CRIMINAL JUSTICE REFORM: A TRANSFORMATIVE AGENDA

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Few of the criminal justice system's problems are new. Indigenous and racialized persons continue to be over-represented in the criminal justice system. Pretrial detention rates have increased significantly during the past 30 years. The criminal law is still used to regulate social problems — poverty, homelessness, and substance use — that it cannot fix. Although law reform happens with some frequency, these underlying problems persist.

This article advances a transformative agenda for criminal justice reform. It argues that law reform fails to address three mutually reinforcing features of the criminal justice system that exacerbate its persisting problems. First, reform efforts accord insufficient importance to rehabilitation and reintegration. Second, reform initiatives do not address the growth of police powers that lack adequate transparency and oversight. Third, existing reforms ignore how the justice system increasingly allocates power towards prosecutors and the police, while removing that power from judges.

This article's core argument is that the criminal justice system must be completely transformed in order to address its underlying issues. It contends that meaningful criminal justice reform must take place across four dimensions: (1) substantive criminal law reform; (2) sentencing reform; (3) criminal procedure reform; and (4) institutional reform. It concludes by providing an agenda for criminal justice reform, which includes a set of concrete proposals in each of these four dimensions. Ultimately, this article shows why transformative law reform is necessary to treat individuals with greater dignity, foster rehabilitation and reintegration, and combat the criminal justice system's worst tendencies.

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I. INTRODUCTION

For decades, lawyers, scholars, and civil society groups have highlighted the need for criminal justice reform.[1] Yet Indigenous and racialized persons are still over-policed and over-represented in the criminal justice system.[2] The presumption of innocence is eroding due to the ubiquity of pretrial detention and plea bargaining.[3] Crimes and regulatory offences are still enforced to address social problems that punishment cannot fix.[4]

Many of these problems have worsened despite law reform efforts.[5] Consider this. In 1999 — the year *R. v. Gladue* was decided — 12 percent of all detainees in federal prisons were Indigenous persons.[6] Ten years later, that number rose to roughly 20 percent.[7] In 2017–2018, roughly 30 percent of Canada's federal prison population were Indigenous persons.[8] Or, take the example of pretrial detention. Since the 1960s, scholars sounded alarm bells about the bail system.[9] Yet pretrial detention rates tripled over the past three decades (though these rates have declined in recent years, and have decreased during the COVID-19 pandemic).[10]

Many law reform efforts are piecemeal and fail to address the criminal justice system's underlying problems. In some cases, criminal justice reforms exacerbate these problems. Previously, the Conservative government ratcheted up incarceration by removing conditional sentencing for certain offences, adopting a greater number of mandatory minimum sentences, and decreasing the ratio of enhanced credit for pretrial detention.[11] In other cases, governments adopt piecemeal criminal justice reforms that fail to produce adequate change.

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1 See e.g. Canada, Department of Justice, *Final Report on the Review of Canada's Criminal Justice System*, Catalogue No J4-94/2019E-PDF (Ottawa: Department of Justice, 2019) at 9-10, online: <www.justice.gc.ca/eng/cj-jp/tcjs-tsjp/fr-rf/docs/fr.pdf> [*Final Report*]; Martin L Friedland, "Criminal Justice in Canada Revisited" (2004) 48:4 Crim LQ 419.

2 Statistics Canada, *Adult and Youth Correctional Statistics in Canada, 2017/2018*, by Jamil Malakieh, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2019) at 10, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00010-eng.pdf>; Akwasi Owusu-Bempah & Scot Wortley, "Race, Crime, and Criminal Justice in Canada" in Sandra M Bucerius & Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford: Oxford University Press, 2014) 281 at 281–82.

3 Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10:4 Intl J Evidence & Proof 241 at 256–57.

4 *Final Report*, *supra* note 1 at 9.

5 See Part II, below.

6 Malakieh, *supra* note 2 at 54.

7 *Ibid*.

8 *Ibid*.

9 See e.g. Martin Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) at 172–75.

10 Nicole Marie Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017) 57 Brit J Crim 664 at 666–67. See also Statistics Canada, "After an Unprecedented Decline Early in the Pandemic, the Number of Adults in Custody Rose Steadily over the Summer and Fell Again in December 2020" (8 July 2021), online: <www150.statcan.gc.ca/n1/daily-quotidien/210708/dq210708a-eng.htm>.

11 Elizabeth Comack, Cara Fabre & Shanise Burgher, "The Impact of the Harper Government's 'Tough on Crime' Strategy: Hearing from Frontline Workers" (2015) at 5–8, online: *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2015/09/Tough%20on%20Crime%20WEB.pdf>.

For instance, the current Liberal government adopted a patchwork approach to criminal justice reform. It hybridized certain offences, limited preliminary inquiries to the most serious crimes, abolished a set of antiquated crimes that were never prosecuted anyways, and devised judicial referral hearings to decriminalize low-level bail breaches.[12] The criminal justice system, however, continues to be plagued by the same realities: too much discrimination, too much criminalization, and too much punishment.

This article advances a transformative agenda for criminal justice reform. It argues that the Canadian criminal justice system is characterized by several enduring problems: the over-criminalization of Indigenous and racialized persons, the erosion of the presumption of innocence, and the criminalization of social issues. It highlights how these problems are exacerbated by law reform's failure to rectify three interrelated features of the criminal justice system that mutually reinforce one another. First, previous reform initiatives accord insufficient importance to rehabilitation and reintegration.[13] Second, criminal justice reform does not address the expansion of law enforcement powers that lack adequate transparency and oversight.[14] Third, the justice system increasingly skews powers towards police and prosecutors, while removing it from judges.[15]

This article's main argument is that the criminal justice system must undergo a complete overhaul to address its underlying problems. It demonstrates that meaningful reform must take place across four interrelated dimensions: (1) substantive criminal law reform; (2) sentencing reform; (3) criminal procedure reform; and (4) institutional reform. It concludes by providing an agenda for criminal justice reform, which includes a set of concrete solutions in each of these dimensions — proposals that strive to address the criminal justice system's most persistent problems. To be clear, law reform cannot resolve many structural issues that pull individuals towards the justice system: poverty, unemployment, discrimination, the legacies of colonialism, trauma, and social dislocation. Yet meaningful criminal justice reform can mitigate some of the justice system's worst tendencies, treat individuals with greater dignity and respect, and increase the prospect of rehabilitation and reintegration.

II. ENDURING PROBLEMS IN THE CRIMINAL JUSTICE SYSTEM

A. THE OVER-REPRESENTATION OF MARGINALIZED PERSONS IN THE JUSTICE SYSTEM

Certain core problems continue to pervade the criminal justice system. First, Indigenous persons, racialized persons, people experiencing mental illness, and indigent individuals

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12 *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25.

13 Canada, Department of Justice, *"Moving Towards a Minimalist and Transformative Criminal Justice System": Essay on the Reform of the Objectives and Principles of Sentencing*, by Marie-Eve Sylvestre, Catalogue No J22-29/2017E-PDF (Ottawa: Department of Justice, 5 August 2016), online: <www.justice.gc.ca/eng/rp-pr/jr/pps-opdp/pps-opdp.pdf>.

14 Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2021) 99:2 Can Bar Rev 429 at 448–53 [Skolnik, "Racial Profiling"].

15 Rachel E Barkow, "Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law" (2009) 61:4 Stan L Rev 869 at 871.

continue to be over-represented in the criminal justice system.[16] Law reform and judicially-created principles have not mitigated these problems. As an example, consider how law reform has failed to reduce the over-incarceration of Indigenous persons.

In 1996, Parliament enacted section 718.2(e) of the *Criminal Code*,[17] which requires sentencing judges to accord "particular attention to the circumstances of Aboriginal offenders" and consider all appropriate punishments other than imprisonment.[18] The provision was enacted in part to reduce the incarceration rates of Indigenous persons.[19] In *R. v. Gladue* and *R. v. Ipeelee,* the Supreme Court of Canada set out guiding principles for how section 718.2(e) must be interpreted and applied.[20] First, when sentencing Indigenous persons, judges must take into account "the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts."[21] Second, judges must consider "the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection."[22] This information is supposed to be provided in a pre-sentence *Gladue* report, which the Supreme Court of Canada describes as an "indispensable" tool to ensure that judges fulfil their sentencing duties under section 718.2(e).[23] *Gladue* reports contain information about the defendant's history and personal circumstances, systemic factors that impact them and their community, proposed forms of sentencing other than incarceration, and more.[24]

Despite section 718.2(e) and the development of *Gladue* principles, the percentage of Indigenous prisoners in federal prisons has roughly tripled over the past 30 years.[25] In Manitoba and Saskatchewan, roughly 75 percent of the provincial prison population is comprised of Indigenous persons, even though they make up between 14–15 percent of these provinces' respective populations.[26] Indigenous youth aged between 12–18 years old are particularly vulnerable to over-incarceration. Statistics show that 48 percent of youth who are admitted to corrections services are Indigenous.[27] Between 2002–2012, the incarceration

16 Michael Jackson, "Locking Up Natives in Canada" (1989) 23:2 UBC L Rev 215 at 215–16. See more recently Malakieh, *supra* note 2; Owusu-Bempah & Wortley, *supra* note 2 at 281–82.

17 Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009) 54:4 Crim LQ 447 at 448.

18 *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

19 Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54:4 Crim LQ 470 at 471.

20 [1999] 1 SCR 688 [*Gladue*]; 2012 SCC 13 [*Ipeelee*].

21 *Ipeelee*, *ibid* at para 59.

22 *Ibid*.

23 *Ibid* at para 60; Alexandra Hebert, "Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149 at 150, 157–58.

24 David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 88–89.

25 Michael Jackson, "Locking Up Natives in Canada" (1989) 23:2 UBC L Rev 215 at 215 ("almost 10% of the federal penitentiary population is native"); Malakieh, *supra* note 2 ("[i]n 2018/2019, Indigenous adults accounted for 31% of admissions to provincial/territorial custody and 29% of admissions to federal custody").

26 *Ibid*.

27 *Ibid*; Canada, Department of Justice, *Indigenous Overrepresentation in the Criminal Justice System* (Ottawa: Department of Justice, May 2009) at 4, online: <www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/docs/may01.pdf>.

rate of Indigenous women rose by 109 percent.[28] Today, Indigenous women are more likely than any other group of persons to be incarcerated.[29]

Empirical studies demonstrate that in many cases, judges neither apply section 718.2(e) of the *Criminal Code* nor the *Gladue* principles. Marie-Andrée Denis-Boileau and Marie-Ève Sylvestre analyzed 635 sentencing decisions (505 trial decisions and 135 appellate decisions) rendered between March 2012 and October 2015 that involved Indigenous defendants.[30] The results showed that approximately 40 percent of decisions did not mention section 718.2(e) of the *Criminal Code*.[31] Furthermore, judges did not consider relevant systemic and background factors in one-third of the decisions.[32] Indigenous defendants were sentenced to imprisonment in roughly 87 percent of the decisions that researchers examined.[33]

In many jurisdictions, there are no *Gladue* report writers, and no *Gladue* reports.[34] In the year 2018, there was only one *Gladue* report writer in all of Saskatchewan, even though three quarters of the provincial prison population was comprised of Indigenous persons.[35] Roughly 86 percent of Nunavut's population are Innu persons.[36] In 2020, defence counsel requested that the Nunavut Court of Justice order the first ever *Gladue* report in the territory.[37] In an eighteen-paragraph long decision, the Court rejected that request, and observed that there was no publicly funded *Gladue* report program in the territory.[38]

Data on over-policing is also bleak.[39] Compared to white persons, Black persons are more likely to be carded by the police, pulled-over, charged with offences, and subject to use-of-

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28 Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437 at 450.

29 Public Safety Canada, *Marginalized: The Aboriginal Women's Experience in Federal Corrections* by Mandy Wesley, Catalogue No PS4-120/2012E (Ottawa: Public Safety Canada, 2012) at 1–2, online: <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/mrgnlzd/mrgnlzd-eng.pdf>.

30 Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548 at 562.

31 *Ibid* at 564.

32 *Ibid* at 565.

33 *Ibid* at 578.

34 Canada, Department of Justice, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (Ottawa: Department of Justice, 2017) at 27, online: <publications.gc.ca/collections/collection_2018/jus/J4-46-2017-eng.pdf>.

35 Meaghan Craig, "Only *Gladue* Report Writer in Sask.: 'The People That Are Needing Them Are Not Getting Them,'" *Global News* (1 March 2018), online: <globalnews.ca/news/4054625/gladue-report-writer-saskatchewan/>.

36 Statistics Canada, *Focus on Geography Series, 2016 Census (Nunvavut)* (Ottawa: Statistics Canada, 10 April 2019), online: <www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-pr-eng.cfm?Lang=Eng&GK=PR&GC=62&TOPIC=1>.

37 Sara Frizzell, "Nunavut Court Hears First-Ever Request for Written Gladue Report for Inuit Offenders," *CBC News* (9 January 2020), online: <www.cbc.ca/news/canada/north/gladue-report-nunavut-court-1.5419455>.

38 Emma Tranter, "Top Nunavut Judge Denies Request for Territory's First Written Gladue Report," *The Globe and Mail* (8 October 2020), online: <www.theglobeandmail.com/canada/article-top-nunavut-judge-denies-request-for-territorys-first-written-gladue-2/>; *R v GH*, 2020 NUCJ 21 at paras 5–8.

39 Ontario Human Rights Commission, *A Disparate Impact: Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2020) at 2, online: <www.ohrc.on.ca/sites/default/files/A%20Disparate%20Impact%20Second%20interim%20report%20on%20the%20TPS%20inquiry%20executive%20summary.pdf#overlay-context=en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black> [OHRC, *A Disparate Impact*]; Victor Armony, Mariam Hassaoui & Massimiliano Mulone, "Les interpellations policières à la lumière des identités racisées des personnes interpellées Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d'indicateurs de suivi en matière de profilage racial" (Montreal: August 2019) at 7–11.

force incidents.[40] Racial profiling results in significant consequences. In addition to demeaning human dignity and violating equality, it causes physical and psychological harm.[41] Furthermore, over-policing increases the likelihood of police use of force. In Toronto, roughly one-quarter of police use-of-force incidents that involve Black persons stem from a proactive traffic stop.[42] Recently, the Ontario Human Rights Commission noted that between 2013–2017, Black persons in Toronto were roughly 20 times more likely to be shot and killed by police during a use-of-force incident compared to white persons.[43]

B. THE ERODING PRESUMPTION OF INNOCENCE

The second enduring problem in the criminal justice system is that the presumption of innocence is eroding. Over the past three decades, pretrial detention rates (or remand in custody rates) have roughly tripled.[44] Pretrial custody raises various concerns. Compared to those who are convicted and sentenced of crimes, individuals who are detained pending trial are subject to worse detention conditions.[45] They also lack access to educational, rehabilitative, and recreational resources.[46] Many defendants who are detained pending trial will lose their employment and access to housing.[47] Being detained pending trial produces other downstream consequences. Compared to those who are granted bail, individuals who are detained pending custody are more likely to be convicted at trial and receive harsher sentences.[48]

Pretrial release raises its own set of concerns. Individuals who are granted bail are often subject to numerous bail conditions that can be difficult to obey.[49] For instance, individuals with substance use disorder may have significant difficulty respecting the bail condition to abstain from consuming alcohol or drugs pending their trial, and abstention without proper medical supervision may trigger life-threatening withdrawal symptoms.[50] Defendants who are experiencing homelessness may be unable to abide by a curfew, especially when they

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40 OHRC, *A Disparate Impact*, *ibid* at 2; Scott Wortley, "Halifax, Nova Scotia: Street Checks Report" (Halifax: 2019) at 75, 104–105, online: <humanrights.novascotia.ca/sites/default/files/editor-uploads/halifax_street_checks_report_march_2019_0.pdf> (discussing carding and traffic stop data in Halifax).

41 Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling* (Oxford: Oxford University Press, 2015) at 125–26.

42 Ontario Human Rights Commission, *Use of Force by the Toronto Police Service: Final Report*, by Scot Wortley, Ayobami Laniyolu & Erick Laming (Toronto: Ontario Human Rights Commission, 2020) at 73, online: <www3.ohrc.on.ca/sites/default/files/Use%20of%20force%20by%20the%20Toronto%20Police%20Service%20Final%20report.pdf>.

43 Ontario Human Rights Commission, *A Collective Impact: Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018) at 3, online: <www.ohrc.on.ca/sites/default/files/TPS%20Inquiry_Interim%20Report%20EN%20FINAL%20DESIGNED%20for%20remed_3_0.pdf#overlay-context=en/news_centre/ohrc-interim-report-toronto-police-service-inquiry-shows-disturbing-results>.

44 Myers, *supra* note 10 at 666–67.

45 *R v Summers*, 2014 SCC 26 at para 2.

46 *Ibid*.

47 Crystal S Yang, "Toward an Optimal Bail System" (2017) 92:5 NYUL Rev 1399 at 1424.

48 Gail Kellough & Scot Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42:1 Brit J Crim 186 at 189.

49 Marie-Eve Sylvestre, Céline Bellot & Nicholas Blomley, "Une peine avant jugement? La mise en liberté provisoire et la réforme du droit pénal canadien" in Julie Desrosiers, Margarida Garcia & Marie-Eve Sylvestre, eds, *Réformer le droit criminel au Canada : défis et possibilités* (Montréal: Éditions Yvon Blais, 2017) 191 at 203–10.

50 Alana Hannaford, "Issues Surrounding Pre-Conviction Abstention Conditions on Persons Suffering from Illicit Substance Addictions" (2020) 43:5 Man LJ 39 at 50–51.

lack access to a homeless shelter space.[51] Since many resources for indigent persons and for unhoused persons are located in a city's urban core, defendants experiencing extreme poverty or homelessness may be unable to stay outside of a prohibited perimeter.[52]

Bail conditions also play a significant role in a defendant's trajectory through the criminal justice system. A higher *number* of bail conditions, and a longer *duration* of bail conditions, are both associated with a greater probability that the defendant will breach them.[53] Moreover, police officers and prosecutors may invoke a defendant's past bail breaches to justify pretrial detention.[54]

Then there is the interrelated problem of plea bargaining, which resolves most criminal charges, and diverts most defendants away from trials.[55] Various factors incentivize defendants to accept plea deals: lower sentences, the financial costs of legal representation (for those who can afford it), and ending restrictive bail conditions.[56] Yet two cognitive biases also play a major role in pushing defendants to plea bargain: loss aversion and anchoring.[57]

Consider loss aversion first. The term implies that the fear of loss drives one's decisions more than the prospect of equal gains.[58] All other things equal, individuals who risk losing a certain amount of money view that risk as much more impactful than the chance of winning an equal amount of money.[59] This explains why defendants accept shorter and more certain sentences compared to longer and uncertain ones, even if they must sacrifice their chance of acquittal in the process.[60] When faced with the prospect of a lengthy prison sentence, loss aversion makes plea bargains look particularly attractive. Loss aversion also accounts for why charge stacking is so effective at securing guilty pleas.[61] The term "charge stacking" (or overcharging) implies that officers lay multiple charges for the same conduct.[62] For instance, for the same illicit drug sale, officers may charge a defendant with both trafficking and possession offences. Overcharging magnifies the risk of a harsher sentence if the defendant

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51 Marie-Eve Sylvestre, Nicolas Blomley & Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2019) at 2, 4, 170.

52 *Ibid*.

53 *Ibid* at 84–97.

54 Marie Manikis & Jess De Santi, "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences" (2019) 60:3 C de D 873 at 879.

55 See e.g. Canada, Department of Justice, *Plea Bargaining*, by Milica Potrebic Piccinato (Ottawa: Department of Justice, March 2016), online: <www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/pb-rpc/pb2-rpc2.html> (estimating that percentage to be 91 percent).

56 Canada, Department of Justice, *Guilty Pleas Among Indigenous People in Canada*, by Angela Bressan & Kyle Coady, Catalogue No J4-62/2018E-PDF (Ottawa: Department of Justice, 2017) at 10, online: <www.justice.gc.ca/eng/rp-pr/jr/gp-pc/gp-pc.pdf>.

57 Stephanos Bibas, "Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection" (2011) 99:4 Cal L Rev 1117 at 1153.

58 Amos Tversky & Daniel Kahnemen, "Advances in Prospect Theory: Cumulative Representation of Uncertainty" (1992) 5 J Risk & Uncertainty 297 at 298; Russell Covey, "Reconsidering the Relationship between Cognitive Psychology and Plea Bargaining" (2007) 91:1 Marq L Rev 213 at 243.

59 Tversky & Kahnemen, *ibid* at 298.

60 Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial" (2004) 117:8 Harv L Rev 2464 at 2507–509 [Bibas, "Plea Bargaining Outside Trial"].

61 Kyle Graham, "Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials" (2012) 100:6 Cal L Rev 1573 at 1582.

62 *Ibid*.

goes to trial, while capitalizing on three potential benefits that encourage defendants to plead guilty: more certainty, lower sentences, and dropped charges.[63]

Defendants are also incited to plead guilty due to a second cognitive bias: the anchoring effect.[64] Mark W. Bennett notes that anchoring "describes the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information — the 'anchor.'"[65] An anchor will pull decision-makers' choices towards that set numerical value, even where the anchor is objectively impossible or inordinately high.[66] When a defendant is told that they risk being sentenced to life imprisonment if they go to trial (the anchor), a ten-year prison sentence looks like a huge discount.[67] Although loss aversion and anchoring are irrational cognitive biases, they may make plea bargains seem like the most rational thing to do.

C. THE CRIMINALIZATION OF SOCIAL PROBLEMS

Third, the criminal justice system is used to criminalize and punish various social problems that it only exacerbates.[68] Examples include criminalizing substance use (think: simple possession offences), poverty (for example, laws that regulate sex work), and homelessness (generally through quality-of-life offences).[69]

The way that these social problems are dealt with matters. Criminal records, imprisonment, and financial penalties impose even greater disadvantages on marginalized persons.[70] When individuals cannot pay their fines, their debts accumulate additional fees, and the quantum of the fine can increase drastically.[71] Unpaid fines can be contracted out to consumer reporting bureaus and private collection agencies.[72] Criminal justice debts can destroy one's credit rating and adversely impact one's ability to open a bank account, receive a loan, rent an apartment, or sign up for utilities.[73] In some provinces, fines can be converted into default civil judgments that can be executed for a period of several years.[74] These criminal and civil consequences enmesh individuals within the criminal justice system for

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63 Bibas, "Plea Bargaining Outside Trial," *supra* note 60 at 2519 (discussing the relationship between overcharging and the anchoring effect).

64 *Ibid*; Palma Paciocco, "The Hours are Long: Unreasonable Delay After *Jordan*" (2017) 81 SCLR (2d) 233 at 240.

65 Mark W Bennett, "Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw" (2014) 104:3 J Crim L & Criminology 489 at 495.

66 Thomas Mussweiler, Birte Englich & Fritz Strack, "Anchoring Effect" in Rüdiger F Pohl, ed, *Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking, Judgement and Memory* (New York: Psychology Press, 2004) 185 at 185–86.

67 Bibas, "Plea Bargaining Outside Trial," *supra* note 60 at 2518.

68 Joshua Kleinfeld et al, "White Paper of Democratic Criminal Justice" (2017) 111:6 Nw UL Rev 1693 at 1698–9l; Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 New Crim L Rev 73 at 81–84.

69 Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43:2 Queen's LJ 297 at 304–307.

70 Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equality 69 at 89.

71 Céline Bellot & Marie-Ève Sylvestre, "La judiciarisation de l'itinérance à Montréal: les dérives sécuritaires de la gestion pénale de la pauvreté" (2017) 47 RGD 11 at 40.

72 Catherine T Chesnay, Céline Bellot & Marie-Ève Sylvestre, "Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia" (2013) 55:2 Can J Corr 161 at 178–79. In Ontario, *Provincial Offences Act*, RSO 1990, c P.33, ss 68, 69.1 [*POA*]. See also *Offence Act*, RSBC 1996, c 338, ss 82(6-8), cited in Chesnay, Bellot & Sylvestre, *ibid* at 178-79.

73 Chesnay, Bellot & Sylvestre, *ibid* at 178–79.

74 *POA*, *supra* note 72, ss 69.1, 70.1.

long periods of time.[75] Yet punishment cannot fix many of crime's root causes that are economic, structural, and psychological in nature.[76]

In some cases, criminalization also raises the risk that individuals will endanger their lives in order to avoid arrest and punishment.[77] The criminalization of simple possession offences are a good example. Many individuals who have substance use disorder cannot acquire narcotics lawfully. So, they will purchase illicit drugs on the black market, which is dangerous for various reasons.[78] People generally have no idea about the quality or potency of drugs that they purchase illegally.[79] Some narcotics may be laced with other substances — such as fentanyl — that can lead to drug overdoses and death.[80] When individuals cannot acquire sterilized needles freely and confidentially, they may share needles with other users, which increases the risk of infectious disease transmission.[81] Furthermore, those who are recently released from prison are more likely to overdose as their tolerance to drugs has waned (some studies estimate the risk of overdose in these situations to be 12 times higher than the non-incarcerated population).[82]

Despite various tough-on-crime approaches to narcotics — the war on drugs, broken windows policing, zero-tolerance policies, and so on — illicit drug use persists. Indeed, Canada has criminalized simple possession for over a century.[83] Yet the opioid epidemic is causing unparalleled death and devastation despite harsh drug-enforcement policies.[84] According to Statistics Canada, roughly ten people died per day from opioid-related deaths between January 2016 – March 2018.[85] Approximately 95 percent of these deaths are accidental.[86] Or, consider the worst kept secret about the ineffectiveness of strict drug enforcement policies: the omnipresence of illicit drugs in prisons.[87] If the State cannot stamp out illicit drug use within a prison, it surely cannot do so outside of its walls.

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75 Skolnik, "Homelessness and Unconstitutinal Discrimination," *supra* note 70 at 82–83.

76 Terry Skolnik, "The Punitive Impact of Physical Distancing Laws on Homeless People" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 287 at 297.

77 Douglas N Husak, "Drug Legalization" in Rosamond Rhodes, Leslie P Francis & Anita Silvers, eds, *The Blackwell Guide to Medical Ethics* (Malden, Mass: Blackwell, 2007) 238 at 249–50.

78 Randy E Barnett, "The Harmful Side Effects of Drug Prohibition" (2009) 2009:1 Utah L Rev 11 at 19–20.

79 *Ibid*.

80 *Ibid*; Mahdia Abidi, Qi Xue & Leshawn Benedict, "Decriminalization of Drugs as a Harm Reduction Approach in Canada?" (2020) 1:5 Global Health: Annual Rev 115 at 115.

81 See e.g. Steffanie A Strathdee, Leo Beletsky & Thomas Kerr, "HIV, Drugs and the Legal Environment" (2015) 26 Intl J Drug Policy S27 at S27.

82 Ingrid A Binswanger et al, "Release from Prison — A High Risk of Death for Former Inmates" (2007) 356:2 New Eng J Med 157 at 161.

83 RM Solomon & SJ Usprich, "Canada's Drug Laws" (1991) 21:1 J Drug Issues 17 at 20, citing *The Opium and Drug Act*, SC 1911, c 17.

84 Carol Strike & Tara Marie Watson, "Losing the Uphill Battle? Emergent Harm Reduction Interventions and Barriers during the Opioid Overdose Crisis in Canada" (2019) 71 Intl J Drug Policy 178 at 178.

85 Statistics Canada, *Drug Overdose Crisis: Socioeconomic Characteristics of Those Dying of Illicit Drug Overdoses in British Columbia, 2011 to 2016*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 2018) at 1, online: <www150.statcan.gc.ca/n1/daily-quotidien/181113/dq181113a-eng.htm> (the death rate has increased during the COVID-19 pandemic).

86 Canada, Special Advisory Committee on the Epidemic of Opioid Overdoses, "Opioid and Stimulant-related Harms in Canada" (Ottawa: Public Health Agency of Canada, 2020), online: <health-infobase.canada.ca/substance-related-harms/opioids-stimulants>. Also cited in Abidi, Xue & Benedict, *supra* note 80.

87 Will Small et al, "Incarceration, Addiction and Harm Reduction: Inmates Experience Injecting Drugs in Prison" (2005) 40:6 Substance Use & Misuse 831 at 832.

III. THE OVERSIGHTS OF CRIMINAL JUSTICE REFORM

Why do reform efforts fail to address the criminal justice system's most pressing problems? As discussed next, criminal justice reforms do not rectify three mutually-reinforcing features of the criminal justice system that contribute to over-policing, over-criminalization, and the over-incarceration of racialized and Indigenous persons. First, criminal justice reform accords too little importance to rehabilitation and reintegration. Second, law reform does little to control the expansion of police powers that lack transparency and accountability. Third, reform efforts overlook how the justice system has shifted greater discretionary power towards prosecutors, while removing that power from judges.

A. INSUFFICIENT EMPHASIS ON REHABILITATION AND REINTEGRATION

First, reform efforts accord insufficient important to rehabilitation and reintegration. In many cases, the criminal justice system does not provide offenders with the support, resources, and skills that help reintegrate them within the community. Correctional institutions often lack adequate educational programs, mental health resources, vocational training, and discharge planning.[88]

In 2019, though roughly 33 percent of inmates in Ontario correctional institutions had mental health conditions, half of these institutions lacked access to a psychologist.[89] Many in-prison education and work opportunities are underfunded and lack consistent delivery and availability.[90] Resource allocation is part of the problem. Between 2019–2021, roughly $103 million of the federal budget was devoted to "strengthening federal corrections and keeping communities safe."[91] For those same years, a total of $7 million was earmarked for improving mental health supports for inmates.[92] Yet between 2007–2018, self-injuries and attempted suicides in federal prisons rose by 334 percent and 410 percent respectively.[93]

Or, consider the availability of substance use treatment for inmates. There is a strong connection between substance use and offending.[94] During the mid-1990s, researchers examined the extent to which inmates in federal prisons consumed alcohol, drugs, or both on the day that they committed the offence for which they were incarcerated. Over half of

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88 Canada, Office of the Correctional Investigator, *Annual Report: 2019-2020*, by Ivan Zinger, Catalogue No PS100E-PDF (Ottawa: The Correctional Investigator Canada, 2020) at 53, 58, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20192020-eng.pdf>.

89 Office of the Auditor General of Ontario, *Annual Report 2019: Reports on Correctional Services and Operations* (Toronto: Office of the Auditor General of Ontario, 2019) at 18, online: <www.auditor.on.ca/en/content/annualreports/arreports/en19/v3_100en19.pdf>.

90 Independent Review of Ontario Corrections, *Corrections in Ontario: Directions for Reform* (Toronto: Queen's Printer for Ontario, 2017) at 7, 125, online: <www.ontario.ca/page/corrections-ontario-directions-reform> [IROC, *Corrections in Ontario*].

91 Canada, Office of the Correctional Investigator, *Resourcing, Performance and Value for Investment in Federal Corrections: A Comparative Review* (Ottawa: Office of the Correctional Investigator, 2019) at 23, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20190219-eng.pdf>.

92 *Ibid*.

93 *Ibid*.

94 Serge Brochu et al, "Drugs, Alcohol, and Criminal Behaviour: A Profile of Inmates in Canadian Federal Institutions" (2001) 13:3 Forum on Corrections Research 20 at 21–22 (describing the incidence of substance use amongst offenders in federal correctional institutions).

the offenders incarcerated for assault, break and enter, robbery, murder, or theft consumed one or both substances on the day that they committed the crime.[95] There continues to be a higher prevalence of substance use disorder amongst inmates than the general population.[96] Some studies indicate that between 70–80 percent of federal inmates have a substance use problem.[97] As discussed more below, many correctional facilities do not offer sufficient substance use treatment for inmates.[98]

In many provincial institutions, discharge planning — which prepares inmates to reintegrate the community after prison — is also deficient.[99] Due to the mutually reinforcing relationship between homelessness and incarceration, access to housing is a crucial element of discharge planning.[100] Studies show that roughly one-third of prisoners in Toronto will experience homelessness upon release.[101] Conversely, nearly 20 percent of individuals sentenced to prison in Toronto were experiencing homelessness prior to incarceration.[102] Yet many individuals are released from prison with no discharge plan whatsoever, which can increase the likelihood of recidivism.[103]

There are various reasons why the criminal justice system fails to provide inmates with adequate resources, infrastructure, and support. Compared to other groups, offenders typically lack the political power that is necessary to improve prison conditions.[104] Some note that since roughly 2006, there has been a shift away from rehabilitation and towards greater punitiveness, which may be attributed to the increased salience of crime as a political issue.[105] The main punishment theories that have come to dominate penal policy and sentencing in the past several decades — retribution and deterrence — tend to militate in favour of harsher punishments rather than rehabilitation and reintegration.[106]

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95 *Ibid*.

96 Fiona Kouyoumdjian et al, "Health Status of Prisoners in Canada" (2016) 62:3 Can Family Physician 215 at 217 (listing the relevant studies).

97 Correctional Service Canada, *Lifetime Substance Use Patterns of Men Offenders*, by L Kelly & S Farrell MacDonald, No RIB 14-43 (Ottawa: Correctional Service Canada, 2015).

98 Center for Addiction and Mental Health, "Mental Health and Criminal Justice Policy Framework" (2020), online: <www.camh.ca/-/media/files/pdfs---public-policy-submissions/camh-cj-framework-2020-pdf.pdf> at 27; Claire Bodkin, Matthew Bonn & Sheila Wildeman, "Fuelling A Crisis: Lack of Treatment for Opioid Use in Canada's Prisons and Jails" (5 March 2020), online: <theconversation.com/fuelling-a-crisis-lack-of-treatment-for-opioid-use-in-canadas-prisons-and-jails-130779> (describing the lack of treatment for opioid use in Canadian prisons).

99 IROC, *Corrections in Ontario*, *supra* note 90 at 115, citing John Howard Society of Ontario, "Reintegration in Ontario: Practices, Priorities, and Effective Models" (2016) at 8, online: <johnhoward.on.ca/wp-content/uploads/2016/11/Reintegration-in-Ontario-Final.pdf>.

100 John Howard Society of Toronto, "Homeless and Jailed: Jailed and Homeless" (2010) at 1–3, 20, 27, online: <johnhoward.ca/wp-content/uploads/2016/12/Amber-Kellen-Homeless-and-Jailed-Jailed-and-Homeless.pdf>; Stephen Metraux & Dennis P Culhane, "Homeless Shelter Use and Reincarceration Following Prison Release" (2004) 3:2 Criminology & Public Policy 139 at 140–41, 151.

101 *Ibid*.

102 *Ibid*.

103 Gillian Balfour, Kelly Hannah-Moffat & Sarah Turnbull, "Planning for Precarity? Experiencing the Carceral Continuum of Imprisonment and Reentry" (2019) 77 Studies in L Politics & Society 31 at 36–37.

104 James E Robertson, "The Jurisprudence of the PLRA: Inmates as 'Outsiders' and the Countermajoritarian Difficulty" (2001) 92:1 J Crim L & Criminology 187 at 203.

105 Cheryl Marie Webster & Anthony N Doob, "US Punitiveness 'Canadian Style'? Cultural Values and Canadian Punishment Policy" (2015) 17:3 Punishment & Society 299 at 303–14; David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2002) at 8–16.

106 Ivan Zinger, "Human Rights and Federal Corrections: A Commentary on a Decade of Tough on Crime Policies in Canada" (2016) 58:4 Can J Corr 609 at 614.

B. THE EXPANSION OF POLICE POWERS

Second, criminal justice reforms do not typically address the expansion of law enforcement powers that lack transparency and accountability, and ultimately, result in over-policing. Most routine police powers were created by the Supreme Court of Canada through the ancillary powers doctrine, rather than by Parliament through the legislative process.[107] The ancillary powers doctrine allows judges to recognize new police powers that aim to fill legislative gaps.[108] Since the doctrine was developed nearly four decades ago in *R. v. Dedman*,[109] the Supreme Court has created a range of common law police powers that confer significant police discretion, and that result in racial and social profiling.[110] For instance, the Supreme Court upheld the constitutionality of roving random vehicle stops.[111] It created the police power to detain persons for investigative purposes,[112] and to stop and frisk individuals for safety reasons.[113] The Supreme Court has also observed that Parliament can abolish, constrain, or modify common law police powers that judges have created.[114] Yet no judicially created, street-level police power has been legislated into the *Criminal Code*. Nor have these powers been abrogated, constrained, or modified. What explains this?

Many scholars note that the judicial creation of police powers disincentivizes Parliament from codifying and limiting them for various reasons.[115] For one, judges would not create new police powers unless they were lawful and constitutional.[116] It is thus unclear why Parliament would restrict these powers further. Moreover, judicially created police powers create path dependency, where Parliament relies on courts to develop new police powers because they have done so in the past.[117] Limiting police powers is also contrary to law-and-order type criminal justice reforms. Insofar as Parliament is expanding other areas of the criminal law — more mandatory minimum sentences, more crimes, more punishment — lawmakers are discouraged from restraining police powers that are means to those ends.

Despite the expansion of law enforcement powers, both the Supreme Court of Canada and Parliament have failed to impose adequate police oversight measures.[118] Police forces are not required to gather or publish ethnicity-based data regarding routine law enforcement interactions, such as traffic stops, frisk searches, or street checks.[119] Aside from research

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107 James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's LJ 1 at 46–47.

108 *Fleming v Ontario*, 2019 SCC 45 at para 42 [*Fleming*].

109 [1985] 2 SCR 2.

110 Richard Jochelson et al, "Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged Charter" (2020) 28 Crit Criminol 107 at 113.

111 *R v Ladouceur*, [1990] 1 SCR 1257 [*Ladouceur*].

112 *R v Mann*, 2004 SCC 52 [*Mann*]; *R v Aucoin*, 2012 SCC 66.

113 *Mann*, *ibid*.

114 *Fleming, supra* note 108 at para 42.

115 James Stribopoulos, "Has Everything Been Decided? Certainty, the Charter and Criminal Justice" (2006) 34 SCLR (2d) 381 at 405–406; James Stribopoulos "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41:2 Alta L Rev 335 at 337; Terry Skolnik & Vanessa MacDonnell, "Policing Arbitrariness: *Fleming v. Ontario* and the Ancillary Powers Doctrine" (2021) 100 SCLR 187; Alan Young, "Search and Seizure in 2004: Dialogue or Dead-End?" (2005) 29 SCLR (2d) 351 at 356.

116 Skolnik, "Racial Profiling," *supra* note 14 at 432.

117 Oona A Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86:2 Iowa L Rev 601 at 605, 632.

118 Skolnik, "Racial Profiling," *supra* note 14 at 449–52; Lisa Schultz Bressman, "Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State" (2003) 78 NYUL Rev 461 at 506.

119 Owusu-Bempah & Wortley, *supra* note 2 at 287–89; David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) at 172–78.

studies by human rights commissions, scholars, and civil society groups, we lack data about how police powers are exercised in most cities.[120]

Judicial review of police misconduct also fails to provide adequate law enforcement oversight.[121] Section 24(2) of the *Charter* empowers courts to exclude unconstitutionally obtained evidence whose admission would "bring the administration of justice into disrepute."[122] The provision aims to ensure that courts dissociate themselves from unlawful conduct, and in doing so, promote the rule of law and public confidence in the justice system.[123] When one does the math, though, it becomes clear that the prospect of meaningful section 24(2) redress is not great. Most routine police encounters are low visibility and never make their way to court (think routine traffic stops and street checks that yield no evidence whatsoever).[124] Police interactions that *do* make it to court result in guilty pleas roughly 90 percent of the time, such that many defendants do not benefit from section 24(2) *Charter* protection in practice.[125]

Civil claims have their own limitations. High legal costs, low compensation, and complex evidentiary rules may dissuade individuals from seeking legal redress in a manner that would hold police accountable for wrongdoing.[126] In contexts when courts accord *Charter* damages, the value can be relatively low, such that the costs of bringing a claim may exceed the potential gain.[127]

Then there is the problem of provincial and municipal regulatory offences. In many cases, their enforcement cascades into more intrusive criminal investigations. Furthermore, by enforcing regulatory offences, officers can identify individuals and determine whether they are sought by warrant, or whether they are breaching their bail conditions.[128] Since criminal justice reform takes place at the federal level, it fails to address how officers enforce provincial and municipal offences as a gateway to investigate crimes, and charge individuals with criminal offences.

C. THE ALLOCATION OF POWER IN THE CRIMINAL JUSTICE SYSTEM

Third, criminal justice reform does not address how the criminal justice system increasingly distributes power away from judges and towards prosecutors — an argument advanced by scholars such as William Stuntz and Rachel Barkow. Typically, the criminal

120 For examples of such reports, see Wortley, *supra* note 40 at 33.
121 Akhil Reed Amar, "The Document and the Doctrine" (2000) 114:1 Harv L Rev 26 at 94.
122 *Canadian Charter of Rights and Freedoms*, s 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
123 *R v Grant*, 2009 SCC 32 at para 68.
124 Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29:2 Osgoode Hall LJ 329 at 330–31, 338.
125 Piccinato, *supra* note 55 at 6.
126 *R v Golden*, 2001 SCC 83 at para 56.
127 *Ibid*; Michelle Psutka & Elizabeth Sheehy, "Strip-Searching of Women in Canada: Wrongs and Rights" (2016) 94:2 Can Bar Rev 241 at 272; Terry Skolnik, "Repenser le rôle de la Cour suprême du Canada en procédure criminelle" (2022) McGill LJ [forthcoming].
128 I Bennett Capers, "Criminal Procedure and the Good Citizen" (2018) 118:2 Colum L Rev 653 at 690.

law is portrayed in the following way.[129] The general part of the criminal law — which comprises notions such as criminal responsibility, modes of liability, legality, *actus reus, mens rea,* and defences — is depicted as central to the criminal law's daily administration.[130] The trial is painted as the default process that assesses the accused's guilt.[131] This story suggests that a range of substantive and procedural rights protect the accused throughout the criminal justice process. Each party advances their strongest version of the case: they present evidence, call witnesses, and cross-examine the opposing party's witnesses. Based on that evidence, the judge (or jury) decides whether the prosecution proved the accused's guilt beyond a reasonable doubt.[132]

In practice, most of this never happens. The majority of criminal accusations are resolved informally through plea bargaining.[133] Even though the *Criminal Code* requires judges to assess the validity of a guilty plea, the plea is still valid if they fail to do so.[134] When cases are resolved through plea bargaining, many basic substantive and procedural protections — the burden of proof beyond a reasonable doubt, the *actus reus* and *mens rea* requirements, the right to cross-examination — all but disappear.[135] In cases where defendants plead guilty or plea bargain, judges play a far smaller role than if the case went to trial.[136]

Most convictions happen in the penumbra of criminal trials, where prosecutors enjoy vast discretion, much of which is unreviewable.[137] Compared to judges, prosecutors' independence and discretionary decisions are accorded far greater protection in many respects.[138] The majority of these decisions are insulated from judicial review.[139] Courts can interfere with prosecutorial discretion in contexts of abuse of process, meaning "conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system."[140] Judges ensure that the prosecution respects its constitutional duty to disclose all relevant evidence to the defense.[141] Courts also have the inherent jurisdiction to control prosecutorial conduct and tactics that take place at trial, such as abusive cross-examinations, inappropriate opening or closing arguments, and incivility.[142] Leaving aside these three general exceptions, courts do not interfere with the bread and butter of prosecutorial decision-making that occurs before trial, yet drives convictions.[143] Prosecutors' discretion,

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129 See e.g. *R v ADH*, 2013 SCC 28 at paras 1, 41; William J Stuntz, "The Pathological Politics of Criminal Law" (2001) 100:3 Mich L Rev 505 at 565–66 [Stuntz, "The Pathological Politics"].

130 AP Simester & Stephen Shute, "On the General Part in Criminal Law" in Stephen Shute & AP Simester, eds, *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2005) 1 at 4.

131 Stephanos Bibas, "Transparency and Participation in Criminal Procedure" (2006) 81:3 NYUL Rev 911 at 913 [Bibas, "Transparency and Participation"].

132 *Ibid*.

133 Piccinato, *supra* note 55 at 6.

134 *Criminal Code*, *supra* note 18, ss 606(1)–(1.1); Zina Lu Burke Scott, "An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada" (2018) 81:1 Sask L Rev 53 at 81.

135 William J Stuntz, "The Uneasy Relationship Between Criminal Procedure and Criminal Justice" (1997) 107:1 Yale LJ 1 at 13 [Stuntz, "The Uneasy Relationship"].

136 Barkow, *supra* note 15 at 871.

137 William J Stuntz, "The Political Constitution of Criminal Justice" (2006) 119:3 Harv L Rev 781 at 790.

138 *Ibid*; Marie Manikis, "The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-Representation of Aboriginal People in Prisons" (2015) 71 SCLR (2d) 277 at 284; Paul Calarco, "*R. v. Anderson*: The Narrow Review of Crown Discretion Means Less Justice" (2015) 62:1/2 Crim LQ 33 at 33.

139 *Ibid*.

140 *R v Anderson*, 2014 SCC 41 at para 50 [*Anderson*].

141 *R v Stinchcombe*, [1991] 3 SCR 326.

142 *Anderson*, *supra* note 140 at paras 57–61.

143 This list of discretionary decisions is taken from *Anderson*, *ibid* at para 44.

though, is protected most significantly at the pretrial stage — the stage where most convictions happen, and where prosecutors have the most leverage to induce guilty pleas.

To be clear, in many contexts, prosecutors exercise their discretion benevolently and fairly towards defendants. They withdraw charges, offer lenient sentences, try cases by summary procedure rather than by indictment, and divert low-level cases away from the criminal justice process.[144] In other contexts, high caseloads — and the lack of adequate pre-charge screening — can incentivize prosecutors to leverage their discretion in precisely the opposite direction.[145] Prosecutors can only take so many cases to trial, and overburdened legal aid counsel can only advance so many claims.[146] Though both parties have little else in common, they share a common interest in advancing the strongest arguments, and disposing of the weakest cases.[147]

Yet the point at which the parties dispose of charges matters. High caseloads exert pressure on prosecutors, which they in turn externalize onto defendants.[148] In jurisdictions that lack pre-charge screening — meaning prosecutors are not required to pre-authorize police officers' charges — prosecutors have less resources to examine the substantive merit of certain criminal charges earlier in the process. This also explains why jurisdictions *with* pre-charge screening have lower charge-withdrawal rates and higher conviction rates.[149] The longer that charges hang over defendants' heads, the more they are incentivized to plead guilty, especially if they are detained pending trial or subject to harsh bail conditions.[150] But when charges are not screened out early, prosecutors can use them as effective bargaining chips to secure guilty pleas for other crimes — a trade-off that is largely immune from judicial review.[151]

IV. FOUR DIMENSIONS OF CRIMINAL JUSTICE REFORM: A TRANSFORMATIVE AGENDA

How can law reform tackle the persistent problems that plague the Canadian criminal justice system? As discussed more below, reform must take place across four dimensions in order to meaningfully address the criminal justice system's worst shortcomings. These dimensions are: (1) substantive criminal law reform; (2) sentencing reform; (3) criminal procedure reform; and (4) institutional reform.

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144 Over the past five years, the formal diversion rate remains relatively low and stable: Canada, Department of Justice, *State of the Criminal Justice System: 2019 Report*, Catalogue No J2-491/2019E-PDF (Ottawa: Government of Canada, 2019) at 25–26, online: <www.justice.gc.ca/eng/cj-jp/state-etat/2019rpt-rap 2019/state-etat.pdf>.

145 William J Stuntz, "Unequal Justice" (2008) 121:8 Harv L Rev 1969 at 1978.

146 Stuntz, "The Pathological Politics," *supra* note 129 at 536–37; Stuntz, "The Uneasy Relationship," *supra* note 135 at 4.

147 Stuntz, "The Uneasy Relationship," *ibid* at 34–35 .

148 Bibas, "Transparency and Participation," *supra* note 131 at 921–22.

149 Statistics Canada, *Adult Criminal Court Statistics in Canada: 2014/2015*, by Ashley Maxwell, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2017) at 5–6, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54900-eng.pdf> [Statistics Canada, *Adult Criminal Court*]; Kevin Tilley, "Justice Denied: The Causes of B.C.'s Criminal Justice System Crisis" (2012) at 15–16, online: <bccla.org/wp-content/uploads/2012/05/20120401-Justice-Denied-report1.pdf>.

150 Josh Bowers, "Punishing the Innocent" (2008) 156:5 U Pa L Rev 1117 at 1134–35.

151 David Ireland, "Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence" (2015) 38:1 Man LJ 273 at 277.

First, *substantive criminal law reform* is necessary to change some of the criminal justice system's overarching principles that fuel over-policing, over-criminalization, and the over-incarceration of marginalized persons. Such reform efforts would also narrow the criminal law's reach, especially through decriminalization and diversion. Reform efforts would also change the ways in which criminal justice policy is developed, namely, by favouring evidence-based criminal law policies over populist and counter-productive measures.

The second dimension of criminal justice reform is *sentencing reform.* Even if the State did modify certain substantive criminal law principles and decriminalize certain offences, harsh custodial and economic sanctions would continue to entrench individuals in the criminal justice system. Sentencing reform is required to reorient the criminal justice system towards rehabilitation, decrease incarceration, and treat defendants with greater dignity.

The third dimension of criminal justice reform is *criminal procedure reform*, which addresses the fundamental issue of *how* defendants are charged and convicted of crimes. Suppose the State modified certain parts of the substantive criminal law and sentencing practices. Yet individuals were still over-policed, detained pending trial at unacceptably high rates, and exposed to coercive (and largely unregulated) plea bargaining practices. Many of the criminal justice's system's core problems would remain. Furthermore, justice system actors might be incentivized to exploit the lack of safeguards in criminal procedure to circumvent the criminal trial's substantive protections. Beyond addressing what happens when defendants get their day in court, reform efforts must also encompass the pretrial aspects of the criminal justice process that directly bear on many convictions. More specifically, the law governing police powers, bail, and plea bargaining must be reformed. Furthermore, Parliament must impose greater mechanisms to promote transparency and accountability in criminal procedure.

Finally, *institutional reform* is essential to meaningfully change how the criminal justice system's principal actors function within it. The criminal justice system's core institutions — the police, prosecution services, corrections, and the judiciary — must also play a role in alleviating the justice system's most persistent ills.

One overarching principle unites these various dimensions of criminal justice reform: the criminal justice system — and its core institutions — must be transformed completely rather than improved through limited reforms.[152] Paul Butler notes that one of the core misconceptions about criminal justice reform is that the system is broken, does not attain its objectives, and must be fixed through precise initiatives.[153]

Yet incremental and targeted reforms may fail because the system is actually "working the way it is supposed to."[154] According to this view, the criminal justice system is achieving its core objectives: over-criminalizing conduct, punishing harshly, disproportionately

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[152] Richard Delgado & Jean Stefancic, "Critical Perspectives on Police, Policing, and Mass Incarceration" (2016) 104:6 Geo LJ 1531 at 1543–50; Amna A Akbar, "Toward a Radical Imagination of Law" (2018) 93:3 NYUL Rev 405 at 426–34; Margarida Garcia & Richard Dubé, "La réforme du droit criminel: une idée dont le temps est venu" in Desrosiers, Garcia & Sylvestre, *supra* note 49, 3 at 22–35.

[153] Paul Butler, "The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform" (2016) 104:6 Geo LJ 1419 at 1425–26.

[154] *Ibid*. The quoted portion is the title of Butler's article.

impacting marginalized persons and groups, and perpetuating disadvantage.[155] Transformative theories posit that the entire criminal justice system — and the institutions that comprise it — must be revamped accordingly. If this transformative approach seems radical, it is not. Many criminal justice insiders who are most acquainted with the system's daily functioning increasingly adopt a similar view.[156]

The following subsections explore the four dimensions of criminal justice reform and advance an agenda to achieve it. Each section sets out a non-exhaustive list of concrete proposals to achieve lasting change in the Canadian criminal justice system, and ultimately, address its most pressing underlying problems.

A. SUBSTANTIVE CRIMINAL LAW REFORM

1. RECALIBRATE THE CRIMINAL JUSTICE SYSTEM'S UNDERLYING VALUES

The first dimension of criminal justice reform is substantive criminal law reform. The criminal justice system should shift away from a predominantly coercive and punitive paradigm that emphasizes blame and stigma.[157] Instead, it should shift towards a model that is grounded in rehabilitation and reintegration.[158] More specifically, the *Criminal Code* should set out the bedrock *values* upon which the rest of criminal justice system is built, the primary *objectives* of punishment, and *constraints* that aim to prevent over-criminalization. Each of these notions are examined in turn.

First, the *Criminal Code*'s opening provisions should specify that the criminal justice system is premised on a commitment to the underlying *values* of human dignity, equality, and respect for persons — all of which are fundamental in a free and democratic society.[159] These values also militate in favour of penal moderation.[160] A commitment to these values aims to counteract systemic racism, the over-representation of marginalized persons in the justice system, and the criminalization of social problems. The *Criminal Code* should expressly state that these types of values underpin all aspects of the criminal justice process: policing, prosecutorial decision-making, plea bargaining, bail, trials, sentencing, and

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155 *Ibid*. See also Garland, *supra* note 105 at 24; Wendy Chan & Dorothy Chunn, *Racialization, Crime, and Criminal Justice in Canada* (Toronto: University of Toronto Press, 2014) at 14–22.

156 Canada, Department of Justice, *What We Heard: Transforming Canada's Criminal Justice System*, Catalogue No J2-455/2017E-PDF (Ottawa: Department of Justice, 2018) at 7–13, online: <www.justice.gc.ca/eng/rp-pr/other-autre/tcjs-tsjp/WWH_EN.pdf> [Department of Justice, *What We Heard*]; Institute for Research on Public Policy, "Rethinking Criminal Justice in Canada" (October 2018) at 12–20, online: <irpp.org/wp-content/ uploads/2018/10/Rethinking-Criminal-Justice-in-Canada.pdf>; Michael Spratt, "A Wish List for Federal Criminal Justice Reform," *Canadian Lawyer* (28 October 2019), online: <www.canadianlawyermag.com/news/opinion/a-wish-list-for-federal-justice-reform/321305>; Marie Henein, "Breaking the Law: How the State Weaponizes an Unjust Criminal Justice System," *The Globe and Mail* (13 June 2020), online: <www.theglobeandmail.com/opinion/article-the-state-is-kneeling-on-the-job/>.

157 Sylvestre, *supra* note 13 at 1–3.

158 *Ibid*; Michael Tonry, "Equality and Human Dignity: The Missing Ingredients in American Sentencing" (2016) 45 Crime & Justice 459 at 459–60.

159 *R v Oakes*, [1986] 1 SCR 103 at 136.

160 Sonja Snacken, "Punishment, Legitimate Policies and Values: Penal Moderation, Dignity and Human Rights" (2015) 17:3 Punishment & Society 397 at 409–10; Michael Pinard, "Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity" (2010) 85:2 NYUL Rev 457 at 527–33.

corrections.[161] An express statement of these values could shape the interpretation of *Criminal Code* provisions, the substance of prosecutorial and correctional policies, and the types of sentences that are imposed on defendants.

Second, the *Criminal Code* should expressly place greater emphasis on rehabilitation and reintegration as punishment objectives.[162] Rehabilitative and reintegrative objectives recognize that many of the underlying factors that contribute to criminal justice system involvement — poverty, addiction, disadvantage, trauma, mental illness, and marginalization — cannot be alleviated through coercion and punishment.[163] There are several advantages to this approach. For one, an emphasis on rehabilitation and reintegration treats offenders more humanely. Furthermore, by devoting more resources towards rehabilitation and reintegration, the State may decrease recidivism rates more effectively by addressing some of criminality's underlying causes. This approach may also avert some of punishment's most harmful direct and collateral consequences, including unnecessarily harsh prison conditions, decreased employment opportunities, homelessness, and social dislocation.

Third, the criminal justice system's foundational principles should also set out a list of *constraints* that aim to prevent the justice system's worst tendencies. For instance, the *Criminal Code* should set out that the criminal justice system is committed to combatting racism and discrimination (the anti-discrimination principle), decreasing the perpetuation of disadvantage (the anti-entrenchment principle), and decriminalizing social problems (the anti-marginalization principle).

Notice that fidelity to these underlying values, objectives, and constraints does not entirely abrogate the role of retribution and deterrence in the criminal justice system. However, rehabilitation and reintegration *does* inform our understanding of desert and deterrence, as well as the correctional system's role in fulfilling these objectives.

Consider retribution first. Censure plays a core role in the criminal law.[164] The expressive function of criminal law distinguishes it from other areas of the law, such as tort law.[165] In certain cases, incarceration expresses an appropriate and proportional response to particularly egregious forms of wrongdoing.[166] Yet "desert" does not entail that offenders deserve a given term of imprisonment without the prospect of rehabilitation or reintegration. They also deserve the opportunity to address the underlying causes that contributed to the crime, as well as the prospect of eventually reintegrating into the community so as not to re-offend in

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161 Jonathan Simon, "The Second Coming of Dignity" in Sharon Dolovich & Alexandra Natapoff, eds, *The New Criminal Justice Thinking* (New York: New York University Press, 2017) 275 at 275–82.

162 Allison Morris & Warren Young, "Reforming Criminal Justice: The Potential of Restorative Justice" in Heather Strang & John Braithwaite, eds, *Restorative Justice: Philosophy to Practice* (London, UK: Routledge, 2016) 11 at 14–20.

163 Sara K Rankin, "The Influence of Exile" (2016) 76:1 Md L Rev 4 at 45.

164 AP Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford: Oxford University Press, 2021) at 4–5.

165 *Ibid*.

166 RA Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) at 149–51.

the future.[167] In this sense, retribution still plays an expressive and symbolic role in the criminal law, yet desert is shaped by rehabilitative and reintegrative principles.[168]

Conversely, specific deterrence — which aims to prevent a particular offender's recidivism — should also be informed by rehabilitative and reintegrative objectives. All other things equal, a system that deters wrongdoing is better than a system that does not. In a similar vein, a system that achieves greater specific deterrence by addressing the individual's underlying reasons for offending is better than a system that does not.[169]

2. REFORM THE *CRIMINAL CODE* AND DOWNGRADE CERTAIN CRIMES

Second, Parliament should completely overhaul the *Criminal Code*. Many note that the *Code* is antiquated, disorganized, and verbose.[170] It lacks many aspects of criminal law and procedure. For instance, many crimes do not specify the requisite fault element.[171] Most judicially created police powers have not been codified.[172] Nor have a significant portion of defences, such as necessity, entrapment, and mistake of fact.[173]

Parliament should modernize the *Criminal Code* in various ways. First, as the Law Reform Commission of Canada noted, the *Criminal Code* should be systematized, comprehensive, and simple.[174] In other words, the *Code* should be cohesive, organized, logical, and reflect the state of criminal law accurately.[175] Martin Friedland observes that it may be helpful to divide the current *Criminal Code* into four separate codes, each of which encompass a discrete area of the criminal justice process.[176] The first code — the *Criminal Code* — would encompass the general and specific parts of the criminal law, including the principles and values underlying criminal law and the rules governing criminal responsibility, culpability, party liability, crimes, and defences.[177] The second code — the *Code of Criminal Procedure* — would govern the jurisdiction of criminal courts, police powers, warrants, bail, and the rest of the pretrial process.[178] The third code would govern all matters related to

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167 Howard Zehr, *Little Book of Restorative Justice* (New York: Good Books, 2002) at 59, cited in Declan Roche, "Retribution and Restorative Justice" in Gerry Johnstone & Daniel W Van Ness, eds, *Handbook of Restorative Justice* (Cullopmton, UK: Willan, 2007) 75 at 85.

168 Antony Duff, "Restoration and Retribution" in Andrew von Hirsch et al, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart, 2003) 43 at 43–44.

169 Gordon Bazemore & Mara Schiff, *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson, 2001) at 67.

170 See e.g. Justice Allen M Linden, "Recodifying Criminal Law" (1989) 14:1 Queen's LJ 3 at 3; Steve Coughlan, "Canada Needs a Criminal Code" in Desrosiers, Garcia & Sylvestre, *supra* note 49, 37 at 37; Dennis R Klinck, "The Language of Codification" (1989) 14:1 Queen's LJ 33 at 49–51.

171 Steve Coughlan, "*Criminal Code* Reform: Where Do We Stand?" (2019) 24 Can Crim L Rev 111 at 113–15.

172 James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*" (2007) 52:3/4 Crim LQ 299 at 315–16.

173 Nicholas Kasirer, "Canada's Criminal Law Codification Viewed and Reviewed" (1990) 35:4 McGill LJ 841 at 871.

174 Patrick Healy, "The Process of Reform in Canadian Criminal Law" (1984) 42:2 UT Fac L Rev 1 at 9, cited in Kasirer, *ibid* at 872–73; Law Reform Commission of Canada, *Recodifying Criminal Law* (Ottawa: Law Reform Commission of Canada, 1987) at 9.

175 Healy, *ibid* at 9.

176 Martin L Friedland, "Reflections on Criminal Justice Reform in Canada" (2017) 64:3/4 Crim LQ 274 at 279 [Friedland, "Reflections"]. See also Vincent M Del Buono, "Toward a New Criminal Code for Canada" (1986) 28:3 Crim LQ 370.

177 Simester & Shute, *supra* note 130 at 4.

178 Del Buono, *supra* note 176 at 279.

punishment and sentencing.[179] The final code would encompass criminal evidence and incorporate portions of the *Canada Evidence Act* that apply in criminal trials.[180]

The second aspect of *Criminal Code* reform is that certain low-level crimes should be transformed into regulatory sanctions that neither result in a criminal record nor are punishable by imprisonment.[181] This could be achieved by downgrading certain low-level crimes to a third category of non-criminal offence that exists in other jurisdictions: contraventions.[182] Interestingly, contraventions have a rich history within the development of England's criminal law. They existed as a predecessor to modern-day regulatory offences that were distinct from felonies and misdemeanours.[183]

The third aspect of *Criminal Code* reform concerns the reform process itself. In order to promote effective and evidence-based reform, Parliament must re-establish and maintain the Law Reform Commission of Canada.[184] Although the 2021 government budget plans to revive the Law Reform Commission for a five-year period, the Commission should be a permanent fixture.[185] Furthermore, the Commission should work together closely with legal experts, justice system actors, affected communities, and a broad range of individuals to develop inclusive and effective criminal justice policies.[186] As Roderick MacDonald notes, law reform efforts should be consistent with a more democratic process that respects the value of legal pluralism.[187] An independent and non-partisan law reform commission avoids many problems that worsen the criminal justice system's pathologies: unscientific law reform policies, excessive punitiveness, and populist criminal justice policy.

3. DECRIMINALIZE SIMPLE POSSESSION OF DRUGS

The third element of substantive criminal law reform is that the State should decriminalize simple possession offences.[188] The decriminalization of simple possession is consistent with a minimalist approach to criminal law. Penal minimalism recognizes that the criminal law is the harshest and most stigmatizing measure of social control.[189] For this reason, the criminal law should be used only as a last resort where less coercive measures cannot address the relevant conduct.[190]

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179 See e.g. United States Sentencing Commission, *Guidelines Manual 2018* (§ 3E1.1).
180 Friedland, "Reflections," *supra* note 176 at 279.
181 Andrew Ashworth & Lucia Zedner, "Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions" (2008) 2 Crim L & Philosophy 21 at 45.
182 Michael Bohlander, *Principles of German Criminal Law* (Portland: Hart, 2009) at 27.
183 Mireille Hildebrandt, "Justice and Police: Regulatory Offenses and the Criminal Law" (2009) 12:1 New Crim L Rev 43 at 48–50.
184 Marcus Moore, "The Past, Present and Future of Law Reform in Canada" (2018) 6:2 Theory & Practice Legislation 225 at 239–40.
185 Government of Canada, *Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience*, Catalogue No F1-23/3E-PDF (Ottawa: Government of Canada, 2021) at 286, online: <www.budget.gc.ca/2021/pdf/budget-2021-en.pdf>.
186 Yves Le Bouthillier, "The Former Law Commission of Canada: The Road Less Traveled" in Matthew Dyson, James Lee & Shona Wilson Stark, eds, *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Oxford: Hart, 2016) 102 at 103–104.
187 Roderick A MacDonald, "Law Reform for Dummies (3rd Edition)" (2014) 51:3 Osgoode Hall LJ 859 at 878.
188 Spratt, *supra* note 156.
189 Jeremy Horder, *Ashworth's Principles of Criminal Law,* 9th ed (Oxford: Oxford University Press, 2019) at 72–74.
190 *Ibid*.

Compared to criminalization, a public-health-oriented approach to simple possession is more consistent with penal minimalism. This approach can also address drug use more effectively while avoiding the criminal law's direct and collateral consequences. The opioid crisis, emergence of fentanyl, ineffectiveness of criminalizing simple possession, and greater scientific knowledge about substance use disorder also militate in favour of a public health approach that reduces harm and stigma.[191]

Governments, policy makers, civil society groups, and medical professionals increasingly recognize personal drug use as a public health issue that should not be criminalized.[192] The Canadian Association of Chiefs of Police, the World Health Organization, the United Nations, and various cities' health officers have argued that the State should decriminalize simple drug possession.[193] The Public Prosecution Service of Canada has also adopted a directive that aims to reduce prosecutions for simple possession offences.[194]

Certain jurisdictions — such as Portugal and Oregon — have decriminalized personal drug use.[195] Studies show that in Portugal, decriminalization decreased the rate of drug-related infectious disease transmission.[196] Decriminalization lowered overdose rates and the number of drug-related deaths per capita.[197] Problematic drug use and incarceration for drug-related offences have both decreased as well.[198]

Criminalization invites additional feelings of stigmatization, humiliation, and shame to those who are struggling with a health condition.[199] A public-health-oriented approach to substance use, on the other hand, can support individuals rather than stigmatize them — an approach that is crucial to help individuals who are struggling with substance use disorder.[200] Indeed, a public health approach to personal drug use has the potential to affirm human dignity, rather than demean it through criminalization and punishment.

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191 Mark Tyndall, "A Safer Drug Supply: A Pragmatic and Ethical Response to the Overdose Crisis" (2020) 192:34 CMAJ E986 at E986–87.

192 Health Canada Expert Task Force on Substance Use, *Report #2: Recommendations on the Federal Government's Drug Policy as Articulated in a Draft Canadian Drugs and Substances Strategy (CDSS)* (Ottawa: Health Canada, 2021) at 4–5, 25, online: <www.canada.ca/content/dam/hc-sc/documents/corporate/about-health-canada/public-engagement/external-advisory-bodies/reports/report-2-2021/report-2-HC-expert-task-force-on-substance-use-final-en.pdf>; Philip Leger et al, "Policy Brief: CSAM in Support of the Decriminalization of Drug Use and Possession for Personal Use" (2021) 12:1 Can J Addiction 13 at 13–15.

193 Toronto Star Editorial Board, "Canada Should Listen to the Experts and Decriminalize Drug Possession," *Toronto Star* (14 July 2020), online: <www.thestar.com/opinion/editorials/2020/07/14/canada-should-listen-to-the-experts-and-decriminalize-drug-possession.html>.

194 Public Prosecution Service of Canada, *5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the Controlled Drugs and Substances Act* (Ottawa: Public Prosecution Service of Canada, 17 August 2020), online: <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch13.html>.

195 Thomas Fuller, "Oregon Decriminalizes Small Amounts of Heroin and Cocaine; Four States Legalize Marijuana," *New York Times* (4 November 2020), online: <www.nytimes.com/2020/11/04/us/ballot-measures-propositions-2020.html>.

196 Hannah Laqueur, "Uses and Abuses of Drug Decriminalization in Portugal" (2015) 40:3 Law & Soc Inquiry 746 at 766–67, 769–70.

197 *Ibid*; Tiago S Cabral, "The 15th Anniversary of the Portuguese Drug Policy: Its History, its Success and its Future" (2017) 3:0 Drug Science, Policy & L 1 at 2–3.

198 Harvey Slade, "Drug Decriminalisation in Portugal: Setting the Record Straight" (13 May 2021) at 3–4, online: <transformdrugs.org/blog/drug-decriminalisation-in-portugal-setting-the-record-straight>.

199 Sarah E Wakeman & Josiah D Rich, "Barriers to Medications for Addiction Treatment: How Stigma Kills" (2018) 53:2 Substance Use & Misuse 330 at 330–31.

200 Brendan Saloner et al, "A Public Health Strategy for the Opioid Crisis" (2018) 133:1 Public Health Reports 24S at 29S–31S.

B. SENTENCING REFORM

1. ABOLISH MANDATORY MINIMUM SENTENCES

First, as part of sentencing reform, Parliament should abolish mandatory minimum sentences for various reasons. Mandatory minimum penalties can result in disproportionately harsh punishments considering the defendant's moral blameworthiness.[201] Empirical research demonstrates that mandatory minimum sentences do not produce a greater deterrent effect compared to more discretionary sentencing regimes.[202]

Furthermore, mandatory minimum sentences also exacerbate the over-representation of Indigenous and racialized persons in the criminal justice system.[203] Judges must consider the *Gladue* principles when sentencing Indigenous defendants.[204] When crimes impose mandatory minimum sentences, however, judges lack the discretion to impose punishments other than imprisonment.[205] Mandatory penalties can neither be squared with the *Gladue* principles, nor with the State's broader goal of fostering reconciliation with Indigenous Peoples.[206]

Compared to both shorter punishments and non-custodial punishments, mandatory minimum sentences incur higher financial costs on governments.[207] By abolishing mandatory minimum penalties, the State could save money, and spend that savings on other ameliorative programs outside of the criminal justice system, and on more humane and effective rehabilitative programs within it.[208]

Lastly, mandatory minimum penalties create negative externalities within the criminal justice system. There is a staggering number of judicial decisions that address the constitutionality of these sentences for various crimes.[209] Courts must devote significant time and effort to determine whether some offence survives *Charter* scrutiny given existing case law.[210] This creates additional delays for the defendant and monopolizes judicial resources that could be used to adjudicate other defendants' disputes. The process of challenging mandatory minimum sentences thus externalizes the delays associated with constitutional review onto other defendants, and slows down the justice system for all.

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201 David M Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2014) 19:2 Can Crim L Rev 173 at 176.

202 For an overview of these studies, see Daniel S Nagin, "Deterrence in the Twenty-First Century" (2013) 42 Crime & Justice 199 at 231; Raji Mangat, "More Than We Can Afford: The Costs of Mandatory Minimum Sentencing" (2014), online: <bccla.org/wp-content/uploads/2014/09/Mandatory-Minimum-Sentencing.pdf>.

203 Christopher Sewrattan, "Apples, Oranges, and Steel: The Effect of Mandatory Minimum Sentences for Drug Offences on the Equality Rights of Aboriginal Peoples" (2013) 46:1 UBC L Rev 121 at 144.

204 *Ipeelee*, *supra* note 20 at para 85.

205 Sewrattan, *supra* note 203 at 132, 136–37.

206 Debra Parkes, "*Ipeelee* and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences" (2012) 33:3 For Defence 22 at 25.

207 Canada, Department of Justice, *Mandatory Minimum Penalties in Canada: Analysis and Annotated Bibliography*, by Kari Glynes Elliot & Kyle Coady (Ottawa: Department of Justice, 2016), online: <www.justice.gc.ca/eng/rp-pr/jr/mmp-pmo/mmp-pmo.pdf>.

208 *Ibid*.

209 Debra Parkes, "Punishment and Its Limits" (2019) 88 SCLR (2d) 351 at 365.

210 *Ibid*.

2. RE-ESTABLISH A SENTENCING COMMISSION AND ENACT SENTENCING GUIDELINES

Second, Parliament should establish a sentencing commission, and enact evidence-based sentencing guidelines.[211] Jurisdictions such as England, Wales, and Victoria (an Australian state) have implemented sentencing commissions (as have more punitive jurisdictions, such as the United States).[212] Sentencing commissions aim to fulfil several aims, which tend to vary across jurisdictions that implement them.[213] Principally, though, sentencing commissions strive to reduce disparities in sentencing, study evidence-based penal policies, propose sentencing guidelines that respect judicial independence, and promote public confidence in the justice system.[214] Moreover, these commissions conduct empirical studies to identify the extent to which there is parity in sentencing.[215] In the 1980s, a temporary sentencing commission existed in Canada.[216] Although it recommended that the government establish a permanent sentencing commission, the recommendation has not been implemented.[217] Later commissions and government reports also recommended that the government establish a sentencing commission.[218]

There are several advantages to sentencing commissions. First, similarly to independent law reform commissions, independent sentencing commissions can promote evidence-based sentencing policy, while insulating it from the pressures of penal populism.[219] Second, sentencing commissions can help detect sentencing disparities, and modify sentencing guidelines to correct for excessive variability in punishment.[220] Third, by consulting with a broad range of stakeholders, sentencing commissions can better incorporate the community's views within penal policy.[221] Fourth, sentencing commissions can improve transparency and expand the public's knowledge about sentencing, and increase their confidence in it.[222]

A sentencing commission should also establish sentencing guidelines that govern how judges should impose sentences on offenders in light of a variety of factors that determine

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211 Julian V Roberts & Howard H Bebbington, "Sentencing Reform in Canada: Promoting a Return to Principles and Evidenced-Based Policy" (2013) 17:3 Can Crim L Rev 327 at 345–46.

212 Julian Roberts, "Sentencing Guidelines in England and Wales: A Review of Recent Developments" (2010) 82 Crim Justice Matters 41 at 41–42.

213 Arie Freiberg & Karen Gelb, "Penal Populism, Sentencing Councils and Sentencing Policy" in Arie Freiberg & Karen Gelb, eds, *Penal Populism, Sentencing Councils and Sentencing Policy* (New York: Routledge, 2013) 1 at 8.

214 *Ibid*.

215 *Ibid*.

216 Michael Tonry, "'Nothing' Works: Sentencing 'Reform' in Canada and the United States" (2013) 55:4 Can J Corr 465 at 468.

217 *Ibid*; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Catalogue No J2-67/1986E (Ottawa: Government of Canada, 1987) at 438.

218 *Ibid*; House of Commons, *Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (August 1988) (Chair: David Daubney) at 60.

219 Karen Gelb, "Myths and Misconceptions: Public Opinion Versus Public Judgment about Sentencing" in Freiberg & Gelb, *supra* note 213, 68 at 79, 81–82.

220 Jose Pina-Sánchez, "Defining and Measuring Consistency in Sentencing" in Julian V Roberts, ed, *Exploring Sentencing Practice in England and Wales* (London: Palgrave MacMillan, 2015) 76 at 77; Hannah Maslen, "Penitence and Persistence: How Should Sentencing Factors Interact?" in Roberts, *ibid* 173 at 190.

221 Freiberg & Gelb, *supra* note 213 at 10.

222 *Ibid*.

the appropriate sentencing range.[223] Judges can depart from these guidelines where it would be contrary to the interests of justice.[224] Other jurisdictions — such as Northern Ireland, Scotland, and South Korea — have already implemented sentencing guidelines.[225] Moreover, various Canadian government reports and commissions have suggested that sentencing guidelines should be imposed.[226] Some studies indicate that sentence disparity decreased in jurisdictions that imposed sentencing guidelines.[227]

Certain scholars critique sentencing guidelines on two main grounds. First, some observe that sentencing guidelines may still result in disparity between racialized and non-racialized persons, such that the former is sentenced more harshly than the latter (to be clear, racial disparities in sentencing are prevalent even without sentencing guidelines).[228] Second, other scholars note that even if sentencing guidelines promote parity in sentencing, they may increase the mean severity of offenders' sentences.[229] These criticisms are crucial. In order to be effective and fair, sentencing guidelines must not disproportionately impact Indigenous and racialized persons, result in harsher sentences, or increase disparity between judges.

Carefully designed guidelines, though, can maximize parity, egalitarianism, and fairness in sentencing. Some jurisdictions have devised guidelines that have lowered mean severity, decreased inter-judge disparity, and reduced racial disparity in sentencing.[230] To achieve similar outcomes, Canadian sentencing guidelines can be created with these specific targets in mind, with a particular emphasis on decarcerating groups that are over-represented within the prison population.[231]

3. IMPLEMENT GRADUATING ECONOMIC SANCTIONS

The third feature of sentencing reform relates to economic sanctions. Namely, the State should replace fixed financial penalties with a system of graduating economic sanctions that

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223 Samuel Mosonyi, "Sentencing Guidelines for Canada: A Re-Evaluation" (2017) 22:3 Can Crim L Rev 275 at 276.

224 *Ibid*.

225 Julian V Roberts, "Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions" (2012) 23 Crim LF 319 at 344–45.

226 Canadian Sentencing Commission, *supra* note 217 at 329; Daubney, *supra* note 218 at 61; Government of Canada, *Directions for Reform: A Framework for Reform of Sentencing, Corrections and Conditional Release* (Ottawa: Government of Canada, 1990) at 19. These reports are all cited in Canada, Department of Justice, *A Review of the Principles and Purposes of Sentencing in Sections 718–718.21 of the Criminal Code* by Gerry Ferguson, Catalogue No J22-32/2017E-PDF (Ottawa: Department of Justice Canada, 2016) at 5, 7–8, online: <www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/RSD_2016-eng.pdf>. Note that the report is not paginated. The footnote refers to the seventh page in the document.

227 See e.g. James M Anderson, Jeffrey R Kling & Kate Stith, "Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines" (1999) 42:1 JL & Econ 271 at 303; Paul J Hofer, Kevin R Blackwell & R Barry Ruback, "The Effect of the Federal Sentencing Guidelines on Interjudge Sentencing Disparity" (1999) 90:1 J Crim L & Criminology 239 at 241, 287.

228 Cassia C Spohn, "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process" (2000) 3 Crim Justice 427 at 478–82; Ojmarrh Mitchell, "A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies" (2005) 21:4 J Quantative Criminology 439 at 462–63. Both studies cited in Brian D Johnson & Jacqueline G Lee, "Racial Disparity Under Sentencing Guidelines: A Survey of Recent Research and Emerging Perspectives" (2013) 7 Sociology Compass 503.

229 Frank O Bowman III, "The Failure of the Federal Sentencing Guidelines: A Structural Analysis" (2005) 105:4 Colum L Rev 1315 at 1328–29.

230 Griffin Edwards, Stephen Rushin & Joseph Colquitt, "The Effects of Voluntary and Presumptive Sentencing Guidelines" (2019) 98:1 Tex L Rev 1 at 6, 58–59.

231 Richard S Frase, "Can Sentencing Guidelines Commissions Help States Substantially Reduce Mass Incarceration?" (2020) 104:6 Minn L Rev 2781 at 2797.

consider a defendant's financial capacities.[232] In many cases, individuals experiencing homelessness and extreme poverty receive fines that they cannot pay.[233] These fines lead to additional fees, interests, and in some cases, suspended driver's licenses or other collateral consequences.[234]

Certain European countries employ graduating economic sanctions that avoid these problems.[235] The term "graduating economic sanctions" implies that a fine is calculated according to the defendant's daily adjusted income and the severity of the offence.[236] Jurisdictions can also impose a statutory cap on these fines (known as "day fines"), such that affluent defendants do not receive excessively expensive fines that are disproportionate to the offence's gravity.[237] Empirical research demonstrates that day fines carry many benefits for defendants and for the State. Beyond ensuring more proportionate economic sanctions, day fines tend to be less costly for governments, lead to higher collection rates, and result in higher payment rates by defendants.[238]

Ideally, graduating economic sanctions would be adopted at the federal, provincial, and municipal levels of government. Municipal and provincial governments both impose fines that can lead to high levels of criminal justice debt.[239] For instance, in the city of Montreal, some alternative justice organizations report that they assist at least one unhoused person per week who has accumulated over $10,000 of fines for violating municipal bylaws.[240] Graduating economic sanctions have the potential to curb some of the worst penal excesses that disproportionately impact economically disadvantaged persons.

C. CRIMINAL PROCEDURE REFORM

1. CODIFY POLICE POWERS WITH ADEQUATE OVERSIGHT MEASURES

The third dimension of criminal justice reform is criminal procedure reform, which should take place across the following areas. First, the State should codify police powers.[241] Within the past three decades, the Supreme Court of Canada created a litany of street-level police powers that have not been legislated into the *Criminal Code*.[242] Many individuals neither

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232 See e.g. Beth A Colgan, "Graduating Economic Sanctions According to Ability to Pay" (2017) 103 Iowa L Rev 53 at 59; Terry Skolnik, "Beyond *Boudreault*: Challenging Choice, Culpability, and Punishment" (2019) 50 Crim R (7th) 283 at 292–93.

233 Chesnay, Bellot & Sylvestre, *supra* note 72 at 175–76.

234 *Ibid* at 178–79; Terry Skolnik, "The Punitive Impact of Physical Distancing Laws on Homeless People" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy, and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 289 at 291.

235 Elena Kantorowicz-Reznichenko, "Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend" (2018) 55:2 Am Crim L Rev 333 at 338–43.

236 Elena Kantorowicz-Reznichenko, "Day-Fines: Should the Rich Pay More?" (2015) 11:3 Rev L & Economics 481 at 482.

237 Beth A Colgan, "Graduating Economic Sanctions According to Ability to Pay" (2017) 103 Iowa L Rev 53 at 96–101.

238 *Ibid* at 67–73.

239 Bellot & Sylvestre, *supra* note 71 at 40.

240 CBC News, "Homeless Man's $110K in Fines Sign of 'Systemic' Issue with Police, Advocate Says," *CBC News* (2 March 2016), online: <www.cbc.ca/news/canada/montreal/montreal-homeless-man-100k-fines-1.3473707>.

241 Skolnik, "Racial Profiling," *supra* note 14 at 459.

242 Richard Jochelson, "Ancillary Issues with Oakes: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory" (2012) 43:3 Ottawa L Rev 355 at 360–66.

understand the scope of police powers, nor know where to find this information. Codification provides individuals — and police officers — with clearer guidelines about the scope of police power.[243]

Second, the State should impose adequate transparency and oversight mechanisms that govern policing.[244] Currently, the law does not require police officers to collect data about how they exercise their powers.[245] Since no such data is gathered, there is no requirement that government publish it. In the case of vehicle stops, investigative detentions, and frisk searches, officers are neither required to document that they exercised these powers, nor obliged to provide a receipt or other document to individuals who were subject to them.[246] The law does not require police forces to implement early intervention systems, which are used to proactively detect which officers are likely to use excessive force, drive dangerously, or be subject to ethics complaints.[247] Yet many other jurisdictions have these types of oversight mechanisms in place to both prevent and address police misconduct.[248] Furthermore, police abuses notoriously breed distrust of the police, and disincentivize individuals from cooperating with law enforcement.[249] When individuals distrust the police, they are more reluctant to report criminal activity, and crimes go unsolved.[250]

These considerations militate towards the codification of criminal procedure in a manner that incorporates rigorous police oversight and accountability mechanisms. More specifically, Parliament should require police officers to document the exercise of routine police powers, such as vehicle stops, frisk searches, and investigative detentions.[251] Like in other jurisdictions, police forces ought to be obliged to gather and publish data regarding the ethnicity of individuals who are subject to the exercise of these powers.[252] Officers should also be mandated to provide receipts to individuals that detail the officer's name and badge number, the date and time of the intervention, and its justification.[253] Furthermore, Parliament should require police forces to incorporate early intervention systems that are designed to detect, prevent, and remedy police conduct.[254]

Even if Parliament did codify criminal procedure, some police powers can be exercised so arbitrarily that they require significant reform.[255] In *Ladouceur*, the Supreme Court of

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243 Don Stuart, "Time to Recodify Criminal Law and Rise above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28:1 Man LJ 89 at 110.

244 Skolnik, "Racial Profiling," *supra* note 14 at 459–60.

245 Owusu-Bempah & Wortley, *supra* note 2 at 281–82.

246 Skolnik, "Racial Profiling," *supra* note 14 at 451.

247 *Ibid*. See e.g. Mary D Fan, *Camera Power: Proof, Policing, Privacy, and Audiovisual Big Data* (Cambridge: Cambridge University Press, 2019) at 123–25; Christi L Gullion, Erin A Orrick & Stephen A Bishopp, "Who Is At-Risk? An Examination of the Likelihood and Time Variation in the Predictors of Repeated Police Misconduct" (2021) 24:4 Police Q 519 at 521–22, 537–38.

248 Stephen James, Lois James & Liz Dotson, "Evaluating the Effectiveness of a Police Department's Early Intervention System" (2021) 17 J Experimental Criminology 457.

249 Tom R Tyler, Jonathan Jackson & Avital Mentovich, "The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact" (2015) 12:4 J Empirical Leg Stud 602 at 629–30.

250 Tom R Tyler, "From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century" (2017) 111:6 Nw UL Rev 1537 at 1543.

251 Skolnik, "Racial Profiling," *supra* note 14 at 459.

252 *Ibid*.

253 *Ibid*.

254 *Ibid*.

255 David M Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alta L Rev 905 at 928–99 [Tanovich, "E-Racing"].

Canada authorized police officers to conduct random traffic stops.[256] As the Supreme Court noted, officers can stop vehicles at random for one of three reasons: to verify that the driver's license is valid, to assess their sobriety, or to evaluate the vehicle's mechanical fitness.[257] They can exercise this power without meeting the threshold of reasonable suspicion or reasonable and probable grounds. Although the dissenting opinion in *Ladouceur* warned that random traffic stops would be exercised disproportionately against marginalized individuals and groups, the majority of the Supreme Court dismissed that concern as unfounded.[258] In the majority's view, other adequate safeguards will prevent abuse, such as the need to provide a valid reason for the stop, the limited scope of questioning, and the possibility to exclude evidence under section 24(2) of the *Charter*.[259]

The majority's decision in *Ladouceur* is problematic in various respects. Racialized persons continue to be disproportionately pulled over by the police.[260] The majority's position also ignores that traffic stops are low-visibility encounters, such that courts rarely assess their lawfulness.[261] Furthermore, even when traffic stops are assessed by courts, racial profiling is notoriously difficult to prove.[262] Many individuals do not believe officers' justifications for a traffic stop, and instead interpret the stop as abusive and discriminatory.[263] Lastly, the exclusionary rule provides no recourse when an abusive traffic stop reveals no inculpatory evidence.[264] In light of these considerations, either the Supreme Court of Canada should overrule *Ladouceur*, or Parliament should abolish the random vehicle stop power entirely.[265]

What if Parliament fails to codify criminal procedure, provide adequate police oversight mechanisms, or modify certain police powers? One option is that the Supreme Court of Canada can abandon the ancillary police powers doctrine, while sending a clear signal to Parliament that existing common law powers are constitutionally suspect insofar as they lack more rigorous transparency and oversight measures.[266] This approach would be justified on the ancillary powers doctrine's inconsistency with the separation of powers and the rule of law.[267] It would also be justified because of the Supreme Court of Canada's failure to

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256 *Ladouceur*, *supra* note 111.
257 *Ibid* at 1280.
258 *Ibid* at 1287.
259 *Ibid*.
260 Lorne Foster, Les Jacobs & Bobby Siu, "Race Data and Traffic Stops in Ottawa, 2013–2015: A Report on Ottawa and the Police Districts" (October 2016) at 3–5, 17–19; Wortley, *supra* note 40 at 34, 132, 134; OHRC, *A Disparate Impact*, *supra* note 39 at 6–7.
261 James Stribopoulos, "Packer's Blind Spot: Low Visibility Encounters and the Limits of Due Process versus Crime Control" in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) 193 at 209–12.
262 See e.g. Tanovich, "E-Racing," *supra* note 255 at 928–29; Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41:1 Osgoode Hall LJ 1 at 17–18; Tim Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41:4 Alta L Rev 935 at 946–47.
263 Wortley, *supra* note 40 at 41 (noting that roughly 70 percent of Black survey participants in Halifax who were pulled over by the police did not believe the officer's justification for the traffic stop).
264 Josh Bowers, "Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a 'Pointless Indignity'" (2014) 66:5 Stan L Rev 987 at 1009.
265 Tanovich, "E-Racing," *supra* note 255 at 928–29.
266 Skolnik, "Racial Profiling," *supra* note 14 at 459–60.
267 *Ibid*.

consider the realities of racial profiling and systemic discrimination when creating new police powers.[268]

2. ALLEVIATE PRETRIAL DETENTION AND PRETRIAL COERCION

Criminal justice reform must also address the bail system. Two major realities pervade the bail system: high pretrial detention rates, and the pervasiveness of bail conditions.[269] Several law reform initiatives can address these two realities. First, non-violent bail breaches should generally be treated as administrative sanctions as opposed to criminal offences.[270] Many non-violent breaches tend to involve conduct that would be lawful if it was not prohibited by a bail condition, such as substance use, entering a perimeter, and staying outside past a certain hour.[271] By indirectly criminalizing such otherwise lawful conduct, the State further criminalizes substance use, poverty, and homelessness.[272] These considerations militate in favour of decriminalizing non-violent bail breaches that contribute to over-incarceration.[273]

Second, Parliament should repeal the "tertiary ground" for pretrial detention. The tertiary ground justifies pretrial detention according to the need to maintain the public's confidence in the administration of justice.[274] Remand in custody should only be justifiable in two situations: preventing the accused from absconding before trial, and ensuring the safety of victims, witnesses, and the general public.[275] Currently, the tertiary ground is assessed according to various factors set out in the *Criminal Code*: the apparent strength of the prosecution's case, the crime's gravity, the circumstances surrounding its commission, and the defendant's liability to a long prison sentence.[276] Yet factors such as the strength of the prosecution's case — especially when analyzed in conjunction with the crime's seriousness and the defendant's potential punishment — are primarily concerned with the normative issue of guilt.[277] The presumption of innocence, however, militates strongly against a pretrial evaluation of the defendant's factual guilt and their potential punishment.[278] Furthermore, there is a strong precedent for repealing the tertiary ground for pretrial detention. Between the years 1992–1997, there was no tertiary ground for pretrial detention because the previous provision was struck down as unconstitutional in *R. v. Morales*.[279]

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268 *Ibid*.

269 Myers, *supra* note 10 at 666–67.

270 Darcie Bennett & DJ Larkin, "Project Inclusion: Confronting Anti-Homeless & Anti-Substance User Stigma in British Columbia" (2019) at 102, recommendation 1(f), online: <www.homelesshub.ca/resource/project-inclusion-confronting-anti-homeless-and-anti-substance-user-stigma-british-columbia>. Note that the Report suggests that all non-violent bail breaches should be decriminalized. See also Brittany Stout, "The Myth of Presuming Innocence: An Examination of Bail Conditions in Canada" (2020) 5:1 Society 29 at 34.

271 Bennett & Larkin, *ibid* at 75.

272 *Ibid*.

273 *Ibid*.

274 Canada, Department of Justice, *'Broken Bail' in Canada: How We Might Go About Fixing It*, by Cheryl Marie Webster (Ottawa: Department of Justice, 2015) at 13–14. Webster argues that only two grounds ought to justify pretrial detention. For the tertiary ground more generally, see *Criminal Code*, *supra* note 18, s 515(10)(c).

275 See e.g. Shima Baradaran, "Restoring the Presumption of Innocence" (2011) 72:4 Ohio St LJ 723 at 768.

276 *Ibid*.

277 *Ibid* at 770.

278 Hamish Stewart, "The Right to Be Presumed Innocent" (2014) 8 Crim L & Philosophy 407 at 417.

279 [1992] 3 SCR 711; Kent Roach, "A Charter Reality Check: How Relevant Is the Charter to the Justness of Our Criminal Justice System?" (2008) 40 SCLR (2d) 717 at 725;

Third, in contexts where the Crown requests that the defendant be detained pending trial, the Crown should be required to demonstrate why electronic monitoring is not an acceptable alternative.[280] Given the COVID-19 pandemic and its impact on detainees, courts have shifted towards electronic monitoring as an alternative to remand in custody.[281] This shift illustrates that it is possible to decrease reliance on pretrial detention in a manner that addresses flight and public safety risks adequately. Given its intrusive nature and the threat that courts will expand its use unnecessarily, electronic monitoring should only be used as a substitute for remand in custody, and only apply in the clearest of cases.[282]

Lastly, bail reform should favour supportive approaches to pretrial release.[283] The justice system generally employs coercion to ensure that defendants attend court and respect their bail conditions.[284] Police officers may undertake compliance checks, arrest defendants who breach their conditions, and lay criminal charges accordingly.[285] More supportive mechanisms, however, can reduce the likelihood of bail breaches and improve outcomes. For instance, empirical evidence shows that email and text message reminders can improve court attendance rates amongst defendants.[286] Some US cities also provide free transportation to defendants in order to increase court attendance.[287] These mechanisms illustrate how the criminal justice system can reduce bail breaches and pretrial detention through more compassionate means.

3. ENHANCE TRANSPARENCY, ACCOUNTABILITY, AND FAIRNESS IN PLEA BARGAINING

Criminal justice reform should also aim to enhance transparency, accountability, and fairness in plea bargaining.[288] As Palma Paciocco notes, plea bargains should produce just outcomes that meet certain substantive requirements.[289] First, the plea deal should accurately reflect the defendant's factual guilt based on admissible evidence.[290] Second, defendants should not accept plea bargains for offences that are intrinsically unjust or discriminatory.[291] Third, there should be a proper fit between the circumstances of the case and the offence that is charged.[292] Furthermore, plea bargaining should include procedural safeguards that

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280 Sandra G Mayson, "Dangerous Defendants" (2018) 127:3 Yale LJ 490 at 563; Samuel R Wiseman, "Pretrial Detention and the Right to Be Monitored" (2014) 123:5 Yale LJ 1344.

281 Lisa Mathews, "Bail in the Time of COVID" [2020] CanLII Docs 564 at 3.1.1; James Byrne et al, "An Imperfect Storm: Identifying the Root Causes of COVID-19 Outbreaks in the World's Largest Corrections Systems" (2020) 15:7/8 Victims & Offenders 862 at 890.

282 Megan Stevenson & Sandra Mayson, "Pretrial Detention and Bail" in Eric Luna, ed, *Reforming Criminal Justice* (Phoenix: Academy for Justice, 2017) 21 at 46.

283 John Logan Koepke & David G Robinson, "Danger Ahead: Risk Assessment and the Future of Bail Reform" (2018) 93:4 Wash L Rev 1725 at 1793.

284 Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention" (2014) at 1–2, online: <ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf>.

285 *Ibid*.

286 See an overview of these studies in: Wendy R Calaway & Jennifer M Kinsley, "Rethinking Bail Reform" (2018) 52:4 U Rich L Rev 795 at 807–808.

287 Evelyn F McCoy et al, "Removing Barriers to Pretrial Appearance: Lessons Learned from Tulsa County, Oklahoma, and Hennepin County, Minnesota" (2021) at 2, online: <www.urban.org/sites/default/files/publication/104177/removing-barriers-to-pretrial-appearance_0.pdf>.

288 Marie Manikis & Peter Grbac, "Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process" 40:3 Man LJ 85 at 99–109.

289 Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining" (2017) 63:1 McGill LJ 45 at 58–59.

290 *Ibid*.

291 *Ibid*.

292 *Ibid*.

mitigate defendants' loss aversion and that prevent undue pressure to plead guilty.[293] According to this model, criminal justice reform should incentivize prosecutors to avoid charge stacking, screen out weak cases optimally, and bargain more equitably.[294]

Two mechanisms can advance these aims. First, as Chloé Leclerc and Elsa Euvrard note, the criminal justice system could decrease undue pressure on defendants by adopting a fixed plea-bargaining discount schedule — a scheme that exists in other jurisdictions.[295] According to this scheme, defendants would receive some fixed discount percentage for pleading guilty at the initial arraignment, and that fixed percentage would incrementally decrease at each later point in the criminal justice process (for example, after the bail hearing, at the judicial pretrial hearing, at the preliminary inquiry, and at trial).[296] Furthermore, prosecutors could be mandated to inform defendants of the applicable sentencing discount at each stage of proceedings. This approach would mitigate prosecutors' abilities to pressure defendants to plead guilty by leveraging their loss aversion and uncertainty.[297]

Second, Parliament can impose specific safeguards to prevent charge-stacking — requirements that would be further constrained by appropriate prosecutorial guidelines. Prosecutors could be prohibited from pursuing stacked charges that involve a more serious crime and a lesser and included offence that stems from the same transaction (compounded charges for trafficking narcotics and possession of narcotics is an example).[298] As discussed more below, the State could also reduce coercive plea-bargaining practices by implementing a pre-charge screening mechanism in all provinces.

D. INSTITUTIONAL REFORM

1. POLICE REFORM

The fourth dimension of criminal justice reform is institutional reform. Even if Parliament modifies various aspects of the criminal law, police reform is still necessary. Although the Supreme Court of Canada has expanded police powers significantly in the past several decades, Parliament has done little to constrain them. Furthermore, officers are routinely dispatched to situations that exceed the scope of law enforcement duties, and that fall outside of their institutional competence and expertise.[299] For example, officers frequently respond to calls related to mental illness, such as mental wellness checks and mental health crises.[300] Police officers have a disproportionate number of interactions with people experiencing

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293 *Ibid*.

294 Ronald Wright & Marc Miller, "The Screening/Bargaining Tradeoff" (2002) 55:1 Stan L Rev 29 at 35.

295 Chloé Leclerc & Elsa Euvrard, "Pleading Guilty: A Voluntary or Coerced Decision?" (2019) 34:3 CJLS 457 at 476. For instance, a similar scheme exists in England and Wales. See also Jens David Ohlin, *Adjudicative Criminal Procedure: Doctrine, Application, and Practice* (New York: Wolters Kluwer, 2020) at 286.

296 Leclerc & Euvrard, *ibid* at 476; Russell D Covey, "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings" (2008) 82:4 Tul L Rev 1237 at 1268–80.

297 Covey, *ibid* at 1281–84.

298 Andrew Manuel Crespo, "The Hidden Law of Plea Bargaining" (2018) 118:5 Colum L Rev 1303 at 1370–71.

299 Krystle Shore & Jennifer AA Lavoie, "Exploring Mental Health-Related Calls for Police Service: A Canadian Study of Police Officers as 'Frontline Mental Health Workers'" (2018) 13:2 Policing 157 at 157, 159.

300 Terry G Coleman & Dorothy Cotton, "A Strategic Approach to Police Interactions with People with a Mental Illness" (2016) 1:2 J Community Safety & Well-Being 7 at 7–8.

homelessness.[301] Police are often called to deal with intoxicated persons and substance use issues.[302] Various unarmed front-line workers — such as paramedics, psychologists, and social workers — have greater expertise in dealing with these precise types of issues.

Together, the growth of proactive police encounters and the expansion of law enforcement's role result in various negative consequences. Police interventions carry the risk that officers will use force if individuals are non-compliant.[303] Many use-of-force incidents stem from proactive policing interventions, or calls related to a mental health crisis.[304] Even non-physical encounters generate serious concerns. Negative police encounters can produce lasting adverse effects on individuals' physical and mental health, human dignity, and faith in public institutions.[305]

For these reasons, reform efforts should aim to reduce police *power* and decrease police *jurisdiction.* In terms of limiting police *power*, previous sections illustrated how criminal procedure reform can impose greater transparency and accountability measures, and abolish certain police powers that can be exercised arbitrarily, such as the random traffic stop power. Institutional reforms should also aim to narrow police *jurisdiction.*[306] Various types of routine calls should be dispatched away from the police and towards other types of first responders that enjoy greater expertise and institutional competence, and are less likely to lead to use-of-force escalations.[307] In higher-risk situations, the State could dispatch specialized teams that are comprised of crisis intervention workers and police officers.[308]

2. PROSECUTORIAL REFORM

Since the vast majority of criminal accusations are resolved by prosecutors informally, institutional reform should also take place within prosecution services. Various reform initiatives can ensure greater transparency, accountability, and fairness in prosecutorial decisions, all the while respecting prosecutors' constitutionally protected independence.[309]

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301 Fiona G Kouyoumdjian et al, "Interactions between Police and Persons Who Experience Homelessness and Mental Illness in Toronto, Canada: Findings from a Prospective Study" (2019) 64:10 Can J Psychiatry 718 at 721–23.

302 Robin Orr et al, "Investigating the Routine Dispatch Tasks Performed by Police Officers" (2020) 6:4 Safety 54 at 58.

303 Aziz Z Huq, "The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing" (2017) 101:6 Minn L Rev 2397 at 2431-32.

304 Laura J McTackett & Stuart DM Thomas, "Police Perceptions of Irrational Unstable Behaviours and Use of Force" (2017) 32 J Police & Crim Psychology 163 at 164.

305 Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario* (Toronto: Ontario Human Rights Commission, April 2017) at 40, online: <www.ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario>.

306 Monica C Bell, "Police Reform and the Dismantling of Legal Estrangement" (2017) 126:7 Yale LJ 2054 at 2147–49 [Bell, "Police Reform"].

307 Monica C Bell, "Anti-Segregation Policing" (2020) 95:3 NYUL Rev 650 at 755.

308 Jacek Koziarski, Christopher O'Connor & Tyler Frederick, "Policing Mental Health: The Composition and Perceived Challenges of Co-Response Teams and Crisis Intervention Teams in the Canadian Context" (2021) 22:1 Police Practice & Research 977 at 978–81.

309 *R v Cawthorne*, 2016 SCC 32 at paras 23–34.

First, prosecutorial guidelines could impose a uniform and more demanding standard that applies to decisions to prosecute: substantial likelihood of conviction.[310] For federal prosecutions and prosecutions in most provinces, prosecutorial guidelines currently impose a lower standard of "reasonable prospect of conviction" to proceed with charges.[311] As these prosecution manuals make clear, the "reasonable prospect of conviction" standard is more demanding than prima facie evidence, yet does not require a probability of conviction.[312] Other provinces, such as British Columbia, impose a more demanding threshold: the substantial probability of conviction.[313] This higher standard discourages prosecutors from prosecuting weak cases.

Second and interrelatedly, all prosecution services should implement pre-charge screening models that require prosecutors to pre-approve criminal charges.[314] Several provinces such as Quebec, British Columbia, and New Brunswick use this model.[315] Other provinces, such as Alberta, have developed pilot projects that involve pre-charge screening.[316] Empirical evidence shows that in jurisdictions that require prosecutors to screen charges, conviction rates are higher, and a lower proportion of charges are stayed or withdrawn.[317] Combining pre-charge screening with the substantial likelihood of conviction standard could reduce over-charging practices.

Prosecutorial guidelines should also align with evidence-based practices that divert social problems away from the criminal justice system, reduce recidivism rates, and favour decarceration.[318] Prosecution services should prioritize problem-oriented approaches to offending that collaborate with various actors, such as social workers, medical professionals, community workers, and probation officers.[319]

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310 Eric S Fish, "Prosecutorial Constitutionalism" (2017) 90:2 S Cal L Rev 237 at 284; Mark Phillips, "The Public Interest Criterion in Prosecutorial Discretion: A Lingering Source of Flexibility in the Canadian Criminal Process?" (2015) 36 Windsor Rev Legal Soc Issues 43 at 43–44. Phillips discusses the applicable standards for decisions to prosecute in various provinces, which are used within this subsection's analysis.

311 Public Prosecution Service of Canada, *Guideline of the Director Issued under Section 3(3)(C) of* The Director of Public Prosecutions Act (Ottawa: Government of Canada, 2019) at 3.1, online: <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch03.html>; Ontario, Ministry of the Attorney General, *Crown Prosecution Manual* (Toronto: Government of Ontario, 2020) at D.3, online: <www.ontario.ca/document/crown-prosecution-manual/?_ga=2.264935119.1733827426.1638831368-894229249.1638831368>.

312 *Ibid*.

313 British Columbia Prosecution Service, *Crown Counsel Policy Manual,* CHA-1: Charge Assessment Guidelines (Vancouver: Government of British Columbia, 2021) at 2–3, online: <www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual>.

314 Department of Justice, *What We Heard*, *supra* note 156 at 11.

315 Jennie Russell, "Alberta Government Expands Criminal Charge Pre-Screening Pilot Project," *CBC News* (2 September 2020), online: <www.cbc.ca/news/canada/edmonton/alberta-government-expands-criminal-charge-pre-screening-pilot-project-1.5708710>.

316 *Ibid*.

317 *Ibid*; Statistics Canada, *Adult Criminal Court*, *supra* note 149 at 5-6; Tilley, *supra* note 149 at 15–16.

318 Kay L Levine, "The New Prosecution" (2005) 40:4 Wake Forest L Rev 1125 at 1127; Brennan Center for Justice, "21 Principles for the 21st Century Prosecutor" (2018) at 4–12 , online: <fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf>.

319 Allegra M McLeod, "Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law" (2012) 100:5 Geo LJ 1587 at 1652–53.

3. CORRECTIONAL REFORM

Third, criminal justice reform should target correctional services. Like the criminal justice system itself, correctional services should centre around reintegration and rehabilitation.[320] Several measures can help achieve this aim. First, correctional institutions should prioritize psychological care for offenders. Though roughly half of Ontario's correctional institutions lack access to a psychologist, systematic review studies show that cognitive behavioural therapy (CBT) is effective in reducing recidivism rates, including amongst high-risk offenders.[321] In order to decrease barriers to treatment and foster inclusivity, correctional services must also ensure that culturally appropriate services are widely available.[322]

Second, using a harm-reduction approach, correctional services should devote greater resources to treat inmates with substance use disorder. Therapeutic communities offer a promising treatment option. The term "therapeutic community" implies a correctional model where incarcerated offenders with substance use issues are housed in a separate unit that focuses on treatment and rehabilitation.[323] Offenders run essential parts of the program.[324] They organize and take part in treatment sessions, resolve disputes between participants, and promote compliance with rules.[325] Research shows that therapeutic communities can foster offenders' psychological wellbeing, improve safety, decrease self-harm rates, and reduce offender misconduct in prison.[326] Meta-analysis studies show that therapeutic communities are amongst the most successful forms of treatment for inmates with substance use disorder.[327] Beyond therapeutic communities, correctional services should also provide adequate opioid substitution therapy (OST) that diminishes the likelihood of drug overdoses.[328] Despite their importance, many prisons do not offer OST programs.[329] Some correctional facilities do offer such programs, yet impose significant barriers and waiting times.[330] Studies demonstrate that when OST is provided during incarceration and upon release from prison, the likelihood of overdose declines.[331]

Third, correctional services must promote greater vocational and educational programs for inmates. The majority of federal inmates' education levels are below grade 10.[332]

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320 *Ibid*.

321 Mark W Lipsey, Nana A Landenberger & Sandra J Wilson, "Effects of Cognitive-Behavioral Programs for Criminal Offenders" [2007] 6 Campbell Systematic Reviews 1 at 21–22. The estimated decrease in recidivism rates was between 25–50 percent; Patrick Clark, "Preventing Future Crime with Cognitive Behavioral Therapy" (2010) 265 Nat'l Inst Just J 22 at 23.

322 Elke Perdacher, David Kavanagh & Jeanie Sheffield, "Well-Being and Mental Health Interventions for Indigenous People in Prison: Systematic Review" (2019) 5:6 British J Psychiatry Open E95 at 6.

323 Ojmarrh Mitchell, David B Wilson & Doris L MacKenzie, "Does Incarceration-Based Drug Treatment Reduce Recidivism? A Meta-Analytic Synthesis of the Research" (2007) 3:4 J Experimental Criminology 353 at 355.

324 *Ibid*.

325 *Ibid*.

326 Jamie Bennett & Richard Shuker, "The Potential of Prison-Based Democratic Therapeutic Communities" (2017) 13:1 Intl J Prisoner Health 19 at 21–22.

327 Mitchell, Wilson & MacKenzie, *supra* note 323 at 369–70.

328 Traci Green et al, "Postincarceration Fatal Overdoses After Implementing Medications for Addiction Treatment in a Statewide Correctional System" (2018) 75:4 JAMA Psychiatry 405 at 406, cited in Bodkin, Bonn & Wildeman, *supra* note 98.

329 Sandra M Bucerius & Kevin D Haggerty, "Fentanyl Behind Bars: The Implications of Synthetic Opiates for Prisoners and Correctional Officers" (2019) 71 Intl J Drug Policy 133 at 137.

330 Bodkin, Bonn & Wildeman, *supra* note 98.

331 Green et al, *supra* note 328 at 406.

332 Office of the Correctional Officer, *supra* note 88 at 68.

Furthermore, over 60 percent of federal inmates were unemployed at the time they were arrested.[333] Many federal prisons lack proper educational programs, distance-learning opportunities, and infrastructure (some computers in federal penitentiaries still use floppy disks, while others date back to the early 2000s).[334] Yet many studies demonstrate that vocational and educational programs improve inmates' employment prospects and reduce recidivism rates.[335] Indeed, these types of opportunities are deeply connected to rehabilitation and reintegration within the community.

Fourth, correctional reform must ensure proper discharge planning for offenders. Without proper discharge planning, many individuals lack access to employment, housing, and continued support for mental health or substance use — all of which increase their likelihood of reoffending.[336] Correctional services should help ensure that individuals have access to housing and employment prior to release.[337]

4. JUDICIAL REFORM

Lastly, institutional reform should encompass the judiciary and the organization of courts. Several reform initiatives can help address some of the criminal justice system's persisting problems. First and foremost, Parliament should expand the role of Indigenous courts within Canada's criminal justice system.[338] Indigenous courts can offer more culturally appropriate processes and sanctions, better representation of Indigenous persons in the criminal justice process, greater community control, and more communal participation in the criminal justice process.[339] Given their therapeutic and restorative nature, these specialized courts can help address the over-incarceration of Indigenous persons.[340] By establishing such courts, the State would also honour the Truth and Reconciliation Commission's recommendations to establish Indigenous justice systems,[341] as well as the *United Nations Declaration on the Rights of Indigenous Peoples*.[342]

Indigenous courts are already in place in various Canadian jurisdictions. For instance, Saskatchewan has implemented Cree courts — a circuit court that travels to different areas

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333 *Ibid*.

334 *Ibid* at 67.

335 Grant Duwe & Valerie Clark, "The Effects of Prison-Based Educational Programming on Recidivism and Employment" (2014) 94:4 Prison J 454 at 474–75; Robert Bozick et al, "Does Providing Inmates with Education Improve Postrelease Outcomes? A Meta-Analysis of Correctional Education Programs in the United States" (2018) 14 J Experimental Criminology 389 at 407–408.

336 James B Luther et al, "An Exploration of Community Reentry Needs and Services for Prisoners: A Focus on Care to Limit Return to High-Risk Behavior" (2011) 25:8 AIDS Patient Care & STDs 475 at 476, 479–80.

337 Valerie Schneider, "The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact" (2018) 93:2 Ind LJ 421 at 432.

338 Shelly Johnson, "Developing First Nations Courts in Canada: Elders as Foundational to Indigenous Therapeutic Jurisprudence" (2014) 3:2 J Indigenous Soc Development 1 at 11.

339 Gabe Boothroyd, "Urban Indigenous Courts: Possibilities for Increasing Community Control Over Justice" (2019) 56:3 Alta L Rev 903 at 920 (community control), 921 (representation), and 925 (culturally appropriate processes).

340 Valmaine Toki, "Indigenous Courts" in Edna Erez & Peter Ibarra, eds, *Oxford Encyclopedia of International Criminology* (Oxford: Oxford University Press, 2020) at 2.

341 Truth and Reconciliation Commission, *Calls to Action* (Winnipeg: TRC Canada, 2012) at 4, online: <www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf>,

342 GA Res 61/295, UNGAOR, 61st Sess, Sup No 53, UN Doc A/61/295 (2007) 1, arts 11, 40.

of the province.[343] The presiding judge, clerks, court employees, and legal-aid counsel are all members of the Cree community.[344] The Court incorporates traditional Cree principles into the sentencing process, and accords significant importance to the defendant and the community's particular needs.[345] Other jurisdictions — including Akwesasne, Kahnawake, and the province of British Columbia — have also created Indigenous courts.[346] Elders also play a vital role in the proceedings. In British Columbia First Nation Courts, elders advise the court regarding sentencing, and offer support to the defendant.[347] In order to maximize cultural appropriateness, restorative justice, and autonomy, the State should ensure that Indigenous communities control the implementation and development of these courts, and that Indigenous communities provide ongoing oversight over them.[348]

Second, in conjunction with the Law Reform Commission of Canada's guidance, Parliament should also examine the feasibility of implementing other specialized courts (or problem-solving courts). Specialized courts aim to provide a more individualized and holistic approach to offenders, mitigate the justice system's harshness, foster collaboration between different communal agencies, and improve outcomes for defendants, victims, and the community.[349] Certain jurisdictions already have various specialized courts in place, such as mental health courts, drug treatment courts, domestic violence courts, and more.[350]

There are various benefits associated with problem-solving courts. Some empirical studies demonstrate that certain problem-solving courts — such as drug treatment courts and domestic violence courts — may lower recidivism rates.[351] Domestic violence courts may also increase victim and offender satisfaction with the criminal justice process.[352] Other studies indicate that the general public favours certain types of problem-solving courts.[353] More recently, commissions of inquiry have called for the implementation of specialized domestic violence courts.[354]

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343 Elena Marchetti & Riley Downie, "Indigenous People and Sentencing Courts in Australia, New Zealand, and Canada" in Bucerius & Tonry, *supra* note 2, 374 at 376–78.

344 *Ibid*; Courts of Saskatchewan, "Cree Court," online: <sasklawcourts.ca/index.php/home/provincial-court/cree-court-pc>.

345 Marchetti & Downie, *ibid*.

346 *Ibid*; Angelique EagleWoman, "Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations" (2019) 56:3 Alta L Rev 669 at 700–704; Yvon Dandurand & Annette Vogt, "Documenting the Experience and the Successes of First Nations Courts in British Columbia" (2017) at 1–10, online: *International Centre for Criminal Law Reform and Criminal Justice Policy* <icclr.org/wp-content/uploads/2019/06/Documenting-the-Experience-of-First-Nations-Courts_25_06_2017.pdf?x12984>.

347 *Ibid* at 2–3.

348 Boothroyd, *supra* note 339 at 920–22.

349 Jane Donoghue, *Transforming Criminal Justice? Problem-Solving and Court Specialisation* (New York: Routledge, 2014) at 14–16.

350 Emily Slinger & Ronald Roesch. "Problem-Solving Courts in Canada: A Review and A Call for Empirically-Based Evaluation Methods" (2010) 33:4 Intl J L & Psychiatry 258 at 258.

351 Matthew W Logan & Nathan W Link, "Taking Stock of Drug Courts: Do They Work?" (2019) 14:3 Victims & Offenders 283 at 289–90; Leticia Gutierrez, Julie Blais, & Guy Bourgon, "Do Domestic Violence Courts Work? A Meta-Analytic Review Examining Treatment and Study Quality" (2016) 17:2 Justice Research & Policy 75 at 90.

352 For an overview of these studies, see Jorge Quintas & Pedro Sousa, "Does a Coordinated Program Between the Police and Prosecution Services Matter? The Impacts on Satisfaction and Safety of Domestic Violence Victims" (2021) 32:4 Crim Justice Policy Rev 331 at 335.

353 Angela J Thielo et al, "Prisons or Problem-Solving: Does the Public Support Specialty Courts?" (2019) 14:3 Victims & Offenders 267 at 275–76.

354 Elizabeth Corte & Julie Desrosiers, "Rebâtir la confiance: rapport du Comité d'experts sur l'accompagnement des victimes d'agressions sexuelles et de violence conjugale" (Quebec, 2020) at 25–27, recommendations at 156–72.

Problem-solving courts, however, also generate important concerns. Some scholars suggest that specialized courts may subject defendants to greater degrees of surveillance and intervention compared to traditional courts.[355] Others posit that the collaborative nature of problem-solving courts may limit some of the defendant's procedural due process rights, or coerce defendants under the guise of providing treatment.[356] They worry that the judiciary's more active role within these courts may imperil judicial independence and impartiality.[357] They note that the collaborative model may push defence counsel to exert additional pressure on defendants to accept a problem-solving procedure, rather than staunchly defending their interests at trial.[358] Others still question the efficacy of problem-solving courts and whether these courts reduce recidivism better than traditional courts.[359]

These concerns highlight the need to examine the best practices associated with specialized courts. There is a significant distinction between different types of specialized courts, such as drug treatment courts versus mental health courts.[360] There are also major differences between how certain specialized courts — such as homelessness courts — operate across jurisdictions.[361] When it comes to problem-solving courts, the details matter.

In order to examine the feasibility of expanding the use of various specialized courts within Canada, an independent law reform commission should judiciously examine the roles, empirical data, and best practices associated with these courts. Indeed, carefully designed problem-solving courts hold the potential to improve criminal justice outcomes, while treating individuals with greater dignity and respect.

V. CONCLUSION

This article set out a transformative agenda for criminal justice reform. It explained why Parliament must overhaul the Canadian criminal justice system entirely in order to address its underlying problems. It showed why criminal justice reform must take place across four interrelated dimensions: substantive criminal law reform, sentencing reform, criminal procedure reform, and institutional reform. It concluded with a set of concrete proposals within each of these dimensions.

As discussed in this article's introduction, criminal justice reform cannot address the personal and structural reasons why many individuals pass through the justice system, such as poverty, homelessness, substance use, mental health challenges, trauma, and colonialism. However, a transformative and evidence-based approach to criminal justice reform can play a vital role in reducing over-policing, over-criminalization, and the over-incarceration of

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355 Kelly Hannah-Moffat & Paula Maurutto, "Shifting and Targeted Forms of Penal Governance: Bail, Punishment and Specialized Courts" (2012) 16:2 Theoretical Criminology 201 at 214.

356 David DeMatteo, et al, *Problem Solving Courts and the Criminal Justice System* (Oxford: Oxford University Press, 2019) at 175–77; Tamar M Meekins, "Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender" (2007) 12:1 Berkeley J Crim L 75 at 88–89.

357 Eric Lane, "Due Process and Problem-Solving Courts" (2003) 30:3 Fordham Urb LJ 955 at 974–75.

358 *Ibid* at 965.

359 Mae C Quinn, "The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform" (2009) 31:1 Wash UJL & Pol'y 57 at 63.

360 Pamela M Casey & David B Rottman, "Problem-Solving Courts: Models and Trends" (2005) 26:1 Justice System J 35 at 35.

361 *Ibid*.

racialized and Indigenous persons. Moreover, this article's concrete proposals hold the potential to treat defendants with greater dignity, increase the prospect of rehabilitation, and decrease the likelihood of recidivism.

To be clear, this article's list of proposals is non-exhaustive. Furthermore, this article neither claims to cover *all* possible areas of criminal justice reform, nor explore all possible reform initiatives. As explained in this article's introduction, reform must take place in consultation with affected communities, groups, and individuals who continue to be impacted disproportionately by the criminal justice system.

Lastly, this article explained why more criminal justice reform is necessary to restrict the criminal justice system's place within society. The criminal justice system is more analogous to a hammer than a scalpel; it is a crude tool that inflicts significant harm to individuals and communities.[362] Yet by many metrics, it is also a counter-productive tool that worsens the problems it is supposed to fix. Ultimately, this article demonstrated why significant criminal justice reform is necessary to shrink the criminal justice system's role and footprint within Canada.[363]

[362] Simester, *supra* note 164 at 6.
[363] Bell, "Police Reform," *supra* note 306 at 2147. Bell uses the term "footprint."

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