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TABLE OF CONTENTS

FOREWORD 4

SECTION 1: INTERVIEWS 5

IN CONVERSATION WITH THERESA MCCLENAGHAN, EXECUTIVE DIRECTOR AND COUNSEL, CANADIAN ENVIRONMENTAL LAW SOCIETY - BY: MACKENZIE BONNETT 5

IN CONVERSATION WITH PETRA MOLNAR - BY: ALESSIA AVOLA 11

SECTION 2: REVIEWS AND CRITIQUES 13

BOOK REVIEW ON CONSTANCE BACKHOUSE'S COLOUR-CODED: A LEGAL HISTORY OF RACISM IN CANADA, 1900-1950 - BY: CHELSEA TAO 13

THE SILENT SPECTRE: A CRITICAL REVIEW OF YAEL ZERUBAVEL'S RECOVERED ROOTS - BY: KATE REEVE 18

SECTION 3: DISCUSSIONS 23

CONSTRUCTING EQUITABLE COMMUNITY DEVELOPMENT AGREEMENTS: UNEARTHING THEIR POTENTIAL - BY: GINA KWON 23

THE OBSTRUCTIVE ROLE OF ABORIGINAL TITLE IN THE RECONCILIATION OF CROWN INDIGENOUS RELATIONS IN CANADA - BY: TANZIM RASHID 42

A NEW UNDERSTANDING OF THE STATE AS THE "EMBRACER" - BY: MAGGIE MORRIS 55

COMMUNITY CONTACT CARDING: IMPACTS ON BLACK YOUTH - BY: TERREN LEE 66

TWEETING OUT TORTURE: A FOUCAULDIAN ANALYSIS OF SOCIAL MEDIA SHAMING AS THE MODERN FORM OF PUNISHMENT AS SPECTACLE - BY: TEODORA PASCA 81

POPULIST RHETORIC AND TWITTER: A CASE STUDY OF TRUMP'S DISCOURSE - BY: AMMAR HASAN 88

A FEMINIST CRITIQUE OF THE FIRST SECTION OF KANT'S GROUNDWORK OF THE METAPHYSICS OF MORALS - BY: OLIVIA SMITH 99

ECONOMIC SANCTIONS: WHEN APPROPRIATE, WHEN NOT? - BY: ALEN HIRSTOV 105

LENSES FOR DEHUMANIZATION: BIOPOLITICS, COLONIALISM, AND THE CANADIAN SEASONAL AGRICULTURAL WORKERS PROGRAM - BY: MAHTA TALANI 115

MORAL TRUTH - BY: BENJAMIN MACLEAN-MAX 126

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Foreword

Mackenzie Bonnett, Editor-in-Chief, Mindful

I am proud and delighted to present the 2017/2018 issue of the *Mindful Journal of Ethics*. Overseeing the compilation and editing of the ninth issue of *Mindful* has been one of the most rewarding and meaningful experiences of my undergraduate degree within the Ethics, Society, and Law program.

This issue showcases some of the most innovative and critical work being done by undergraduates at the University of Toronto in the field of ethics. It engages with important ethical topics in contemporary Canadian society including Crown-Indigenous relations and the community impacts of carding black youth. It also features critiques of historical works such as Kant, and the legal history of racism in Canada. This year's issue further examines the increasingly important role that social media plays in contemporary political culture. I believe that this ninth issue of *Mindful* truly reflects the inter-disciplinary nature of both the Ethics, Society, and Law major program, and the broader study of ethics, that permeates almost all aspects of academia and modern society.

I would first like to thank the *Mindful* student editorial board for their diligent work curating and editing this year's issue. I would l also like to thank Theresa McClenghan for taking the time to be interviewed for this year's issue of *Mindful,* and for sharing her insights and work at the Canadian Environmental Law Society on issues related to the clean water crisis facing First Nations' reserves across Canada. Finally, I would like to thank Professor Simone Davis and Professor John Duncan for their guidance and help in the editing and compiling of *Mindful* this year.

Section 1: Interviews

In Conversation with Theresa McClenaghan, Executive Director and Counsel, Canadian Environmental Law Society

Theresa McClenaghan was appointed as Executive Director of Canadian Environmental Law Society, (CELA) in November 2007. She holds an LL.B. from Western and an LL.M. in constitutional law from Osgoode as well as a diploma in Environmental Health from McMaster. She was called to the Bars of Manitoba and Ontario. Focussing on environmental health and environmental safety, particularly in the areas of energy and water. Theresa has practised public interest environmental law for over 25 years both in private practice and then at CELA. Theresa has been a member of numerous water protection related provincial and national panels, including most recently the National Panel on Contaminants in Wastewater Effluent. In 2006-7, Theresa was senior water policy advisor to the Ontario Minister of the Environment where she was responsible for overseeing the passage of the Clean Water Act, and implementation of the remaining Walkerton Inquiry recommendations. She has represented clients at the Supreme Court of Canada, Federal Court of Appeal and Trial Division and the Ontario Court of Appeal on a range of matters including pesticide by-laws and the Oncomouse patent. She has four children, and lives in Paris, Ontario with her husband and one daughter.

In March of 2018, Mackenzie Bonnett, Editor-in-Chief of the Mindful Journal of Ethics, sat down with McClenaghan at her office on Toronto to discuss her role at CELA, her past work on water issues in Ontario, and the current clean water crisis facing First Nations across Canada.

MACKENZIE BONNETT: Could you briefly outline your role as the Executive Director of the CELA, the mission of your organization, and some major projects it is currently undertaking?

THERESA MCCLENAGHAN: All the executive directors in the legal aid clinic system do both administrative and case work. Because we are a legal aid clinic we are a small organization so I do oversight of the strategic plan and delivery of our objectives, while interfacing with our major funders, like Legal Aid Ontario, with our board of directors, with stakeholders, and with government. I also supervise staff and provide feedback on their substantive work. I also have a role as a counsel doing work on cases, law reform, public legal education, and I write for the Ontario Waterline publication, so it is a very varied set of tasks. CELA is almost 50 years old, we were founded in 1970 at the University of Toronto by law students the year after the Pollution Probe was founded at the university. Pollution Probe, at the time found, that for the various issues coming to their attention they needed lawyers to work on them. A few years later, we were funded as one of the first Ontario legal aid clinics as part of a broad approach to social justice that looks at not only poverty law not only within geographic mandates but also within specialized areas of law. We run a clinic for environmental law and similarly there are clinics co-located with us that do justice for youth and for industrial accidents. We co-located these clinics recently as we found we can often work together on these issues, whether its occupational health or indoor safety for low-income tenants or energy poverty issues. As a legal aid clinic our mandate is to assist low-income and vulnerable communities and to advocate for law reform that would help them, and all Ontarians, with better environmental law, and to help people

participate in environmental decision-making. Our mandate does include federal and international work if it relates to our work in Ontario, for example, sometimes we will weigh in on trade and environmental agreements. Our priorities are air and water pollution health and safety, and access to environmental justice. We look also into land use, toxic chemicals management, and industrial waste, focusing on the intersection of these issues with low-income communities. One of our major projects is Healthy Great Lakes focused on detoxifying the Great Lakes, another is the Low-Income Energy Network that works on a complete solution to energy poverty. Finally, we have project going on with three First Nations, the Oneida of the Thames, the Chippewa of the Thames, and Munsee Delaware of the Thames, in southwest Ontario that is trying to implement source water protection because it is not in place currently with government funding. Often what we work can take the form of advocacy work as opposed to active legal issues. Before we take on these cases we consider the eligibility, the merits, and the environmental relevance of the case, as well as the possibility of setting a precedent, either good or bad, and whether or not private bar lawyers maybe more effective.

BONNETT: Could you explain your work specifically on the clean water legislation in Ontario in the aftermath of the Walkerton Water Crisis?

MCCLENAGHAN: At the time there were four lawyers working at CELA, and we representing the concerned Walkerton citizens from the very beginning, immediately after the tragedy. We helped them write to the Attorney General of Ontario about an inquiry. From then on we also engaged with the Commission and gave them feedback as they did not initially have a specialist environmental lawyer on their team. We gave them information on past policy, and about our concerns such as water privatization. When the Walkerton Inquiry was launched by Justice O'Connor it had two phases, phase one looked at causation and the actual sequence of events, and phase two looked at what can be done ensure it does not happen again, the policy and law the needs to be put into place. CELA represented the citizens of Walkerton in both phases. I dealt with the health and hydrogeology issues in the case, and also participated in town halls and expert meetings in phase two of the inquiry on behalf of Walkerton citizens. Afterward, there were 120 recommendations out of the Walkerton Inquiry. I worked on the Water Nutrient Act, dealing with source water protection, which was on the pieces of legislation responding to the Inquiry. I also sat on advisory committees for the the Harris/Eves and McGuinty governments that implemented much of this legislation. Partway through this process I was asked to go into the Provincial Government, working with the ministries of health and natural resources, to help with the implementation of the remaining legislation, especially around the Clean Water Act, dealing with other problems such as lead in drinking water in 2007. I then returned to CELA as Executive Director and continued to oversee the implementation of this legislation and continued to advise on standards and consult with stakeholders.

BONNETT: How would you characterize the current clean water crisis facing Indigenous reserves across Canada?

MCCLENAGHAN: It is a dire and longstanding crisis, which finally has some progress being made. It is getting some concerted attention, although there is still a long way to go. The federal government passed legislation, called the Safe Drinking Water for First Nations Act, which I, and many First Nations, did not support. I did not like the approach and philosophy it took and it did not have resourcing and capacity behind it. I recently participated in a symposium in Vancouver on safe drinking water for First Nations and

the strong message was that change needs to be Indigenous lead with support from the federal and provincial governments in their proper jurisdictional role. I think there is currently a lot of goodwill that has been combined with substantially increased funding, however past attempts of increased funding to solve this problem have had a lack of consideration for the huge backlog of work and have not taken the concerted multi-jurisdictional approach necessary. The current federal government has given many of its minsters, in their mandate letters, directive to work towards the elimination of the boil water and drinking water advisories that are endemic to so many Frist Nations' reserves. In Ontario, some minsters were also given a similar mandate. There have been many communities that have been taken off boil water advisories since the new government was elected, although the majority remain under advisories. In this year's federal budget there was additional funding on top of the amount that was dedicated last year, the reason expressed for this was to speed up the pace of moving communities off of the boil water advisories.

BONNETT: Do you believe that this increased funding will actually be effective in addressing this problem?

MCCLENAGHAN: Absolutely. You can certainly spend money without doing any good. In Ontario, for example, they are taking an approach where they are having tri-lateral (federal government, provincial government, and First Nations government) discussion, community by community that have long-standing water advisories, to understand why specific communities have this problem and what can be done to address it, as opposed to taking broad brush strokes and hoping it filters down to solutions gradually. And although these systematic solutions are needed, without addressing each community individually progress won't be made. In each community things such as source water, equipment, the capacity of the operators, and threats facing the water system are not identical. So, the provincial government in Ontario is taking specific targeted efforts in each community that are producing results. However, having said all this there is so much still to be done, while some the real crisis situation are being addressed. What we need to see now is ongoing sustainable funding and supports that are tailored to communities, many of which are remote, very small, or off grid. We have also made no progress in terms of source after protection for First Nations communities, which is the project I am working on with the three First Nations on the Thames River. The reason we are undertaking this project is because we are not content at CELA to sit back and watch First Nations not have what we think is an essential piece of the multi-barrier approach to drinking water protection. So we are trying to establish some tools and legal precedent to work towards a solution.

Bonnett: Do you believe a legislative approach, on behalf of the federal government, similar to that of the Province of Ontario in response to the Walkerton Water Crisis, is necessary in dealing with the clean water crisis on Indigenous reserves in the long term?

MCCLENAGHAN: That is a bit of a fraught question, because in the case of the provincial governments approach, that is very good, only deals with municipal water. There are many towns and villages that do not have centrally treated water and the Clean Water Act did provide a way to bring them under provincial regulation but it has not done that yet. So there is a lot of risk still for people in Ontario. For municipal systems, however, water quality is very good and that is what most of the post-Walkerton legislation addresses. Walkerton happened because of a whole sequence of things that went wrong that provincial legislation has addressed. Because First Nations drinking water is managed by the federal government provincial regulations do not apply. Therefore, many First Nations contract with private firms to provide

their water services and require them to meet provincial standards to ensure they are binding as a matter of contract. What the federal legislation did is took a lot of control out of First Nations governments' hands and said that the federal government can now decide unilaterally that a private firm should provide water services on any given reserve. I think that the answer is that First Nations government's need to have a lead role. The federal government first needs to establish who will ultimately have authority in this is realm and ensure sustainable funding before it establishes binding tools. Right now, however, if the federal government implemented the existing act and unilaterally decided to enforce existing provincial water legislation on reserves and began issuing orders to fix existing problem, how is that going to work? The province wouldn't have the legal authority to act on reserves and likely the reason this problem exists in the first place would be due to a lack of capacity or capital. It is not a straightforward question, and I don't think the answer is immediate binding federal legislation because I think we have not developed the framework in a way that is truly going to work.

BONNETT: So this ideal framework, in your view, would first have to include more autonomy for First Nations government.

MCCLENAGHAN: Yes, I think it should both in law and in concept, that is the greatest path to success.

BONNETT: Do you think the provinces have a role in this problem by taking on individual source water clean ups?

MCCLENAGHAN: Yes. One of the amendments of the Clean Water Act was that the Ontario government added the ability for First Nations drinking water system to be designated by the Band Council to be under provincial law. If they do this all the aspects of the Clean Water Act apply and their system can be assessed accordingly, however, only a few First Nations have done this in Ontario. One of the major reasons I think this is a good is because if one of the major threats to a system is off-reserve source water, such as another municipality's waste water that threat can be dealt with under the Clean Water Act and become binding and enforceable against that municipality or industry. Whereas right now that is something that is not clear as First Nations don't have a direct tool to address these problems. For that reason, this tool of the Clean Water Act can be very effective for First Nations when dealing with off-reserve source water pollution. The other thing that has taken place extensively in terms of source water protection is that there are 19 regions across Ontario that have multi-stakeholder committees that look at threats to source water, First Nations were given seats at these committees. So even though only a few have officially designated their systems under provincial law many more have been at the table and participated for the development of source water protection. There are also many efforts underway along with conservation groups and other provincial agencies to protect source water.

BONNETT: In what ways can we better support Indigenous voices leading the movement for access to clean and safe drinking water?

MCCLENAGHAN: It is a very dynamic time for Indigenous voices and law in Canada, a lot of this is being driven by many factors, even though the jurisprudence is not leading to what we want. Nevertheless, a lot of the experience and learning from this jurisprudence is being used across the country to better support Indigenous voices. We now also have the federal government saying they will officially endorse UNDRIP

(United Nations Declaration on the Rights of Indigenous Peoples) which is very important and they are now consulting on what this means in practice. There is also a lot of good will on behalf of the government where they are consulting with Indigenous leaders and reviewing the Indian Act. There are many First Nations that would prefer to see inherent government approaches being taken without the Indian Act and we are not very far yet on this front in Canada. But I do think there is a prospect of getting there and I think it is a dynamic time in which a lot will continue to change in terms of First Nations' ability to exercise their own governance.

BONNETT: How do you think that Indigenous spiritual and cultural practices relating to water can be reconciled with the law? And are there any current efforts being taken to meaningful reconcile these two factors?

MCCLENAGHAN: It is becoming much more frequent that people think of Indigenous knowledge and spirituality and make room for inclusion. I would say it is baby steps now for sure. There are many situations where there may be reference to these values and kinds of knowledge upfront with little actual implementation. I don't think people intend for it just be lip service, it is that people need to learn how to integrate these things. For example, Chiefs of Ontario did a very interesting report on traditional Indigenous knowledge and integrating that into decision-making. I have been sitting for the last six months on a national expert panel on contaminates on waste water and we were very conscious of trying to embed in the report inclusion of Indigenous knowledge, that is not necessarily a prescription on how best do this but here is really interesting work happening both in First Nations and academically about integrating Indigenous knowledge and spirituality with the law. I think if we return to this question in ten years we will see really fascinating examples of Indigenous values and knowledge being embedded in law and intersecting with Western law in much more deep and influential ways than we have seen so far.

BONNETT: To conclude, what kinds of initiatives can the average citizens and students take to assist in helping to solve the Indigenous clean water crisis? For example, what NGOs or activist groups do you think are doing an effective job in working towards real solutions?

MCCLENAGHAN: Most of the Canadian NGOs that work on water are very concerned with First Nations' water and so are their funders. Many of the funders are especially interested in funding youth lead projects. NGOs like Water First, the Tides Foundation, and the Joyce Foundation have been doing work in these areas. The Law Foundation of Ontario, that has been supporting our work on source water protection, has also been supporting other work on youth and law. There are others such as the David Suzuki Foundation, the World Wildlife Fund, and the Council of Canadians that all work on water issues are very interested in First Nations' water. An organization that is primarily lead by youth leaders called FLOW (federal leadership on water) is a young, new, dynamic group doing important work in this area. Swim Fish Drink Canada is now leading some fascinating, highly interactive projects on water that have a lot of engagement from youth. So there are a lot of opportunities for youth to get engaged on water issues in Canada right now. One other thing I would like to add is that beyond getting involved with these groups at the activist level is that as students there is a lot going on in the academic environment right now in First Nations' issues. There are many First Nations that need capacity, as a lawyers we have been able to tackle these issues from a legal perspective, but we are not hydrogeologists or the geoscientists, so we have been working with universities who are highly interested in having opportunities for their students to have

practical opportunities working with First Nations to impactfully help with the improvement of their water systems. We have also had students in our office helping us by doing geomapping things like pollution and poverty which really helps us with our advocacy and was something we didn't learn how to do in law school. On the topic of Indigenous spiritual practices and knowledge there is a professor named John Borrows that does fascinating work on this topic, and it would be wonderful to see a whole cadre of undergraduate, law, and policy students exploring these topics and working to bring them into a real body of law. I have run workshops on my own Master's thesis, which was on using Section 35 of the Constitution, which protects existing Indigenous treaty rights as tool to constitutionally underpin inherent governance on environmental issues, and my worry is that when there is a gap in governance and law then you are likely to see the courts uphold law that may infringe on what may otherwise be First Nations' space, because the courts don't recognize Indigenous law that is not written down like Western law. This is where John Borrows and others are doing excellent work in showing that this law does exist and should be recognized.

In Conversation with Petra Molnar

By: Alessia Avola

Note:

This interview is being reprinted with permission from CARFMS' *Notes from the Field* Series. As U of T professor and Secretary of CARFMS, the Canadian Association for Refugee and Forced Migration Studies, Dr. Stephanie J. Silverman shares, "each *Note* is based on conversation between an undergraduate student finishing their degree or a postgraduate student starting off their degree, and a more established researcher in refugee and forced migration studies. While all *Notes* will be different, the unifying thread connecting them is a focus on recent developments in research, law, policy, and approaches within Canada to issues of asylum, borders, and immigration. Each student will also find out if the researcher has advice to dispense to scholars at the end of undergraduate studies, and if there is one key change that we should be making about how refugees are treated in Canada."

If anyone would like to participate in *Notes from the Field* as either an interviewer or interviewee, please contact Dr. Stephanie J. Silverman at sj.silverman@gmail.com or @DrSJSilverman on Twitter.

Read more about CARFMS and other contributions from Notes from the Field through CARFMS website http://carfms.org/ and follow CARFMS on Twitter @_carfms for the latest updates on refugee and forced migration studies

The following discussion is focused on how to navigate field work ethically, the roles of different actors in shaping critical discourses, and the challenges facing refugees and their advocates today.

Alessia Avola is a fourth-year undergraduate student studying Ethics, Society and Law and International Relations at the University of Toronto, and a senior editor for the Mindful Journal of Ethics, who looks forward to helping create a kinder world. Petra Molnar is a lawyer and refugee advocate in Toronto and a researcher at the International Human Rights Program, University of Toronto Faculty of Law.

How do researchers, advocates, legal professionals and academics ensure that their practice is ethical when engaging with refugee populations and other vulnerable populations who have experienced trauma? As someone who has done academic field research, and would like to continue doing so, my mind often returns to this line of inquiry. So, I was excited for the opportunity to run these questions by multihyphenate scholar Petra Molnar, a Barrister and Solicitor, academic, and field researcher. In 2015, Petra conducted field work in Jordan and Turkey towards understanding the lived experiences of Syrian refugees.

When I asked Petra how she approaches field work, she expounded on the importance of thorough background research before departing and embarking on the work. This background research includes: understanding the local context; establishing linkages in the community with established persons and groups; and reflecting on your own positionality to the dynamics at play in a particular space. She recommends thinking through vital questions such as: Does this space have a history of information being (violently) extracted from its communities and people without the agreed-upon return coming back to the community? How is your power at play in your role as researcher? Do you understand your role as someone who is meant to learn and observe, and not act as an authority over the lived experiences of the community?

One could also ask, how am I being responsive to the community with which I am working, and how do I know this?
For Petra, actors committed to doing ethical work must ground their research practices in local knowledge, and commit to critically assessing and reassessing their positionality, philosophy, and methodology. Petra noted that although there are a lot of organizations and initiatives that are doing community-based advocacy work, there is a current lack of trauma-informed frameworks, including frameworks that value the knowledge of people's lived experiences, across disciplines and areas of study.

A trauma-informed framework of engagement includes (but is by no means limited to) a one that is designed with principal space for the target population who have experienced and continue to experience trauma. This population needs trust, space, and time to elucidate their required supports, with partners that are responsive to their needs and value their lived experiences and knowledges (without putting the onus for care onto them). She noted that elites in law, academia, and elsewhere must do more to make space for collaborative partnerships. This is critical, as Petra noted, because knowledge production organizes the conversations we have and influence discourse, especially when that knowledge trickles down to the media and is disseminated outward.

This paradigm is exemplified by the way that legal agents, media, and government actors interact to decide on legitimacy, victimhood, deservingness, and how these politically contested concepts become embodied. Careful thought should be devoted to the language used to describe refugees, or images used to associate refugees and migrants. Consider the association of refugee movements with 'floods' or other natural disasters who are over-running a country, accompanying visions of contagion and threats to the health or purity of the host country. These images and corresponding fears stoke and justify sovereignty-enforcing securitization tools like detention and expulsion. In *Discretion to Deport,* Petra documents the stigmatization, and subsequent deportations back to Syria, of Syrian refugees in Jordan who are engaged in sex work or found to be HIV-positive.
I asked Petra about the key change she would make to how Canada treats refugees. She responded with a spotlight on empathy: 'I would want people to look at the humanity of migrants and their hopes and fears. People get reduced to quotas and numbers, but they are complex and embody humanity, in all its dimensions.' Petra's response asks us to consider the stringent, unfair standards that refugees and migrants are held to, where they, to qualify legally or normatively as a 'legitimate' refugee and be considered worthy of care, are cast in a narrow light and understood as a particular type of victim.

We ended our discussion with a look inward, and backward. I asked Petra what advice she wishes she could have told herself at the end of her undergraduate degree. Her answer: to trust yourself, reflect on what it is you want in life, and what is right for you. This means asking yourself what balance you want to strike in your life, what matters to you, and re-evaluating the directions you thought your life would take. This advice coheres with my take-away from our conversation: it encourages a willingness to reassess one's plan, engage in critical -reflection of self and our systems of value.

Thank you Petra, for being so generous with your time and thoughts.

Section 2: Reviews and Critiques

Book Review on Constance Backhouse's Colour-Coded: A Legal History of Racism in Canada, 1900-1950

By Chelsea Tao

Constance Backhouse's *Colour-Coded: A Legal History of Racism in Canada, 1900-1950: A Legal History of Racism in Canada, 1900-1950* analyzes the role of Canadian law in shaping racialized identities from 1900-1950 through an exploration of six distinct legal cases that have entered Canadian courtrooms. Backhouse, a historian and legal scholar, underscores the participation of legal systems in solidifying white supremacy in the 20th century and explores the numerous forces that influenced the relationship between law and racialized individuals. The appropriately titled *Colour-Coded* challenges the colour-blindness adopted by traditional historical texts, effectively rejecting the Canadian mythology of racelessness. Backhouse's analysis on the realities of race in legal history and the implications of the legal system in the establishment of racial inequality rightfully confronts long-standing notions of justice and attempts to recover crucial Canadian history.

Apart from the book's introduction and conclusion, each chapter in *Colour-Coded* focuses on providing an in-depth exploration of landmark cases that Backhouse has chosen from various jurisdictions to illustrate the intersection between race and law. Her deliberate ordering of the cases establishes a gradual scaffolding of concepts from foundational to more complex and/or controversial. She first presents *Re Eskimos*, a 1939 Supreme Court ruling deciding that "Eskimos" fit the definition of" Indian" within Canada's Constitutional Framework, which was plagued by racist misunderstandings of Indigenous identity and culture.[1] The SCC failed to recognize Indigenous peoples as an "interested party" in the matter,[2] counsel and courts perpetuated accounts of biological differences in those who had "Indian blood," and ignored

[1] Backhouse, Constance, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950*. (Toronto: University of Toronto Press, 1999), 18
[2] Ibid., 35.

distinct histories and experiences that characterized Inuit communities. Backhouse uses *Re Eskimos* as a framework for "dissecting racial classification"[3] so that the reader can fully appreciate the implications of the transformative cases that follow. Backhouse explores challenges to racist policies through the defense of Indigenous dance in *Wanduta,* and illuminates Canadian legal attempts to define Indigenous identity through the denial of Mohawk sovereignty in *Sero v. Gault*. Her account of *Yee Clun* exposes the misleading and transmutable legal categories of race and the dominance of exclusionary and racist methods of reasoning in the legal nexus. Backhouse's assessment of *R. v. Phillips* explores the striking accommodation of white supremacy in Canadian legal structures, and highlights the hypocrisy via comparisons to unjust legal experiences of racialized individuals. The final chapter explores the "smokescreen" established by judges who applied "traditional judicial precedents" based on their own predilections.[4] This distracted focus on legal technicality results in the erasure of the racialized nature of Viola Desmond's case, underscoring the dangers of colour-blindness in contemporary Canadian society.

Backhouse presents a socio-legal account of legal relations, which understands and defines law as an incredibly powerful and active force that both houses and produces immense social forces and implications. Her work on racial hierarchies reflects Oliver Holmes' concept of power, especially in *Re Eskimos,* where white experts and authorities failed to "question the whole project of racial classification".[5] The Western fetishization of physical documents is addressed in *Sero v. Gault*. Riddell J. stressed that Sero's case for Mohawk sovereignty was "an unofficial opinion" because the physical documents he researched showed no support for her cause,[6] and disregarded a rich cultural history of Six Nations claims to legal sovereignty. Legal pluralism is a consistent theme in *Colour-Coded*. The concept appears in the interactions between Indigenous and formal legal codes in *Re: Eskimos* and *Wanduta*, the battle to follow Mohawk law in *Sero v. Gault*, and in *R. v. Phillips*' exposition of the legal system's stark double-standard and accommodation of

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[3] Backhouse, 17.
[4] Ibid., 256.
[5] Cole, Stephanie. "Review of Colour-Coded: A Legal History of Racism in Canada, 1900 – 1950, by Constance Backhouse". *Colour-Coded: A Legal History of Racism in Canada, 1900 – 1950. Law & History Review*, 2002, 1.
[6] Backhouse, 126.

informal white legal codes involving white vigilantism against the racial "other". Above all, Backhouse's work is informed by by sociolegal notions of personhood, underscoring the law's construction and control of racial identities and the harmful implications of the lack of this self-definition.

The weakness of *Colour-Coded* lies in its ironic reproduction of the Canadian Census classifications of skin colour – "white, red, black, and yellow."[7] Backhouse recognizes this limitation, and admits that other racialized communities "deserve extensive further treatment."[8] However, the few paragraphs she provides in the introduction to *Colour-Coded* do not adequately frame the implications of this reproduction. To omit the exploration of racialized communities outside of the four arbitrary categories is to omit the telling of valuable stories and contributions that are key to a full understanding of Canadian legal history. Featuring legal cases that involve individuals with recognized racial identities may provide a strong exploration of struggles within the dominant legal framework, but it neglects the experiences of individuals who fall into the margins of racial categorization. Although *Colour-Coded* achieves its goal of laying a foundational understanding of the role of law in preserving racial discrimination, its failure to explore identities that complicate the Canadian conception of the "four tidy boxes"[9] winds up, ironically, reaffirming those very conceptual categories. This creates an unfortunate barrier to a full analysis on legal and racial interactions.

The strengths of *Colour-Coded* lie in its dedicated challenging of harmful Canadian mythologies that conflate notions of racelessness with national identity. Backhouse prefaces her work by highlighting the distinctive Canadian history of race and racism,[10] asserting that the concept of race has traditionally only been attached to racialized individuals, while whiteness is treated as treated as beyond the the scope of racial discussion. To combat this, Backhouse extends the emphasis on racial characteristics to whites – a simple yet revolutionary act that underscores the "tendency of whites to not perceive themselves in racial terms," and thereby combatting the "erasure of privileges attached to membership in the white race."[11] An account

[7] Backhouse, 20.
[8] Ibid., 17.
[9] Ibid., 20.
[10] Ibid., 12.
[11] Ibid., 9.

of Canadian legal history featuring race as the dominant subject fractures the prior focus of mainstream Canadian historical writings in which racialized individuals are not identified by race or ethnicity. The harm of the erasure of racial characteristics is most effectively communicated in Backhouse's emphasis on the implications of legal categorization from 1900-1950. In the first half of the 20th century, race did not appear in legal classification[12] and federal and provincial statutes drawing racial distinctions were raceless in title, yet law was used as an instrument to perpetuate white supremacy. Backhouse's investigation into how this was possible exposes the Canadian legal system as a force shaped by and that worked for the racially dominant group. In addition, by eliminating the complicating details of legal framework from the storyline,[13] Backhouse battles the technicality of legal language that prevents individuals from the legal tools required to criticize the law. Technical language allows the law to be broadly applied, but Backhouse challenges this by delving into specific lived experiences, painting portraits of "the players in each [case]…with biographical attention paid even to seemingly minor actors."[14]

Colour-Coded asserts that "racism was much more than the work of aberrant individuals" and "that racism remains a systemic…fact of life."[15] Its dedicated defamiliarization of contemporary Canadian approaches to racial identity allows for an effective re-introduction of the legal system as a force implicated in the "formation and preservation of racial discrimination."[16] Fortunately, Backhouse's clarity of thought and precise pacing give the reader the required tools to experience this re-introduction patiently and thoughtfully. Above all, Backhouse recognizes that the individuals who show up in the pages of*Colour-Coded* are not just hollow actors who exhibit long-conquered immoral attitudes on the stage of Canadian legal history, but human beings shaped by powerful social forces that influenced their conceptions of reality.

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[12] Backhouse, 13.
[13] Ibid., 16.
[14] Berger, Benjamin. "Review of Colour-Coded: A Legal History of Racism in Canada, 1900-1950, by Constance Backhouse". "*Colour-Coded: A Legal History of Racism in Canada, 1900 – 1950. Osgoode Hall Law Journal,* 2000, 7.
[15] Sharma, Nandita. "Review of Colour-Coded: A Legal History of Racism in Canada, 1900-1950, by Constance Backhouse". *Colour-Coded: A Legal History of Racism in Canada, 1900 – 1950. Historical Studies in Education*, 2002, 3.
[16] Backhouse, 17.

With this meaningful recognition, Backhouse invites us to question our own truths and the paths we will carve in Canadian legal history.

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The Silent Spectre: A Critical Review of Yael Zerubavel's Recovered Roots

By: Kate Reeve

In her award-winning book, *Recovered Roots: Collective Memory and the Making of Israeli National Tradition,* Yael Zerubavel explores the construction of Israeli identity through three key events: the stand at Masada, wherein hundreds of Jews reportedly committed mass suicide to avoid capture in 73 CE, the Bar Kokhba revolt against the invading Romans from 132 - 135 CE, and the defense of a new Jewish settlement, Tel Hai, in 1920. Although Zerubavel presents a compelling analysis of the creation of Israeli collective memory, she ultimately fails to address the inherent gender inequalities reinforced by this process and the consequences for women inside the burgeoning state. This is clear in three ways. First, men are at the center of the myths and histories used by Zionists to build a national consciousness, excluding women from the supposed bedrock of Israeli identity, and cementing the primacy of one gender over the other. Second, these nationalist interpretations were built alongside the primary institutions of the Yishuv - the Jewish community in Palestine - in the pre-state period, whose legacy continues to reverberate through Israeli society today. Finally, the plasticity of collective memory and subsequent challenges to the dominant nationalist rhetoric could have provided opportunities for women to assert their presence in the national character. Zerubavel instead focuses on the fact that these debates centered around the relevance of the three myths to the political climate; the figures she highlights as leading these counter currents were all prominent male thinkers.[1]

The first section of the book focuses on the instruments of and rationale for the Zionist reconstruction of the Jewish past, including the periodization of history and the rise of nationalist myth-making to further political objectives. Zerubavel then breaks into the core of her analysis - an examination of the regeneration of the events of Masada, the Bar Kokhba Revolt, and the settler altercations at Tel Hai. She explains how different cultural mechanisms – music, literature, and ritual – further engrained these narratives into the identity of the state. In the final section, Zerubavel highlights the emergence of debate

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[1] Yael Zerubavel, *Recovered Roots: Collective Memory and the Making of Israeli National Tradition,* (London, England: The University of Chicago Press, 1995), Chapter One.

around the validity of this monolithic nationalist perspective and its intersection with the contemporary Israeli political climate. Drawing on a wide range of sources, the author clearly and persuasively defends her thesis that the Israeli national tradition was consciously manufactured by a wide variety of actors through diverse cultural and political mechanisms, and this production shaped the character of the state, as well as the debates surrounding it. As illustrated above, Zerubavel's work is undermined by a narrow scope, and would be greatly improved with more critical analysis of the role of gender in the processes she describes. Further, the use of a gendered lens not only opens critical space for women, but also includes other marginalized groups as well.

The three re-appropriated myths in Jewish history that Zerubavel chose to analyze are entirely masculinized narratives. Due to the enduringly patriarchal nature of the historical contexts of these events, this is unsurprising.[2] What does require more scrutiny, however, is why Zerubavel does not acknowledge this, or discuss the impact of this gendered character on contemporary Israeli society. In fact, she explains that Zionist memory shaped "the image of the young generation of New Hebrews as *'grandsons'* of the ancient heroes," (emphasis mine) to emphasize continuity with antiquity and as a simultaneous rejection of the weak Jews of Exile.[3] This rhetoric is not uncommon in nationalist movements, but is telling nevertheless. A society built around one bipole of the gender spectrum is inherently exclusionary, and this must be acknowledged in any analysis.[4] In the retelling of the fall of Masada, female characters are only marginal – women and children are simply sacrificed at the hands of their zealous husbands and fathers. They have no personal agency, no role in the overall story besides their heralded commitment to the male figures in their lives: their husbands, fathers, and most importantly, God.[5] Further, in Zerubavel's analysis of the construction of the myth of the Bar Kokhba revolt, women are not present at all, even as props. Lastly, the more recent example, depicting Trumpeldor's final stand at Tel Hai, focuses on his heroism, the image of the plow and the gun, and his all-important last words. But what place do women have in this? They were

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[2] Jessie Montell, "Israeli Identities: The Military, the Family and Feminism," in *Bridges* Vol. 2, (Bridges Association, 1991), 103.
[3] Zerubavel, 25.
[4] Montell, 99.
[5] Zerubavel, 65.

not plowing or shooting, but raising children.[6] They were not dying for their country, but producing the next generation. The merit drawn from Trumpeldor's apparent behaviour relates back to behaviours typically associated with masculinity, which tend to be valued more than those associated with women. This further marginalizes women in the normative climate of the state, as they did not have access to these valued characteristics in the same way as their male counterparts.[7] This is not to say that Zerubavel should have injected women into the narrative when they were not present.[8] The underlying issue is her refusal to address or acknowledge the consequences of this male-dominant narrative on the collective memory of Israelis.

The precursors to state institutions developed while the nationalist interpretations of Jewish history were at their most potent, and the construction of mythologized historical events informed these processes.[9] This took place in a variety of ways, but two of the most important were the development of early education programs, and Hebrew literature. Zerubavel explains that the successful integration of these new myths into the collective memory "depended on the formation of various literary and expressive forms that would reinforce their significance."[10] The cornerstone of the Yishuv's attempt to invent this new national tradition was the development of early education programs, partnered with the Hebrew revival that began to take root in Palestine in the late 1890s. Teachers became significantly powerful actors in the development of the new nation, whose main objective was the socialization of children in nationalist ideology. Classes were taught the Zionist version of Jewish history, with the corresponding values that supported it (heroism, self-sacrifice, connection to the land, etc).[11] Writers, often involved in the school system, responded to the lack of nationalist Hebrew literature, inspired by their perceived role as nation-builders and the frenetic energy of the Yishuv period.[12] Due to their general scarcity, these books became a key part of the New Hebrew

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[6] With the exception of the kibbutzim, which were in decline at this point.
[7] Simona Sharoni, "The Myth of Gender Equality and the Limits of Women's Political Dissent In Israel," in *Middle East Report* Issue No. 207, (MERIP: 1998), 24.
[8] Zerubavel, 53.
[9] Ibid., 153.
[10] Ibid., 79.
[11] Ibid.
[12] Ibid., 81.

culture. In this way, "literature thus reinforced the basic premises of the Zionist master commemorative narrative."[13] Zerubavel explains this very clearly, but she fails to discuss the impact this institutionalization of masculinized narratives would have on the individuals within this new nation. A significant aspect of this culture was the worship of the militarized, strong individual in direct opposition to – and rejection of – the feminine stereotype of the exilic Jew.[14] This leaves the reader with many unanswered questions – how does this define Israeli women?

In the final section, Zerubavel discusses the increasingly public critical analysis of Israel's commemorative memory. In doing so, she reveals the plasticity of collective memory and the mechanisms through which the master commemorative narrative can be challenged. She also highlights that collective memories can be transformed into ideological battlegrounds, as highlighted by the left-right divide of the interpretations of the three main historical events.[15] However, she does not develop how this increasingly critical approach to Israeli history could be an avenue for women to reassert themselves, or the implications this democratization of myth could have on future generations outside the political battlegrounds. This is clear in her analysis of the (entirely male) main ideological challengers to the nationalist's rhetorical hegemony.[16] This section of the book could have been underscored with an activist lens, or at least an examination of how marginalized communities in Israel seized on this growing cultural contestation to make their voices heard. In light of these possibilities, it was disappointing to read a re-iteration of similar perspectives as they applied to the issues of the moment. In fact, Zerubavel concedes that "the earlier commemorative narratives have by no means lost their significance in Israeli culture," despite the steady growth of criticism.[17]

Recovered Roots presents a detailed, fascinating account of the development of the New Hebrew tradition and the mythologized events that underlined this process. However, Zerubavel does not

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[13] Zerubavel, 83.
[14] Montell, 91.
[15] Ibid., 235.
[16] Ibid., 147 - 235.
[17] Ibid., 236.

sufficiently analyze the role of gender in the master commemorative narrative, or discuss the enduring implications of this heavily gendered understanding of Israeli identity. This is evident in her failure to acknowledge the primacy of men and masculinity in the original myths themselves, the role of primary state institutions in cementing the gendered nationalist ideology, and the possibilities presented to women and other marginalized groups through the increasing space for criticism of the nationalist monologue.

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Section 3: Discussions

Constructing Equitable Community Development Agreements: Unearthing Their Potential

By: Gina Kwon

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While Australia is one of the world's richest countries in both absolute and per capita terms, many of its Indigenous peoples live in poverty.[1] This fact becomes particularly shocking in Australia's Northern Territory, where select statistics may suggest that Indigenous peoples have agency and wealth. For instance, according to the Northern Land Council, 50% of the Northern Territory has become Aboriginal land, in addition to 85% of the coastline, since the Parliament of Australia passed the Aboriginal Land Rights (Northern Territory) Act 1976 .[2] Meanwhile, over 80% of the mineral value extracted in the Northern Territory comes from Aboriginal-owned land ("Mining, Minerals and Petroleum Rights" 1).[3] Mining on Aboriginal land contributes more than a billion dollars a year to the territorial economy, accounting for 80% of the Northern Territory mining income.[4] Despite these numbers, Indigenous Australians in the Northern Territory continue to live in poverty. They do not benefit enough from economic development on their land. Why?

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[1] Jon Altman and Katherine May, "Poverty Alleviation in Remote Indigenous Australia," *First World First Nation* (2010): 149.
[2] "About the NLC," Northern Land Council, accessed 24 Oct. 2017, https://www.nlc.org.au/articles/cat/what-we-do/.
[3] "Mining, Minerals and Petroleum Rights in the Northern Territory," Australian Trade and Investment Commission, accessed 20 Oct. 2017, https://www.austrade.gov.au/land-tenure/land-tenure/mining-and-mineral-exploration-leases.
[4] "Making Agreements on Aboriginal Land: Mining and Development," Central Land Council, accessed 21 Oct. 2017, https://www.clc.org.au/index.php?/articles/info/mining-and-development.

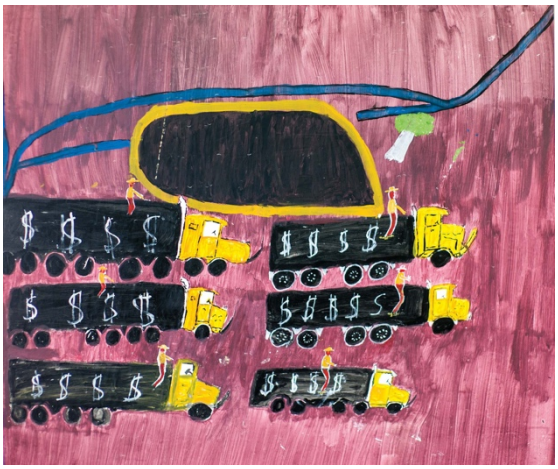

Figure 1: *Yee-haw, Money Trucks* by Jacky Green

One reason is that Indigenous peoples are not getting equitable returns from development projects on their land.[5] Equitable means that a fair share of benefits would go to Indigenous people from projects that are happening on their land. Indigenous artist Jacky Green illustrates what happens when communities do not share in the benefits of development. He depicts the wealth of his homeland being taken away in *Yee-haw, Money Trucks*.[6] Physically, his community is left with a monstrous open-pit mine in the place where his ancestral spirit once lay, a contaminated landscape with a thousand year clean up timeframe.[7] Psychologically, his community is divided over the issue of mining on traditional lands. No significant portion of the profits generated by resource extraction from mineral-rich lands like Jacky's go to the Traditional Owners of those lands. Instead, global corporations reap profits that travel from remote Australia into business centres in cities. A community development agreement (CDA) is one mechanism to fix the discrepancy. CDAs are designed to minimize negative project impacts and ensure that local communities obtain benefits they would not otherwise get.[8]

CDAs are now negotiated for virtually all projects that may affect Indigenous lands in Australia .[9] However, some Indigenous peoples are still disenfranchised by development projects occurring on their land, which suggests some CDAs are faulty; that is, some CDAs unfairly reflect the priorities of the developer and not the local community. This marks a colonial relationship in which the rights and interests of the colonised peoples (local communities) are ignored or considered unimportant compared to the

[5] Jon Altman "Indigenous Communities, Miners and the State in Australia," in *Power, Culture, Economy: Indigenous Australians and Mining,* ed. Jon Altman and David Martin (Canberra: Australian National University Press, 2009), 44.
[6] Figure 1. Jacky Green, *Yee-haw, Money trucks*, 2017, 87 x 100cm, acrylic on canvas.
[7] Rod Campbell, "Wishful Zinking: Economics of McArthur River Mine," *The Australian Institute* (2011), 3.
[8] Ciaran O'Faircheallaigh, "Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon," *Community Development,* vol. 44, no. 2, (2013): 223.
[9] Ibid., 225.

interests of the colonisers (miners). This is the case with McArthur River Mine's version of a CDA, called the "Community Benefits Trust."

This research paper will explore how to move CDAs away from being a colonising tool in the Northern Territory. Appropriate CDAs are a useful mechanism in the Northern Territory to ensure the equitable distribution of benefits from development projects to Indigenous Australians. Firstly, I will define CDAs and their purposes. Secondly, I will argue that there is not a systemic flaw with CDAs, because there have been numerous successful cases in the past.[10] I will explore two successful cases in depth: the Uluru-Kata Tjuta Rent Money Project and the Granites Agreement. Thirdly, I will highlight three elements that are essential to formulating equitable CDAs: legal protection of Indigenous peoples' rights, fair bargaining power for contracting parties, and free, prior, and informed consent for development from local community members. Lastly, I will examine the implications of a poorly structured CDA for the local community, looking at McArthur River Mine's Community Benefits Trust.

THE AIM OF COMMUNITY DEVELOPMENT AGREEMENTS

CDAs are formal agreements, negotiated voluntarily or as a regulatory condition, between developers (either from the private or public sector) and community representatives or organizations ;).[11] [12]Essentially, CDAs aim to ensure that developers contribute to the socio-economic development of communities. Community development is defined as the processes, tasks, practices, and visions that empower communities to take collective responsibility for their own development.[13] [14]CDAs should, therefore, provide a structure to promote self-determination for Indigenous peoples by funding initiatives in Indigenous social enterprises, job creation and training, education, etc. .[15]

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[10] Danielle Campbell and Janet Hunt, "Community Development in Central Australia: Broadening the Benefits from Land Use Agreements," Centre for Aboriginal Economic Policy Research (2010): 15.
[11] Environmental Resources Management, *Mining Community Development Agreements- Practical Experiences and Field Studies* (Washington: World Bank, 2010), 16-17.
[12] O'Faircheallaigh, 222.
[13] Campbell and Hunt, 2.
[14] Altman, 17.
[15] Environmental Resources Management, *Mining Community Development Agreements- Practical Experiences and Field Studies*, 16.

CDAs appear under several different guises and terminologies in international literature.[16] For instance, CDAs are referred to as "Indigenous Land Use Agreements" or "Landowners Agreements" in Australian literature and "Impact Benefit Agreements" or "Exploration Agreements" in Canadian literature.[17]

CDAs are especially important in mining endeavors, where the environmental and social costs are often borne by communities. Meanwhile, benefits accrue in national capitals and global financial centres, leading to conflicts between local communities and miners .[18] Local communities will likely oppose development on their lands if they will bear the cost of development projects and forgo benefits. When communities oppose projects through government statutory or court processes, developers can incur significant financial and time costs. Thus, it is in the corporations' interests to negotiate CDAs and earn social license to operate (Gross 22). [19]

Another reason to have CDAs is that the negotiation process provides a forum for the interests of affected local communities to be addressed (Environmental Resource Management 3).[20] A CDA can be seen as a way to promote basic self-determination for Indigenous peoples; that is, under some CDAs, development may be on land that is still properly under the stewardship of Indigenous peoples. As a result, CDAs in these cases ought not merely mitigate development costs and share development benefits to local communities; they ought to enable Indigenous people to govern development that affects their lives. CDAs recognise Indigenous people's rights to self-determination, which is delineated by Article 18 of the United Nations Declaration of the Rights of Indigenous People (UNDRIP).[21] Article 18 of UNDRIP reads:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

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16. Environmental Resources Management, *Mining Community Development Agreements- Practical Experiences and Field Studies*, 2.
17 Ibid., 16.
18 O'Faircheallaigh, 222.
19 Julian Gross, *Building Healthy Communities: A Guide to Community Economic Development for Advocates, Lawyers, and Policymakers* (Chicago: American Bar Association, 2009), 22.
20 Environmental Resources Management, *Mining Community Development Agreements- Practical Experiences and Field Studies*, 3.
21 "United Nations Declaration on the Rights of Indigenous Peoples*," GA Res 61/295. UNGAOR. 61st sess. 107th plen mtg. Agenda Item 68. Supp No 49*, UN Doc A/RES/61/295 (October 2007).

By virtue of that right, Indigenous peoples can freely determine their political status and freely pursue their economic, social, and cultural development. Indigenous peoples are able to exercise self-determination by framing CDAs to ensure they meet the demands of the local community. Moreover, consultations with Indigenous peoples are carried out with the objective of obtaining a community's consent, which may require letting communities participate in the project approval process, including negotiating CDAs.

SUCCESSFUL CASES OF CDAs

CDAs have been successful in ensuring Traditional Owners of Indigenous lands receive equitable benefits from development in the Northern Territory. According to Australia's Central Land Council, an organization that represents Aboriginal Traditional Owners of central Australia in the Northern Territory,

Figure 2: Uluru-Kata region, NT

Figure 3: Uluru at sunset

successful CDAs build self-reliance, strengthen communities, and promote good governance through self-determination.[22]

For instance, the Uluru-Kata Tjuta Rent Money Project is successful because it empowers Indigenous peoples in the Uluru-Kata region, Northern Territory, to manage their own affairs and take collective control of their lives .[23] In 1977, the Commonwealth declared the Uluru-Kata region a national

[22] "Community Development Framework 2016-2020,". *Central Land Council,* (2016): 16.
[23] Figure 2, https://media1.britannica.com/eb-media/49/137649-004-186A6C7B.jpg

park, calling it "Ayers Rock".[24] Then, Ayers Rock was restored to Anangu Traditional Owners after they won title of their traditional lands through the Aboriginal Land Rights Act in 1985.[25] The Uluru-Kata region still operates as a national park with the Anangu Traditional Owners' consent, but the Commonwealth is now responsible for paying Traditional Owners rent for using their land as park space. Thus, the Uluru-Kata Tjuta Rent Money Project is a type of Indigenous Land Use Agreement.

With the help of the Central Land Council, Traditional Owners have been putting money aside from the rent since 2007. Approximately 50% of the rent is now being spent, or is earmarked for spending, on community development projects; the remainder is distributed to Traditional Owner.[26] The Uluru Rent Money project has allocated $8M AUD to 80 initiatives, with 65 of them already finished .[27] Initiatives range from Indigenous ranger groups to community pools .[28]

The Uluru-Kata Tjuta Board of Management manages park operations and outlines details about rent. Anangu Traditional Owners demanded they form a majority on the Board as a condition to renting out the park. In result, the Board is comprised of 12 members: 8 Indigenous members nominated by the Traditional Owners of the park, the Director of National Parks Australia, a nominee of the Minister for Tourism, a nominee of the Minister for the Environment, and a nominee of the Northern Territory Government.[29] Thus, the Board is organized in a way that gives voice to Traditional Owners and ensures their demands are met.

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[24] Figure 3, https://parksaustralia.gov.au/uluru/.
[25] Central Land Council, "Mutitjulu Uses Uluru Rent Money to Buy Pool," Central Land Council, accessed October 24, 2017, https://www.clc.org.au/index.php?/media-releases/article/mutitjulu-uses-uluru-rent-money-to-buy-pool.
[26] Campbell and Hunt, 6.
[27] Ibid.
[28] Central Land Council, "Mutitjulu Uses Uluru Rent Money to Buy Pool," https://www.clc.org.au/index.php?/media-releases/article/mutitjulu-uses-uluru-rent-money-to-buy-pool.
[29] Campbell and Hunt, 5.

Figure 4: Granites open-pit mine

Secondly, the Granites Agreement was successful in bringing long-term sustainable benefits to Indigenous landowners from 1983 to 2007 because of its flexibility.[30] Made under the Aboriginal Land Rights Act, The Granites Agreement was signed by both Newmont Mining Corporation and Warlpiri Traditional Owners in 1983 .[31] [32]

The Granites Agreement helped to obtain consent from Traditional Owners for the development of a gold mine in the Tanami Desert region, Northern Territory .[33] This Agreement analyzed Indigenous employment and payments to Indigenous landowners. Achieving positive outcomes required highly committed and collaborative approaches.[34] For instance, the Central Land Council, on behalf of the Warlpiri Traditional Owners, and Newmont Mining Corporation collaborated to revise the Agreement in 1991 [35]. A revised agreement was finalized in May 2003 to rectify a financial situation Traditional Owners considered unfair in the original Granites lease: they believed that compensation payments should be based on the value of the ore processed at Granites, which meant higher royalties should be paid to Traditional Owners.[36] Being able to revise the Agreement ensured that the Agreement accurately addressed the needs of both parties as mining evolved over time.

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[30] Rodger Barnes, "Building an Implementation Framework for Agreements with Aboriginal Landowners: A Case Study of The Granites Mine," (Masters thesis, The University of Queensland, 2013), ii.
[31] Ibid.
[32] Figure 4, http://www.alicespringsnews.com.au/2013/11/27/more-sit-down-money-fewer-answers-as-millions-accumulate/.
[33] Figure 5, https://i0.wp.com/australiancamping.com.au/wp-content/uploads/2015/01/Tanami-Desert.jpg?fit=770%2C553.
[34] Barnes, ii.
[35] Ibid., 73.
[36] Barnes, 73-74.

In addition to effectuating equitable compensation for Indigenous Traditional Owners, the Agreement also set out Indigenous employment goals. The original Agreement read, "Newmont shall employ on the Project as many local Aboriginals as is practicable of carrying out or being trained to carry out in satisfactory manner the particular work required" .[37] Like the compensation scheme, the employment scheme could also be reviewed and modified to reflect the demands of the Warlpiri peoples at any given time. The employment scheme was a key strategy for equipping the Warlpiri peoples with the necessary skills to work at the mine, promoting self-determination and agency to work.

Interestingly, these two examples of successful CDAs share similarities in their framework. Both the Uluru-Kata Tjuta Rent Money Project and the Granites Agreement were successful in accurately reflecting and addressing the needs of Indigenous local communities. Both agreements allowed for Indigenous peoples to make decisions on matters affecting them, respecting the Anangu and Warlpiri peoples' autonomy and agency. Furthermore, Traditional Owners were free to organize their own representation for negotiating agreements. Importantly, CDAs served as one method for the actualization of self-determination and self-governance of Indigenous peoples .[38] The capacity for Indigenous peoples to self-govern and self-represent, however, hinges on three factors, explored in the next section.

FACTORS OF SUCCESS

Successful CDAs are organized using a bottom-up approach, with agreements providing structure for local Indigenous peoples to design and implement their own development projects.[39] Successful implementation of community benefits requires a capacity on the part of developers and community representatives to negotiate effectively, which can be achieved by respecting three essential, interconnected

[37] Ibid., 82.
[38] Jacky Green and Seán Kerins, *Indigenous Country in the Southwest Gulf of Carpentaria: Territories of Difference or Indifference? Engaging Indigenous Economy- Debating Diverse Approaches* (Australian National University Press, 2016), 113.
[39] O'Faircheallaigh, 226.

elements: (1) legal protection of Indigenous peoples' rights; (2) fair bargaining power for contracting parties; and (3) free, prior, and informed consent for development from the local community .[40] [41]

(i) Legal Protection of Indigenous Peoples' Rights

The capacity for Indigenous peoples to resist state-sanctioned mining or to ensure equitable benefit sharing is highly dependent on enhancing the capacity for local Indigenous organizations to protect their legal rights.[42] One method of enhancing this capacity is through legal empowerment with acts like the Aoriginal Land Rights (Northern Territory) Act 1976, the Native Title Act 1993, and the Environment Protection and Biodiversity Conservation Act 1999. For instance, management of Uluru operates according to the Environment Protection and Biodiversity Conservation Act 1999, which ensures that visitors to the park respect its natural and cultural values, and according to the Aboriginal Land Rights Act, which recognizes the rights of Anangu Traditional Owners.

Anangu Traditional Owners won native title of Uluru-Kata in 1985.[43] Later, the Warlpiri, Kaktja and Ngarti Land Claim was successful in 1987 ("Warlpiri, Kukatja and Ngarti Land Claim").[44] Consequently, the rights outlined in the Aboriginal Land Rights (Northern Territory) Act 1976 were made available to Indigenous landowners. The Land Rights Act was the first attempt by an Australian government to legally recognize the Aboriginal system of land ownership and put into law the concept of inalienable freehold title .[45] Thus, the Land Rights Act is a fundamental piece of social reform that enabled many Aboriginal peoples to maintain and even re-establish their cultural identity on their ancestral lands.

Success in land claims can mean security and autonomy for Indigenous landowners, as they finally have control over the place where their ancestors lived and died. Moreover, the Land Rights Act

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[40] O'Faircheallaigh, 226, 231-235
[41] Campbell and Hunt, 12-15.
[42] Altman, 44.
[43] "Community Development Framework 2016-2020,". *Central Land Council,* (2016): 1.
[44] "Warlpiri, Kukatja and Ngarti Land Claim," Central Land Council, accessed December 6, 2017, https://www.clc.org.au/index.php?/land-won-back/info/warlpiri-kukatja-and-ngarti-land-claim/.
[45] "Aboriginal Land Rights Act," *Central Land Council,* accessed December 6, 2017, https://www.clc.org.au/index.php?/articles/info/the-aboriginal-land-rights-act/.

includes the right to inalienable freehold title, to hunt and gather on that land, to veto mining exploration, to collect land-use money, and to access land councils.

The Land Rights Act also sets out how exploration or "looking around" and mining must be done on Aboriginal land.[46] A mining company must provide details of its plan, and a land council must consult with traditional landowners about the plan to explore on Indigenous land. Traditional Owners have around two years to make a decision, which may be extended if the developer agrees.[47] If Traditional Owners say no, the mining company and any other company will be blocked for five years, unless the land council applies to remove this block. If Traditional Owners say yes, the mining company and traditional owners must make an agreement about exploration. For example, the Warlpiri Traditional Owners approved of gold mining in the Tanami Desert region and cooperated with Newmont Mining to form the Granites Agreement under the Land Rights Act. The developer must provide further details and make another agreement before mining, but Traditional Owners cannot block mining if they say yes to exploration .[48] Ultimately, the Land Rights Act recognizes Indigenous peoples' rights to decide what happens on their land.

(ii) *Fair Bargaining Power for Contracting Parties*

The Land Rights Act established the Northern Land Council and Central Land Council. The Land councils are representative bodies of elected Aboriginal people. The benefits of having access to land councils through the Land Rights Act are the resources made available to Indigenous Traditional Owners. Land councils determine policy and employ expert legal, anthropological, and land-management staff to assist Aboriginal people in the claiming and management of their land, the protection of their sacred sites, and the financial management of income received, which helps increase Indigenous organizations' bargaining power.

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[46] "Aboriginal Land Rights Act," *Central Land Council,* accessed December 6, 2017, https://www.clc.org.au/index.php?/articles/info/the-aboriginal-land-rights-act/.
[47] Ibid.
[48] Ibid.

Under the Land Rights Act, land councils that are employed by Indigenous organizations must consult with and have regard for the interests of Traditional Owners. Additionally, other duties include "ensuring Traditional Owners understand any proposal, ensuring any affected Aboriginal community has expressed its views, complying with traditional decision making processes, and not giving a direction without the consent of Traditional Owners" .[49] As advisors and facilitators, land councils assist Indigenous peoples to ensure equitable CDAs are made.

In good faith, the Central Land Council and Northern Land Council seek to "maximize opportunities for Aboriginal engagement, ownership and control, particularly in relation to the management of resources that belong to them".[50] [51]Land councils were created under the Commonwealth system and, thus, are familiar with the western framework, such as western laws, governance, and economy. As a result, land councils can be advantageous resources for Indigenous Traditional Owners who operate under Aboriginal Laws, governance, and economy. Essentially, the Central Land Council and Northern Land Council can serve to bridge the divide between two cultural systems. Land councils can also provide useful insights to the Indigenous peoples they represent, which in turn may help Indigenous peoples to make informed decisions concerning development.

Land councils make a conscious decision to develop and articulate community development goals, principles, and processes founded by Indigenous peoples.[52] Thus, land councils help to ensure that fair negotiations occur between Indigenous organizations and developers, and that benefits are not skewed to one party. For instance, the Central Land Council worked with the federal government, during the Uluru-Kata Tjuta Rent Money Project, to ensure Anangu Traditional Owners formed a majority on the board that managed the national park, a demand the Anangu Traditional Owners expressed early in the negotiation process. The Warlpiri Traditional Owners considered compensation payments in the original Granite lease

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[49] "Aboriginal Land Rights Act," *Central Land Council,* accessed December 6, 2017, https://www.clc.org.au/index.php?/articles/info/the-aboriginal-land-rights-act/.
[50] "About CLC – What We Do," *Central Land Council*, September 11, 2017, http://www.clc.org.au/articles/cat/what-we-do/.
[51] Ibid.
[52] Campbell and Hunt, 5.

to be too low compared to the market value of the ore processed at the Granites; thus, the Central Land Council helped bargain fairer financial arrangements with Newmont in 2003 .[53]

(iii) Free, Prior, and Informed Consent (FPIC) for Development from the Local Community

As previously mentioned, Indigenous landowners have the right to temporarily accept or reject development on their lands under the Land Rights Act. This is extremely powerful, because the Northern Territory Government cannot compulsorily acquire land.[54] Therefore, the government needs the consent of Indigenous landowners for development projects. This is a step towards cooperation between developers and local Indigenous communities affected by development.

Moreover, UNDRIP recognizes the right of Indigenous peoples to organize and represent themselves, and to exercise FPIC (Article 19).[55] Although UNDRIP is domestically non-binding in Australia, UNDRIP holds in international law, and serves as a framework for better recognition and protection of the rights of Aboriginal and Torres Strait Islander Australians (Reconciliation Australia 2).[56] Thus, there is international and domestic pressure for Australia to uphold the UNDRIP's principles.

Having native title over land, through either the Land Rights Act (1976) or the Native Title Act (1993), significantly increases the likelihood that CDAs are successful in delivering to Indigenous people equitable benefits from development projects on their traditional lands. Firstly, land rights guarantee legal protection to landowners. Secondly, land rights can contribute to fair bargaining power between landowners and developers. Developers must respect land rights, and landowners have rights to resources (i.e. land councils) that may be useful in making informed decisions. Lastly, land rights ensure FPIC is given prior to development. If any of these three conditions are not met, tensions can rise between developers and local communities. Moreover, the benefits outlined in a poor CDA may greatly favour the developers, leaving the

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[53] Barnes, 73-74.
[54] "Aboriginal Land Rights Act," *Central Land Council,* accessed December 6, 2017.
[55] "United Nations Declaration on the Rights of Indigenous Peoples*,"* UN Doc (October 2007).
[56] "Reconciliation Australia," United Nations Declaration on the Rights of Indigenous Peoples, Reconciliation Australia, accessed October 24, 2017, https://www.reconciliation.org.au/wp-content/uploads/2016/09/Reconciliation-Australia-United-Nations-Declaration-on-the-Rights-of-Indigenous-Peoples-UNDRIP.pdf.

local community to bear the costs of development (i.e. environmental degradation, cultural destruction, health deterioration, pollution, etc.). This is the case for McArthur River Mine's Community Benefits Trust.

UNSUCCESSFUL CASE OF A CDA

While both the Granites Agreement and the Uluru-Kata Tjuta Rent Money Project serve as examples of a larger set of successful CDAs in Australia, McArthur River Mine's Community Benefits Trust (CBT) is an example of a poorly structured and poorly functioning CDA- one that fails to deliver benefits to the community near the McArthur River. It is important to examine reasons for CBT's shortcomings to know what to avoid going forward in structuring CDAs and what elements need to be changed for CBT to function equitably.

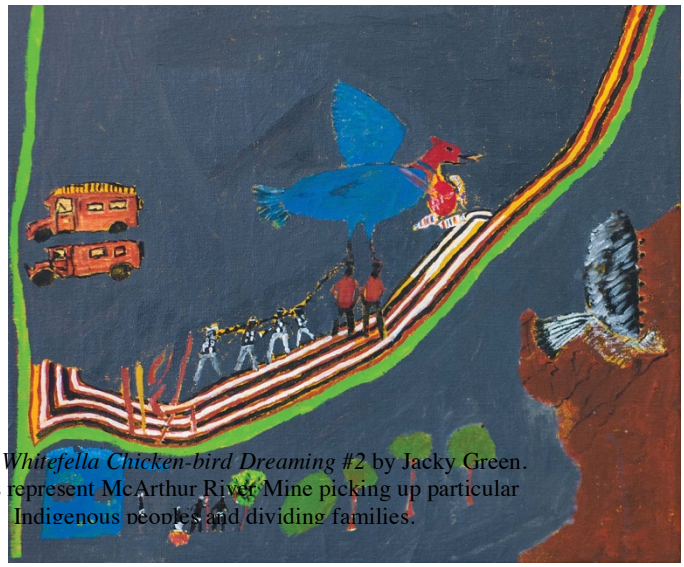

Figure 6: *Whitefella Chicken-bird Dreaming #2* by Jacky Green. The birds represent McArthur River Mine picking up particular Indigenous peoples and dividing families.

McArthur River Mine is located 65 km southwest of the remote community of Borroloola, Northern Territory, about 900 km southeast from the territory capital, Darwin.[57] Situated in the remote Gulf of Carpentaria, Borroloola is home to 1,200 Australians, 700 of whom are Indigenous and live on the traditional lands of four regional language groups: the Yanyuwa, Gurdanji, Garawa, and Mara .[58] The McArthur River cuts through Borroloola and leads to McArthur River Mine, which lies 70 km southwest of the town. McArthur River Mine is a world-class zinc-lead mine. Since its operations began in 1995, McArthur River Mine has established itself as the world's second largest zinc mine.[59]

CBT was formulated in 2007 as a condition imposed on McArthur River Mine by the Northern Territory government for approving a mine expansion proposal. As a result, CBT was negotiated between

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[57] Green and Kerins, 112.
[58] Ibid., 112-113.
[59] Paul Daley, "Jacky Green: "Nothing Has Really Changed Since Whitefellas Came. First it was Horses Now Bulldozers," *The Guardian,* March 30 2015, 4 https://www.theguardian.com/world/2015/mar/30/jacky-green-nothing-has-really-changed-since-whitefellas-came-first-it-was-horses-now-bulldozers.

the Northern Territory government and McArthur River Mine, without consulting Indigenous people who make up 60% of the residents in Borroloola. Every year, until 2028, McArthur River Mine is responsible for providing $1.25M AUD into the Trust that funds initiatives aimed at developing the Borroloola community.[60] Initiatives include implementing a breakfast program at the Borroloola Public School to try to improve attendance and retention rates, organizing an after-school soccer program for youth, and providing job training to local residents in the hope of future employment with the mine.[61] Moreover, McArthur River Mine dipped into the CBT and took $600,000 AUD to fund its own indigenous employment program.

A Trustee Board is responsible for producing an Annual Plan, which outlines the priorities, projects, and funding for each year. Then, the Allocation and Investment Committee reviews the Trustee Board's Annual Plan for final approval.[62]

Whereas the Uluru-Kata Tjuta Rent Money Project and Granites Agreement had powerful 3rd parties (i.e. CLC) to negotiate their CDAs and help remedy the huge power imbalance between developers and local communities, the Indigenous peoples in Borroloola have none. Furthermore, low literacy and numeracy of some Indigenous members have made them subject to a CDA that fails to satisfy their needs in two ways.

Firstly, local Indigenous peoples are misrepresented on the Trustee Board. The McArthur River Mine Community Benefits Trust Agreement, which founded the CBT, reads, "The Trust will be managed by a Trustee Board comprising 9 directors: 2 nominated by the NT Government, 2 nominated by McArthur River Mining, 1 elected by community members and 4 representing Indigenous members".[63] Thus, representation of the local Borroloola community is through five board members. Although community members elect their community representative, Indigenous people cannot engage in traditional forms of governance to decide who sits on the Board for them. Instead, since CBT's inception, the mine always

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[60] "McArthur River Mine Community Benefits Trust Agreement," Agreements, Treaties and Negotiated Settlements Projects, accessed December 2017, http://www.atns.net.au/agreement.asp?EntityID=4702.
[61] "Northern Territory Schools," *2014 Annual Performance Report to the School Community: Borroloola School*, (2014):10.
[62] "McArthur River Mine Community Benefits Trust Agreement," Agreements, Treaties and Negotiated Settlements Projects.
[63] Ibid.

appointed the four Indigenous representatives. (see Fig. 6).[64] [65] Unlike the Anangu Traditional Owners who picked their Board representatives, Indigenous Borroloola peoples are not able to exercise their agency by participating in decision-making matters on policies affecting them. Instead, the mine or the government, without Indigenous Borroloola peoples freely engaging or being heard at the table, makes decisions paternalistically.

In Borroloola, Indigenous representatives cherry-picked by the mines are often those who feel the least cultural connection to the land and its peoples. As "weak links" in the community, many are incentivized with motorcars, employment, and cash .[66] This strains the cultural survival of the four language groups, as their own representatives do not feel that it is imperative to fight for their culture when it comes into conflict with mining operations. Moreover, Indigenous people cannot seek representation as "community members" because, under the Trust Agreement, the mine decides who becomes a "community member". Borroloola residents can submit a written application to apply for the status of a "community member". The challenge with this form of application system is that 92% of Indigenous Borroloola residents are illiterate.[67]

Secondly, local Indigenous peoples have incomplete information about CBT; that is, although the Trust Agreement is available online and on-site in Borroloola, it does not provide information on the Allocations and Investment Committee, which has the final prerogative on deciding which community development initiatives get funding. This lack of transparency is a concern because, without knowing who forms the Committee or how the Annual Plan gets approved, the local community has no voice in deciding how their community gets developed. Furthermore, there has been no public report provided by the mine since 2015.

The shortcomings of CBT illustrate the need for CDAs to be drafted from negotiations between the local community and the developers with transparency and mutual respect. It also showcases the important

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[64] Figure 6, Jacky Green, *The Whitefella Chicken-bird dreaming #2*, 2017, 46 x 55cm, acrylic on canvas.
[65] Daley, 5.
[66] Ibid, 6.
[67] "Northern Territory Schools," *2014 Annual Performance Report to the School Community: Borroloola School*, 12.

role third parties with some power, like the Central Land Council and Northern Land Council, play to ensure fair negotiations occur. The Yanyuwa, Gurdanji, Garawa, and Mara peoples affected by the McArthur River Mine have not been brought into a partnership by the Northern Territory government or miners. The latter have consistently considered it unnecessary to seek the consent of Indigenous peoples on actions affecting them and have frequently failed to even consult with them. If work is not done to improve CBT's current structure, CBT can result in significantly grave injustices when the mine and the government manipulate it to promote their idea of development. Thus, there must be pressure on the mine and the government to rectify the problems with CBT. There are structures and models in the Northern Territory that have been evaluated to ensure equitable outcomes, such as land councils and various acts, which recognize the needs and rights of Indigenous peoples.

CONCLUSION

While a large portion of Australia's development projects, mainly regarding mineral extraction, occur on Indigenous peoples' ancestral lands, the profits made from these lands are not shared fairly amongst developers and Indigenous Traditional Owners. To remedy this, CDAs can be implemented to ensure benefits are given to the local communities affected by development. Meanwhile, CDAs also provide developers with the community support they require if commercial activity is to be sustainable over time. Most importantly, a CDA is a tool that can promote the self-determination of Indigenous peoples. CDAs provide funding for the socioeconomic development of local communities affected by resource extraction projects. By developing local communities in a way that is envisioned by local Indigenous peoples, local Indigenous peoples can establish and run initiatives that move toward self-determination, as seen by the Anangu and Warlpiri peoples with the collection of rent and compensation payments respectively. As a result of the funding provided by CDAs, Indigenous people have more control over their ancestral lands, and can promote their own initiatives and life-projects.[68]

[68] Green and Kerins, *Indigenous Country in the Southwest Gulf of Carpentaria: Territories of Difference or Indifference?* 119-120.

This paper outlined three components characteristic of successful CDAs in the Northern Territory, Australia. Firstly, Indigenous peoples who are party to a CDA must have legal protection, so that their rights as Traditional Owners are not violated. Secondly, they must have fair bargaining power to bring their concerns to light, and address them while negotiating with developers. Thirdly, they must be able to give free, prior, and informed consent to development on their land. The repercussions of failing to satisfy these components – failing to recognize Indigenous people's right to participate in decision-making matters affecting them, and to self-govern in their own cultural ways – result in high tensions between developers and local Indigenous communities, as evident in Borroloola. Therefore, a poorly structured CDA can disenfranchise local Indigenous people by casting their voice away from the negotiation table and overriding their agency. It is imperative that developers and local communities cooperate, collaborate, and negotiate a fair arrangement that meets the needs of the community and provides equitably distributed benefits, not heavily favoring developers, if development projects transpire on Indigenous lands.

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Images

Fig. 1: Jacky Green, *Yee-haw, Money trucks*, 2017, 87 x 100cm, acrylic on canvas
Fig. 2: https://media1.britannica.com/eb-media/49/137649-004-186A6C7B.jpg
Fig. 3: https://parksaustralia.gov.au/uluru/
Fig. 4: http://www.alicespringsnews.com.au/2013/11/27/more-sit-down-money-fewer-answers-as-millions-accumulate/
Fig. 5: https://i0.wp.com/australiancamping.com.au/wp-content/uploads/2015/01/Tanami-Desert.jpg?fit=770%2C553
Fig. 6: Jacky Green, *The Whitefella Chicken-bird dreaming #2*, 2017, 46 x 55cm, acrylic on canvas

The Obstructive Role of Aboriginal Title in the Reconciliation of Crown Indigenous Relations in Canada

By: Tanzim Rashid

Introduction

The current formulation of Aboriginal title in settler-state Canadian law, as found in the Supreme Court of Canada's decision in *Tsilhqotin Nation v British Columbia,* is insufficient to satisfy the underlying purpose of S.35 (1) of the *Constitution Act*: to reconcile the *prior presence* of Aboriginal peoples with the assertion of Crown sovereignty.[1] The notion of *prior presence* referred to in S. 35(1) pertains to the recognition and affirmation of its two constituent elements: the occupation of land and the prior social organization and distinctive cultures of aboriginal peoples on that land.[2] The insufficiencies latent within Aboriginal title can be traced back to its *sui generis* designation, and the three defective elements which flow from its particular formation, content, and modification of property ownership. First, the regulatory framework dictating the formation of Aboriginal title, as outlined in the *Delgamuukw* decision, inhibits the capacity for Aboriginal peoples to realize a holistic form of land ownership necessary for reconciliation under S.35 (1) of the *Constitution Act* because of its inalienability. Second, the content of Aboriginal title per the *Delgamuukw* decision, specifically its irreconcilability and continuation, puts forward a citizen-state paradigm of Aboriginality that undermines the nation to nation alternative, resulting in the obstruction of reconciliatory processes imagined by S.35 (1) of the *Constitution Act*. Third, in an effort to render these insufficiencies soluble, and to circumvent the aforementioned defects found in the original common law formulation of Aboriginal title, the Nisga'a Treaty of 2000 attempts to convert Aboriginal title to fee simple ownership. Nevertheless, this modified iteration of Aboriginal title reinforces a frozen rights approach to Aboriginal land rights, known as Aboriginalism, and forecloses its organic alternative, the living tree approach, contrary to the purposes of S.35 (1) of the *Constitution Act*.

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[1] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at p. 8.
[2] Ibid.

Sui Generis

The *sui generis, special or unique* designation of Aboriginal title has inhibited the capacity of Aboriginal peoples to realize the holistic form of land ownership that is necessary for reconciliation under S.35 (1) of the *Constitution Act*. The Supreme Court of Canada in both *Delgamuukw v British Columbia,* and *Tsilhqotin Nation v British Columbia,* created a new category of *sui generis* Aboriginal land rights.[3] This category of land rights was "distinguished from other proprietary interests"[4] based on four unique properties. First, *sui generis* land is "inalienable and cannot be transferred, sold, or surrendered to anyone other than the Crown."[5] Second, *sui generis* land "cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to the land"[6] or that is "inconsistent with the continued use [of the land] by future generations of Aboriginals."[7] Third, *sui generis* land can be converted into fee simple ownership with the consent of the title holders.[8] Fourth, *sui generis* land is to be held "communally."[9] In each case, except for the communal quality of Aboriginal title, the designation of *sui generis* has functioned as a restraint on the rights of Aboriginal land owners, relegated Aboriginal title to an inferior status in the law, and operated without legal precedent, contrary to the underlying purposes of S.35 (1) of the *Constitution Act*.

Formation of Aboriginal Title

Inalienability

The principle of inalienability has removed the right of Aboriginal landowners to transfer their lands to non-Aboriginal persons. As a result, the capacity of Aboriginal nations to create interests within lands to which they hold title has been muted. This proves significant because it deprives Aboriginal nations of a key privilege latent in the right to self-government: property management.[10] As Chief Justice Marshall outlined in his decision in *Worcester v Georgia,* title to land, including all of the rights that come with it, goes hand in hand

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[3] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 3 [hereinafter *Delgamuukw*].
[4] Ibid., 112.
[5] Ibid., 68.
[6] Ibid., 111.
[7] Ibid.
[8] Andrew Beynon, "The Nisga'a Land Question," *International Journal on Minority and Group Rights* 11, no. 3 (2004): 269.
[9] Ibid., 115.
[10] Kent McNeil, "Indigenous Land Rights and Self Government: Inseparable Entitlements," in *Between Indigenous and Settler Governance,* (London: Routledge, 2012): 146.

with sovereignty.[11] This is a sentiment shared by the Canadian Government in its Inherent Right Policy of 1995. The Government of Canada recognizes that "jurisdiction and authority" for Aboriginal governments and institutions in a "number of areas" is necessary to "give effect to the inherent right of self government."[12] One of these areas is "land management," including "land tenure and access."[13] These rights to property management are precisely those stripped from Aboriginal title holders through the restrictions imposed on their right to alienation. Thus, insofar as the Inherent Policy flows from S.35 (1) of the *Constitution Act,* the legal disability imposed on Aboriginal title by the notion of inalienability has been a corrosive agent on the form of land ownership necessary for reconciliation.[14]

Furthermore, the principle of inalienability creates an inequality between Aboriginal and settler-state property owners with respect to their property rights. Fee simple ownership, a non-Aboriginal property interest recognized under the common law, provides titleholders with a right to "dispose of interests in their land to third parties without having to go through the Crown."[15] Contrastingly, Aboriginal titleholders are prohibited from transferring, selling, or surrendering their lands to "anyone other than the Crown."[16] This discrepancy, created by the principle of inalienability, relegates Aboriginal property rights to a status that is inferior to owners in fee simple and, in the process, compromises the legal equality between Aboriginal and non-Aboriginal peoples imagined in S.35 (1) of the *Constitution Act*.[17]

Finally, the concept of inalienability finds no precedent in common or government edicts law. Contrary to Chief Justice Lamer's assertion in *Delgamuukw* that "the inalienability of Aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant,"[18] the right to alienate Aboriginal lands is not embedded in the common law itself. As

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[11] *Worcester v Georgia,* 31 U.S. (6 Pet.) 515 (1832), 559.
[12] "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government," *Indigenous and Northern Affairs Canada,* accessed November 26, 2017. http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844.
[13] Ibid.
[14] Ibid.
[15] Beynon, 270.
[16] *Delgamuukw*, [1997] 3 SCR 1010, p. 7.
[17] *R. v. Van der Peet,* [1996] 2 SCR 507 at 50 [hereinafter *Van Der Peet*].
[18] *Delgamuukw*, [1997] 3 SCR 1010, 129.

illustrated in *Mabo v Queensland* – another common law decision involving Aboriginal title – Brennan J. in a majority at the Australian High Court ruled that "Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law."[19] Instead, for Brennan J., the inalienability of Native title depended on the "laws from which it is derived."[20] The Australian High Court's determination that Aboriginal title is not a creature of the common law is appropriate, given the Crown's tendency to allow settler acquisition of Indigenous lands in other common law jurisdictions. For example, in British West Africa and India, "Englishmen were able to purchase lands directly from local inhabitants."[21] Similarly, in New France, British subjects could acquire lands from the French Canadians, "without the intercession of the Crown."[22] As such, Brennan J. in *Mabo* is correct in suggesting that the Crown's right to alienate ought to be located outside of the common law. However, recourse to government edicts as a justification for the Crown's right to alienate is equally problematic.

The notion that the inalienability of Aboriginal title can be located within government edicts is flawed for two reasons. First, in his decision in *Guerin v The Queen,* Dickson J. cites the *Royal Proclamation of 1763* in support of his position that Aboriginal land is *sui generis*.[23] However, the prohibitions on the alienability of Aboriginal lands in the *Royal Proclamation of 1763* concerned "the purchase, not the sale, of Indian lands other than by the Crown."[24] This restriction was a legal disability placed on the commercial freedom of non-Aboriginal settlers and not, as was presumed by Dickson J., on the Aboriginal land owners themselves. In this way, the Crown did not possess a right to wholly alienate Aboriginal land as was argued in *Guerin*. Instead, under the *Royal Proclamation of 1763,* the Crown retained partial authority to dictate who can purchase Aboriginal lands found under their sovereign territory.

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[19] *Mabo v Queensland* (No. 2) (1992), 175 C.L.R. (H.C. Austl.).
[20] Ibid.
[21] McNeil, 482.
[22] Ibid., 483.
[23] *Guerin v The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.) at 335 [hereinafter *Guerin*].
[24] Brian Donovan, "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of Delgamuukw," *University of British Columbia Law Review* 35 (2002): 73.

Second, and more importantly, referring back to the *Mabo v Queensland* decision, it is clear, from Brennan J's attempt to statutorily square a common law circle, that locating an exclusive Crown right to alienate Aboriginal title outside of the common law is futile. Aboriginal title is a creature of the common law,[25] and besides being rewarded with constitutional protection,[26] the rights and limitations underpinning it are defined with recourse to common law sources. Referring to the government edicts to determine the Crown's right to alienability with respect to Aboriginal title undermines the very character that distinguishes it from other forms of land ownership, such as those created under the *Indian Act.*[27] It is therefore clear that, given the Crown's lack of statutory or common law authority, the Crown right to alienate Aboriginal title is legally unfounded. This lack of legal basis runs contrary to S.35 (1) of the *Constitution Act,* which only recognizes existing Aboriginal land rights under the common law,[28] or from concoctions of the legislature designed to infringe on Aboriginal rights for the broader public interest.[29]

Content of Aboriginal Title

Irreconcilability and Continuation

The content of Aboriginal title, specifically, as illustrated in the Supreme Court of Canada's decisions in *Delgamuukw* and *Tsilhqot'in Nation*, particularly the principles of irreconcilability and continuation inherent within it, have functioned as obstructions to the goals of reconciliation imagined in S.35 (1) of the *Constitution Act*. These limitations arose primarily as a result of the Supreme Court of Canada's decision to constitute Aboriginality in a citizen-state – as opposed to a nation-to-nation – paradigm. In order to understand how Aboriginality can be constructed through legal interactions with the Crown, it is necessary to conceptualize Aboriginality through an interactions-based approach. In this approach, Aboriginality can

[25] *Delgamuukw,* 82.
[26] Ibid., 1.
[27] *Roberts v Canada* [1989] 2 C.N.L.R. 146 (S.C.C.).
[28] *Van Der Peet,* 28.
[29] Ibid.

be defined and understood through paradigms of interaction.[30] These paradigms take many forms and involve multiple actors; however, for the purposes of this argument, two particular paradigms will be explored: the citizen-state and nation-to-nation paradigms. A citizen-state paradigm of interaction, and the version of Aboriginality it generates, is based on the premise that "Aboriginal peoples should be considered as Canadian citizens first, but with a special status."[31] From this premise flows two types of interaction: one between individuals and their bounded communities and the other between individuals and the broader political community.[32] The former is manifest in the law through group-specific rights, while the latter is legally realized through a common regime of citizenship and the Crown's ultimate title.[33] This paradigm proves problematic, however, because by understanding Aboriginal peoples as Canadian citizens first, with their rights flowing from the Crown, the citizen-state paradigm situates Aboriginal land entitlements within the domain of Crown sovereignty and strips them of total property ownership. More importantly, relative to Crown citizenship, it reduces Aboriginal citizenship to a subordinate, as opposed to an independent and equal, legal status.

By contrast, a nation-to nation paradigm understands Aboriginal peoples as a self-defining nation, with their lands falling outside the domain of Crown sovereignty, and Aboriginal citizenship being recognized as equal to, and independent of, Crown citizenship.[34] The nation-to-nation paradigm proves necessary to S.35 (1) of the *Constitution Act* because it recognizes the inherent right to self-government vested in all Aboriginal groups.[35] Specifically, by understanding Aboriginal peoples as self-defining, and therefore able to outline both the sources and contours of citizenship, as well as the rules and laws governing land ownership, the nation-to-nation paradigm gives legal expression to the moral entitlement Aboriginal peoples hold to self-government. However, it is precisely this nation-to-nation paradigm, with its

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[30] Dimitrios Panagos, "The Plurality of Meanings Shouldered by the Term "Aboriginality": An Analysis of the Delgamuukw Case," *Canadian Journal of Political Science* 40, no. 3 (2007): 594.
[31] Panagos, 600.
[32] Ibid.
[33] Ibid.
[34] Ibid., 596.
[35] "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government", *Indigenous and Northern Affairs Canada,* accessed December 6, 2017. http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844.

ability to actualize the purposes of S.35 (1) of the *Constitution Act,* which the Supreme Court of Canada rejected in its decision in *Delgamuukw v British Columbia.*

Chief Justice Lamer in his decision in *Delgamuukw* outlines two inherent limitations to Aboriginal title: first, that it cannot be used in a manner irreconcilable with the nature of claimants' attachments to those lands,[36] and second that it must be consistent with the continued use of the land by future generations.[37] In both instances, considerations of Aboriginal identity, as it pertains to Aboriginal relationships to land, play a limiting role on the content of Aboriginal title. More importantly, the construction of Aboriginal title makes a judgment about which types of Aboriginal relationships to land are worthy of protection, and to what extent these relationships can evolve and mutate. In this way, given that Aboriginal peoples draw heavily from their land in the formation of their identities,[38] the contents of Aboriginal title can and do forge a particular form of Aboriginality – one grounded in the citizen-state paradigm, where the power to self-define and determine the parameters of land rights and citizenship fall outside the jurisdiction of Aboriginal groups. More importantly, the authority to make determinations regarding these contents lies with the judiciary. Therefore, the courts assume a major role in defining what is or is not Aboriginality. This proves significant because, contrary to the nation-to-nation paradigm, where Aboriginal peoples would have exclusive power over how they are to be defined, the limitations of irreconcilability and continuation provide non-Aboriginal courts and judges with the ability to define what is or is not Aboriginal identity, land rights, and citizenship.

This point is reinforced by Chief Justice Lamer in his description of the limitations that bind Aboriginal land rights. Lamer, explains that while Aboriginal groups are "distinctive societies,"[39] they "exist within, and are a part of a broader...community, over which the Crown is sovereign."[40] Here again, Lamer makes it clear that there is a duality in the interactions that constitute Aboriginal identity — one in which

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[36] *Delgamuukw,* 111.
[37] Ibid.
[38] Panagos, 607.
[39] *Delgamuukw*, 161.
[40] Ibid.

Aboriginal peoples interact with their bounded communities, but also simultaneously interact with the broader political community in which they are situated, with the latter taking precedence over the former. This illustration falls within the context of justifying limitations on the rights of Aboriginal peoples. As Lamer explains, "limits placed on those [Aboriginal] rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of reconciliation."[41] In this way, the language of justifying infringements on Aboriginal rights reflects, and is contingent on, a citizen-state understanding of Aboriginal-Crown relations. As such, the *Delgamuukw* decision forwards a form of Aboriginality that is contrary to the inherent right of self-definition and self-government in S.35 (1) of the *Constitution Act*.

Modified Iterations of Aboriginal Title

Fee Simple Ownership

The Nisga'a Treaty of 2000 attempted to resolve many of the underlying issues that plague Aboriginal title. The main component of the Nisga'a Treaty, as it relates to Aboriginal land ownership, was the conversion of Nisga'a lands held in *sui generis* to fee simple.[42] This conversion was lauded for its ability to "create certainty"[43] regarding Aboriginal land rights by concretizing the parameters of Aboriginal title within a treaty. Moreover, the treaty's exclusion of the language of 'surrender' and 'extinguishment' was considered a progressive departure from previous treaties which had erased pre-existing Aboriginal rights for the creation of new ones.[44] Most importantly, by converting to fee simple, the "restrictions that the court [in Delgamuukw] identified on Aboriginal title did not apply to the Nisga'a as owners in fee simple."[45] For example, under the treaty, in contrast to the inalienability of Aboriginal title, the Nisga'a owners in fee simple could dispose of interests in their land to third parties without having to go through the Crown.[46]

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[41] *Delgamuukw*, 161.
[42] *Nisga'a Final Agreement,* Chapter 2 at paragraph 24.
[43] Beynon, 266.
[44] Ibid., 267.
[45] Ibid., 269.
[46] *Nisga'a Final Agreement,* Chapter 3 at paragraph 4.

Furthermore, while Aboriginal title cannot be appropriated in a manner that is inconsistent with its continued use by future generations, nor irreconcilable with the nature of the claimant's attachment to the land, Nisga'a owners in fee simple "face no restrictions...in any way similar to the examples described above with respect to Aboriginal title."[47] Therefore, there is a legitimate argument to be made that the issues generated by the *sui generis* designation of Aboriginal title can be resolved by a conversion to fee simple. However, upon closer analysis, the progressive modifications embedded within the Nisga'a Treaty appear to be accompanied by elements that run contrary to S.35 (1) of the *Constitution Act*.

The Nisga'a Treaty features several elements which act as a corrosive agent on the reconciliatory aims of S.35 (1) of the *Constitution Act*. First, although supporters of the treaty have argued that the Nisga'a Agreement excludes the language of 'surrender' and 'extinguishment' of Aboriginal rights, it is clear that the terms within the agreement have simply been substituted with an alternative phraseology that retains the same meaning as its predecessors. In Chapter 2 paragraph 26 of the treaty, it is explained that "the Nisga'a Nation releases an Aboriginal right to Canada to the extent that the Aboriginal right is other than, or different in attributes or geographical extent from, the Nisga'a S.35 (1) right as set out in this Agreement."[48] In this way, Aboriginal peoples do in fact surrender their rights for those set out in the treaty, because the concept of 'release' featured in this clause forecloses future reassessments of those entitlements. More importantly, this release clause runs contrary to one of the main purposes of S.35 (1) of the *Constitution Act* – namely, to prohibit any extinguishment of the rights enshrined therein.[49] Although this concern might be explained away by arguing that all pre-existing Aboriginal rights are already entrenched within the treaty, it does not account for the real and pressing possibility that Aboriginal rights may over time evolve and reveal new concerns or interests.[50] Moreover, though this issue might on the surface be accounted for by the 'continuation'[51] clause of the treaty, or the potential amendment mechanisms provided for,[52] in both cases

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[47] Beynon, 271.
[48] *Nisga'a Final Agreement,* Chapter 2 at paragraph 26.
[49] *Van Der Peet* at 28.
[50] Ibid.
[51] *Nisga'a Final Agreement,* Chapter 2 at paragraph 24
[52] Ibid., paragraph 23.

the definitive *legal* language of release allows the Crown to dismiss the nebulous *political* space for continuation, and provides no assurance that the Crown will agree to future modifications through amendments.

Secondly, by converting Aboriginal title to fee simple, and thus stripping it of its *sui generis* quality, the Nisga'a Agreement releases the Aboriginal rights enshrined within it from the redefinitions and reformulations of the Supreme Court of Canada.[53] This is a result of the court recognition that Aboriginal title and fee simple ownership are "legally distinct"[54] and thus subject to differing judgments. This is problematic because, similar to the release clause, this change in legal orientation forecloses the possibility of a judicial re-imagination of Aboriginal rights through the common law, informed by the changing winds of intellectual opinion. Instead, this element of fee simple runs contrary to one of the primary aims of S.35 (1) of the *Constitution Act*: to ensure that Aboriginal rights retain a quality of continuity and fluidity.[55]

The common thread running through both of the issues identified within the Nisga'a conversion to fee simple ownership is the underlying Aboriginalism activating them. Aboriginalism is a form of constitutional interpretation that understands Aboriginal rights, including the right to land, as static and frozen in time.[56] By contrast, an alternative form of constitutional interpretation, known as the living tree approach, understands Aboriginal rights as fluid, organic, and animate.[57] The issues identified within fee simple ownership, such as the finality of treaty rights and its escape from the changing tides of the common law, reflect an originalist understanding of Aboriginal rights, one in which Nisga'a title is frozen at the time of agreement, and unmalleable in the face of shifting legal and intellectual opinions. This originalist form of constitutional interpretation runs contrary to the purposes of S.35 (1) of the *Constitution Act*. As outlined in the Supreme Court of Canada's decision in *R v Sparrow*, S.35 (1) acts as a "strong check on legislative

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[53] *Nisga'a Final Agreement,* Chapter 2 at paragraph 24
[54] Paul Rynard, "Welcome In, but Check Your Rights at the Door": The James Bay and Nisga'a Agreements in Canada," *Canadian Journal of Political Science* 33, no. 2 (2000): 220.
[55] *Mitchell v M.N.R.,* 1 S.C.R. 911, 2001 SCC 33 at paragraph 12.
[56] John Borrows, "(Ab}Originalism and Canada's Constitution," *Supreme Court Law Review* 52 (2012): 358.
[57] Ibid., 352.

power."[58] Thus, given that any right functioning as a constraint on government action must necessarily be fluid and follow the "stream of constitutional history,"[59] S.35 (1) embraces a living tree approach to constitutional interpretation. Therefore, because the features identified within the Nisga'a Treaty embrace an originalist understanding of Aboriginal rights, Nisga'a fee simple ownership impinges on one of the central features of S.35 (1) of the *Constitution Act*.

Conclusion

Aboriginal title, as it is currently formulated in settler-state law, is insufficient to satisfy the purposes of S.35 (1) of the *Constitution Act*. Its inadequacies flow from the designation of *sui generis* applied to it during the *Delgamuukw* and *Tsilhqot'in Nation* decisions. From this, Aboriginal title is bounded by limitations on its alienability, usage, and evolution. Attempts to resolve these defects, as evident in the Nisga'a Final Agreement, have come in the form of conversions to fee simple ownership. However, while fee simple ownership does help to mitigate many of the issues generated by the *sui generis* designation of Aboriginal title, it ultimately regresses Aboriginal land ownership to an originalist understanding of Aboriginal rights, contrary to the purposes of S.35 (1) of the *Constitution Act*.

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A New Understanding of the State as the "Embracer"

By: Maggie Morris

John Torpey claims that the modern nation-state has seized the exclusive authority to control the legitimate means of movement of subjects, which is particularly problematic when individuals cross the international border of a nation-state.[1] He argues that this monopoly has primarily been achieved through the state's "embrace" of their societies, which can be defined as the process of "registering citizens, to both include and exclude particular persons."[2] This essay will expand upon and redefine the concept of "state embrace." This will be accomplished by updating Torpey's theory and highlighting its increased significance in the post-September 11th era. Then, this essay will expand upon Torpey's theory, suggesting that we reconceptualise our understanding towards a definition which gives heed to the agency of society throughout the embracement process. Finally, this essay will elucidate its key propositions with a case study of the North American Amish.

Before his concept can be expanded and updated, it is necessary to contextualize the period in which Torpey coined the notion of "state embrace." Writing in 1998, Torpey was witness to many shifts in the international migration regime. The fall of the Berlin Wall in 1989 incited mass migration, while the Schengen Agreement, effective in 1995, led to the displacement of borders between many European nations.[3] Moreover, Torpey's concept is situated within the decade in which the means of transport, such as international air travel, continued to become increasingly cost effective and popular,[4] yet the migration-security discourse, which postulates international migration as a national security issue, was gaining global momentum.[5]

Torpey spoke directly to the modern liberal democratic nation-state (hereafter used synonymously

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[1] John Torpey, "Coming and Going: On the State Monopolization of the Legitimate Means of Movement,"' *Sociological Theory* 16 no. 3 (1998): 239.
[2] David Lyon, *Identifying Citizens: ID Cards as Surveillance* (Cambridge: Polity Press, 2009), 23.
[3] Georgios Karyotis, "European Migration Policy In The Aftermath Of September 11," *Innovation: The European Journal of Social Science Research* 20 no. 1 (2007): 6-8.
[4] Brandon Dupont et al., "Long-term rise in overseas travel by Americans, 1820-2000," *Economic History Review* 65 no. 1 (2011): 147, 161.
[5] Karyotis 6-8.

with "state"), which can be defined as a sovereign political organization which governs a body of subjects who share a sentiment of solidarity.[6] Importantly, a nation-state is not a fixed entity, but a fluctuating network of cultural and political institutions existing "of and for particular peoples."[7] This essay will speak exclusively to the modern liberal state.

According to Torpey, the nexus between the state and society is characterized by the need for the state to embrace society and its subjects. By "embrace," Torpey is referring to the way in which the state registers, grasps, or nurtures society, to enfold desirable subjects and exclude undesirable others, ultimately attaining exclusive control over the means of movement.[8] State embrace is achieved primarily through registering persons within identification and documentary regimes. Torpey, and thus this essay, gives the most consideration to the international passport regime, which provides nation-states administrative authority to dispense passports "at will, and thereby locate and control individuals and peoples according to the changing demands of economic, social and political contingencies."[9] Indeed, the passport enhances bureaucratic domination over society, and is an expression of the nation-state's endeavours to monopolize the means of movement.[10] Moreover, the passport is a matrix of *governmentality,* as coined by Michel Foucault, because it creates national subjects through productive discourses of power "such as control over exit and entry," and domains of knowledge, such as those "concerning individual and national identities, citizenship and security."[11] Finally, the passport also functions through the use of *biopower,* meaning that both society as a collective, and the individual body, are subjugated through their identification.[12]

Since Torpey coined the concept of state embrace and highlighted the significance of bureaucratic documentation, the state's embrace has become increasingly contingent upon the temporal context within which it operates. Therefore, it is necessary to update Torpey's theory and discuss its operation within the

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[6] Torpey 246.
[7] Ibid.
[8] Ibid., 239-257.
[9] Lesley Higgins and Marie Christine Leps, "Rethinking the Exercise of Power: The Case of the Passport v. Mobility Right," *Rethinking Marxism* 11 no. 4 (1999): 114.
[10] Torpey, 250.
[11] Higgins and Leps, 114.
[12] Ibid.

post-September 11th landscape of surveillance. The 9/11 terror attacks in New York City and Washington were seen to be a direct affront to the state's embrace. Indeed, 9/11 elucidated a limit to the capacity of the state to embrace its subjects, as news broke that the pilots of both planes crashed into the World Trade Centre towers had entered the United States with fraudulent identification yet valid American visas.[13] In terms of documentation then, the United States itself authorized their movement into the nation, placing the terrorists well within their embrace. Yet, the simplicity with which fraudulent documentation and malevolent intentions could remain undetectable inside the parameters of the state's embrace raised international concern.[14] Subsequently, both society and the state called upon the enhancement of documentary and surveillance regimes to avoid future tragedy.[15]

What has arisen since is the termination of the "paper based" identification bureaucracy which figured prominently in Torpey's conceptualization. Instead, the coalescing of a digital and technological surveillance regime has reified both the state's embrace of society and its supposed necessity.[16] Firstly, since 9/11, the most notable global shift has been towards biometrics; defined as the use of physical attributes of the body for verification of identity. These include retina and iris scans, fingerprinting, and facial recognition technology. Many of these mechanisms have been employed to make border crossings "smart," such as using facial recognition technology and passport scans, to replace face-to-face passport checks.[17] Many biometric mechanisms have been employed within current passport regimes, serving to authenticate the identity of the bearer and thus enhance the accuracy of the state's embrace.[18]

To illustrate, the use of biometrics to facilitate the state's embrace is identifiable within the recent adoption of ePassports, which gained momentum in 2003, when the International Civil Aviation Organisation touted them as an effective mechanism to verify the identity of travellers and regain state

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[13] Mark Salter, "Passports, Mobility and Security: How smart can the border be?" *International Studies Perspectives* 5 no. 1 (2004): 84.
[14] Salter, 84.
[15] David Lyon, *Surveillance After September 11* (Cambridge: Polity Press, 2003), 15.
[16] Craig Robertson, "A Documentary Regime of Verification," *Cultural Studies* 23 no. 3 (2009): 346.
[17] Lyon, *Surveillance After September 11* 68-71.
[18] Lyon, *Identifying Citizens* 53.

control over the means of movement.[19] All ePassports contain a contactless microchip, encoded with the bearer's digitized biometric image, digital signature and personal data, which are inputted into a searchable government database.[20] These features "increase security, provide greater protection against tampering [and] reduce the risk of fraud."[21]

These technological advancements have immense implications for Torpey's theory. Torpey claims that the "efforts of modern states to grasp their populations and monopolize control over legitimate movement" operate upon a continuum.[22] Taking this as fact, it is evident that the state's grasp of society since 9/11 has swiftly advanced down this continuum, exhibiting an increasingly ubiquitous nature, and reaffirming the state's enduring interest in identifying persons. This is evidenced in the utilization of digitized biometric measures, which increases the state's ability to unambiguously identify persons, a practice which is essential for the increased effectiveness of the state's embrace and capacity to exclude unwanted intruders. Moreover, biometrics and digitization have substantiated the link between "mobile documents" and their corresponding state held "files" of knowledge on individual subjects, as they provide an increasingly direct, inextricable, and tamper-resistant link between the bearer and the information attained by the state.[23] Overall, it is possible to conclude that since documentary regimes which facilitate the state's embrace are being enhanced, so too is the state's embrace.

The enhancement of the state's embrace through biometrics is nearly undeniable. Yet, it raises ethical and ontological questions surrounding the use of identifiers of the body to regulate movement. Many members of both society and the state posit that biometrical authentication of identity is an invaluable advancement, as it "replaces the subjective eye of the inspector," with the objective eye of a tamperproof passport.[24] Moreover, proponents argue that bodily identifiers are stable and infallible, and thus provide full

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[19] Lyon, *Surveillance After September 11* 70-71.
[20] McPhail et al., "Identifying Canadians at the Border: ePassports and the 9/11 Legacy," *Canadian Journal of Law and Society* 27 no. 3 (2012): 342.
[21] "The ePassport," *Government of Canada, Citizenship and Immigration Canada, Communications Branch*, Government of Canada, 14 Sept. 2015. Web. 31 Mar. 2016. http://www.cic.gc.ca/english/passport/help/epassport.asp
[22] Torpey, 255.
[23] Lyon, *Identifying Citizens* 53.
[24] Ibid., *121*.

knowledge of a subject's identity, which "guarantees" the power to control said subject's movement.[25] Resultantly, many posit that "biometrical embracement" is justifiable, because it secures the safety of the majority.

Despite these claims, the current "biometrical embracement" may be understood as unethical. This is because it represents an invasion of bodily integrity, as it involves a conquest into subjects' personal privacy. Forcible requirement of biometric data within documentary regimes removes one's bodily autonomy. Further, given that "freedom of movement" is an international human right, it is unethical to subject individuals to the requirement of biometric bodily invasions to receive the documentation for the enjoyment of this right.

Proponents have further advocated for the global use of fingerprints and iris scans to decrease documentary fallibility. These measures insinuate the expropriation of internal bodily data from the subject in the name of embracement. This is unethical, as it facilitates the use of a subject's body as self-incriminating, perhaps with regard to allegations of assumed identity or terrorism. This is especially disconcerting when considered within the current "Islamophobic" mobility and migration regime, wherein those with Arabic sounding names or features are most likely to be put under investigation whilst travelling. As a result, biometric passport systems have increased the state's embrace, but also the effectiveness with which the state can "sort" and discriminate between groups of people.[26]

Thus far, this essay has demonstrated the significance of Torpey's theory in the post 9/11 world. Yet, it is imperative to identify a limitation to the way in which Torpey substantiates his theory. His concluding proposition claims that society has fostered an "everyday acceptance" of the state's embrace.[27] Here, Torpey's conceptualization speaks to the power of the state to enfold its members, while conveying society as submissively yielding to such power. Notably, this does not consider the agency of society, or the

[25] Lyon, *Surveillance After September 11 35* and Lyon, *Identifying Citizens* 118.
[26] Lyon, *Surveillance After September 11* 82.
[27] Torpey 255.

question of "how far [subjects] will collude with, negotiate or resist practices" that control their movements.[28]

Indeed, Torpey's understanding of the state's embrace is grounded in questioning how societies are compelled to "'render unto Caesar what is Caesar's,'" wherein "Caesar" is theoretically, the state.[29] However, what if we reconsider "Caesar" to denote society, such that the question reads "how is the state compelled to render unto society what is society's?" Here, citizens and permanent residents of most democratic nations have cultivated an assumption that with their citizenship (or bearing of a passport), they have a "legitimate claim" to draw upon the resources of their nation-state.[30] These resources typically include diplomatic and legal protections, medical and welfare services, public education, or voting rights.[31] Yet, accessing these desirable ends requires one to be within the state's embrace, as valid identification, customarily, must be presented. Evidently, citizens have an interest in the adherence to documentary regimes. But, in using state-issued identification to access, and occasionally demand, services and resources, we can understand citizens and permanent residents as *embracing* the state and keeping a "watchful eye" on its accountability.[32] For example, as Torpey posits, state embrace results in subjects' requirement to pay taxes.[33] Yet, subjects of society return this embrace by positioning themselves to extract resources sustained by taxes, such as utilizing medical, educational, or welfare services. Failure of the state to produce these resources impartially often results in collective mobilization, social disdain, or tax dollar misuse claims.

For example, voting in a national election requires citizens to be positioned firmly within the state's embrace, by registering themselves and presenting photographic identification. Voting for a particular candidate also allows citizens to voice their desires and demand services. As a result, citizens "take hold of" the state. Moreover, through their embrace of the state, voting can be understood as achieving the exclusion of "unwanted others;" a critical tenet of Torpey's embracement process. This is identifiable, for example,

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[28] Lyon, *Surveillance After September 11* 35.
[29] Torpey 244.
[30] Ibid., 251.
[31] Lyon, *Surveillance After September 11* 152.
[32] Torpey 248.
[33] Ibid., 241.

when individual Canadian citizens collectively voted Prime Minister Stephen Harper out of office in the 2015 federal election. The agency of citizens, exhibited as they access and utilize services provided *through* the state's embrace, amounts to their subsequent embrace of the state.

Thus, the state-society nexus is characterized by cooperative dependency, reciprocal extraction, and mutual embracement. Importantly however, each party's embrace *reinforces* the effectiveness and legitimacy of the other. This can be seen as citizens access and demand resources from within the state's embrace, which fortifies the legitimacy of the state's role as the "embracer." Furthermore, society must embrace the state for the state's embrace of society to be effective. In the event that one party severs their "grasp" on the other, the efficiency of the embracement process is diminished.

This concept of "mutually reinforced embracement" is elucidated through a study of the North American Amish; a socio-religious community descending from the "Anabaptists of sixteenth century Europe."[34] The Amish have historically constituted a geographically and socially isolated community with a "set of values, loyalties and aspirations" differing from mainstream society.[35] Their lives are lived almost exclusively in the private sphere, and members forgo the privileges conferred with citizenship in liberal democratic states, such as welfare and social security services, secondary and post-secondary education, and civic rights and duties. In effect, the Amish have annulled their embrace of the modern federal state.

To illustrate, "John Doe," an Amish Canadian, filed a lawsuit at a District Court in Pennsylvania in 2004. After emigrating from Canada and living in Pennsylvania for three years, Doe alleges he was forced by the state to apply for a visitor's visa; an identification document with a biometric photograph. Doe states that the necessity of this visa "coerces [him] to ignore [his] religious belief" because, for the Amish, a photograph is a "graven image." Doe was thus forced to choose between being deported to Canada or violating his faith.[36, 37]

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[34] Jeff Spinner-Halev, *The Boundaries of Citizenship: Race, Ethnicity and Nationality in the Liberal State* (Baltimore: John Hopkins University Press, 1994), 88.
[35] Ibid., 88.
[36] Randy Boswell, "Amish Canadian Sues U.S Over Photo Requirement," *CanWest News* 28 Oct. 2006: 2.
[37] There have been no recent published developments, conclusions or decisions on this case.

Evidently, the Amish do not desire the state's embrace, nor do they wish to enfold the state themselves. They evade practices that facilitate embracement, such as documentary regimes and state institutions.[38] As the above legal case suggests, many Amish also outwardly refuse to embrace the state, and have worked tirelessly to sever the state's responsibilities towards them.[39] Arguably then, the Amish have sought to nullify both the entitlements *and* demands of liberal citizenship within this tightening embrace.[40]

Finally, critics of my argument may argue that the Amish pay taxes, and thus are embraced by, and embrace, the state. However, my theory has not postulated that the Amish have absolutely evaded the state's embrace. Certainly, the Amish do pay taxes – on income, property and estates, at least. Conversely, their belief and consumption patterns have legally exempted them from social security, welfare and goods and services tax systems, resultant from the legal case *United States v. Lee,* in 1965.[41] Accordingly, in comparison to society at large, the state's extractive positionality is marginal, and, as Torpey notes, a structure of ideas such as the state's embrace is "most vulnerable at its margins."[42]

Overall, communities within society who refuse to "surround" the state, constitute a limitation on the state's ability to embrace them in return. Indeed, as communities akin to the Amish "close their doors" on the state's embrace, the state's corresponding positionality to implement policies, extract resources, or monitor means of movement is weak. Evidently then, the concept of embracement is mutually reinforcing: when one party annuls their embrace, the entire effectiveness of the embracement process is abated. Generally, communities that do not embrace the state should be understood as a "grey area" within Torpey's theory.

Importantly, many other communities represent a "grey area" of the state's embrace. Consider the many asylum seekers who desire the embrace of liberal democratic states, yet often lack the documentation required to achieve it. This can be seen in the millions of currently passport-less Syrian refugees fleeing

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[38] Spinner-Halev, 100, 105.
[39] Spinner-Halev 98.
[40] Ibid., 94.
[41] United States v. Lee (455 U.S. 252), United States Supreme Court, 23 Feb. 1982, *Kentucky Law Review*, Web. 20 Mar. 2016.
[42] Torpey 245.

persecution and who are being globally rejected from the embrace of liberal states. Further, consider the 15 million *de facto* and *de jure* stateless persons, such as the Kurdish, Palestinians or North Korean defectors, who are not embraced by a state for political reasons, yet remain physically within the international borders of a state. Arguably, this jars Torpey's theory from its dichotomous foundations of subjects being either excluded or included from the state's embrace, as stateless persons appear to be neither. As such, their inability to fully participate in the embracement process raises complications for their attainment of basic human rights, because "their plight is not that they are not equal before the law, but that no law exists for them."[43]

In conclusion, this essay has updated and nuanced the discourse of state embracement in order to situate it within the post-September 11th era of augmented security. This essay elucidated that the state's embrace is now characterized by technologically advanced identification systems. Indeed, as time progresses and we delve deeper into the digital and technological bureaucracy, it will become increasingly important for scholars to appraise consistently the fluid nature of the state's embrace and its implications for society. Furthermore, this essay reconceptualised Torpey's theory, illustrating that "embracement" must be understood as a reinforcing process: when one party withdraws their embrace, the effectiveness of the embracement process crumbles with great rapidity. Henceforward then, it is important that we imagine the concept of "state embrace" as a fragile, contingent and dependent process, sustained equally by a critical nexus between the state and social actors.

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[43] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & World, 1966): 295-296.

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Community Contact Carding: Impacts On Black Youth

By: Terren Lee

Introduction

The Toronto Police Service's Community Contacts Policy (CCP) has garnered attention from the community and media in recent years. Colloquially referred to as carding, this practice gathers personal details through the stopping and questioning of individuals, and recording of information into a database.[1] [2] Oftentimes, contact carding is initiated by a police officer when no particular offence is being investigated but rather for *general investigation.*[3] Much of the discourse on carding concerns the ethical implications and efficacy of the practice; however, the Toronto Police remain steadfast in their support of carding activities. While its effectiveness is still being debated, attention has been directed towards the effects of carding on the vulnerable youth population. Since people of colour are disproportionately documented, research should explore the impacts on these youth populations[4] [5]

This paper examines how the nature of carding and its documentation of personal information in the police database impact the attitudes and lives of black youth, and how this affects their behaviour. Preliminary literature in the *Toronto Star* will first be presented, laying the foundation for how prevalent and problematic carding is. After detailing contrasting perspectives by police and critics of the CCP, examinations will be carried out on how the practice of carding affects the perceptions and behaviour of black youth, their sense of identity, and livelihood. Negative effects dominate each area of inquiry. The analysis finds that black youth develop negative conceptions of police through direct or vicarious negative experiences, resulting in widespread distrust of, and opposition towards cooperation with, police

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[1] Lila MacLellan, "Toronto Police controversy: What is 'carding' and is it legal?" *Daily Brew,* 6 May 2015. http://digitalcommons.osgoode.yorku.ca/media_mentions/54/.
[2] Akwasi Owusu-Bempah, "Black Males' Perceptions of and Experiences with the Police in Toronto" (Ph.D. thesis, University of Toronto, 2014)
[3] Jim Rankin et al., "As Criticism Piles Up, so Do the Police Cards," Thestar.com, September 27, 2013.
[4] Ibid.
[5] Scot Wortley and Akwasi Owusu-Bempah, "The usual suspects: police stop and search practices in Canada," *Policing & Society*, vol. 21, no. 4 (2011): 395-407.

investigations. The incriminating notion portrayed by carding records also makes it difficult for youth to secure employment and housing.

Preliminary Literature: The *Toronto Star's* Investigation

The *Toronto Star*'s *Known to Police 2013* study examines the nature of the practice of carding, highlighting the excessive propensity of Toronto Police to question and document visible minority groups. Between 2008 and 2012, Toronto police registered 1.8 million cards, with 400,000 filled out in 2012 alone.[6] The *Star* found that black persons were carded at a proportional rate three times greater than their population share in Toronto.[7] In particular, the number of young black males documented exceeded the total black youth population in Toronto.[8] These disproportionate figures are unique to black persons, as white, brown, and other individuals of colour are carded much less often in the patrol zones in which they live[9]. These findings have raised concerns of overt racism and implicit bias within the Toronto police. In the case of Knia Singh, then a law student at Osgoode Hall, police managed to accumulate 50 pages of data on him in records through carding, despite his not having a criminal record[10]. Police transcripts such as these seriously hinder the upward mobility of black individuals, especially youth. The carding procedure is also problematic. The intimidating approach of police officers often elicits a defensive reaction by those who are questioned, which can easily escalate into an aggressive interaction or misdemeanor.[11]

Officers of the police unit TAVIS (Toronto Anti-Violence Intervention Strategy) fill out cards at a significantly higher rate than regular police. The *Star* identified that one officer in the TAVIS unit alone completed more than 6,600 cards from 2008 to 2012, most of them being for black individuals.[12] Since contact cards were used as a performance measure for police, critics question whether officers exploit youth,

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[6] Jim Rankin et al., "As Criticism Piles Up, so Do the Police Cards"
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Jim Rankin et al.,"One Officer, Five Years, 6,600 Contact Cards," Thestar.com, September 27, 2013, https://www.thestar.com/news/gta/knowntopolice2013/2013/09/27/one_officer_five_years_6600_contact_cards.html.

targeting them in order to inflate their own statistics. In fact, TAVIS officers commonly cited the nature of contact for youth to be for general investigation, allowing them to arbitrarily stop and question individuals without reasonable grounds of suspicion.[13] Officers in the TAVIS unit also employ aggressive tactics far more frequently when initiating contact with people.[14] The *Star* documents an instance where TAVIS officers became belligerent and arrested four teenagers when one asserted his rights and walked away from a police stop.[15]

The *Star*'s piece on carding provides a thorough account of the pervasive nature of carding by Toronto police. The rising rate of cards filled out during the study period, overrepresentation of black individuals, and forceful methods used by some officers naturally produce concerns around how it negatively affects police-citizen relationships.

Perspectives on the Practice of Carding

While criticisms against the legality and ethics of contact carding continue to accumulate, the practice persists. The positions of the police and opponents to carding will be reviewed in order to understand the objectives of the CCP and the perceived faults of its operation.

Police Rationale

The Toronto Police believe gathering personal information and logging it onto a mass database aids them in solving and preventing future crimes.[16] Deputy Chief Peter Sloly asserts that carding is an effective policing tool, as it helps to search for connections that may link to witnesses or suspects.[17] [18] Police claim that strategically and frequently engaging in carding in high crime areas has contributed to declines in

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[13] Jim Rankin et al.,"One Officer, Five Years, 6,600 Contact Cards,"
[14] Patty Winsa and Jim Rankin, "Tense times in Policing on TCHC Property," Thestar.com, September 27, 2013, , https://www.thestar.com/news/gta/knowntopolice2013/2013/09/27/tense_times_in_policing_on_tchc_property.html.
[15] Ibid.
[16] "Toronto Police Carding an 'incredibly Effective Tool' | CBC News," CBCnews, July 04, 2013, http://www.cbc.ca/news/canada/toronto/toronto-police-carding-an-incredibly-effective-tool-1.1353828.
[17] Ibid.
[18] Jim Rankin et al., "As Criticism Piles Up, so Do the Police Cards"

crime[19]. Police maintain that carding is not random, but is instead intelligence-led.[20] These interactions have allegedly helped to solve major cases that involve sexual assaults, child abuse, and violence.[21]While some officers may naturally hold biased beliefs, the Toronto Police Board's policy does condemn practices that discriminate and suggest racial profiling.[22] When done correctly and in accordance with policy, then-Police Chief Bill Blair remarked in 2013 that carding was part of good policing practice.[23]

External Criticism

Countless criticisms have been made against the efficacy of carding. One issue with carding is that documented information remains in the database indefinitely.[24] This puts individuals at risk, as they will be recognized as being known to police every time their name is run through the system in future interactions, despite having had no criminal record.[25] Sandy Hudson, co-founder of Black Lives Matter Toronto, warns that the commonly cited reason for police contact -- that is, general investigation -- allows far too much leeway for officers to justify initiating and carding people.[26] In the case of *R. v. K. (A.)*, it was found that the carding that took place was in violation of multiple sections of the Canadian Charter of Rights and Freedoms. Specifically, comments were made that police arbitrarily detained and searched the individual without reasonable grounds of suspicion, did not inform the individual for reason of detention, and extracted incriminating evidence as a result of carding.[27]

Anecdotes about carding success are also absent. Lawyer Vilko Zbogar claims that police have yet to provide a single example of a case being solved as a result of carding.[28] Despite multiple requests by advocacy groups, police have not shown any empirical evidence that demonstrates that carding has made

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[19] Ibid.
[20] Ibid.
[21] "Toronto Police Carding an 'incredibly Effective Tool'
[22] "The Police and Community Engagement Review," *Toronto Police Service*
[23] Jim Rankin et al., "As Criticism Piles Up, so Do the Police Cards"
[24] Ibid.
[25] Lila MacLellan, "Toronto Police controversy: What is 'carding' and is it legal?"
[26] Muriel Draaisma, "New Ontario Rule Banning Carding by Police Takes Effect,"CBC News, CBCnews, January 02, 2017, https://www.cbc.ca/news/canada/toronto/carding-ontario-police-government-ban-1.3918134.
[27] David M. Tanovich and Donald R. Stuart, Comment on "R v K(A): Carding, Racial Profiling and Police Perjury," SSRN, 2014, 13 Criminal Reports (7th) 76-77. https://ssrn.com/abstract=2741280.
[28] Lila MacLellan, "Toronto Police controversy: What is 'carding' and is it legal?"

communities safer.[29] Since there exists no proof of carding accomplishing its objectives, the disproportionate number of black individuals carded is inexcusable. With black individuals accounting for 25% of cards filled out between 2008 and 2011 while only making up 8.3% of Toronto's population, critics suggest that carding figures reflect racial profiling. [30]Some representatives suggest that improving relationships between police and citizens is more effective in preventing crimes and keeping communities safe. [31]Others claim that banning the practice of carding altogether is paramount to eliminating systemic racism from the criminal justice process. [32]As Justice Harry LaForme in *R. v. Ferdinand* comments, the continuation of carding will ultimately lead to serious consequences in police-community relationships.[33]

Effects on Black Youth

Undeniably, there are rippling effects throughout the community in the presence of unfair and aggressive carding. Effects on black youth will be discussed in the following sections. This population is more likely to be approached by police due to their often unsupervised use of public spaces.[34] The experiences and impressions that black youth develop and assimilate are deeply concerning because of their lasting effects on attitudes and behaviours in the future.[35] Three areas of inquiry will be explored in particular: the feelings of distrust and acts of resistance, impacts on identity, and impacts on the livelihood of black youth. These provide a comprehensive account of how impactful police carding practices are on the lives of young black people.

Feelings of Distrust and Acts of Resistance

Owusu-Bempah's study on the perceptions of male black youth of Toronto police performance finds that negative attitudes are dominant. Of respondents, 75.6% described themselves as not trusting the

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[29] Ibid.
[30] Lila MacLellan, "Toronto Police controversy: What is 'carding' and is it legal?"
[31] Muriel Draaisma, "New Ontario Rule Banning Carding by Police Takes Effect"
[32] Ibid.
[33] David M. Tanovich and Donald R. Stuart, Comment on "R v K(A): Carding, Racial Profiling and Police Perjury"
[34] Owusu-Bempah, 113.
[35] Ibid.

police, with similar numbers having no confidence in the police system and claiming that they would not go to the police for help. [36]Unsurprisingly, these negative responses included a lack of respect for the police and beliefs that police do not care about the people in their community. But despite these prevailing negative attitudes, black youth still concede that police presence does play a positive role in some respects. 61% of respondents agreed that police do make life less difficult. [37]Simultaneously however, 56.1% disagreed (15.2% were undecided) that police keep their neighbourhoods safe. [38]These results suggest that black youth believe in the positive effects of police practices in general, but that they personally witness poor outcomes (such as those brought about through carding) in their own community. This perception makes one perceive police bias and corruption against their racial group. In Owusu-Bempah's (2014) study, 75.6% of black youth respondents felt that police held racial biases against them more than against other racial groups.[39] 83% perceived police to use unfair and often aggressive methods in order to collect information, and more than half of respondents recalled being treated disrespectfully in their most recent police stop.[40] Personal accounts of black youth describe frequent negative interactions with the police:

> Had a lot [of negative police experiences]… I get stopped a lot – one night I was stopped four times … and questioned. It is annoying because they don't look at anyone else.They constantly harass me. Ask me where I'm going and where my papers are.They always stop you, pat you down, ask you to empty your pockets and ask you where you are going. It is disrespectful.[41]

Respondents recalled interactions where police verbally abused and embarrassed them in front of their peers. This is particularly upsetting for youth who are engaging in normal activities but are then approached and questioned by police. Youth explained that officers would deliberately tease and insult them, such as addressing them as a "bunch of niggers."[42] As well, some accounts detail excessive force by police:

> They arrested me for no reason and I wasn't talking. They saw that I had a crack in my head. They banged my head against the wall and cracked it open again to make me talk. I asked a

[36] Ibid., 121.
[37] Owusu-Bempah, 121.
[38] Ibid.
[39] Ibid.
[40] Ibid., 126.
[41] Ibid., 133.
[42] Ibid. 135.,.

> police officer for his badge number and name. Supposedly I threatened him by saying I would shoot him. Got chased and pepper-sprayed and my little sister did too.[43]

These violent recollections are most damaging to black youth's impressions of the police. Youth victimized by police are more likely to perceive bias and corruption.[44] Unable to rely on the police who are supposed to serve and protect but instead harass and assault them, these youth develop distrust and animosity towards law enforcement. Rumors spread fast amongst black communities. Survey results on indirect experiences with police racial bias suggest that younger black people experience more vicarious accounts of racial profiling than older members.[45] One study notes that black victims tend to share their negative police experiences with family and peers, which incites and reinforces hatred against the police within these social circles.[46] Black persons from these communities would then draw from their own experiences, and also those of other members of their racial group when evaluating police.[47] Feeling over-policed and under-protected, black youth counter by exhibiting acts of resistance against most if not all officers.[48] One officer surveyed by Owusu-Bempah (2014) highlighted that one single negative experience with a police officer greatly influences a person's views of all other officers.[49]

Wortley and Owusu-Bempah's (2011) research on police stop and search practices and black persons mentions that people with unfavourable perceptions of the law enforcement are less likely to cooperate with police in future investigations.[50] This includes a wide variety of activities, such as not reporting crime, or refusing to provide crime tips to the police. Interviewees in Morris' (2010) study suggests that some would even go so far as to withhold from seeking help from police even if they themselves were victimized.[51] The *Community Assessment of Police Practices Report* found that 36% of respondents (an additional

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[43] Ibid., 137.
[44] Owusu-Bempah, 151.
[45] Scot Wortley and Akwasi Owusu-Bempah, "The usual suspects: police stop and search practices in Canada," 401.
[46] Rod K. Brunson, "'Police Don't Like Black People': African-American Young Men's Accumulated Police Experiences," *Criminology & Public Policy,* vol. 6, no. 1 (2007): 73.
[47] Ibid., 72.
[48] Owusu-Bempah, 152.
[49] Ibid., 183.
[50] Wortley and Owusu-Bempah, 403.
[51] Edward W. Morris, "Snitches End Up in Ditches and Other Cautionary Tales," *Journal of Contemporary Criminal Justice*, vol. 26, no. 3 (2010): 255.

12% claimed to be unsure) in their survey have decided not to contact police services for help because they thought that they (the police) would worsen the issue.[52] Specifically, 48% of carded respondents have at some point decided not to report crime to the police, suggesting that experiences of arbitrary carding by the police fuel reluctance and animosity.[53] Toronto Police's *Police and Community Engagement Review* (PACER) (n.d.) report discusses how the negative implications produced by the practice of carding includes the widespread refusal to report crime or to come forward as witnesses amongst black individuals.[54] Negative perceptions of a supposedly protective authority make them feel displaced and self-reliant for safety. This leads to people becoming vigilantes for usurping justice through their own means, which is often dangerous and illegal.

Racial differences amongst low-deviance youth who are stopped and questioned by officers also presents concerns. Wortley and Tanner's (2005) investigation on racial profiling by Toronto police finds that low-deviance black youth are stopped and questioned at a higher rate than other racial groups.[55] Simultaneously, high deviance white and black students are stopped at a similar rate.[56] Good attitudes and behaviour do not safeguard black youth from police suspicion to the extent that they protect their white counterparts. By logical extension, young black individuals have little reason to act responsibly and manage their behaviour.

Some youth were actually found to forgo their rights when being carded by police. Carding procedures induce fear for one's own safety, which motivates them to comply with police despite the illegality of their methods. One individual details that he actively chooses to relinquish his rights because it seems to bring about a safer exchange with officers when compared to direct confrontation and standing up for one's own rights:

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[52] "This Issue Has Been With Us For Ages: A Community-Based Assessment of Police Contact Carding in 31 Division," *Logical Outcomes*, November (2014): 44.
[53] Ibid., 56.
[54] "The Police and Community Engagement Review," *Toronto Police Service,* 42.
[55] Scot Wortley and Julian Tanner, "Inflammatory Rhetoric? Baseless Accusations? A Response to Gabor's Critique of Racial Profiling Research in Canada," *Canadian Journal of Criminology and Criminal Justice*, vol. 47, no. 3 (2005): 596.
[56] Ibid.

> I was close to a park near my neighbourhood … when I was approached by an undercover TAVIS officer… And as I stepped into my car the TAVIS officer asked me for my license and registration… I just wanted to get on with my day, so I just gave it to him.[57]

While not all police stops involve carding, the excessive frequency of stops experienced by black youth underscores the difficulties that they face by simply being in their own neighbourhood.[58]The compounded effects of citizen distrust and black youth and adult resistance against cooperating with police generate more crime. This induces those communities to become vulnerable to repeated victimization.[59] Hindered upward mobility of black individuals becomes the collateral damage as a result of this.

Impacts on Identity

The prevalence of police in black communities and persistent personal and vicarious accounts of carding take a toll on a youth's self-identification. Being arbitrarily stopped on the basis of one's skin colour often induces feelings of injustice, fear, and confusion.[60] Funke Oba, a university lecturer in social work has researched the impacts of carding practices on black youth. Oba points out that a lot of local black children become puzzled when stopped and questioned by officers, saying, "I'm just a child. Why would anybody be afraid of me? Why do people think I am bad?" [61] She says that it is important to recognize how this confusion damages a young person's psyche and how it continually reminds them that they are portrayed as thieves and deviants. [62]While contact carding aims to solve and prevent future crimes, the perceived racial profiling that Toronto Police operate on ultimately becomes a self-fulfilling prophecy for members of the black community.

The documentary *Crisis of Distrust: Police and Community in Toronto* interviews several individuals about how they feel about the oppressive and unfair practices of carding. Black Toronto resident Matt discloses

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[57] Bador Saadeldin Alagraa, "'Known to the Police': A Black Male Reflection on Police Violence in Toronto" (Master's thesis, *University of Toronto*, June 2015): 80.
[58] Ibid., 81.
[59] "The Police and Community Engagement Review," *Toronto Police Service,* 42.
[60] Wortley and Tanner, 601.
[61] Kate Bueckert and Jackie Sharkey, "Community leader 'surprised by the surprise' over carding statistics," *CBC News,* 12 April 2016. http://www.cbc.ca/news/canada/kitchener-waterloo/waterloo-2015-carding-response-surprises-black-leader-funke-oba-1.3532244.
[62] Ibid.

that while people from the outside see the procedures involved in carding as disturbing, "in our eyes, it's normal." [63] The normalization of feeling fear and prejudice is capable of making an individual doubt their capabilities, especially when stigmatized by trustworthy authorities. Another interviewee in the documentary talks about the difficulties of filing a complaint against an officer for abusing rights. Complaints are made in police stations, but when people go into these areas, station personnel present as both uninviting and unhelpful. [64]Feeling stigmatized and rejected by social institutions makes it difficult for black youth to feel that they are a part of mainstream society.[65]As Matt explains, "if you have people who are growing up being harassed [by police], they have a mental stigma, thinking 'this is how I'm looked at by society.'"[66] To add, community consultations in the PACER report complain in particular about the TAVIS unit, which with their intrusive and notably violent methods of filling out cards, creates a feeling of "guilty until proven innocent" in black citizens.[67][68]

As black youth feel displaced from society, this causes them to identify the police as an oppressive entity against them and others of the same racial background. Carding makes communities more dangerous, by alienating and eroding police-citizen relationships. Quirouette et al.'s (2016) study notes that being labelled and stigmatized by players in the justice system catalyzes the creation of deviant groups.[69] The stratification between black communities and police is exacerbated due to the lack of respect that most officers display when stopping and questioning youth. [70]Black youth retaliate by forming a code of silence, refusing to cooperate, or interact, with law enforcement as a means of demonstrating solidarity against police injustice.[71] A "no snitchin'" norm is then established amongst black youth, mirroring the cultural

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[63] Dan Epstein and Jamil Jivani, "Crisis of Distrust: Police and Community in Toronto," *YouTube*, uploaded by PLIToronto, 26 April 2014, https://www.youtube.com/watch?v=u627BsqA5BM.
[64] Ibid.
[65] Marianne Quirouette, Tyler Frederick, Jean Hughes, Jeff Karabanow, and Sean Kidd, "Conflict with the Law: Regulation & Homeless Youth Trajectories toward Stability," *Canadian Journal of Law and Society*, vol. 31, no. 3 (2016): 398.
[66] Epstein and Jivani, "Crisis of Distrust: Police and Community in Toronto"
[67] "The Police and Community Engagement Review," *Toronto Police Service,* 42.
[68] Wortley and Owusu-Bempah, 402.
[69] Quirouette et. al., 395.
[70] Epstein and Jivani, "Crisis of Distrust: Police and Community in Toronto"
[71] Edward W. Morris, "Snitches End Up in Ditches and Other Cautionary Tales," *Journal of Contemporary Criminal Justice*, vol. 26, no. 3 (2010): 270.

structures of gangsters.[72] Some youth cliques also align themselves to ignore the legal structures set by police. However, this feeds into a vicious cycle as it reinforces police initiatives to control crime by continuing carding practices.

Since carding is invasive, and often viewed as racial profiling, black youth become marginalized and feel that they are not valuable citizens who deserve protection and freedom of movement. Negative self-concepts of identity orient youth away from mainstream trajectories. When a youth's identity is misrepresented by mainstream society on a regular basis, beliefs about the self change, and manifest in accordance with those negative labels. These manifestations impact the livelihood of black youth.

Impacts on Livelihood

The products of carding are capable of impairing a black youth's future prospects. Participants in the PACER report discussed how the collection and holding of personal information on police databases negatively impacts future employment chances.[73] Respondents felt that being "known to police" has damaging effects on both the individual and their family members, and that records of individuals obtained through carding should have an expiration date. [74]Logically, if black youths are carded significantly more than others, they are likewise more likely to be seen as linked to illegal activity than people from other racial backgrounds.[75] As Jim Rankin from the *Toronto Star* explains, "The vast majority of those [carding] interactions, there's nothing criminal happening. Yet, all of your personal details enter this database. Now, internally in that database, you're connected to a gang."[76]

Ayaan Farah, who has been a customer service agent at Pearson Airport for eight years, has been a victim of hindered employment as a result of carding links. Farah's background check clearance was revoked when a vague police report was brought to Transport Canada. The information in the report stated the she was seen around a Dixon Crew gang member and, in another instance, two people with criminal records

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[72] Calvin J. Smiley, "From Silence to Propagation: Understanding the Relationship between 'Stop Snitchin' and 'YOLO,'" *Deviant Behavior*, vol. 36 (2015): 1.
[73] "The Police and Community Engagement Review," *Toronto Police Service,* 42.
[74] Ibid.
[75] Wortley and Owusu-Bempah, 403.
[76] Epstein and Jivani, "Crisis of Distrust: Police and Community in Toronto"

were seen in her car leaving the funeral of a gang member.[77]Farah claims that it was likely her father driving the car at that time and that she did not know any of those people mentioned in the police reports. [78]The police report led to her being suspended without pay in January 2016. The details in the police report were obtained through carding. However, in this case Farah says that she was not the one carded, but that instead it was her father who was documented by police on the day of the funeral.[79] Since information can be gathered remotely, the ramifications of carding are ubiquitous in black communities. Linking black youth to gangs or crime becomes easy, due to their high presence and movement around public spaces, making it difficult for students to acquire jobs and even volunteer opportunities. The Canadian Civil Liberties Association has acknowledged that institutional bodies of all kinds are gradually normalizing the incorporation of police record checks in their hiring procedures.[80] Youth are burdened with these consequences despite having never participated in criminal activities.

Youth with records in the police database also find difficulty securing housing. Homeless youth are in constant conflict with the criminal justice system. Since they mostly dwell on the streets, police frequently approach these people and card them. Police records of all kinds exclude youth from the housing market. [81]A study by Evans and Porter found that for youth, having a disclosed criminal record reduced the probability that a landlord would accept a request to view an apartment by more than 50%. [82] Even when black youth secure a place of accommodation, being arrested or jailed (which is made more probable due to carding records) could result in them losing their housing. [83] Fear of being screened for records make youth take substandard housing (as these are less likely to check for records) or share a lease with others without putting their name on the agreement.[84] When faced with legal issues, youth become preoccupied with

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[77] Alyshah Hasham, "Fight to get back airport security clearance lands in court," *Toronto Star*, 11 January 2016. https://www.thestar.com/news/gta/2016/01/11/fight-to-get-back-airport-security-clearance-lands-in-court.html.
[78] Ibid.
[79] Ibid.
[80] Quirouette et. al., 394.
[81] Ibid.
[82] Ibid.
[83] Ibid., 392.
[84] Ibid., 393.

resolving these problems, and de-prioritize other responsibilities in their lives such as education and employment, negatively impacting their well-being. The copious amounts of stress pull these youth back into illegal activity and street culture. [85] Frequent shifts between dwelling places make for an insecure life for youth, frustrating their attempts to find stability with housing and employment.

Conflict with the law becomes self-perpetuating, as it decreases the probability that a black youth can disengage from street culture. The stigmatization of carding practices hurts the identity and morale of black youth.[86] As well, incarceration can break relationship ties between youth and their social supports.[87] Without confidence and support, youth often feel isolated and helpless, leading to stress-related disorders and feelings of being rejected by society. For far too many young, black people, achieving stability and wellness becomes an impossible aspiration.

Obstructed from several opportunities for income and housing, black youth are unable to prosper. They become restricted to the confines of their community, which are often characterized as poor and riddled with crime. All of this makes upward mobility difficult for black youth, instead inciting the self-fulfilling prophecy of deviant labels.

Conclusion

This essay has explored the impacts of carding practices on black youth. The ubiquity of negative personal and vicarious police encounters in their community incites young black people to develop a sense of distrust towards law enforcement. When their rights as citizens are ignored and a lack of respect is shown towards them, youth begin to show signs of resistance. To them, no matter how well they behave, they will always be racially profiled by police. Feeling stigmatized, and let down by social institutions, black youth adopt anti-police codes, as they identify themselves to be part of a group that opposes law enforcement. Labels induce a self-fulfilling prophecy for this population, the consequences of which carry over across generations. Carding also has the unintended consequences of criminalizing those who are recorded,

[85] Quirouette et. al., 395.
[86] Ibid., 390.
[87] Ibid.

displacing them from mainstream society, and inhibiting their ability to thrive. Unable to find adequate employment and housing, a great number of these youth lead unstable lives, and many are unable to achieve a good future. Overall, the impacts of carding practices on youth are damaging to their wellbeing, and alienate them from society.

Policy makers and law enforcement agents must seriously consider the adverse effects of carding on young black individuals. Carding leads black youth to feel as if their neighbourhoods were occupied.[88] If the purported goals of contact carding are genuinely of importance to police, then practices should recognize that it is necessary to establish and preserve positive police-citizen relationships. Citizen willingness to cooperate with law enforcement is essential, both for police to solve and prevent future crimes, and for black youth to prosper in society.

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Tweeting Out Torture: A Foucauldian Analysis of Social Media Shaming as the Modern Form of Punishment as Spectacle

By: Teodora Pasca

It is common to assume that technological advancements make a society more civilized. With respect to social media, this assumption has not necessarily proven true. Contrary to what we may believe about the evolutionary progress that humanity has made throughout history, the disturbingly accessible manner in which the Internet facilitates the sharing of incriminating information has drawn out our ugliest tendencies as a species.

In particular, the now-ubiquitous practice of social media shaming — in which an individual's actions are publicly condemned by online networks, often on a mass scale — bears concerning implications for the future of punishment and social control. In *Discipline and Punish: The Birth of the Prison*, Michel Foucault argues that punishment has historically faded from the public eye as its landscapes have shifted from public squares to correctional institutions.

Using the example of online shaming, I argue that Foucault's teachings on the historical evolution of punishment can be applied in a way that sheds new light on his ultimate conclusion. By extending the metaphor of the Panopticon to apply to the constant state of surveillance and information-sharing that characterizes the 21st century, I argue that social media shaming represents a rebirth of the concept of "punishment as spectacle," and therefore constitutes a form of discipline that blurs the lines between the public and the private spheres.

Foucault observes a key historical transformation that occurred up until approximately the end of the 18th century: the gradual disappearance of public torture and executions.[1] Foucault opens his chapter on torture with a graphic description of the fate of Damiens, an individual convicted of regicide and flayed, mutilated with molten substances, drawn and quartered, and burned into ash — all before a crowd of spectators. Public executions like that of Damiens largely disappeared by 1848; consequently, the gradual

[1] Michel Foucault, *Discipline and punish: The birth of the prison* (New York, NY: Pantheon Books, 1975), 2.

desertion of such punitive "spectacles" led punishment to become more hidden from public view, over time being entirely concealed behind the walls of the prison.[2]

Alleging prison sentences to be more humane than previous horrors, the infliction of pain onto the body became less and less common with the development of the prison.[3] Instead of physical torture, criminal sanctions took the form of extremely regimented penal sentences, forced labour, and mass monitoring.[4] Foucault also argues that these forms of punishment are not necessarily more humane or noble; it is just that their objectives have changed. The new target of punishment is not the offender's body, but his soul, with the ultimate goal being to re-educate, reform, and reintegrate him back into society.[5] Systems of punishment that employ such methods —"correctional" systems — have persisted today and can be observed through the massive flourishing of penal institutions around the world.

Jeremy Bentham's Panopticon is one of the most infamous examples of a correctional institution in criminological history. The institution was designed to promote total surveillance by positioning all of its cells around a centralized vantage point, thereby maximizing power over offenders by expanding the gaze of officials so as to be watchful of their subjects' every move.[6] As Foucault argues, the disciplinary logic of the Panopticon is to promote self-regulation. Though inmates are unaware of when exactly the warden's eyes are on their cells, they understand that they can be monitored at any given moment. This means it will be significantly more difficult for them to successfully resist the prison's rules, and to do so undetected.[7] The ultimate goal of the Panopticon is to provide a system of absolute control and regulation.[8]

The Panopticon and its embodiment of the omnipresent eye of the state serves as a useful metaphor for public surveillance in the 21st century, a large part of which is conducted through social media networks. Just as the Panopticon grants the viewer limitless powers of observation, we now have billions of Facebook,

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[2] Foucault, above n 2, 13.
[3] Ibid., 16.
[4] Ibid., 9.
[5] Ibid., 22.
[6] Ibid., 200.
[7] Ibid., 201.
[8] Ibid., 200.

Twitter, and Instagram feeds at our fingertips, all of which have the potential to reveal intimate details about their users' lives. In many places around the world, it is unusual not to possess a phone with photo, video, and voice recording capabilities. Curiously enough, the conditions for the enforcement of order that Foucault describes as essential to Panopticism — "mechanisms that analyse distributions, gaps, series, combinations, and which use instruments that render visible, record, differentiate, and compare" — seem starkly similar to computerized algorithms and Google searches when considered in this context.[9] The accessibility of these technologies and their sheer processing powers has effectively transformed ordinary citizens into surveyors.

The key difference between the Panopticon and the social media universe is the distribution of power. As opposed to being consolidated within a penal institution, the ability to watch, record, and share has now returned to the hands of the public. Foucault predicted the diffusion of surveillance technologies in this manner when he discussed the spread of "centres of observation" through churches and charities, which extended disciplinary powers to individuals other than state representatives.[10] It is unlikely, however, that he could have anticipated that the metaphorical role of "prison watchman" could come to be filled by anyone with access to the relevant technology, creating a state of constant surveillance that has the potential to hold all of society within its grasp.

The ubiquity of surveillance in the social media age is emblematic of the functions of Panopticism with respect to social control. The logic of the Internet and the possibility that one's actions could be recorded and uploaded at any given moment has the potential to create the same tendency toward rule-following and social conformity as the centralized gaze of the Panopticon's watchman. Accordingly, just as an inmate hesitates to cause trouble knowing that the warden may be watching, we are wise to think twice before acting out in public. It only takes one viral YouTube video to put a life on the line.

[9] Foucault, 208.
[10] Ibid., 212.

Believing society to have long since moved past the age of the stocks and public floggings, the Foucault of 1975 could not have predicted that the resurgence of public punishment would gain new momentum in the form of online shaming. The concepts of shame as punishment is not foreign to the law, and it is often embodied through retributive or denunciatory forms of punishment. However, as reported by Eric Posner, a new "shame culture" has developed specifically to online media, and is all the more expansive in its scope. An alchemic mix of anonymity, inability to tolerate disagreement, and instantaneity of reactions has resulted in extrajudicial responses to behaviours deemed socially unacceptable, all of which take place online.[11] In a similar vein to how fields like psychiatry and education have embraced elements of punishment and social control that are common within the criminal law, [12] online shaming has now become one of the most widely accessible extrajudicial methods of inflicting discipline: the judging and condemnation of wrongdoing is open to anyone with an Internet connection.

If shaming goes viral, the ultimate result is that the individuals targeted experience what can only be described as a new form of torture. After a photo of Lindsey Stone making a crude pose in front of a national cemetery in Washington, D.C. went viral in 2012, social media exploded with condemnation for Stone's apparent lack of respect for veterans, bombarding her with hate mail and death threats.[13] Public relations executive Justine Sacco was vilified and lost her job and the support of her family after her tweet — "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!" — became the Number 1 trending topic on Twitter in 2013.[14]

When Adria Richards took to Twitter to condemn two men for making sexual jokes at a tech conference in 2013, one of them was fired.[15] Subsequently, Richards herself received immense backlash from those who thought her reaction had been too severe — she was targeted with rape threats, her face

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[11] Eric Posner, "A terrible shame," *Slate*, April 9, 2015, http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/04/internet_shaming_the_legal_history_of_shame_and_its_costs_and_benefits.html.
[12] Foucault, above n 2, 21.
[13] Jon Ronson, "How one stupid tweet blew up Justine Sacco's life," *The New York Times Magazine*, February 12, 2015, https://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html?_r=0.
[14] Ibid.
[15] Laura Hudson, "Why you should think twice before shaming anyone on social media," *Wired,* July 24, 2013. https://www.wired.com/2013/07/ap_argshaming/.

was superimposed onto pornographic videos, and at one point she was sent a photo of a beheaded woman with tape over her mouth.[16]

It is not that disrespecting military graves or nonchalant bigotry should go unpunished, and receiving threats can hardly be equated with being flayed and burned alive. Yet one cannot help but see parallels between these instances of shaming and the disproportionately punitive behaviour that lawmakers aimed to eradicate over a century ago by bringing punishment out of the public eye. Crowds of spectators flock to the Twitterverse just as easily as they would have to the gallows, and the accessibility of the Internet has facilitated the success of shaming spectacles in gaining millions of participants.

Consequently, while the criminal justice system seems to have moved towards more sequestered forms of punishment within institutions, online shaming can serve as an alternative or complement to criminal sanction. It is also characterized by the same sense of publicity as open-air executions.[17] This is not to mention that those accused or convicted of crimes often face additional online backlash, sometimes to the point of dehumanization, and potentially in addition to any institutional penal punishment they face to begin with.

While Foucault identifies the modern penitentiary as ostensibly corrective in nature,[18] there is less of this sentiment in online shaming. In fact, the practice seems to align closely with the denunciatory and retributive functions of public displays of torture. Comments, shares, and retweets *en masse* serve as virtual rallying cries for the public condemnation of conduct deemed unacceptable by society, while harassing or threatening the individuals responsible for the initial offence can be justified on principles of just desert. One should note how individuals respond to their own demonization in similar ways, regardless of whether it takes the form of physical torture or virtual torment. While Damiens' violent ordeals caused him to desperately plead to the gods for mercy and forgiveness,[19] the Internet's mass vilification of their actions

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[16] Jon Ronson, "'Overnight, everything I loved was gone': the internet shaming of Lindsey Stone," *The Guardian*, February 21, 2015, https://www.theguardian.com/technology/2015/feb/21/internet-shaming-lindsey-stone-jon-ronson.
[17] Foucault, above n 2, 3.
[18] Ibid., 16.
[19] Ibid., 3.

drove Stone, Sacco, and Richards to shame, fear, and humiliation, culminating in emotional breakdowns and social isolation.[20]

Despite the important parallels between public displays of torture and social media shaming, the latter phenomenon presents unique challenges for modern approaches to punishment. Posner calls shaming "the very antithesis of the law" because it exists outside of the parameters laid out by the state — meaning that online shaming, as an extrajudicial practice, can exist entirely absent of the due process considerations that are afforded to individuals accused of crimes.[21] And contrary to the calculated swiftness of the guillotine — described by Foucault as an ingeniously visible yet instantaneous method of execution[22] — damage to reputation or relationships is prolonged through online shaming and can continue indefinitely, as it is virtually impossible to control the rate at which online content is shared. Considering the sheer amount of information an individual typically projects into the social media sphere on a daily basis, often without thinking twice about the consequences, the continued pervasiveness of online shaming is a matter of serious public concern.

Foucault's chapters on torture and Panopticism suggest that punishment has not necessarily become more benevolent over the years, despite having changed its tactics.[23] This becomes all the more evident when placing these chapters in the context of the digital age. Despite having abandoned public executions in favour of the more covert methods undertaken by correctional facilities, Internet demonization represents the new order for punishment as spectacle, and a frightening one at that. The eerie parallels between online shaming and previous forms of public punishment demonstrate that, as a species pursuing respect for individual humanity and dignity, we have a long way to go yet.

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[20] Ronson, above n 13.
[21] Posner, above n 11.
[22] Foucault, above n 2, 12.
[23] Ibid., 16.

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Populist Rhetoric and Twitter: A Case Study of Trump's Discourse

By: Ammar Hasan

In the past decade, Twitter has been growing at a rapid pace, reaching 500 million users in 2014.[1] Consequently, various scholars and e-linguists have sought to examine the implications Twitter, or micro-blogging, has for the way we communicate with one another. The recent 2016 United States presidential election has revealed some of these implications. From my examination of President Donald Trump's communication method, I will argue that his populist rhetoric has been facilitated by the micro-blogging medium of Twitter, and its structure of public discourse. To substantiate my claim I will first contextualize my argument by examining the defining characteristics of populist rhetoric. Second, I will refer to numerous scholars and linguists to address the impact of Twitter on public discourse, and examine how it facilitates this populist rhetoric. Third, I will examine how Trump utilized populism as a rhetorical strategy through Twitter and his public discourse in general.

First, in the 21st century, populist rhetoric has been mobilized by numerous Western democratic parties. Parties such as UKIP, Danish People's Party, the French National Front, the Greek Syriza and Spanish Podemos party, have all successfully utilized populist language to gain power.[2] Though the definition of populism varies depending on the context, Engesser et al define the main characteristics of populism as language that "[emphasizes] the sovereignty of the people, [advocates] for the people, [attacks] elites, [ostracizes] others, and [invokes] heartland."[3] More to the point, they describe how populism emphasizes people's sovereignty by accusing the elite of subordinating people's rights to their prerogatives. In addition, the populist poses as a crusader, and claims that they alone are able to restore people's sovereignty.[4] Populists advocate for the people by promoting social solidarity in the face of the 'other,' and by trying to keep a close relationship with the people. They attack the elite by claiming that members wield a disproportionate degree of power that curbs rights and freedoms, negatively impacting the country's well-being. Populists ostracize

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[1] Marcel Danesi, *Language, Society, and New Media: Sociolinguistics Today*. New York: Routledge, 2016.
[2] Sven Engesser et al, "Populism and Social Media: How Politicians Spread a Fragmented Ideology" (London: Routledge, 2016) 4.
[3] Ibid., 3.
[4] Ibid.

others by creating binaries, a dichotomy of 'us' vs. 'them'. Consequently, they scape-goat issues on particular people such as immigrants or religious groups, depicting them as threats to the 'pure' society. Finally, right-wing populists invoke a longing for heartland by appealing to an image of a utopian society that has been lost in the present. This utopia the populist leader supposedly can restore.

Second, in regards to the structure of discourse on Twitter, it is important to note that there are two distinct paradigms that are sometimes difficult to distinguish from each other. There is the paradigm that deals with entertainment, which makes up 80 percent of Twitter's activity; and a paradigm that deals with social, cultural, and political issues, making up 20 percent of the activity.[5] According to Ott, the problem concerns that 20 percent of activity, in that complex social, cultural, and political issues get "filtered through the lens of Twitter," and are thereby simplified, instead of becoming discourse that requires meaningful dialogue.[6] Furthermore, since Twitter promotes "simplicity, impulsivity, and incivility," the medium is evidently ill-equipped to deal with dialogue surrounding complex issues and events such as the elections.[7] Instead, Ott believes that Twitter "destroys dialogue and deliberation, fosters farce and fanaticism, and contributes to callousness and contempt"[8]. Furthermore, as noted in an e-literacy study conducted by Greenhow and Gleason on the topic of "Twitteracy," they conclude that Twitter has not only impacted the way we write and communicate online, but has also impacted discourse in the offline world.[9] Since this is, in a sense, a language problem, before going into the exact mechanisms inherent in the micro-blog mode which may be seen as a facilitator for populist rhetoric, it is worth looking at the problem from the theoretical perspective of philosopher Jurgen Habermas.

As Gumperz notes, "systematic linguistic fieldwork began in the mid 19th century. Prior to 1940 the best known studies were concerned with dialects, special parlances, (and) national languages."[10] This concern reflected what might be termed as the 'pre-linguistic revolution' understanding of language as a formal system

[5] Brian L. Ott, "The age of Twitter: Donald J. Trump and the Politics of Debasement." (Routledge, 2016), 63.
[6] Ibid., 60.
[7] Ibid.
[8] Ibid.
[9] Danesi, "Language, Society, and New Media: Sociolinguistic"
[10] John Gumperz, "The Speech Community. Linguistic Anthropology" Malden: Blackwell Press, 2001), 67.

of lexical items and rules for the arrangement of those items.[11] After the influence of the ideas of F. de Saussure amounted to a theoretical revolution in the theory of linguistics, the perception of language changed drastically.[12] Language was no longer understood naively as a reflection of the world on the mind, but as a closed system with a complex relation to social processes.[13] This paved the way for philosophers such as Jurgen Habermas to write about language in terms of its functional role in the project of 'communication discourse.'

According to Habermas, language plays a unique role for the human species.[14] It is the vehicle of speech acts that aims "to establish and renew interpersonal relations, whereby the speaker takes up a relation to something in the world of legitimate social orders."[15] It is important to recognize that for Habermas this objective is the essence of human language, more specifically, for habermas language is not just a complicated system of communication observable in other species[16] (The notion of language having an 'aim' was a point missed in the 19th century view, as Habermas notes). This is further theorized by Habermas to comprise what might be called the Enlightenment project of creating a society that has the best possible context of individual freedom. To realize this social situation is the objective of language.[17] And although people are equipped with the 'communicative competence' to engage in this liberating social project, there is a problem barring the way to freedom.[18] It is at this point that Habermas' social criticism begins. He critiques the ways in which society today weakens or distorts the 'communicative competence' evolved in the human species. The parts of society which have such a negative impact include the government, and the economy.[19] It would not be hard to endorse adding technology, and specifically micro-blogging mediums like Twitter, to this list of detriments to 'communicative competence.'

A recent argument that expands on Habermas' theory was posed by Ott who holds that Twitter promotes

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[11] Gumperz, 67.
[12] Ferdinand De Saussure, "Course in General Linguistics." (New York: Open Court Classics, 2001)
[13] Ibid.
[14] Jurgen Habermas, "The Theory of Communicative Action." (Boston: Beacon Press, 1985), 308
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.

public discourse that is simple and superficial.[20] Ott explains that since the 140 character limit on Twitter structurally prohibits "the communication of detailed and sophisticated messages," users are required to either resort to brevity in articulating the message, or resort to the practice of linking to videos, articles, and research to convey more complex messages.[21] As Ott notes, this is problematic because "the repeated production and consumption of simple messages, which endlessly redirect our attention elsewhere via hyperlinks, reshapes human cognition in ways that nurture simple mindedness and promote short attention spans."[22] The demanding simplicity of Twitter diminishes our ability to ponder and discuss issues in sophisticated ways. Therefore, due to the simplistic mode Twitter takes; it becomes easier for the rhetoric of populism to reproduce itself. The seemingly simple messages that populists communicate with the public would be heavily politically charged, and since Twitter does not promote thoughtful dialogue, populist rhetoric would fly under the radar and would be uncritically communicated with the people.

At its conception Twitter was established as a site for social purposes; thus, the logic of Twitter structurally promotes low-register and informal discourse. Consequently, Ott notes that the undermined formality of Twitter promotes discourse that is denigrating and uncivil because the "lack of concern with proper grammar and style undermines norms that tend to enforce civility."[23] Ott also argues that since Twitter depersonalizes interactions, it creates a context in which people disregard the consequences of their remarks for others, which as a result generates an environment that fosters negative and controversial discourse.[24] As Danesi notes, the objective for Twitter users is to accrue more followers, and draw attention through likes and retweets.[25] Scholars Gross and Johnson note that in order for people to achieve that, there must be a focus on producing content that emphasizes "novelty and even outrageousness."[26] In regards to Twitter specifically, Ott notes that there is an emphasis on emotionally charged tweets because they tend to get "retweeted more often

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[20] Ott., 60.
[21] Ibid.
[22] Ibid., 61.
[23] Ibid.
[24] Ibid.
[25] Danesi, "Language, Society, and New Media: Sociolinguistic"
[26] Justin Gross and Johnson Kaylee, "Twitter Taunts and Tirades: Negative Campaigning in the Age of Trump" (Political Science and Politics, 2016), 749

and more quickly compared to neutral ones."[27] While emotions can differ between positive and negative, tweets that signify "negative sentiment" and controversy have become the key to popularity.[28] Evidently, since Twitter fosters an environment that promotes informal and uncivil dialogue, it becomes easier for populists to 'attack the elite,' and engage in discourse that excludes people and ostracizes the 'other.'

As Danesi notes, social media sites like Twitter function as venues for "social grooming," in which the objective for Twitter users is to present a favourable image of oneself through self-promotion to "gain attention and to gather followers."[29] Consequently, in recent research conducted on the discourse of Twitter, it was noted that "personality traits of narcissism, Machiavellianism, and psychopathology – commonly referred to as the Dark Triad – are positively correlated to Twitter usage."[30] Twitter users are not motivated by engaging in meaningful dialogue, rather, their discourse is motivated by the aspects of self-promotion and self-interest.[31] Furthermore, since Twitter is a platform that intends to communicate seemingly personal messages, Engesser et al. argue that populists can benefit from this "personal action frame" by keeping their populist rhetoric ambiguous under the guise of self-promotion.[32] Populists are able to use this self-promotional platform to style themselves as advocates for the people, by presenting themselves as the solution to the problems and threats that their society faces.

Another important aspect of the structure of micro-blogging in general and Twitter specifically is the way the 'hashtag' is used to promote what can amount to populism. The hashtag is a form of metadata, which is information about information, that is visible to the readers of micro-blog posts.[33] As Zappavigna notes, the hashtag lets micro-bloggers "mark (their) discourse so that it can be found by others in effect so that (they) can bond around particular values."[34] In a sense, the hashtag has become a discourse marker, and the result is a change in the way people relate to each other. Zappavigna points out that just as 'search' functions

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[27] Ott, 61.
[28] Ibid., 62.
[29] Danesi, 108.
[30] Ott, 62.
[31] Ibid.
[32] Engesser et al., 15.
[33] Zappayigna, 13.
[34] Ibid., 12.

revolutionized the way information is approached and organized, the 'hashtag' is an analogous revolution in terms of the way people socialize[35]. The effect is what she calls "ambient affiliation," "a process whereby people sharing associated values bond around these user-defined topics."[36] It is not difficult to imagine that a populist with considerable resources to conduct research could easily research these topics and effectively 'tap into' them in order to promote him or herself. 'Ambient affiliation' would do two things: gain the populist leader a wide support base comprised of individuals drawn to certain themes, and give the populist leader's movement the legitimacy of being 'grassroots.'

In addition to the features noted earlier, another aspect of Twitter that could be explored in further research might be that it is nearly impossible to factually check claims in "a timely fashion" on Twitter.[37] Since Twitter is continuously being updated by live stream, there could be a tendency for the 'followers' of a populist to focus disproportionately on the present moment and ignore issues of consistency, and even validity.

When Trump's discourse with the public through his Twitter feed is analyzed, it can be seen that even though his lexicon and syntax are quite simple, his messages are loaded with politically charged meaning. In an examination of Trump's Twitter feed of over 2,500 Tweets between October 2015 and May 2016, scholar Crockett notes that Trump's lexicon is "simple and repetitious," in which he only relies on monosyllabic words such as "sad," and "bad."[38] When Trump's discourse is examined according to the "Flesch-Kincaid grade level test, it rates at 3rd or 4th grade reading level."[39] From a linguistic perspective, when Trump refrains from using any jargon, and by speaking very simply, Trump is trying to communicate with the public by talking like a common citizen. As Bakhtin notes, discourse style has a cohesive social function, and by simplifying his speech, Trump is possibly trying to impart a sense of togetherness with the public.[40]

Furthermore, when Trump's discourse is examined, undertones to his oversimplified rhetoric can be

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[35] Zappayigna, 14.
[36] Ibid.
[37] Symeon Papadopoulos, "Overview of the Special Issue on Trust and Veracity of Information in Social Media" (ACM Transactions on Information Systems, 2016), 14
[38] Ott, 64.
[39] Ibid., 63.
[40] Danesi, 108.

discovered. For instance, on May 2016, Trump tweets: "failing @NYTimes will always take a good story about me and make it bad. Every article is unfair and biased. Very sad!"[41] Or for instance: "The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!"[42] In these simple tweets and countless others, Trump is not merely attributing comments to the mainstream media, but through further analysis it seems that he is in fact implicitly trying to delegitimize mainstream news outlets by undermining their professional integrity. As Engesser et al write, without traditional media intervention, such simple and politically charged rhetoric that Tump utilizes can circulate in Twitter "without any critical intervention or further contextualization."[43]

Another example of Trump's oversimplified and politically charged rhetoric can be noted in his campaign slogan 'Make America Great Again.' While this slogan might seem trivial at first glance, the objective here is to appeal to people by invoking a longing for 'heartland.' As noted by Engesser et al, populists try to create an "idealized conception of the community" by "[promising] to construct what has been lost by the present."[44] Trump's slogan does just that. The underlying meaning behind this slogan portrays Trump as a leader who is going to restore the greatness of America. Since Twitter may create an environment that promotes uncivil discourse, it is easier for Trump to ostracize the 'other,' and to 'attack the elite.' According to Ott, Trump's tweets are "overwhelmingly negative in connotation--and the majority of them are outright insults."[45] Take Trump's attack on Arianna Huffington, the co-founder of the Huffington post: "@ariannahuff is unattractive both inside and out. I fully understand why her husband left her for a man- he made a good decision."[46] Or take this other tweet: "Barney Frank looked disgusting- - nipples protruding- - in his blue shirt before Congress. Very, very disrespectful."[47] The uncivil and informal platform that Twitter fosters facilitates and even encourages Trump to attack others. Hence, Trump takes advantage of this micro-blog by attacking his

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[41] Ott, 64
[42] Andrew Marantz, "Is Trump Trolling the White House Press Corps?" (The New Yorker, 2017)
[43] Engesser et al., 11.
[44] Ibid., 3.
[45] Ott, 64.
[46] Ibid.
[47] Nick Wing, "Donald Trump's S**t-Talking Game Is So Bad, It's Good" (The Huffington Post, 2015)

opposition, and members of the media and political elite. Furthermore, Twitter allows Trump to reinforce negative sentiments in his tweets through stylistic practices such as excessive use of exclamation points and caps lock that "heighten [the] emotional impact" of his claims, making his populist rhetoric more effective.[48]

Moreover, Trump uses Twitter to criminalize and marginalize immigrants and Muslims using them as scapegoats for other domestic issues. Take this tweet about Mexican immigrants: "Druggies, drug dealers, rapists and killers are coming across the southern border. When will the U.S. get smart and stop this travesty"[49] or this tweet about Muslim immigrants: "Hillary Clinton said it is O.K. to ban Muslims from Israel by building a WALL, but not O.K. to do so in the U.S. We must be vigilant."[50] These kinds of tweets are in line with what Engesser et al. write about, where the populist tries to criminalize certain groups, and calls for their deportation based on the premise that they pose a threat to society.[51] In the examples illustrated, it can be seen that the criminalization of Mexican immigrants and Muslims by Trump is intended to appeal to fear and implicitly exclude those groups from the narrative of nation building. Trump is creating a dichotomy by mobilizing those who he deems "the American people" against the 'other.' Also, since Twitter allows Trump "to circumvent the journalistic gatekeepers," this leads to the propagation of his exclusionary and offensive discourse.[52]

When Trump's rhetoric is examined in his tweets, it can be observed that his discourse is mostly motivated by self-promotional purposes. According to a study that compared Trump with the other candidates, Ahmadian et al. note that Trump scores the highest in his use of personal pronouns, or what linguists refer to as "I- talk."[53] Consequently, Ahmadian et al. discern that Trump's rhetoric is mostly "grandiose" and self-promotional in nature.[54] In 2015, *The Washington Post* analyzed over 6000 tweets from Trump's Twitter feed. It found that while 11 percent of his tweets were insults and offensive remarks, the other 88 percent of the

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[48] Ott, 64.
[49] David Lawler, "Why Donald Trump is wrong about Mexican immigrants" (The Telegraph, 2015)
[50] Donald J. Trump, "Hillary Clinton said that it is O.K. to ban Muslims from Israel by building a WALL, but not O.K. to do so in the U.S. We must be vigilant!" (Twitter, 2016)
[51] Engesser et al., 2.
[52] Ibid.
[53] Sara Ahmadian, "Explaining Donald Trump via Communication Style: Grandiosity, Informality, and Dynamism" (Toronto: Elsevier Ltd, 2016), 50
[54] Ibid.

rhetoric of his tweets fell under the category of self-promotion and bragging.[55] When we further examine Trump's 'self-promotional' tweets, we can discern that Trump takes advantage of Twitter's 'self-promotional' platform to promote himself as the favourable leader that America needs. Take this tweet: "The attack on Mosul is turning out to be a total disaster. We gave them months of notice. U.S. is looking so dumb. VOTE TRUMP and WIN AGAIN!"[56] As Engesser et al. note, an integral characteristic of a populist is to seem like a "a true representative of the people," and to "create the impression as if the populist stands up for the entire country and all its inhabitants."[57] Clearly, as seen in the tweet above, Trump is both advocating for the people by claiming to protect them from the threat of ISIS, while promoting himself as the leader that is going to do that.

Due to the logic of Twitter, this micro-blogging platform has facilitated populist rhetoric which can be exemplified by the case of Trump's communication method in the 21st century. More specifically, features like micro-posts, hashtags, live-stream and Twitter's simple, impulsive, and self-promotional logic all aid in the communication of the key characteristics of the populist rhetoric that were discussed in this essay. Thus from examining these implications, it becomes evident that while the communicative features of Twitter can be used creatively and positively, Twitter can also be prone to exploitation by opportunists in the form of populists in this case. This begs the question, how can we confront the exacerbating effects of Twitter on discourse? Will Twitter continue to undermine our ability to engage in meaningful dialogue when discussing issues like the 2016 elections? Evidently, what we must do is remain wary of these detrimental effects on communication, but more importantly, we must be aware and critical of the likes of Trump that try to stealthily utilize Twitter and other social media platforms to divide us and skew our judgment on defining issues.

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A Feminist Critique of the First Section of Kant's Groundwork of the Metaphysics Of Morals

By: Olivia Smith

It is no secret that women have been denied a great deal throughout history. Principal and primary in this respect is agency, most noticeably in the material sense. However, as Mary Wollstonecraft noted in her seminal 1792 work, *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects,* women have also been denied agency in that respect which is itself derived from the recognition of a subject as morally operative; that is, women have been denied recognition of their status as subjects that admit of moral agency.[1] The perceived 'goodness' of women was – and, arguably, still *is* – predicated upon both their fidelity to certain externally imposed behavioral standards – virtues, in the vernacular sense – and upon their ability to function in a manner instrumental to the moral aims of men. Women, in short, were denied recognition as moral actors, and their empirical experiences *vis a vis* morality were often rejected out of hand. This effacement has its roots in deeply embedded power structures of patriarchal society, and in a consequent high regard for qualities perceived as masculine. The co-constitutive forces of the effacement of the 'feminine' and the prioritization of the 'masculine' have shaped the social realities in which philosophers have operated, detrimentally restricting the development and content of many ethical theories, including Kant's deontology.

I will discuss the first section of Kant's *Groundwork of the Metaphysics of Morals* from a philosophically critical feminist perspective, arguing not only that Kant's account of morality from duty excludes the empirical perspectives of women and unduly prioritizes masculine values, but also that this functions to the detriment of his account in two respects. First, though Kant has indicated that he will embark upon an *a priori* exposition of moral law, his fallback upon the concept of duty to elucidate the concept of a 'good will' inhibits such reasoning, inviting criticism of his choice of *duty* as the referent for moral value; I argue that such a choice is founded, at least partially, upon a prioritization of authoritarian masculine ideals. Second, Kant's hyper-selective theory of morality from duty is premised upon a prohibition against teleological valuation even though the categorical imperative appears to demand it, forcing the theory to contradict itself.

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[1] Mary Wollstonecraft, *A vindication of the rights of women: with strictures of political and moral subjects,* ed. G. Vale (London: Dodo Press, 2007).

In *Groundwork of the Metaphysics of Morals,* Kant sets out to establish "the supreme principle of morality,"[2] the universal canon by which action may be judged to be right or wrong. His investigation begins with the assertion that there is no thing that is without qualification good save for a 'good will,' i.e., a will which acts solely from the dictates of moral law.[3] The good will takes moral reasons as necessary and sufficient conditions for moral action; it admits of no predisposition to act other than respect for the moral law, and is equally good when it is acting as when it is not. To demonstrate the concept of the good will, Kant selects the concept of duty — i.e., acts done in accordance with moral law —which he says contains the concept of the good will.

Kant's argument hinges upon a distinction between acts done *from* duty and those done in *accordance* with duty. To take an example of his, we all have a duty to preserve our own lives. However, the vast majority of us are strongly disposed to do this. If I act in some way to preserve my own life, what I have done is dictated by duty; but, because of my strong disposition towards acting in that way, my action is merely in *accordance* with duty. If I do, in fact, wish to be dead, but I act in some way to preserve my own life regardless, solely due to respect for the duty I have to preserve my own life, then I have acted *from* duty. It is only in acting solely *from* duty, says Kant, that actions may be judged to have moral worth.[4] Why does Kant prohibit actions done in accordance with duty from having moral value? Kant holds predispositions to be inconstant, and from this maintains that actions done in accordance with duty, with predisposition being the motivating force of such actions, are too unstable and fickle to form the basis of truly moral action.

Women readers might recognize such criticism, and it is here that we may begin looking at Kant's account from a feminist perspective. Many of the predispositions, otherwise read as motives and/or justifications, that Kant rejects as bases of moral action are highly feminized traits; pathological love (in fairness to Kant, he does not mean love that is *per se* detrimental, but rather love insofar as it is a state people are sometimes in), the derivation of satisfaction from spreading joy, and kindness are all rejected out of hand. Imperatives of care, partiality, and communalism, commonly associated with women, are wholly rejected in

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[2] Immanuel Kant, Groundwork of the metaphysics of morals, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 2003), 5.
[3] Ibid., 7.
[4] Ibid., 11.

favour of a rigid insistence upon rule by the universal, by the categorial imperative to act only on that maxim which one could also at the same time will become a universal law.[5] Authoritarian words such as "subjugation," "overpower," and "respect" feature heavily;[6] these are masculine constructions insofar as they are traits that are prized either in such a capacity as they are expressed by men (e.g., subjugating something) or in such a capacity as they are referent to the privileged status of men (e.g., "Show your father some respect!"). The moral law as defined by Kant may therefore be seen as a masculine construction, as its development, or elucidation, is founded upon a rejection of feminine justifications and a prioritization of masculine values.

This is doubly clear in light of the parallels that may be drawn between the moral status afforded to women at the time Kant penned *the Metaphysics of Morals* and his characterization of the qualities that predispose one to act in accordance with duty. Kant notes that "even qualities that are conducive to this good will and can make its work easier have no intrinsic unconditional worth."[7] Women were then, as now, regarded as having instrumental moral value; that is, their activities (e.g., keeping a home, loving/supporting their husbands, giving birth to, raising, and loving children, performing edifying songs on the pianoforte, *et cetera)* enabled more transcendent moral activities on the parts of others without being of intrinsic moral value themselves. Where women are conceptualized as possessing instrumental qualities, and where men are conceptualized as being legitimate moral actors, the possibility of analogy with the quality/good-will dichotomy is evident. Putting Kant and his philosophy in its proper social and historical context, it is not surprising that he would reject feminized qualities; women were perceived as incapable of rigorous reason, fickle, and overburdened by irrational emotionality. If the feminine were thus defined, then it would be a poor foundation indeed for an objective theory of universal and reason-accessed morality. All evidence pertaining to such a definition is, however, to the contrary.

Furthermore, Kant's insistence that actions only have moral worth if they are done solely from duty[8] evokes masculine ideals of honour and chivalry. A life lived in faithfulness to Kantian ethical imperatives

[5] Kant, 15.
[6] Ibid., 13-16.
[7] Ibid., 7-8.
[8] Kant, 13.

would be a dry, difficult one indeed, but Kant conceptualizes a life lived from duty as a sort of noble struggle in pursuit of an end higher than happiness. Masculinized ideals of "grinning and bearing it," doing what is required of you, suffering for a cause, honour, and transcendently realizing a higher purpose are all evident in Kant's prioritization of duty discharged solely from respect for the moral law. Though Kant has claimed pure reason for his purposes, I would argue that, as social beings, it is very difficult if not impossible to reach a position of pure detachment from the socialized aspect of cognition, save for in the realms of scientific investigation and mathematics. Furthermore, Kant admits that in choosing the concept of duty he has brought the good will under certain subjective restrictions.[9] This is a serious threat to his pursuit of a supreme moral principle by means of *a priori* reasoning. In light of this admission of partial *a posteriori* investigation, the question of why he has chosen *duty* as the referent for moral value is rendered a fair one. I contend that Kant's focus upon duty is at the very least partially derivative of a prioritization of authoritarian masculine values and a rejection of feminized qualities. If I am correct, this threatens the *a priori* nature of Kant's account, as socialization, a decidedly experiential factor, may be seen to have come to bear on his reasoning.

This rigid focus upon duty led Kant to reject teleological moral valuation, but the categorical imperative appears to demand it; Kant's exposition of the categorical imperative reinforces this fact. He defines the categorical imperative thus: act only on that maxim which one could also at the same time will become a universal law. It is a promising proposition, and also a partially teleological one; Kant, in speaking to the function and applicability of the categorical imperative, speaks of the results, the *consequences,* of everyone adopting a maxim, and then permits the acceptance or rejection of a given maxim on these grounds.[10] Kant has also, however, said that the moral value of an action (in this case, the moral value of keeping with a maxim consistent or inconsistent with the categorical imperative) has no grounds in the purpose achieved by it, but exists in virtue of the reasons for the action.[11] Unfortunately, Kant's rigid focus upon action from duty renders his legitimately important conclusion partially unsupported in light of his premises. In fact, it induces a contradiction, bringing the integrity of his account into question.

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[9] Ibid., 7.
[10] Ibid., 15.
[11] Kant, 7.

In this paper, I have not sought to wholly dispute Kant's claims. Rather, I undertook to expose, from a philosophically critical feminist perspective, certain weaknesses in his argument that are derivative from a prioritization of traditionally masculine values and a rejection of traditionally feminine ones. In my opinion, Kant's account would be strengthened by the incorporation of the empirical moral perspectives of women or, at the very least, by an attempt to do so. This might widen the scope of his theory and render it more practically applicable and recognizable; as it stands, humans can, in my view, *experience* moral value, and Kant's account might try to reconcile such perception with universal moral truths; it could lead to an interesting perspective that would not necessarily invalidate some of his deeper claims about moral objectivity.

The manner in which Kant, in *Groundwork of the Metaphysics of Morals,* fails to account for the empirical moral perspectives of women, rejects traditionally feminine qualities without due process, and thereby threatens the philosophical integrity of his moral theory, speaks to the necessity of incorporating and valuing the 'feminine' in ethics. This is neither to be construed as an assertion that the feminine *is* such as the structures of the patriarchy have defined it, nor is it to be construed as an assertion that women's moral value is, or ought to be, limited to traditionally 'feminine' activities. Rather, from a feminist perspective that acknowledges the negative effects of patriarchy on all persons (though, of course, to differing extents), the prospect of an overall re-evaluation of ethics that incorporates the qualities and reasons that have thus far been rejected, implicitly or explicitly, on the basis of their association with the feminine seems especially compelling. The implications could very well prove profound.

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Economic Sanctions: When Appropriate, When Not?

By: Alen Hristov

Economic sanctions are considered one of the most controversial topics in international law. During the two most recent decades, economic coercion has been highly criticized, especially with regard to two contentious issues. The first is concerned with the legality of economic sanctions under international law – i.e. the question of when a state or a group of states can legitimately, and in compatibility with international law, apply economic measures against another state or group of states. Sanctions can have adverse impact on innocent civilians, which is incompatible with the norms and principles of international humanitarian law and international human rights law. For this reason, amongst others, a number of international lawyers have condemned the imposition of economic sanctions. One could conclude, then, that sanctions which cannot be legally justified and which inflict damage upon civilians or innocent third parties must be deemed *inappropriate*.

An intriguing question that arises, therefore, is: when can economic sanctions be considered *appropriate*? Taking into consideration the aforementioned contentious aspects of economic punitive actions, the object of this paper is to demonstrate that economic sanctions are appropriately imposed only when they meet the following three criteria: firstly, sanctions must be *collectively imposed,* because unilateral sanctions under international law are illegal; secondly, sanctions must be *closely targeted*, since comprehensive economic measures tend to pose negative effects upon civilian populations; lastly, *the duration* of economic sanctions must be short, as, in many cases, prolonged sanctions starve civilians by depriving them of vital commodities. The paper explores these criteria by demonstrating their relevance to the normative and the humanitarian aspects of economic sanctions.

Punitive economic action has proven to be an ineffective method for restraining the policies of target states, with only a 34 per cent success rate.[1] The negative effects of economic sanctions on the humanitarian and normative aspects of international law should not be compromised by a coercive and controversial policy

[1] Boris Kondoch, "The Limits of Economic Sanctions under International Law: The Case of Iraq," *International Peacekeeping: The Yearbook of International Peace Operations*, Vol 7 (2001), 237.

which achieves success in less than one third of the cases. Therefore, economic sanctions should only be used when appropriate, as defined by the aforementioned criteria.

I. The Legality of Economic Sanctions: Multilateral versus Unilateral Sanctions

Pursuant to Article 2 (4) of the United Nations Charter, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[2] Although the term "force" was generally accepted to mean military force, the UN General Assembly, as well as several other international organs, have adopted a number of significant resolutions aiming to prohibit individual states from using *economic* coercion.[3] For example, the 1965 "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty"[4] proclaimed:

> No State may use or encourage the use of economic, political or other types or measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.[5]

In 1970, the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations"[6], a document widely considered as a reliable interpretation of the UN Charter, employed the very same excerpt.[7] Moreover, in 1996, the "Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion"[8] was yet another resolution adopted by the UN General Assembly that aimed to eliminate the use of unilateral economic sanctions by individual states.[9] In addition to these documents, an expert group dealing with "Economic Measures as a Means of Political and Economic Coercion against Developing Countries"[10] was

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[2] United Nations Official Website, "UN Charter," *CHAPTER I: PURPOSES AND PRINCIPLES*, Retrieved from: http://www.un.org/en/sections/un-charter/chapter-i/
[3] Michael Schmitt and L. C. Green, *The law of armed conflict: into the next millennium* (Newport, R.I.: Naval War College, 1998), 456
[4] Ibid
[5] Ibid.
[6] Ibid., 456
[7] Ibid.
[8] Ibid., 457
[9] Ibid.
[10] Schmitt and Green, 457.

assembled by the UN Secretariat in 1997. The group concluded that pursuant to the principles of international law set out in the UN Charter, and further supported by legal instruments and declarations adopted by international conferences, the imposition of unilateral economic sanctions as a means of intervention must be regarded as illegitimate; thus, sanctions are illegitimate except in the following instances:

> multilateral economic sanctions mandated by the Security Council; other situations where the Security Council has determined the existence of a threat to the peace, breach of the peace, or act of aggression; where the Security Council has merely recommended economic sanctions, provided that any limits specified by the Council are observed; where the General Assembly recommends sanctions by consensus or by large majorities over a period of time; certain instances where regional organizations impose economic sanctions for cause against their own members; where one or more States adopt unilateral measures in response to a clear violation of universally accepted norms, standards, or obligations, provided these States are not seeking advantages for themselves but are pursuing an international community interest; and where the economic measures constitute proportional countermeasures by a State for a prior injury, provided inter alia that the measures are not designed to endanger the territorial integrity or political independence of the target State.[11]

Furthermore, with reference made to the aforementioned efforts invested by the UN bodies regarding the de-legitimization of unilateral economic sanctions, one practical example in particular exists that demonstrates the eagerness of the General Assembly to condemn the use of unilateral economic coercion. Over the past two decades, the states within the General Assembly that denounced the U.S. sanctions against Cuba have continuously adopted strong resolutions, which received support from vast majorities. In 1997, 143 states voted in favor, and only three voted against those resolutions.[12]

Based on these resolutions and examples, one may conclude that no state should have the right to legally impose economic sanctions unilaterally against other states in the future. It may be permissible only if the "coercion is exercised in the interest of the international community and the latter supports or at least

[11] Ibid., 457-8
[12] Ibid., 458

does not strongly oppose the measures in question"[13] – an instance that is extremely unlikely to occur, given the international community's assiduous efforts to proscribe the use of unilateral economic sanctions.

In summary, international law acknowledges only "collective or multilateral sanctions,"[14] applied pursuant to Chapter VII of the UN Charter. Unlike unilateral sanctions, multilateral or collective sanctions are legally recognized as "specific countermeasures to violations of international law."[15] The position that many international lawyers assume on the matter is that the UN Security Council is not bound by any instrument of international law in connection with the preservation of international security and peace.[16] Since no provision exists in the UN Charter that binds the Security Council to meet a certain requirement, should it impose economic sanctions as a result of a breach or threat to peace, the Council is free to act accordingly.[17] One would conclude, therefore, that collective economic sanctions supervised by the UN Security Council can be considered to be a legitimate type of sanctions imposed under international law.

Nevertheless, should states decide to refrain from imposing unilateral sanctions in the future, and begin to rely on collective efforts instead, violations of the normative aspects of international humanitarian law and international human rights law might occur sporadically. Human rights violations could occur if collective action is imposed, and if the targeted state's civilian populations become indiscriminately and/or deliberately attacked as a result of said collective action.[18] No international body – including the UN Security Council acting under Chapter VII – can legitimately "violate the fundamental human rights of an entire population in the name of international peace and security."[19] In this context, although multilateral sanctions are legitimately permissible under international law, their adverse impact upon innocent civilians is not justified and should be eliminated.[20] In order to do so, this paper proposes two concrete solutions: firstly, sanctions should become more closely targeted; secondly, their duration should be reduced.

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[13] Schmitt and Green, 458.
[14] Ali Marossi and Marisa Bassett, *Economic Sanctions under International Law : Unilateralism, Multilateralism, Legitimacy, and Consequences*, (The Hague: T.M.C. Asser Press, 2015), 73
[15] Ibid., 73
[16] Ibid.
[17] Mary E. O'Connell, "Debating the Law of Sanctions," *European Journal of International Law* 13, 1, (2002), 70
[18] Ibid., 74-75
[19] Marossi and Bassett, 74.
[20] Ibid., 75

II. Targeted Sanctions versus Comprehensive Sanctions

Economic sanctions can be classified into two groups based on their humanitarian impact: those based on moral high ground, and punitive sanctions. Sanctions based on moral high ground generally satisfy an interest of the sender, rather than causing a profound impact on the target state. In this case, the sender state adopts a policy that merely takes a stance on an issue, instead of aiming to radically change the objective policy of the target.[21] Occasionally, sanctions taken for a moral high ground can be costly to the sender. This has been demonstrated by U.S. President Carter's grain export embargo on the USSR, which imposed huge costs on U.S. firms and farmers, and imposed significantly less damage on the economy of the Soviet Union.[22]

Economic sanctions, however, can also be punitive. Such sanctions are generally comprehensive, multilateral, and designed to force high economic costs upon the target.[23] Above all, punitive sanctions tend to negatively impact civilian populations of the target states. For instance, the continuing economic sanctions on Iraq were believed to be the cause of hundreds of civilian deaths monthly.[24] For this reason, one should consider if the economic punishment of the target state is worth the high toll in terms of human life, given the principles of international law enshrined in the UN Charter and in other sources of law. For this reason, *targeted sanctions* should be taken into consideration, as they can possibly serve as an alternative to comprehensive and punitive economic measures.

Why would targeted sanctions be considered a better option than comprehensive sanctions regarding the adverse impact upon civilians and third parties? It is generally true that comprehensive sanctions cause much greater commercial damage to the target state; this economic burden, however, is generally distributed not among the target's ruling political elite or leaders, but, to a great extent, among the target state's citizens,

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[21] William Kaempfer and Anton Lowenberg, "Alternatives to Comprehensive Sanctions," Working Paper, *Center for Economic Analysis at the University of Colorado*, (2000), 4
[22] Ibid., 4
[23] Ibid., 5
[24] Dennis Halliday, "The Deadly and Illegal Consequences of Economic Sanctions on the People of Iraq," *The Brown Journal of World Affairs*, Vol. 7, No. 1 (2000), 229

or third parties such as neighbouring states.[25] The relevance of economic sanctions depends greatly on the damage inflicted on the appropriate groups of the target state, not on their overall impact on the state's economy.[26]

To impose targeted sanctions, however, a sender nation would need thorough intelligence concerning the individuals within the target state. One way to obtain such detailed data is through intelligence operations, directed at observing the sources of wealth of the targeted persons.[27] Once this information is collected an asset freeze for the political elite can be implemented. This is a typical measure that does not involve any adverse effect upon civilians or third parties. Due to modern financial tracking technology, the accounts and transactions of specific individuals might also be frozen, as such actions would impact only those persons responsible for a state's objectionable policies. [28]

The international capital market is another venue where closely targeted financial sanctions can be applied. The effectiveness of these sanctions is clearly demonstrated by Kaempfer and Lowenberg, who declare that "the most effective economic sanction against South Africa in terms of bringing about substantive reform was the private banking community's refusal to reschedule the country's debt."[29] If the target government is actively engaged in borrowing from abroad, a restricted access to international capital would significantly reduce its ability to rule effectively, as the implementation of objectionable policies usually requires considerable amounts of capital.[30]

Another type of targeted sanctions might include an embargo on particular goods, whose consumption patterns are distributed unequally among the various religious, ethnic, or racial groups.[31] In South Africa, for instance, the amount of income spent on cigarettes was known to be three times less for the black population than for the white. Sanctions on exports of tobacco products to South Africa, therefore,

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[25] Kaempfer and Lowerberg, 6-7.
[26] Ibid., 10
[27] Ibid.
[28] Ibid., 16
[29] Ibid.
[30] Ibid.
[31] Ibid., 11

would have produced a disproportionate impact on the fortune of white people, given the low-price elasticity of such products and the extremely low income of South Africans.[32]

Restricted access to military and technological goods provides yet another illustration of the inner workings of targeted sanctions. Given the dependence of both leaders and political figures on such products, an embargo on arms and technology would certainly reduce their ability to successfully perform objectionable agendas. A restriction on New Delhi's and Islamabad's access to technology, for instance, could have significantly prolonged the development of nuclear weapons in India and Pakistan.[33]

Even though some international lawyers are convinced that targeted sanctions are less efficient than comprehensive ones, their imposition meets "a legal standard that balances the injury with the corresponding measure."[34] Moreover, targeted sanctions are more likely to uphold the essential customary principles of law such as proportionality, necessity, and distinction.[35]

In short, the implementation of targeted economic sanctions can significantly reduce the probability of human rights violations, as their negative effect upon civilians is minimized. To further avoid infringements of international law, imposing parties should also reduce the duration of economic sanctions, as prolonged sanctions tend to harm innocent civilians.

III. The Duration of Economic Sanctions and Its Impact upon Civilian Populations

Since economic sanctions are generally costly and rarely efficient, their imposition is often provoked by domestic political benefits or incentives. For this reason, two possible scenarios should be considered. Let us suppose that, due to the high cost of the imposed sanctions, the target prefers to comply with the demands of the sender than to suffer consequences. Perhaps fearing the sender's persistence, the target state might be expected to comply shortly after an imposition is brought forth. One would conclude, therefore, that "sanctions are either very short or, more likely, their mere threat is sufficient to bring about the target's

[32] Kaempfer and Lowerberg, 11.
[33] Ibid.
[34] O'Connell, 70.
[35] Ibid., 73.

compliance."[36] In a second scenario, however, the target state refuses to comply and is willing to bear the consequences of the sanctions for an indefinite period. Target states are less likely to concede in such scenarios, thus rendering the sanctions useless in their aim to accomplish policy change.[37] The sender, on the other hand, will "never impose the sanction unless it gains some domestic political benefit that offsets the economic cost of the sanctions."[38] It follows that protracted sanctions are extremely unlikely to be executed, as both sender and target states would rather postpone than implement.[39] McGillvray and Stam summarize the duration-success rate relationship of economic sanctions, declaring that "[t]he longer sanctions are in place, the less likely they are to succeed."[40] With an increase of the duration of economic sanctions, however, the adverse humanitarian impact upon civilians might grow correspondingly.

One case clearly demonstrates the humanitarian problems that continued economic measures can cause. The economic sanctions imposed on Iraq in 1990 constitute "the longest, most comprehensive, and most severe multilateral sanctions imposed by the United Nations (UN) Security Council."[41] The punitive and comprehensive character of the sanctions – an aspect that this paper has already disapproved of – caused a humanitarian crisis for the Iraqi people, resulting in extreme malnutrition that took the lives of hundreds of thousands of Iraqi civilians. Euclid Rose, in his work *From a Punitive to a Bargaining Model of Sanctions: Lessons from Iraq*, declares that "more than 600,000 Iraqi children died as a result of punitive UN sanctions—a number three times larger than the Japanese killed in 1945 by the U.S. atomic bombs."[42] Moreover, UNICEF pointed out in 1996 that "4,500 children under the age of five died every month in Iraq from hunger and diseases."[43] These numbers were much higher than the rates that had existed in Iraq prior to Saddam Hussain's invasion of Kuwait in 1990, which served as a trigger for corresponding measures on the part of the UN.[44]

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[36] Fiona McGillivray and Allan Stam, "Political Institutions, Coercive Diplomacy, and the Duration of Economic Sanctions," *The Journal of Conflict Resolution*, Vol. 48, No. 2, (2004), 159
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid., 158
[41] Euclid Rose, "From a Punitive to a Bargaining Model of Sanctions: Lessons from Iraq," *International Studies Quarterly*, Vol. 49, No. 3 (2005), 459
[42] Ibid., 467
[43] Ibid.
[44] Rose, 467.

In addition, the Iraqi economy was destroyed by a model of comprehensive economic coercion. Their GDP fell by about eighty percent, while ninety-seven percent of Iraqi exports and ninety percent of imports were shut down.[45] Altogether, these factors rendered the already difficult life of Iraqi citizens unbearable, as inflation and unemployment also increased drastically.[46]

Despite being legally imposed and in accordance with the first criterion posed by this paper, the UN Security Council sanctions on Iraq were neither targeted, nor brief. The data demonstrates the negative impact that such sanctions had on Iraqi civilians. In addition to the negative humanitarian effect, the relatively low success rate of economic sanctions, only about one third of all cases, makes them an unacceptable instrument in attaining policy change.

IV. Conclusion

Given the legal and humanitarian aspects surrounding the imposition of economic coercion under international law, economic sanctions might be deemed to be appropriately applied only when they meet three core criteria: with respect to the matter of legality, economic sanctions ought to be collectively applied, receiving the acceptance of the international community as a necessary precondition; the humanitarian impact of international sanctions upon civilian populations requires a closely targeted imposition of sanctions aiming to coerce the right group of individuals, namely the leaders and politicians responsible for the conduct of objectionable state policies; economic sanctions should be applied for a short period of time, as protracted economic measures tend to further exacerbate humanitarian concerns.

Despite being less punitive in their character, economic sanctions that satisfy the aforementioned three criteria are more likely to be considered legitimate and humane. In contrast, the inappropriate imposition of comprehensive and prolonged sanctions has already taken the lives of hundreds of thousands of civilians, many of whom were children. No single human life--especially that of a child--should be sacrificed for the

[45] Ibid.
[46] Ibid.

sake of a coercive policy that is especially inefficient in bringing about political change. Should the international community choose not to meet the three aforementioned criteria in the future, then it should instead begin to reconsider the imposition of comprehensive sanctions. The relatively low success rate of economic sanctions, combined with their controversial legal and humanitarian aspects, does not justify the risk of taking the lives of an even greater number of people.

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Lenses for Dehumanization: Biopolitics, Colonialism, and the Canadian Seasonal Agricultural Workers Program

By: Mahta Talani

The Seasonal Agricultural Worker Program (SAWP) has been a major contributor to the Canadian labour force for decades. SAWP is a program under the category of low-skilled temporary work in Canada. This program began in 1966, when Canada signed a bilateral agreement with Jamaica, six other Caribbean countries, and Mexico.[1] This program was put in place to fulfill labour shortages, mainly in the province of Ontario and during the harvesting season in the areas of fruit, vegetables and horticulture.[2] As of 2014, there are annually approximately 17,960 SAWP employees in Canada, an approximate increase of 1,000 employees from 2013-2014.[3] Keeping in mind SAWP's overall success for Canada, the program has nevertheless continuously placed its enrollees in precarious positions facing a lack of political and social rights. A Foucauldian biopolitical interpretation reveals that the Government of Canada (GoC) justifies its poor treatment of labour migrants (LMs)[4] according to deep-set racial and colonial ideologies, implying that this population is inherently inferior. This ideology is coupled with economic profits, and leads to the dehumanization of LMs, and the misuse of LMs as a resource in the Canadian nation-building project. I will demonstrate this argument in three main sections. Firstly, I will begin by explaining aspects of Foucauldian biopolitics, and its relation to my argument. Secondly, I will explain the political, social and economic implications of SAWP. Finally, I will analyze the biopolitical interpretations of SAWP's effects through the lens of colonialism.

Michel Foucault presented his understanding of biopolitics and biopower in the lecture series *Society Must be Defended* in 1975-1976. I will be using Foucault's lecture series, as well as two other interpretations, to

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[1] Gabriel, C., and L. Macdonald. Citizenship at the Margins: The Canadian Seasonal Agricultural Worker Program and Civil Society Advocacy. *Politics & Policy* 39(1): (2011) 49.

[2] Ibid.

[3] Mussell, A. (2015). "The Economic Impact of Seasonal Agricultural Worker Program in the Ontario Horticulture Sector." *Agri-Food Economic Systems.* 6.

[4] The term labour migrants encompass a variety of workers such as live-in caregivers or high-skilled workers who migrate for jobs. However, in this context I will be using it to refer specifically to seasonal agricultural workers in Canada.

define biopolitics and biopower as it relates to my argument. Biopolitics identifies a particular rationality of politics that is characterized by the connection between the operations of the state and its control over life.[5] As Mills explains, Foucauldian biopolitics arose out of the change in Western politics from sovereign power to a new regime of biopower, "in which biological life itself became the object and target of political power."[6] Foucault explains that the political subject is no longer the individual body but rather the population, with the aim to use mechanisms to achieve overall states of equilibration or regularity across this population.[7] Biopower operates according to the maxim of "fostering life or disallowing it."[8] It is through this maxim that we can understand how biopower is intertwined with biopolitics, which enables authoritative power to render some lives inherently more valuable than others.

As Sergei Prozorov explains, although biopolitics is conventionally understood as positive and productive, it is also inherently paradoxical because its ambition to optimize life remains intertwined with the power of exclusion.[9] Biopolitics and biopower demonstrate this inter-dependency of the positive and negative. As Foucault explains, since power's essential objective is to optimize life, it is through the intervention of racism that power can simultaneously justify the exclusion of certain populations.[10] Foucault defines racism as "[…] primarily a way of introducing a break into the domain of life that is under power's control: the break between what must live and what must die."[11] This understanding of racism functions through the death of the "Other," or the "inferior" race, in order to purify the health of populations. Although various definitions[12] can explain the concept of death in racism, the definition I will focus on is the concept of political death – expulsion and rejection – which is an indirect form of murder.[13] In addition,

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[5] Mills, C. Biopolitical Life. In J. Nilsson & S. Wallenstein (Eds.), *Foucault, Biopolitics, and Governmentality*. Stockholm: Sodertorn Philosophical Studies. (2013). 73-74.
[6] Ibid., 85.
[7] Foucault, M. *Society Must Be Defended.* M. Bertani and A. Fontana (Eds.).
France. (1976). 246.
[8] Mills, 85-86.
[9] Prozorov, S. Powers of Life and Death: Biopolitics Beyond Foucault. *Alternatives: Global, Local, Political* 38(3): (2013). 191.
[10] Foucault, 254.
[11] Ibid.
[12] Foucault explains here that the death of inferior races has a eugenic affect in making the population purer. Furthermore, this racist justification is often used as states commit genocides on certain races, as the Nazis did (p. 256). However, I leave out this aspect of his definition, as it is not relevant to my overall thesis.
[13] Foucault, 256.

Foucault explains that "in a normalizing society, racism is the precondition that makes killing acceptable."[14] Biopower and biopolitics show that the state's power justifies population regulation but also selective rejetion. In relation to SAWP, LMs are forbidden from obtaining citizenship; this prohibition results in permanent exclusion and precarious status in Canada.

The SAWP employee-employer relationship presents an uneven power hierarchy and little agency for the employee, thus placing LMs in a precarious and permanently temporary category. Employers and the GoC must ensure that Canadian citizens cannot fill agricultural labour shortages, which then enables them to hire LMs and assign employer-specific visas to enrollees that are valid for up to eight months at a time. However, the employer-specific visa creates vulnerable LMs who are forced to live on site with employers, work 10-12 hour days six days per week, and face immediate deportation if they lose their job.[15] The Government of Canada website states that employers are responsible for transportation fares, housing, and health insurance of employees.[16] However, portions of airfare and travel expenses, as well as healthcare costs for workers from Mexico, are deducted from employee paycheques.[17] In addition, employers complete an evaluation of all workers at the end of each season, which plays a significant role in whether they get chosen to return for next season.[18] Accordingly, many workers comply with the employer's requests out of fear. Further, employees who do initiate complaints face litigation barriers, such as a lack of access to counsel.[19] This process of evaluation effectively gives employers the power to decide the worker's future in Canada.

Nonetheless, an abolitionist position may not be the best way to tackle the structural injustices within SAWP's policies. LMs are coerced to comply with SAWP, but their agency in making a decision and then acting to enroll in SAWP must not be denied.[20] For instance, LMs' remittances are a major source of

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[14] Foucault, 256.
[15] Gabriel and Macdonald, 49.
[16] Government of Canada. (2016). *Hire a Temporary Worker Through the Seasonal Agricultural Program.* https://www.canada.ca/en/employment-social-development/services/foreign-workers/hire/agricultural/seasonal-agricultural/requirements.html
[17] King-Chigbo, K. (Producer), Lee, M. S. (Director). (2003). *El Contrato* [Documentary Film]. Canada: National Film Board of Canada.
[18] Gabriel and Macdonald, 49.
[19] Silverman, S. J. and A. Hari. "Troubling the Fields: Choice, Consent, and Coercion of Canada's Seasonal Agricultural Workers." *International Migration* 54(05): (2016). 94.
[20] Hari and Silverman, 97.

income for Mexico: earnings from eight months of work in Canada equates to five years' wages for similarly positioned work in Mexico.[21] As SAWP provides a financial benefit to LMs, policy reforms are the most ideal solution towards justice for LMs. However, drastic policy reforms that may allocate greater agency to LMs and place them in less precarious positions have yet to appear. The GoC's reluctance to improve SAWP policies can be interpreted using a biopolitical justification.

Based on the preceding explanation of SAWP, a biopolitical interpretation can explain the justification behind some political and social exclusions that LMs face. LM's inability to gain permanent resident status is a major source of political exclusion. Martin Ruhs (2016) explains that the trade-off between the openness of admitting labour migrants versus the rights *de jure* that are granted to these migrants favours high-skilled workers by providing them an opportunity to become permanent members of the host society.[22] He points out that immigration categories with fewer admission restrictions often correlate with temporariness and a lack of social, residential, and family reunion rights. Due to national interest, the state views openness to admission and full equality of rights for low-skilled migrants as simply unavailable.[23] There is thus an interplay between meritocracy of skills and creating a "self-versus-other" binary when deciding on allocation of permanent status, and this falsified zero-sum equation lends justification to the mistreatment of lower-skilled workers. The "Othering" of lower-skilled workers equates the inferiority of their skills with an implication of their lives' inferiority, and due to national interest, these "inferior" individuals cannot enjoy the rights afforded to Canadian citizens.

LMs' lack of political and social rights is emphasized due to their lack of citizenship. Even in cases when workers are legally entitled to certain rights, they often lack adequate access to these rights due to language barriers, lack of knowledge, and fear of deportation. These include the right to safe working

[21] Hari and Silverman, 93.
[22] Ruhs, M. The Rights of Migrant Workers: Economics, Politics and Ethics. *International Labour Review* 155(2): (2016). 285.
[23] Ibid., 286.

conditions, employment insurance,[24] parental leave, pensions, and the right to organize and unionize.[25] In terms of safe working conditions, for example, the majority of LMs are not properly trained to work with hazardous chemical sprays, yet employers often overlook this issue, leading to an increased number of workplace injuries and fatalities.[26] Therefore, although the enjoyment of safe working conditions is a legal entitlement, the enforceability of this right is complaint-based, and workers cannot afford to risk the loss of their jobs. Furthermore, a complaint-based system of rights enforcement enables employers to view LMs as easily replaceable because employers are free to fire LMs who cause any problems or sustain injuries. The lack of rights renders LMs as simply a means to an end, no more than resources in the progression of a farm's profit.

The economic profit generated through the precarious status of LMs significantly contributes to the biopolitical justification of their inferior status. This argument relates to both the sending and the receiving countries. As Ruhs explains, "few of these low-income countries are willing to insist on full and equal rights [within emigration policies] for fear of reduced access for their citizens to the labour markets of these higher-income countries."[27] Similarly, this applies when LMs are working in the host country, and contact their home country's consulate to lodge a complaint. As Gabriel and Macdonald explain, the consulates are responsible for the LMs' rights, but they are also responsible for the overall success of the program, and often the latter becomes the primary goal of the consulate in order to ensure remittances are sent back to their country.[28] Sending countries are especially vulnerable, because receiving countries can simply replace their workers with workers from another country that will comply with a lack of rights for their workers. As a result, sending countries are left with little choice but to prioritize access to this labour market and its economic benefits. Receiving countries gain profit from the low wages that LMs must accept, while also

[24] Although workers are required to pay for unemployment insurance, they are often deported when they lose their jobs with their current employer because their presence in Canada is reliant on their employer-specific visa. Therefore, they cannot even collect insurance in the case of unemployment.
[25] Gabriel and Macdonald, 54.
[26] Ibid., 63.
[27] Ruhs, 287.
[28] Gabriel and Macdonald, 51.

benefitting from the fact that LMs will not refuse poor labour conditions and physically demanding jobs.[29] Therefore, this profit becomes an economic reward for Canadian employers to continue the poor treatment of LMs, reaffirming their biopolitical superiority via economic gains.

Additionally, LMs' lack of family reunification rights is used as a tool to deter them from attempts to become full members in Canadian society. SAWP prefers LMs who have families staying behind in the sending country because this deters visa overstay, as seasonal workers are not entitled to family reunification rights[30][31] and would presumably wish to see and be with their family members.[32] The separation of family members is also strategic, since SAWP LMs are incompatible with the ideal national subject, and are therefore only welcomed when they are productively relevant to Canada. As Judy Fudge explains, "[i]mmigration law is not only about who stays in and who gets out; it is just as much about structuring the vulnerability of those who enter by assigning them to various categories of precariousness, ranging from illegality through permanent temporariness, transitional temporariness and permanent residence to citizenship."[33] Thus, administrative law operates in society in ways that lead to the exclusion of LMs by enforcing precarious categories of non-belonging.

While the state extends social and political rights only to those whom it considers to be appropriate members of the national community, some international legal documents aim to extend these rights to *all* migrant workers. The most prominent of these tools is the *United Nations Convention on Migrant's Rights*. Canada, among many other host countries[34], has yet to ratify this convention.[35] Some host countries abstain

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[29] Asomah, J. Y. Understanding the Role of the State in Promoting Capitalist Accumulation: A Case Study of the Canadian Seasonal Agricultural Worker Program. *Canadian Graduate Journal of Sociology and Criminology* 3(2): (2014). 124.
[30] Trumper, R., and L. L. Wong. Temporary Workers in Canada: A National Perspective. *Canadian Issues*, (2010). 87.
[31] Trumper and Wong explain that high-skilled temporary workers actually have a form of family reunification rights in which spouses are allowed to join them. This change in familial rights is further evidentiary of my earlier point about the equivalence of human value and skill level.
[32] Gabriel and Macdonald, 50.
[33] Fudge, J. Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers. *Comparative Labor Law and Policy Journal* 34(1): (2011). 101.
[34] The term host country in this context refers to countries that receive LMs for SAWP, mainly focusing on Canada as a host country.
[35] United Nations Educational, Scientific and Cultural Organization. "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families." *United Nations Treaty Collection*. 8 December 1990. New York: United Nations. Online Collection.

since *the Convention* provides LMs with too much citizen-like agency, thus undermining the host country's control. Through the creation of docile and vulnerable LMs, host countries are able to capitalize their economic profit. Ratifying the *Convention* would empower employees and diminish economic profit, as it would hold host countries legally responsible for the rights granted in the *Convention*. Yet, there are some scholars who justify this situation. They see the lack of rights—especially the lack of freedom of movement within the labour market—as streamlined to the logic of SAWP: namely, absolute freedom of movement is unreasonable because LMs' visas are granted to address labour shortages in specific areas in Canada.[36] Although this argument is plausible, it cannot justify the mistreatment of workers.

As an interim solution, the GoC could grant LMs labour-specific visas rather than employer-specific visas. While labour-specific visas leave workers with very little room for moving up the social and economic ladder, they would be helpful in discouraging employers' misuse of the end-of-season evaluations. This would lessen the extent of exploitation, while also enabling LMs to feel secure changing employers. However, deep-set vulnerability creates a specific type of worker that the Canadian employers seem to prefer. Employers view LMs as a much more willing and committed workforce than that which is available in Canada. They are seen as 'hard workers' because they come from poor countries[37] and can be treated in similarly poor fashion in Canada. The docility of LMs makes them an ideal resource for employers, with little concern for Canadian or international labour laws.

The hierarchical divide of citizens and non-citizens has racial and colonial implications that contribute to justifications for poor SAWP conditions. With reference to Foucault's definition of biopower, it is evident that racialization is inherent in the biopolitical justification of the inferiority of non-citizens who are viewed as inassimilable subjects but a productive workforce. Adam Perry explains that racist ideologies were embedded into the labour migration program from the beginning, as claims were made that Natives of

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[36] Wright, C. F. et al. Employer-sponsored Temporary Labour Migration Schemes in Australia, Canada and Sweden: Enhancing Efficiency, Compromising Fairness? *Journal of Ethnic and Migration Studies*, (2016). 4.
[37] Preibisch, K. L., and E. E. Grez. The Other Side of 'El Otro Lado': Mexican Migrant Women and Labor Flexibility in Canadian Agriculture. *Signs: Journal of Women in Culture and Society* 35(2): (2012). 297.

West Indies are unable to assimilate or handle the Canadian climate.[38] By enlisting a national ideology that marks the ideal national citizen as a specific race, national subjects find a point of relation amongst themselves, enabling them to reject other subjects as politically unfit for membership. In addition, LMs are hired to do work that is unattractive to Canadian citizens, yet necessary for their well-being, while getting access to few of the rights to which Canadian citizens are entitled.[39] As a result of this ideology, racialized LMs can farm the food that nourishes citizens and allows society to flourish, but can never join that same society as full-fledged members.

Based on Foucault's maxim of "fostering life or disallowing it," we see how the state renders the lives of racialized non-citizens less valuable in order to foster the lives of its own citizens towards becoming productive subjects. Some scholars – such as Perry – argue that the GoC's colonial attitude is embedded in the history of Canada's nation-building project. This colonial attitude was initially applied to Indigenous populations,[40] for example by enforcing the *Indian Act*. Colonial attitudes are glimpsed in the GoC's official use of less affluent populations for the provision of Canadians with services and resources that ultimately better Canada, with little regard to the implications of these attitudes. This biopolitical interpretation sheds light on how and why the GoC is a partner in the continuous structural violence of SAWP in the name of progress.

In conclusion, the dehumanization and structural racialization of LMs, coupled with economic profits,[41] allows the GoC to continue the Canadian nation-building project through its participation in SAWP. The inferior status of migrant workers becomes a means to Canada's end goal of national and economic prosperity. Employers and the state work hard to keep the truth about SAWP invisible to the public. The Government of Canada website outlines a set of labour laws and inspection rules, which make

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[38] Perry, J. A. Barely Legal: Facism and Migrant Farm Labour in the Context of Canadian Multiculturalism. *Citizenship Studies* 16(2): (2012). 192.

[39] Perry, 190.

[40] Note that I do not imply that such colonial attitudes no longer apply to Indigenous populations, but rather that this is where such attitudes began and continue today in different forms.

[41] See Asomah (2014) for further discussion on how economic profits through capitalism can be an important addition and intersection with the structural injustices in SAWP. This is a point worth considering in relation with Foucault, however I did not have room to discuss this, as it is outside the scope of my argument.

SAWP appear consistent with similarly situated sectors. In reality, these labour laws are rarely enforced.[42] For example, although health inspection in LMs' homes is supposed to take place consistently, both *El Contrato*[43] and *Migrant Dreams* document the unsanitary and uncomfortable housing allocated to SAWP enrollees.[44] The housing is characterized by grotesque living conditions, overpopulation, and infestations of cockroaches and other bugs. Within the thirteen years between both documentary films, little improvement has been made. The GoC claims to be continuously working with the Mexican Consulate to improve the conditions for SAWP workers. In order for real progress to occur, however, the national ideology that migrants and LMs are inherently inferior must be challenged, so as to motivate Canadians to demand better from their government for all members of Canadian society, even those with temporary residence status.

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Moral Truth

By: Benjamin Maclean-Max

In the present political climate of polarization and fake news, people seem to be losing faith in truth. What passes for political and moral debate tends to be either performative and self-congratulatory outrage in a "bubble," or vicious and unconstructive ad-hominems lobbed across the aisle. Few people seem concerned with convincing others of the truth of their own views, and instead content themselves with demonizing those who disagree. Undergirding and surrounding this trend, however, is a growing loss of faith in truth itself; people who criticize the growing hostility in political debate often do so on the grounds that neither side is any more right or wrong than the other.

I do not seek to offer a critique of modern political debate. With the rise of radical ideologies which pose a genuine threat to the way of life of many, who am I to judge those who seek to defend themselves and others against destructive beliefs and practices? However, I do believe in truth. Furthermore, I believe that anyone who feels their moral or political beliefs cannot stand in the face of truth should seriously re-evaluate their positions. Regardless of your political orientation, your beliefs should be predicated upon reality; if not, what possible credibility can they have?

With this in mind, I intend to offer an argument in favour of the existence of objective moral truth, and a refutation of moral relativism. The central claim of moral relativism is that moral truth is not objective or universal; that conflicting moral beliefs can both be true, because of the different moral worldviews of the people who hold those conflicting beliefs. However, this is logically incoherent; the claim that all moral beliefs can be equally valid generates a contradiction, and leads to nihilism.

A moral belief is, in essence, a belief about the moral right-ness or wrong-ness of something. All moral beliefs can be distilled to the form, "x is morally right/wrong," where x can stand for any morally relevant action. The contradiction arises out of relativism because something cannot be right and wrong at the same time; the nature of right and wrong intrinsically exclude one another. However, since relativists claim that different people's moral beliefs can be equally valid, relativism implies that x can literally be both right and

wrong. Since this conclusion is impossible, one of the two main premises must be false. To resolve this contradiction, a relativist would have to make one of two concessions. They could abandon the premise that conflicting moral beliefs can be equally correct. Alternatively, they could abandon the premise that right and wrong intrinsically exclude one another; tacitly, this would be to say that moral truth does not exist. If the concede the former, they are abandoning relativism in favour of objectivism. If they concede the latter, they are making an argument for nihilism.

Ultimately, the claim that moral truth is relative is comparable to the claim that moral truth doesn't exist; a relative truth is not "true" in any meaningful sense. This is not to say that people should not be tolerant of those who hold different moral – and by extension, political – beliefs. Just because moral truth is objective doesn't mean that *your* opinion is true; it just means that there is a real, objective answer to moral questions. Of course, it could be that moral truth doesn't, in fact, exist. Nihilism is much harder to argue against, since you cannot *prove* that right and wrong exist. However, it is worthwhile examining the consequences of nihilism on moral and political debate.

One might imagine that, if right and wrong were demonstrated not to exist, then anything goes. This is not the case. If right and wrong don't exist, that doesn't mean that killing is suddenly okay; *nothing* is okay. Moral meaning has been stripped away from any and all actions; you cannot say that anything is morally permissible, even as you can't say that anything is morally impermissible. Nihilism can never support any particular moral or political belief, because it simply denies the terms of argument. For example, if you eat meat, and dislike vegans telling you that eating meat is wrong, nihilism isn't going to help: yes, it means that eating meat isn't *wrong*, but it doesn't say that eating meat is *right*. Nihilism shuts down the conversation, but not in a way that is beneficial to any one side. Nihilism doesn't even tacitly condone the status quo: the only substantive ethical claim you can derive from nihilism is that any action is just as morally wrong as it is morally right; no action is morally better or morally worse than any other. So yes, eating meat would be no worse than eating a vegan diet; it would also be no *better* than being a serial killer.

What I have tried to show here is that, if moral truth exists, it must be objective. Moral truth might not exist; I can't conclusively prove that it does. However, nihilism doesn't help an argument for any particular moral or political position. Assuming that right and wrong mean something, however, objective moral truth means you must be willing to accept the possibility that your belief is false. This is not to say that it *is* false; it may very well be true, and by all means, advocate for your beliefs. However, rather than attacking those who disagree, show them why they are wrong – all the while being prepared to be shown that it is you, not they, who hold a false belief. Some moral and political beliefs are false, dangerous, and seriously problematic. They should be debunked, and those who refuse to abandon them should not be coddled on the grounds that their beliefs are just as valid as anyone else's.