Inuit, DEW Line employees used liquor to influence Inuit women into engaging in sexual relations. We begin to realize that the true exploiter of Inuit women is the colonizer, not the Inuit man.

The RCMP initially enforced ss. 93-99 of the Indian Act prohibiting the sale of alcohol to the Inuit without regard to the sexual exploitation of Inuit women perpetuated by foreign men. Shortly thereafter, "a legal ruling in 1959 clarified that Inuit were not subject to the alcohol provisions of the Indian Act and that laws concerning alcohol in the Northwest Territories applied equally to Inuit and all individuals not subject to the Act." In settlement locations, the Inuit began drinking excessive amounts, in part to imitate the behaviour of Qallunaat they saw drinking. There was a profound sense of displacement due to relocation, and community values and beliefs were weakened in the settlement context to the point of non-existence as well as general despair. "The response from officials was often moralistic and racist. In 1962, …an official suggested that drunkenness among Inuit was the result of flaws in personality… [T]he trouble is not with recognizing… drinking as a problem but rather with finding… power to control their drinking." By the 1970s, almost all Inuit were living in settlements and some were entering cycles of trauma. "…Most had access to liquor and even drugs [and] many families were experiencing first-hand the devastating consequences of substance abuse, including alcoholism, [drug] addiction, physical and sexual abuse, neglect of children, poverty and death" among other readily apparent symptoms. Crime rates rose and relations between Inuit and Qallunaat authorities slowly began to degenerate. "From the beginning of the settlements, Inuit were aware of these problems. Some people attempted to control access to alcohol in their communities. Their success was limited, however, because they were only able to speak about rules of the

product, not [rehabilitative] programs." On balance, Qallunaat imposed a set of circumstances that have created widespread dependency.

Qimmiijaqtauniq ("The Dog Slaughters")

Qimmiit ("Inuit Dogs") were an fundamental part of Inuit culture as well as life on the land. "In winter,… they pulled hunters and their equipment for hunting and traplines; brought the game back to ilagiit nunagivaktangat ["the trading post"]; helped locate game by scent; protected against predators; assisted in polar bear hunts; and warned about sea cracks while traveling." Consequently, the decline of qimmiit began in 1957 and was the product of some combined factors. In the Qikiqtani region, there was a disease outbreak which killed large numbers of the dogs. Second, many hunters shot their qimmiit after acquiescing to the sedentary life in settlements, while others abandoned their dog teams once they found employment or left to go down South. Third, snowmobiles slowly began to replace qamutiik ("Dog Sleds") as preferred transportation. Nevertheless, "it is also an undisputed fact that hundreds—perhaps thousands—of qimmiit were shot by the RCMP and other authorities in settlements from the mid-1950s onwards because Qallunaat considered the dogs to be a danger to inhabitants or feared [the spread of diseases]." The Ordinance Respecting Dogs gave the RCMP the authority to kill the dogs at their discretion. "[It] provided that if a dog officer was unable to seize a dog that was running at large, or was… in violation of the ordinance, he could destroy it, and no compensation would be provided." Consequently, the RCMP, the de facto dog officers, did not bother to either catch or impound dogs. "The evidence shows that the force used by the Provincial Police— the violence, which should be referred to as killing dogs—created resentment among the… Inuit that still exists today." Hunters and families suffered from these killings, especially those who could not find jobs.

High Arctic Relocations

The Qikiqtani Truth Commission makes it clear that the Government of Canada failed in its obligation to the Inuit by destroying an integral part of their culture: the qimmiit. Concomitantly, the Canadian government is responsible for wrongfully relocating many Inuit from Inujuak, Northern Quebec, etc. to High Arctic settings in the 1950s for development purposes: "In our report on the High Arctic relocation, we called upon the federal government to recognize that moving 92 Inuit to Grise Fiord and Craig Harbour on Ellesmere Island and to Resolute Bay on Cornwallis Island was wrong." Not enough information was given for informed consent. These calamitous relocations demonstrate how faulty assumptions by administrators concerning Aboriginal peoples lead to abuses of authority. "The analogy of

human pawns being moved on an Arctic chessboard is perhaps [never better] illustrated than in the instance of Devon Island… as it suited the experimental economic interests of the [Hudson's Bay] Company, and [was] set against the background geopolitical interests of the State." The Canadian government merely assumed that the Inuit could survive in any Northern climate since they had done so for centuries before. "In addition to being… different terrain, the species available at Resolute were limited compared to those at Inukjuak. At Inukjuak, Inuit were used to many different species of birds and their eggs, fish whales, seals, and walrus. Caribou could be hunted to the south at Richmond Gulf." The federal government failed in its relocation efforts in five main ways: (1) a lack of authority; (2) no informed consent; (3) poor planning; (4) unkept promises; (5) inhumane conditions.

Part II: Alcoholism in the North

Alcoholism has been identified by Inuit as a fundamental health and social concern in their communities due to its catastrophic effects. "Although Inuit drink less than Canadians generally, binge drinking is the most prevalent pattern among those who drink, and as is [also] true with binge drinking around the world." The high rates of alcoholism in the North are invariably a result of a long colonial history which is fraught with economic and sexual exploitation, inter alia. The introduction of alcohol to the High Arctic begins with the European whalers who used alcohol to exploit the Inuit. Any meaningful discussion of agency must take this fact into account.

In Canada, 20.1% of individuals above 12 years of age drink 5 or more drinks on 1 occasion ("heavy" drinking), 12 or more times a year. In Nunavut, this figure increases to 30% and in the Northwest Territories (NWT) it is 40.5%. Binge drinking is common among Inuit offenders who often claim to have little no memory of the crimes that they are then alleged to have committed. For example, in *R. v. Nowdlak*, the accused was charged with first degree murder after the victim he sexually assaulted died from her injuries. He claimed to have no recollection of the offence since he was very intoxicated at the time. Kilpatrick J. stated that "many of Nunavut's serious violent crimes are committed by those who are drunk. Many wake up after a night of drinking to discover that they have committed… crimes against strangers and even those they… love." Elevated rates of alcohol consumption in the North lead to violence, accidents, self-inflicted injuries and suicide, trouble with the justice system, child neglect, truancy and personal trauma.

Alcohol consumption by pregnant women can produce Fetal Alcohol Spectrum Disorders (FASD). The Manitoba Children and Youth Secretariat estimated that FASD ranges anywhere from 2 to 40 per 1,000 live

births and is most severe among First Nations children at about 20%. One FASD inquiry found that over 90 percent of the clients studied had mental health problems; 60 percent of those 12 years or older had been suspended or expelled from school or had dropped out of school; 50 percent of those 12 or over had been confined for mental health or alcoholism, or incarcerated for crime; 50 percent of those 12 or over engaged in sexually aberrant behaviour; and 30 percent of those 12 or over had addictions.

There is no concrete empirical data on the incidence rates of FASD in Inuit communities. However, anecdotal evidence combined with the strong nexus between alcoholism and crime in the North gives reason to believe "that the incidence of FASD is many times higher in Inuit communities than the national average." The lack of empirical data of incidence rates in the North is exacerbated by the absence of FASD specialists and scarcity of rehabilitation programs. "Although federal funding for FASD prevention, awareness resources, and community supports in Aboriginal communities has increased over the last several years, Inuit communities receive a disproportionately low portion of this funding [and there is a] lack of Inuit-specific planning." The answer to these challenges entails a coordinated development of a territorial, Inuit-specific strategy towards prevention, promotion and awareness with more funding for capacity building. Only a flexible and multi-pronged view can pave the way to effective and meaningful change. This approach must re-consider agency in the criminal law and balance FASD in sentencing.

Part III: The Nexus Between Crime and Alcoholism in the North

The overarching nexus between crime and alcoholism in the North becomes evident with a brief overview of recent jurisprudence in Nunavut:

- In *R. v. Makpah*, the accused was charged with manslaughter after stabbing the victim in the abdomen four times, while he was intoxicated. "By his own estimate, he had consumed four or five shots. He said that he and Abraham drank about one-third of Abraham's forty-ouncer." The accused was sentenced to four years to be served in a federal penitentiary for his crime. Sharkey J. accented the intoxication of the accused and the four stab wounds as aggravating factors in determining a just and appropriate sentence.
- In *R. v. Shappa*, the accused was charged with assault with a weapon after he kicked his son in the stomach and pushed him into a wall with a loaded firearm in hand while he was intoxicated. "The use of a loaded firearm as a weapon while heavily intoxicated [was] a recipe for disaster. Mr. Shappa's

level of intoxication was such that he now [claims] that he has no present memory of the events underlying the charge." The accused was sentenced to 60 weeks imprisonment.

- In *R. v. Arnaquq*, the accused was charged with handling a weapon in a careless manner following an attempt to shoot himself but accidentally fired the rifle into the air as his wife intervened. The RCMP "received a call from the common-law wife of the accused advising that he was intoxicated and had tried shooting himself… She advised that she had tried to take the gun away from the accused and… had accidentally pulled the trigger causing the firearm to discharge."

The nexus is evident: alcohol is a contributing factor to many crimes in Nunavut. This is just a small sample of recent cases which reflect the nexus between alcoholism and crime in the North.

By contrast, there are only two cases in the jurisprudence that explicitly reference FASD. In *R. v. T.K.*, a youth was charged with multiple offences including assault with a weapon. Counsel for the defendant filed a Notice of Application requesting an order pursuant to sections 34(1)(b)(i) and 34(1)(b)(iii) of the Youth Criminal Justice Act, suspecting the youth had an FASD disorder. The case dealt with who should pay for the diagnosis and many interesting points were made. Indeed, Justice Johnson stated that "since Nunavut has substance abuse problems at three times the national average, it is but common sense that there is a huge potential problem ticking away in our communities that remains untouched because of lack of information" innate to the territories. The Government of Nunavut (GN) conceded that there was no expertise in Nunavut to assist in diagnosing and treating FASD despite the reasonable requests made by defence counsel. Moreover, Johnson J. wrote that he suspected "this request will be occurring much more frequently in the future and will have significant cost ramifications for the government… Hopefully this expertise will be developed locally…" And yet, nothing resembling an infrastructure is in place.

In *R. v. Joamie*, the second case, the accused was charged with sexual assault after he attempted sexual intercourse with a woman who had passed out on a couch during a house party. He pled guilty to the offence and was sentenced to 12 months custody and 12 months probation. In determining this generous sentence, Justice Kilpatrick considered the likelihood of FASD. Moreover, he implored the legal community to lobby the state for funding to address FASD. "When it comes to remedial services and programs, there is no room for complacency, there is no place for resignation… in a Territory struggling with substance abuse of epidemic proportions." However, in the interim, Kilpatrick J. placed the burden on defence counsel to identify resources in the territory which would facilitate (1) specialized diagnosis and (2) alternatives to sentencing. He maintained that "it falls upon defense counsel, not the Court, to find a sentencing alternative

to custody for citizens of diminished responsibility. It falls upon defense counsel, not the Court, to identify the resources needed to address the offender's special needs" in instances of FASD.

This dissociation of blame is at odds with a contextual awareness of how colonialism has shaped the agency of Inuit offenders in the North and the nexus between alcoholism and crime. Moreover, it goes against Kilpatrick J.'s own earlier statements regarding the Nunavut Territory. He writes: "If the Territory lacks the means to provide the diagnostic services required, the Court has the ability to order out of territory forensic assessments to be performed when necessary. The Court will not hesitate to do so when this is required for sentencing purposes." Incidentally, Nunavut's Chief Medical Officer had testified in the case that the Nunavut Territory lacks the diagnostic services necessary to make an FASD diagnosis, so this need appears to exist.

Therefore, I argue for a flexible and multi-faceted approach to sentencing which takes FASD into account while re-affirming the principles expressed in *R. v. Gladue* and *R. v. Ipeelee*. Section 718.2(e) of the Criminal Code of Canada ("the Code") stipulates that the Court should weigh "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" in question. In *R. v. Gladue*, the Supreme Court of Canada (SCC) breathed new life into this codal provision so as to address the overrepresentation of Aboriginal Canadians in penal institutions as well as the problem of over-incarceration in Canada and the excessive use of imprisonment as punishment. In *R. v. Ipeelee*, the SCC re-affirmed the need to consider *Gladue* principles in sentencing. Accordingly, the SCC asserted that "over a decade has passed since this Court [issued] its judgment in *Gladue*. As the statistics indicate, s. 718.2(e) of the Criminal Code has not had a discernible impact on the overrepresentation of Aboriginal people in the… justice system." Overall, I call for a re-affirmation of *Gladue* coupled with an innovative and dynamic approach to sentencing.

This approach is typified by the British Columbia Court of Appeal ruling in *R. v. Harris*. In this case, the accused was sentenced to a conditional sentence of 9 months and 3 years probation after pleading guilty to two counts of breaking & entering and one breach of a probation order. The Crown appealed on grounds that the sentencing judge erred in concluding that the accused has FASD and that, therefore, the sentence was unfit, but the BC Court of Appeal upheld the ruling. The sentencing judge had based her finding that the accused possessed FASD on "information she obtained directly from Mr. Harris; submissions by defence counsel, including confirmation from Mr. Harris' mother that she 'drank a lot' of alcohol during her pregnancy; the completed Asante Centre intake form; and her knowledge of the symptoms and effects of

FAS or ARND." She held that these factors had likely led to disability and cognitive impairment in the accused. Moreover, "in considering the appropriate sentence, the sentencing judge rejected the principles of denunciation, deterrence and separation from the public as having no application to Mr. Harris because, she found (at para. 127), [that] he was not violent or dangerous to the community." She emphasized that rehabilitation was the principal objective of the sentence in question and cited that the chief objective of sentencing is that the accused receive a just sanction for their actions. In ss. 718.2(d) and (e) of the Code, the legislator decided that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and that all reasonable sanctions available should first be exhausted before imposing a term of imprisonment. As a result, the sentencing judge crafted a conditional sentence order which was directed towards rehabilitation and community supervision under individuals who understand FASD.

Part IV: Agency and Alcoholism in the Criminal Law

The criminal law is the body of law which deals with crime and regulates social conduct by proscribing whatever threatens or endangers the moral welfare of citizens and their property. Accordingly, a crime is said to be a wrong against the community as a whole rather than against the individual victim and a criminal prosecution is launched by the state rather than the victim. This prosecution is conducted in the name of the Queen who is Canada's symbolic head of state. Therefore, the person prosecuting Inuit offenders in Nunavut is also the person most responsible for persecuting them historically, raising pressing doubts as to the legitimacy of the criminal law. The introduction of alcohol in the North, the residential school system, the relocation programs and the qimmiijaqtauniq all point to harms committed by the community against the individual. By and large, there is an aporia from the very beginning which is inherent to Northern "crime".

The presumption of agency in criminal law is the capacity to choose a course of action. This presumption, which is predicated on reasonableness, exists both in theory and in practice. The principle of culpability dictates that the imposition of criminal liability requires free choice on the part of the individual and that both free choice and criminal liability are embodied together. "The trial is the place where a political community asserts its respect for our responsible agency and for our shared public values by calling us to account when our conduct appears to violate those shared values." The principle of culpability has been a cornerstone of the criminal law.

Broadly, "alcoholism" describes any drinking of alcohol that then results in problems. The exercise of full and enlightened agency can be affected by alcohol dependency and use. "Alcoholism, almost by definition, robs its victims of the capacity to [realize] the consequences of their drinking. It appears, then, that an alcoholic's drinking may be accompanied by a mental condition not sufficient to ground moral culpability or deserved punishment for that drinking." This assumption is perhaps never more apparent than in the territorial context where alcoholism is rampant and binge drinking is so common that offenders often drink until they black-out. Furthermore, if we see alcohol dependency in the territory as the result of intergenerational effects of colonialism and the introduction of alcohol in the North by European whalers, then we slowly begin to question whether our natural presumption of agency applies in this context.

There are four ways that alcoholism may attenuate culpability in the current paradigm: (1) it could first be offered to show that the defendant was so drunk that he was physically incapable of engaging in the crime in question; (2) it could demonstrate an absence of voluntary conduct; (3) it could negate a mental state required for the crime; (4) it could lead to a claim of insanity. These four possibilities can subsequently be divided into two categories for the sake of simplicity. First, intoxication negativing the actus reus and, second, intoxication negativing the *mens rea*. Intoxication negativing the actus reus is the "tautology that legal guilt is required for legal guilt" and that it is a foregone conclusion not to punish someone for a crime they did not commit. Furthermore, it can also reflect intoxication negativing the voluntariness of the prohibited act whereby the minimal requirement of willful behaviour—an act or omission—has not been met. The second category supports the view that knowledge and purpose are required for a conviction. The crime is not forgiven per se; however, it is recognized that the necessary intent was not present. We must draw a distinction between "specific" and "general" intent towards this end.

In *R. v. Daviault*, the SCC imposed a persuasive burden on the accused to prove a defence of extreme intoxication to a general intent offence. To be clear, general intent offences describe offences where "the mental element simply relates to the performance of an illegal act. Such crimes do not require an intent to bring about certain consequences external to the actus reus." These crimes include manslaughter and assault inter alia. Conversely, specific intent offences are offences where "the accused must not only intend to do the act that constitutes the actus reus, he must also act with an ulterior purpose in mind." Therefore, they require greater mental acuity. These crimes include murder and robbery inter alia. In addition to this mental differentiation, the SCC in *R. v. Tatton* clarified that the second consideration in this binary is a policy inquiry on whether alcohol is usually associated with the given crime, and other policy considerations. Turning back to the decision in *R. v. Daviault*, the SCC ruled that extreme intoxication could in rare cases be a defence to general intent offences. The main thrust of the decision in *Daviault* was based on extreme intoxication that

negatived "the accused's capacity for voluntary conduct and the minimal *mens rea* necessary for a general intent offence as opposed to evidence of intoxication that could raise a reasonable doubt about the more complex mental processes required in specific intent offences." This defence would have been very relevant in Nunavut, had it not been subsequently overridden by the legislator in Ottawa.

Daviault opened up a very narrow defence of intoxication for general intent offences where the degree of intoxication is so extreme "as to be akin to insanity or automatism." Parliament responded to this unprecedented decision by implementing section 33.1 of the Criminal Code. This section denies the *Daviault* defence where there is an assault or threat of bodily integrity:

> 33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2)
>
> (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
>
> (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

At the heart of this legislation are the views espoused by Sopinka J. who dissented in *Daviault*. The majority decision reflected concerns that the blameworthiness for becoming intoxicated cannot be substituted for the fault of the particular offence given the contemporaneity principle. Conversely, Sopinka J. found that there is no need for absolute symmetry between the *mens rea* and the *actus reus* and that perpetrators of intoxicated violence should be held accountable.

The sharp nexus between alcoholism and intoxication in Nunavut would suggest that it is an environment where the *Daviault* defence of extreme intoxication could have been applicable. In *R. v. S.N.*, the accused, S.N., brought an application to have s. 33.1 of the Code declared unconstitutional and was dismissed after the application of the Oakes test by Justice Sharkey. S.N. was accused of having sexually assaulted another adult male one evening when they were both confined overnight in the local drunk tank of the RCMP detachment in Iqaluit, Nunavut. Neither men had any memory given their respective states of intoxication, and the only evidence of the sexual activity were some observations made by the civilian guard and a policeman on duty. S.N. gathered scientific evidence to suggest that he was intoxicated to the point of

automatism. The accused submitted that he did not have the requisite guilty mind to accompany the guilty act. Justice Sharkey found that s. 33.1 is indeed an infringement of constitutionally guaranteed rights under both s. 7 and 11(d) of the Canadian Charter of Rights and Freedoms ("Charter"). Nevertheless, he affirmed that the constitutional validity of s. 33.1 of the Code was saved by s. 1 of the Charter because it met the test criteria previously established by the SCC in *R. v. Oakes*. Sharkey J. maintained that "the objective of s. 33.1 is of sufficient importance to warrant overriding [S.N.]'s constitutionally guaranteed rights. The importance of this objective is clear in Nunavut, where rates of violent crime are considerably higher than the rest of the country." First, the objective of s. 33.1 relates to a pressing and substantial concern: ensuring the protection of women and children and other victims of intoxicated violence in addition to the security of their person. Second, s. 33.1. passes the proportionality test given that it is rationally connected to the objective. The impairment to s. 7 and 11(d) was found to be minimal and the salutary benefits of protecting women and children were said to outweigh the deleterious effects of restricting the defence. Indeed, "section 33.1 is a fair law, through offering full benefit of the law to victims and makes common sense by holding perpetrators of intoxicated violence accountable. It is a justifiable public policy response to the discreet legal issue of conceptual liability canvassed in *Daviault*." On balance, Sharkey J. affirmed the constitutional validity of s. 33.1 of the Code and declared it of full force and effect. S.N. was not afforded the defence of extreme intoxication at trial.

Sharkey J. upheld s. 33.1 of the Code on the basis of safeguarding women and children. By extension, he simultaneously provided a defence of Sopinka's dissenting opinion in *Daviault*. Sharkey J. stated: "in my view, reasonable people do not agree that a person who drinks himself or herself to a stupor is morally innocent, at all. Reasonable people know as a matter of common sense and life experience that there is at least a connection between intoxication and violence." This appeal to reasonableness presupposes a shared understanding of agency in the criminal law. "In [Sharkey J.'s] view, reasonable people support the 'Scots Law' approach that intoxication, even extreme intoxication, should not excuse criminal liability, and that perpetrators of drunken violence should be held accountable." Many would agree with these uncontroversial statements. That being said, is this imaginary reasonable person a survivor of residential schooling in Canada? Was this reasonable person wrongfully relocated to Grise Fiord without guidance or provisions? Did this reasonable person have their dogs slaughtered to restrict their mobility in settlements? Does this reasonable person have three family members whom they witnessed commit suicide? This is not to say that Inuit offenders lack the capacity to meet the standard of reasonableness. Indeed, there are numerous examples of Inuit citizens who succeed by any measure or barometer. It is also not to insinuate that the experiences described above are never replicated in other circumstances where the offender is not Inuit; there are many

people who suffer from hardship. Conversely, the aim here is to unpack our "shared" understanding of reasonableness and agency to show that it does not encompass the intergenerational effects of settler-colonialism in Canada. The position adopted by Sopinka J. and Sharkey J. is not deficient by any standard legal measure. And yet, it fails to adequately consider that the circumstances which lead to extreme intoxication in the North are a result of state persecution whereas the means to punish are state prosecution.

In adopting a post-colonial lens, it becomes conceivable that the criminal justice institution in Nunavut exists merely as a continuation of the Canadian colonial apparatus. Taiaiake Alfred correctly highlights that "the Inuit people are not the titular heads of government, but the apparatus of government is staffed and controlled mainly by white southerners, and it operates in much the same way as the Canadian territorial government did in the period of open colonization." Accordingly, the high rates of domestic abuse in Nunavut are understood as the inevitable result of ongoing colonialism in the North as opposed to the innate violent predispositions of Inuit men. Such an adaptation of anti-essentialist critique situates itself squarely within a post-colonial lens. Inuit men may have compounded the oppression of Inuit women by inflicting pain on their wives; but once we grasp the totality of oppression, it does not take much to see that Native men's inability to confront the real source of their disempowerment leads to the oppression of Native women. In *R. v. S.N.*, Sharkey J. conceded "that the notion of moral blameworthiness can be problematic. For example, one can sympathize with the high school senior who, never having had a drink, achieves an unexpected and extreme state of intoxication at the grad dance" after drinking a bit. Subsequently, he proposes a flexible interpretation to the usage of the word "self-inducement". Why, then, do we not adopt a comparable sympathy for the Aboriginal offender who, as a result of a traumatic upbringing, has relied on alcohol to quell the memories of systemic exploitation? The answer here may be that this offender has exercised agency over an extended period of time and made no meaningful attempt to break the cycle of trauma and change their life for the better. We must also be wary of patronizing the Inuit offender as exercising a "lesser" form of agency. Nevertheless, these responses fail to the truly grasp the longevity of the colonial era in Canada. These effects are not historic and continue to shape relations between the Inuit and the state.

The post-colonial lens can be combined with an abolitionist critique of the criminal law. This is not to contend that the criminal law should be abolished but rather to argue that our understanding of agency can benefit from abolitionist insights in making the law more inclusive. Indeed, the criminal law purports to declare and enforce authoritative standards of value but this amounts to an illegitimate attempt to impose a moral consensus on inherently divided societies. The values espoused by the judiciary are, more often than not, the values held by a particular class. This class is usually white, male and wealthy, which reflects a certain

spectrum of experience. Nunavut would certainly benefit if the Inuit were adequately represented in positions of power. The aspiration is one of legal pluralism where Inuit conceptions of law are infused with state law. The word "criminal" may not have a basis in Inuktikut but actions which offend the collective community are similarly denounced and punished.

The justice system appropriates conflict from those to whom it properly belongs, thereby transferring all control to a professionalized setting where the original parties rarely participate. This is undoubtedly to ensure that offenders are prosecuted in situations where the victim is either unable or unwilling to bring a claim forward and to protect against social degeneration. Nevertheless, it seems paradoxical to cede the sphere of conflict to other parties to mediate, especially if those parties embody the state which has perpetrated the most harm against you.

Criminal law deals in punishment whereas the intergenerational effects of colonialism can only be undone via a process which repairs the individual harm and the harm to the community. In many ways, the criminal law maintains a very primitive, backward-looking focus on retribution. The saturation of Baffin Correctional Centre with Inuit offenders, some of whom likely have some form of FASD, does next to nothing to help, and more to hamper any long-term positive change. Overall, the authority of the criminal law to monopolize the legitimate public norms of conduct is put into question in a context like Nunavut where the reverberations of colonialism are so apparent. We must, therefore, look to re-conceptualize agency along pluralistic lines in the future.

The idea of abandoning the criminal law is folly because the criminal law is here to stay. The Nunavut Court of Justice is a perfectly procedurally fair institution with well-intentioned, smart and fearless advocates who attempt to strive towards justice just like elsewhere in Canada. But as Derrida states, the re-institution of law is founded in violence making justice impossible. This is true for any legal system regardless of if it is derived from Anglo-saxon common law. Before colonialism, the Inuit had their own rules which governed their interactions in communities. For instance, punishment for serious crimes committed against an individual or the community took the form of leaving the offender at the bottom of a fissure in the ice to die from starvation. The violent re-institution of law is inescapable whether our starting reference point is the Code or Inuit customary law, because of dissonance between the relevant rule and the unique case at bar. I support Sharkey J.'s decision to uphold s. 33.1 of the Code and Sopinka J.'s flexible approach to contemporaneity between the actus reus and the *mens rea* in cases of extreme intoxication. However, where I diverge is in appealing to "shared" conceptions of reasonableness to justify our understanding of agency in the criminal law when this reality is starkly different for the Inuit. Consequently, the most obvious starting point to

addressing this concern is re-affirming 718.2(e) and the principles enshrined in both *R. v. Gladue* and *R. v. Ipeelee* at the final stage of sentencing. This would entail funding more meaningful alternatives to custodial sentences in consultation with Aboriginal and Inuit leaders to reduce the over-representation in Canadian prisons and jails. Beyond that, the more important undertaking is in empowering these communities and forging nation-nation relationships between equals as opposed to perpetuating the colonial legacy.

Conclusion

In this paper, I explored the nexus between alcoholism and crime in Nunavut through a post-colonial lens to show that the Nunavut Court of Justice is paradigmatic of some structural inequalities innate to the justice system. I began by first unearthing the history of colonialism as it was experienced by the Inuit in Northern Quebec, the Northwest Territories and Nunavut. Second, I unpacked the contemporary circumstances of alcoholism in the North and contended that these realities derive from a colonial history which has produced deepened cycles of abuse. Third, I engaged with the relevant jurisprudence in Nunavut, particularly the landmark cases which revolve around alcoholism and domestic abuse, but also some of the pronouncements made concerning fetal alcohol spectrum disorder (FASD) as a potential mitigating factor in sentencing. Fourth, I considered questions of agency in the criminal law and whether our common assumptions of choice are sacrosanct in the context of Nunavut. Here, I weighed the *Daviault* defence in instances of extreme intoxication and the legislature's response to the Supreme Court of Canada in passing section 33.1 of the Criminal Code which terminates any defence of extreme intoxication where the accused's behaviour interferes/threatens to interfere with the bodily integrity of another. My goal was to re-evaluate our conception of excuses within a very specific context and history. I end with this quote: "The power of just mercy is that it belongs to the undeserving. It's when mercy is least expected that it's most potent—strong enough to break the cycle of victimization and victimhood, retribution and suffering." Only just mercy can liberate the Inuit "offender". We must expand our simplistic and rudimentary forms of empathy to understand their plight.

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