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Effectuating Change: A Tool Box of Strategies for Reducing the Unnecessary Use of Administrative Court Orders

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Article abstract

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Effectuating Change: A Tool Box of Strategies for Reducing the Unnecessary Use of Administrative Court Orders

Sarah Runyon*

This article is a sequel to Correctional Afterthought, in which the author argued that Gladue's promise of reducing Indigenous over-incarceration by employing non-custodial measures has been thwarted. By insisting on alternatives to incarceration, the justice system is forced to rely on administrative court orders managed by provincial probation services. The judiciary and justice system participants possess a misplaced faith in the probationary regime, which functions as a repressive system of control that necessarily views the Indigenous accused as a risk that must be managed. The most common probation conditions, far from fostering reintegration, serve to erode individual autonomy, engender mistrust, alienation, resentment, and resistance; in the end creating disunity and discord. The aim of Effectuating Change is to offer a sound proposal for legislative reform and in the interim, practical sentencing solutions to deliver the true intention of Gladue and its offspring. Regardless of whether the proposals in this article are vigorously critiqued, supported, denounced or modified the hope is that they create a springboard for creative solutions to the problems identified in Correctional Afterthought.

Le présent article se veut une forme de suite de l'article intitulé « Correctional Afterthought », lequel soutenait que la promesse de l'arrêt Gladue, soit celle de réduire l'incarcération disproportionnée des Autochtones au moyen de mesures non privatives de liberté, avait été contrecarrée. En insistant sur des solutions de rechange à l'incarcération, le système de justice est obligé de se fonder sur des ordonnances de tribunaux administratifs gérées par les services de probation provinciaux. La magistrature et les participants au système de justice accordent une confiance mal placée au régime de probation, lequel fonctionne en tant que système de contrôle répressif qui perçoit nécessairement l'accusé autochtone comme un risque à gérer. J'ai examiné comment les conditions de probation les plus courantes, loin de favoriser la réintégration, servent à éroder l'autonomie individuelle et à causer de la méfiance, de l'aliénation, du ressentiment et de la résistance, et finissent par mener à la désunion et à la discorde. Le présent article vise à offrir une solide proposition de réforme législative et, dans l'intervalle, des solutions pratiques en matière de détermination de la peine, afin de réaliser la véritable intention de l'arrêt Gladue et des décisions qui l'ont suivi. Que les propositions figurant dans le présent article soient vigoureusement critiquées, soutenues, dénoncées ou modifiées, j'espère qu'elles créeront un tremplin pour trouver des solutions créatives aux problèmes cernés dans l'article intitulé « Correctional Afterthought ».

In *Correctional Afterthought* I argued that *Gladue*'s promise of reducing Indigenous over-incarceration by employing non-custodial measures has been thwarted.¹ By insisting on alternatives to incarceration, the justice system is forced to rely on administrative court orders managed by provincial probation services. The judiciary and justice system participants possess a misplaced faith in the probationary regime, which functions as a repressive system of control that necessarily views the Indigenous accused as a risk that must be managed. I explored how the most common probation conditions, far from fostering reintegration, serve to erode individual autonomy, engender mistrust, alienation, resentment, and resistance; in the end creating disunity and discord. In short, Indigenous offenders have become further marginalized, both socially and economically, through the criminal prosecution of their administrative offences. This is not what *Gladue* intended.

Correctional Afterthought was offered as the terrain for radical change, where grassroots organizations and justice system participants could ground their proposals for reform, where defence counsel could grasp a normative framework and rationalize the sentencing judge's duty to refrain from imposing administrative court orders as a form of "catch-all" response. In many ways, *Correctional Afterthought* was intended as an analytical tool used to justify the dismantling of probation services, especially in Indigenous communities.

This article offers pragmatic and functional solutions to the systemic problems, borne out by a rich field of academic literature and jurisprudence, and identified in *Correctional Afterthought*. My aim is to offer a sound proposal for legislative reform and in the interim, practical sentencing solutions to deliver the true intention of *Gladue* and its offspring. While I still do not have a definitive answer to the structural violence motivated by administrative court orders, I can offer a sketch of a much-needed alternative to our current sentencing regime.

This article consists of two parts. In Part I, I outline a proposal for innovative intervention in the form of a pilot project. The project's goal is to recognize that Indigenous communities are best placed to make offender-focused decisions that help to minimize systemic barriers. While the alternatives I explore are a drastic shift from the current probationary regime, they are in line with emerging and respected models of crime prevention. These pilot projects are also realistic because they aim to build on and otherwise amalgamate facilities that already exist in communities to address discursive power struggles.

Regardless of whether my proposals are vigorously critiqued, supported, denounced or modified my hope is that they create a springboard for creative solutions. Canadian criminal law scholarship and jurisprudence has not yet had an abrupt confrontation with the probationary regime. It is time to confront difficult questions around penal reform with practical answers. We must prepare to engage in a process of trial and error. Robust enforcement of uncompromising administrative court orders has done little if anything to protect the public or rehabilitate the offender. We have nothing to lose. We have: spent millions of dollars and imprisoned thousands without any discernible benefit; separated indigenous

* Sarah Runyon is a 2019–20 Fulbright Scholarship Recipient for her proposed research in the area of criminal law reform. Thank you to the countless reviewers of earlier drafts. This article is the product of 6 years of criminal defence work within the Indigenous community and would not have been possible without the support of Fulbright Canada, the Law Foundation of British Columbia, and the Indigenous Peoples Law & Policy Program at the University of Arizona.

¹ Sarah Runyon, "Correctional Afterthought: Offences Against the Administration of Justice and Canada's Persistent Savage Anxieties" 43:1 2020 Man LJ [forthcoming]

parents from their children and communities; created court orders that completely ignore the realities of Indigenous people's lives. We have, in effect, replicated colonialism through the use of these court orders.

In Part II, I offer a number of specific interim reforms and practices that can be employed without altering the overall structure of our current sentencing regime. I offer these ideas because they are likely to decrease human and economic costs while we await legislative reform. Each proposal focuses on shrinking the space probation orders previously occupied. At the same time, these proposals can help lay the foundation for more fundamental change in the future by beginning to re-orient our strategy away from a strictly 'law and order' posture toward a more effective and humane public health paradigm.

I. DIVERSIONARY PILOT PROJECTS

A. A Preface

Before going further, it is imperative that we recognize Indigenous communities take leadership and control over projects for reform. Members of the dominant society must take a step back to create the space necessary for Indigenous communities' core values to guide the development of a non-adversarial approach to rehabilitation, denunciation and deterrence. Each community is unique and will approach these so-called pilot projects with their own set of laws, assumptions, concepts, values and practices as a reflection of their identity.²

Not all communities will have the current capacity to independently initiate the proposal. The scarcity and lack of community resources in many Indigenous communities will render these pilot projects (and non-carceral sentences generally) unfeasible. For this reason, it will be beneficial for Indigenous communities to reach out to established third party operators who have experience implementing a grassroots approach to the causes and consequences of crime. The John Howard Society, or Aboriginal Legal Services for example, immediately comes to mind as a sustainable, flexible and cost-effective resource with a considerable amount of expertise.

B. The Pilot Project Structure

My proposal is grounded in a 'Housing First' approach which reverses the long-standing paradigm of combining shelter with services predicated on an individual's readiness for housing. Historically, providers have required that individuals be stabilized through a gradual process of acculturation, with each step in a ladder of greater independence conditioned on meeting service requirements such as following a regime of medication or maintaining sobriety. In place of this approach, Housing First provides shelter without any predicate requirement of "treatment" or "recovery."³

² For a more in-depth discussion of the importance of Indigenous knowledge, methods and laws shaping criminal justice reform, see: Jeffrey G. Hewitt, "Indigenous Restorative Justice: Approaches, Meaning and Possibility" (2016) 67 UNBLJ 313 – 335; Val Napoleon & H Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hömle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014); EJ Dickson-Gilmore & Carol La Prairie, "Will the Circle be Unbroken?": Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change (Toronto: University of Toronto Press, 2005); ME Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue" (1999) 43:1 Crim LQ 34.

³ Nester M Davidson, "'Housing First' for the Chronically Homeless: Challenges of a New Service Model" (2006) 15 J Aff Housing & Community Dev L 125 at 125.

I envision a housing facility (the “Space”) principally operated by Indigenous community leadership. The Space would aim to create a safe environment where “clients”, (no longer referred to as “offenders”) receive culturally appropriate support without the stigma of the criminal justice system. Furnished suites would be provided, each with their own shower facilities. Meals or groceries would also be provided. With no firm deadline for the client’s departure, the Space would be permanent and supportive housing.

This is a service model that, to an extent, mimics John Howard’s Foundry.⁴ At Foundry, clients can access in-house primary health care, mental health counselling, addiction support and counselling, employment information and support, and youth and family conflict resolution. The goal is to ensure community resources intersect to treat overlapping criminogenic factors such as poverty, lack of education, addiction, trauma and mental illness.⁵

Building on the Foundry model, in my proposal, each client would be paired with their own community navigator. Community navigators would ideally belong to the offender’s Indigenous community. The navigator’s role would be to link the client to community services not offered on-site in order to build a personalized care plan. Community services not housed on site could include local school districts and continuing education institutions, employment agencies, literacy associations, and community housing resources. This coalition of community resources would set out to better understand and respond to the intersections of intergenerational trauma, addiction, poverty and criminality.

These are simply ideas. The particular Indigenous community would decide both the visionary and mundane elements this Space comprises. Such decisions might include, for example, the design and layout of the Space, the furniture, where the facility should be built, the resources that should be housed within it, and how to incorporate and employ protective or disciplinary measures. The community would also be responsible for creating and implementing annual budgets and daily accounting. The goal is to facilitate the shifting of power back to these communities because they are in the best position to assess the cause of immediate suffering and address the required material conditions. The goal is not simply the Indigenous community’s input but *control*.

The hardest pill to swallow: there would be no formal enforcement mechanism. Intensive services would be available but not mandatory. The Space would not require abstinence in recognition of the fact that every addict’s process of withdrawal is different and will rarely if ever be flawless. Should clients feel the urge to the use, they may safely do so in safe injections sites housed in the Space. Client’s would not be subject to a curfew and would possess autonomy over their mobility.

⁴ The Foundry is currently stationed in B.C. communities such as Vancouver, Victoria, Kelowna, Campbell River, Terrace and Courtenay. Foundry models have proven widely successful and are continuing to grow. See e.g. Steve Mathias & Pamela Liversidge “Foundry: An Innovation in Youth Health and Wellness” (March 2018), online (pdf): *Mental Health Services and Oversight and Accountability Commission* <https://mhsoac.ca.gov/sites/default/files/documents/2018-03/PPT_Foundry_An_Innovation_in_Youth_Health_and_Wellness_03-07-2018.pdf>

⁵ Foundry British Columbia, online <<https://foundrybc.ca/>>; British Columbia Government News, Mental Health and Addictions, “Foundry Victoria Officially Opens its Doors to Youth” (1 May 2018), online <<https://news.gov.bc.ca/releases/2018MMHA0008-000797>>. The foundry model is not advanced or envisioned as the only housing model. There may be well-founded concerns that drawing on the John Howard model ignores Indigenous concepts of housing and shelter.

The ideal outcome would be an environment where Clients do not feel they need to leave, where there is incentive to follow the few “rules” that exist. Stories of failed community-based dispositions are punctuated by the addict leaving his court ordered residence because of the horrendous effects of withdrawal; disobeying a geographic restriction to access community and loved ones; breaching no-contact conditions because the court has denied them their only source of support. The addict doesn’t need to leave his or her home to use. The offender is housed in his or her own community and can easily access familial supports. He or she is located in a safe space designed to instill autonomy, self-confidence and a reason to look forward to the future. These spaces are meant to instill hope which in turn breeds little incentive to flee.

I join several other scholars in eschewing the conventional and inherently limited strategy of merely tinkering with, or fine tuning, the dominant principles and institutions of the prevailing criminal justice system. We argue that we need to reconfigure the acceptable parameters of legitimate social control mechanisms to facilitate the exercise of Indigenous self-determination.⁶

Community elders and leaders would have the ability to implement and impose special purpose sanctions conducive to their unique cultural traditions and the identity of the client. In my jurisdiction on Vancouver Island, for example, Indigenous communities send offenders into isolation, or time in the community’s Big House or Longhouse. By eliminating mass surveillance and the stigma associated with routine court appearances and probation appointments, the client creates or otherwise maintains an identity separate and apart from the criminal justice system, breaking down the us versus them barrier.

C. The Formation of Community Justice Committees

Communities in the Northwest Territories benefit from the use of “Community Justice Committees.” These Committees are made up of local volunteers “who are interested in justice issues in their community and have a desire to help youth and adult offenders take responsibility for their actions, making their community a safer place to live.”⁷ The RCMP or Crown counsel can divert selected criminal matters away from the traditional court system to be handled by community justice committees. When a matter is diverted, a conviction is not registered on a criminal record. Offenses eligible for diversion include theft, mischief, breaking and entering, alcohol and drug offenses, vandalism, and minor assaults.

In deciding to request a diversion, the Crown or RCMP will consider factors such as the seriousness of the offense, the impact to and feelings of the victims, and the offender’s criminal history and attitude towards the charges.⁸ The practice in the Northwest Territories requires Community Justice Committee

⁶ See e.g. Luke McNamara “The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines,” (2000) 18 Windsor YB Access Just 60; L McNamara, “Aboriginal Peoples, the Administration of Justice, and the Autonomy Agenda: An Assessment of the Status of Criminal Justice Reform in Canada With Reference to the Prairie Region”, Research Report No 4 (Winnipeg: Legal Research Institute of the University of Manitoba, 1993); David Milward & Debra Parkes, “Gladue : Beyond Myth and Towards Implementation in Manitoba” (2011) 35:1 Man LJ 84; David M Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 SCLR 655.

⁷ Government of the Northwest Territories, Department of Justice, “Community Justice Committees” (last visited 19 October 2019), online <<https://www.justice.gov.nt.ca/en/community-justice-committees/>>.

⁸ *Ibid.*

members to be “a citizen of good standing within the community.”⁹ Prospective members should not possess a “recent or serious criminal record.”¹⁰

In my proposed model, the Indigenous community would be responsible for selecting committee members according to their own standards and methods of evaluation. However, the Northwest Territories requirement that members not possess a criminal record is one that should be carefully considered. There is utility in having oversight from individuals who are intimately familiar with the criminal justice system and its collateral effects. In addition, the prospective Community Justice Committee, tasked with implementing, managing and administering the Space, would presumably reside in the community or have a unique and valuable connection to the community.

This proposal embraces the notion that growth, and in some cases reform, is best measured by the offender’s community, not the court. The people whose lives have been affected by colonial policies and systemic racism are better equipped to identify the barriers that stand in the way of the offender’s development. Clients would not need to seek permission to work or modify therapeutic treatment or have their efforts validated by the probation system. The client and the community engage collaboratively to make these decisions and the ultimate conclusion about when the client is ready to leave the Space.

This process of evaluation eschews any notion of “failing to comply”- instead what is measured is effort, personal growth and integration into the offender’s community. The goal is to facilitate individual autonomy in the client and institutional competency and legitimacy in the Space and the community as a whole.

D. Sketching Out Implications

There will be several practical, legislative and ethical hurdles confronting the development of these pilot projects. Most significantly, this proposal will not align with the dominant narrative that Indigenous people are prone to crime and need to be monitored by extreme policing methods. Sustained published empirical research is desperately needed to show the public how administrative court orders are a form of deceptive device wreaking extreme harm with little social value.¹¹ There is a need to communicate that instrumental compliance based on fear of sanction and sentence severity has proven ineffective for a wide class of offenders.

I am also cognizant of the reluctance to fund this type of initiative. The priority of providing adequate and effective funding to Indigenous communities who want to help their members escape the cycle of criminality is not on any government’s agenda in any serious way. The response to these anticipated concerns is addressed below.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Runyon, *supra* note 1; Robert A Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012); Gabe Boothroyd, “Urban Indigenous Courts: Possibilities for Increasing Community Control Over Justice” (2019) 56:3 *Alta L Rev* 903; Marie-Eve Sylvestre et al, “Red Zones and Other Spatial Conditions of Release Imposed on Marginalized People in Vancouver” (2017), online (pdf): Research Gate <www.researchgate.net/perma.cc/AGU2-6Z9X>.

1. The Fiscal Footprint

Undoubtedly, this proposal requires a substantial shift in funding priorities. There is very little funding available to assemble the kind of architecture this project contemplates.

However, we can decrease the funding for ineffective strategies, (recall the more than \$730 million that is spent on the prosecution and policing of administrative court orders),¹² and put some of those funds toward these pilot projects. We have mounting evidence that after decades of trying to “cure” Indigenous recidivism with administrative court orders, we are failing.¹³ We ought to significantly cut back on the amount of funds devoted to traditional probationary regimes and outsource “supervision” and “rehabilitation” to these pilot projects.

The allocation of resources to such measures should actually increase the resources that are available in the criminal justice system to target “true crime.”¹⁴ Removing low-level crime from the system could save both court costs and the costs of incarceration. The criminal justice system is also likely to conserve resources as the reduction in addiction rates results, over time, in fewer addicts committing crimes to support their habit. The associated reduction in disease, suicide, and mental health care should reduce spending.¹⁵

We should also recognize that we do not necessarily need to create and fund new community resources but in some cases, simply reorganize the ones that already exist. When Portugal, for example, enacted its decriminalization law, the multiple organizations charged with addressing drug use were replaced by the Institute for Drugs and Drug Addiction.¹⁶ The approach was to consolidate a number of ineffective organizations into a single effective agency with a new mandate for research, evaluation, implementation, and oversight of drug treatment programs.¹⁷ Programs are not duplicated and resources are not wasted. One unified agency is easier to evaluate, research, analyze and document. Sustained research and evaluation will be integral to the formation of subsequent pilot projects.

Given the collateral consequences associated with administrative court orders, many offenders depend on income assistance. In British Columbia for example, income assistance provides roughly \$700 to \$1100

¹² Runyon, *supra* note 1; Canada, “Department of Justice, The Canadian Criminal Justice System: Overall Trends and Key Pressure Points” (last modified 23 November 2017), online <<https://www.justice.gc.ca/eng/rp-pr/jr/press/>>

¹³ *Ibid*, Runyon; Jillian Rogin, “Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017) 95 Can Bar Rev 325 – 356; Jonathan Rudin, “Aboriginal Over-representation and R. v. Gladue: Where We Were, Where We Are and Where We Might Be Going” (2008), 40 SCLR 687; Statistics Canada, *Trends in Offences Against the Administration of Justice*, by Marta Burczykca & Christopher Munch, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 2015) online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/14233-eng.html>>.

¹⁴ See Runyon, *supra* note 1 for a discussion regarding the distinction and corresponding implications between “true” and “administrative” crime.

¹⁵ There is a voluminous body of literature and research linking harm reduction initiatives to declining crime rates. See for example Pivot Legal Society, “Practical Drug Decriminalization in British Columbia” (August 2019), online: <https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/3368/attachments/original/1568222569/De-facto_Drug_Decrim_in_BC_Pivot_Position_Paper_Aug_2019.pdf?1568222569>; Urban Health Research Initiative, “Drug situation in Vancouver” (Vancouver: British Columbia Centre for Excellence in HIV/AIDS, 2013), online (pdf) <<http://www.bccsu.ca/wp-content/uploads/2016/08/dsiv2013.pdf>>.

¹⁶ Kellen Russoniello, “The Devil (and Drugs) in the Details: Portugal's Focus on Public Health as a Model for Decriminalization of Drugs in Mexico” (2012) 12 Yale J Health Pol'y L. & Ethics 371 at 389-390.

¹⁷ *Ibid* at 389.

per month.¹⁸ Those funds could be diverted to support the Space and its resources while the client is in residence.

As we begin to select the first locations for these pilot projects, we should look to Indigenous communities that already possess a sturdy institutional structure, strong leadership, and established community resources that can be used to coordinate supportive efforts. Of course, these locations must also express a willingness to work together as a community to reduce the symbiotic relationship between recidivism and administrative court orders.¹⁹

Finally, as we contemplate the project's fiscal footprint, recall the unabating studies that have found that access to holistic health care and treatment, educational opportunity, stable housing and opportunities for a living wage is more successful in reducing crime relative to investments in prisons and police surveillance.²⁰ We need to focus on these studies to build momentum for reform among the more conservative stakeholders.

2. The Need for Public Enlightenment

To receive the necessary funding the public needs to recognize that a great deal of the ostensible "criminal" problems associated with the Indigenous population are properly explained and treated though a public health and social justice paradigm. Herein lies the purpose of continued legal scholarship and published empirical research on this issue. Numerous studies confirm that when Canadians are provided with information about the offender, their crime, and the available sentencing options, they are "fair-minded and moderate in their response."²¹

One way to enlighten public opinion is to point to alternative models that have proven effective. The exemplar of the nonpunitive, integrative approach to imprisonment is Halden maximum security prison in Norway. The treatment of inmates at Halden is wholly focused on helping to prepare them for a life after they get out.²² Inmates reside in unbarred units with windows and comfortable furnishings. Prisoners have access to community living space and kitchens (stocked with instruments that could easily be used as weapons) in order to create a sense of family and togetherness. Libraries, computers, hygienic facilities, educational training and even a recording studio, are accessible to all inmates. In some circumstances, inmates are allowed to enjoy the overnight stay of guests.²³

Every inmate's professional future is sketched out while they are serving time in prison. They must choose between work and education. They can enroll in various courses such as chemistry, physics or

¹⁸ Government of British Columbia, "Income Assistance Rate Table" (April 1, 2019), online:

<<https://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables/income-assistance-rate-table#h>>.

¹⁹ For a comprehensive discussion of the symbiotic relationship between recidivism and administrative court orders, see Runyon, *supra* note 1.

²⁰ The Centre for Popular Democracy, "Freedom to Thrive: Reimagining Safety and Security in Our Communities" (7 April 2017), online: <<https://populardemocracy.org/news/publications/freedom-thrive-reimagining-safety-security-our-communities>>.

²¹ Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 365.

²² Jessica Benko, "The Radical Humaneness of Norway's Halden Prison", *New York Times Magazine* (26 March 2015), online: <<https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html>>.

²³ Ava Shahani, "The Time Does Not Fit the Crime: Eliminating Mandatory Minimums for Nonviolent Drug Offenders in Favor of Judicial Discretion" (2017) 23:2 Sw J Intl L 445 at 461.

philosophy, or they may choose to specialize in one of the seven occupations for which the penitentiary offers diplomas (e.g. carpenter, mechanic, metal worker etc.).²⁴ Guards are not armed and prison conditions are maintained with the assistance of questionnaires completed by inmates regarding their experience in prison and what can be done to improve it.²⁵ Positive interpersonal relationships between the staff and the inmates maintain safety within the prison: “the inmates have the opportunity to act out, but somehow they choose not to.”²⁶ Halden was constructed in a lush forested area. There are “many trees, uneven grounds, blueberries and adders. It would be easy to run and hide, but nobody does.”²⁷ In fact, in the history of Halden, no one has ever tried to escape.²⁸

Norway’s approach is achieving outstanding results: the country has the lowest recidivism rate in the world.²⁹ This method is also economical. Halden Prison spends \$93,000 on each inmate per year. According to federal data, Canada spends an average of \$115,000 per prisoner, per year.³⁰

Other Scandinavian models, with a similar approach, have proven successful.³¹ It is noteworthy that unlike their British, American or Canadian counterparts, the Scandinavian media tends to report crime by adopting a “less emotional tone and providing research-based commentaries.”³²

Creating and implementing the first set of pilot projects will no doubt be difficult but if these pilot projects prove successful, we can expect to see a tremendous surge for reform in many areas of social policy and criminal justice. Most importantly, this alternative will cement the notion that Canada is committed to addressing the collateral effects of colonialism and intergenerational trauma as public health and social justice issue-not a criminal justice issue.

Readers may see this proposal as a calling for a moment of radical transformation. But how radical or risky is this idea, *really*? Administrative court orders that are not being complied with are not functioning to protect the public. They are not acting as the protective shield the prosecution envisions when they seek its imposition nor are they curtailing crime. Instead, these orders are manufacturing or creating crime and investing in us a false sense of security.³³

²⁴ Constantin Marc Neagu, “Occupational Therapy - Possible Solution for Preventing the Breach of Criminal Law and Socially Reintegrating Offenders” (2017) 24 Lex ET Scientia Int'l J 136 at 143.

²⁵ Sandeep Gopland, “Progressive Alternatives to Imprisonment in an Increasingly Punitive (and Self-Defeating) Society” (2016) 40:1 Seattle UL Rev 57 at 67.

²⁶ Benko, *supra* note 22.

²⁷ The Story Institute, “Inside Norway’s Halden Prison” (last visited 12 October 2019), online: <<http://www.thestoryinstitute.com/halden/>>.

²⁸ British Broadcasting Corporation, “How Norway Turns Criminals Into Good Neighbours” (7 July 2019), online: <<https://www.bbc.com/news/stories-48885846>>.

²⁹ Recidivism levels of prisoners after they are released are as low as 20%. This compares to a recidivism rate in the U.S. of approximately 50% to 75%. See for example Christina Sterbenz, “Why Norway’s Prison System is So Successful”, *Business Insider Magazine* (11 December 2014) online: <<https://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12>>.

³⁰ The John Howard Society of Canada, “Financial Facts on Canadian Prisons” (23 August 2018) online: <<http://johnhoward.ca/blog/financial-facts-canadian-prisons/>>.

³¹ Tapio Lappi-Seppala, “Criminology, Crime and Criminal Justice in Finland” (2012) 9:2 Eur J Criminology 206.

³² *Ibid.* Norway’s model is far from the only alternative.

³³ See Runyon, *supra* note 1.

3. Who is Eligible to Participate?

Bearing in mind that Halden prison houses the most serious and dangerous criminals in Norway,³⁴ my proposal recommends that no particular class of offender be excluded. The sentencing judge would have the discretion to divert the offender considering the seriousness of the offence, the history of the offender, culpability of the offender as manifested in the offence, and his or her willingness to engage in the program. The Indigenous community would also need to be satisfied that the offender is suitable for the program.

However, the primary targets of these pilot projects are those lower level “criminals” who cannot seem to escape the system: the Fetal Alcohol Spectrum Disorder (FASD) offender who committed a few substantive offences of minor theft and is now trapped in a web of administrative court orders; the addict continuously convicted of breaching his abstention clause; the homeless or transient person facing perpetual charges of causing a disturbance because the optics of his addiction are too much for some to endure. As explained in *Correctional Afterthought*, the criminal law’s reaction to this line of offending often serves to create crime. For this reason, our goal should be to remove these offenders from criminal law’s discourse and grasp as soon as possible.

4. Required Legislative Amendments

There is currently no way to impose a community-based disposition without an administrative court order of some kind.³⁵ A further hurdle, the decision to divert criminal charges away from the formal criminal justice system rests entirely in the hands of the prosecution. Crown counsel is the gatekeeper - the judge cannot order the invocation of alternative measures. Quite simply, our sentencing matrix requires a new legislative provision that allows the court to divert the offender, without the consent of the Crown, to one of these pilot projects with no strings attached.

New legislative provisions aside, this article also advocates for the removal of compulsory probation terms. Section 732.1(2) of the *Criminal Code* creates compulsory conditions of a probation order. This section reads:

- (2) The court shall prescribe, as conditions of a probation order, that the offender do all of the following:
 - (a) keep the peace and be of good behaviour;
 - (b) appear before the court when required to do so by the court; and
 - (c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

³⁴ Bettina Muenster & Jennifer Trone, “Why Is America So Punitive: A Report on the Deliberations of the Interdisciplinary Roundtable on Punitiveness in American (Excerpted)” (2016) 28:5 Federal Sentencing Reporter 340.

³⁵ See Runyon, *supra* note 1. Alternative Measures and Diversion programs, while available under Part XXIII of the *Criminal Code*, require the prosecution to consent to its use. In addition, strict criteria must be met, under s. 717(1) even assuming the prosecution permits entry to the accused.

If we remove compulsory terms, we afford the sentencing judge broader penal latitudes, reducing the need for law enforcement surveillance or supervision by community corrections. This legislative shift will signal that these conditions have not always proven therapeutically valuable, nor have they been shown to alleviate public safety concerns.³⁶ By injecting flexibility into our sentencing legislation, courts will have more tools to transform structures of inequality and affirm visions for change initiated by Indigenous communities.

II. INTERIM SOLUTIONS

These legislative amendments and associated pilot projects will not be created overnight. While we work toward the goal of legislative change, there are several strategies we can employ that do not involve disruption to our current legislative framework, but simply a change in practice. These interim strategies include increased reliance on the absolute discharge provisions for low-level or victimless crime; refraining from imposing certain probationary conditions unless the court is satisfied that there are effective community resources in place to support the offender; and a shift in the way criminal justice system participants view the imposition of a probationary term.

A. Increased Reliance on the Absolute Discharge Provisions

Increased reliance on the absolute discharge provision may be one method to mitigate the surveillance tactics that infiltrate Indigenous communities, and to curb rates of recidivism.³⁷ Subject to certain exceptions, where an accused is found guilty of an offence, the court may, instead of convicting the accused, direct that the accused be discharged absolutely. The *Criminal Code* prohibits an absolute discharge for any offence that has a minimum sentence or is punishable by imprisonment for 14 years or for life.³⁸

The discharge provisions are deemed appropriate if it is in the best interest of the accused and not contrary to the public's interest.³⁹ In assessing the public interest component, the court may consider the seriousness of the offence and the prevalence of the offence in the community. A previous discharge can be considered in making the decision whether to impose a subsequent discharge. A discharge is not restricted to minor or unintentional offences, or to young offenders. Indeed, there is no list of strict prerequisites.⁴⁰ Where a court directs that an offender be discharged, the offender shall be deemed not to have been convicted of the offence and he or she may plead *autrefois convict* in respect of any subsequent charge relating to the offence.⁴¹

The use of the absolute discharge provision allows for those who commit so-called social nuisance crimes to get out of the system rather take the fatal plunge into a web of administrative court orders. This objective appears consistent with the genesis of the discharge sanction: a concern that the negative consequences of a conviction, whether immediate or potential, outweigh the value to be gained from the

³⁶ See Runyon, *supra* note 1.

³⁷ *Ibid.*

³⁸ *Criminal Code*, RSC 1985, c C-46, s 730.

³⁹ *R v. Fallofield*, [1973] BCJ 559.

⁴⁰ Manson, *supra* note 21 at p. 211.

⁴¹ *Criminal Code*, RSC 1985, c C-46, s 730(3).

formal stigmatization as a “convicted offender.”⁴² In many cases the life-long stigma and collateral effects of a conviction will not be warranted by the conduct described in *Correctional Afterthought*.

Consider for example, a common fact pattern in Canada’s criminal sentencing court: the accused has FASD. He steals a package of meat valued at twelve dollars from the local big-box grocery store in exchange for an illicit substance. The fundamental principle for sentencing adults is the retributive idea that the sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility.⁴³ It is well documented that many persons with FASD are incapable of engaging in risk and consequence analysis, struggle to appreciate the moral content of certain behavior, and are prone to impulsive behavior.⁴⁴ The capacity of this offender to satisfy the perfection a probation order demands is drastically limited. It is therefore manifestly unjust to demand that this offender be subject to that kind of an order. But sentencing this offender to a period of custody, given the relative lack of gravity of the offence and the diminished degree of culpability violates the proportionality principle. So, is the theft of meat worth punishing at the expense of perpetual entanglement in a web of administrative court orders? The answer should be obvious and it is imperative that defence counsel demonstrate that anything other than an absolute discharge could easily morph into a prodigious and unforgivable encroachment.

To encourage this point, defence counsel should emphasize the only two accepted goals of probation orders: the rehabilitation of the offender and the protection of the public. In the absence of a therapeutic benefit and evidence that the offender can comply with the condition, the order will be unable to satisfy its purported goal and therefore should not be imposed as a form of “catch all” response. Further, this exercise of restraint gives more legitimacy in our criminal justice system and its administration. We incarcerate and monitor only those who truly create a public safety risk as opposed to a purported social nuisance.

B. Revisiting “Reasonableness”

The restrictions imposed on an offender’s liberty while on probation must be reasonable.⁴⁵ A reasonable condition must be oriented towards ensuring the goals of probation.

*R v Omeasoo*⁴⁶ concerns the sentencing of two Indigenous offenders, each an alcoholic, who were charged with minor offences and released from police custody on the condition that they abstain from consuming alcohol. Judge Rosborough framed the issues as follows: (1) under what circumstances should alcoholics be prohibited from consuming alcohol as a condition of their release from custody? and (2) what is a fit sentence for those alcoholics who breach that condition?⁴⁷

Judge Rosborough imposed nominal sentences on each offender and moved to address the generalized imposition of unreasonable conditions leading to repeated breaches of conditions:

⁴² Manson, *supra* note 21 at p. 212.

⁴³ Kent Roach & Andrea Bailey, “The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing” (2009) 42 UBC L Rev 1 at 5.

⁴⁴ David Milward, “The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways” (2014) 47:3 1025 at 1026.

⁴⁵ *Criminal Code*, RSC 1985, c C-46, s 732.

⁴⁶ 2013 ABPC 343.

⁴⁷ *Ibid* at para 1.

There are circumstances where individuals can be expected to comply with bail conditions merely because they are pronounced by a person in authority and will result in penal sanctions if breached. This is seldom the case with alcoholics subjected to abstention clauses, however. Ordering an alcoholic not to drink is tantamount to ordering the clinically depressed to “just cheer up”. This type of condition has been characterized by some courts (at least in the context of a probation order) as “not entirely realistic”. It has been found to have set the accused up for failure.⁴⁸ [citations omitted]

The Court went on to require that before a police officer imposes a condition requiring the offender to abstain from alcohol, the officer had to consider whether the offender was an alcoholic and, if so, whether the offender was reasonably capable of complying with the condition.⁴⁹ If so, the officer had to consider the circumstances under which that could occur and whether the circumstances were reasonable. If not, the officer had to release the offender without imposing the condition or deny bail altogether. The officer’s failure to undertake the inquiries could make the offender’s degree of responsibility for sentencing purposes very low.

Taking the analysis in *Omeasoo* one step further, in order to satisfy the constitutional requirement that probation conditions be reasonable, the court would need to be satisfied that there are sufficient community resources ready and able to assist the offender in his or her compliance. The prosecution would need to demonstrate, before it requests the imposition of demanding reporting requirements, abstention clauses, geographic restrictions, no-contact orders, that there are community resources mobilized to facilitate compliance. Absent proof, the condition would not be reasonable to impose.

This approach ensures that certain classes of people (namely the poor, homeless, cognitively challenged) are not disproportionately disadvantaged under what was intended to be rehabilitative conditions. For example, if the Crown cannot prove that the homeless, FASD offender has a support worker in place to assist him or her in remembering his or her probation appointments, nothing outside of the compulsory term “report to the court when required to do so by the court” is imposed. Similarly, if the Crown cannot prove that the offending heroin addict has immediate access to a drug treatment facility, an abstention clause is not imposed. This stance is intended to produce a healthy dose of frustration from law enforcement and the prosecution’s office. As explained below, this growing chorus of frustration will nurture the political will for adequate public health resources that is so desperately needed.

C. A Practice Point: It’s Not “Just Probation”

Both the prosecution and the defence are responsible for creating and perpetuating the anachronisms that clog our provincial courts. We too willingly either seek to impose or accept an administrative order as part of an accused’s sentence if it will deter the prospect of jail. Given the associated harm administrative orders bring to bear though, they too ought to be carefully considered and imposed. It is imperative the criminal justice system participants truly understand *who* the accused is. Is he struggling with FASD? Is she suffering from an organic brain injury? Does the offender have a support network in place? Is this administrative court order truly going to accomplish the goal of rehabilitation and/or

⁴⁸ *Ibid* at para 37.

⁴⁹ *Ibid* at para 38.

protection of the public? Or are we seeking to impose it because there is no other alternative? The following example is illustrative of the interim approach this article advocates.

N.J. has committed his second offence of theft of a package of meat, valued at twelve dollars from the local grocery store. He committed his crime to feed his addiction. His drug of choice, heroin, is his coping mechanism for a life on the street. He became street entrenched after he aged-out of foster care—there was no system in place to support him. He was removed from the care of his parents after their own addiction issues, (a by-product of their residential school experience), prevented them from adequately caring for N.J.

The nature of the crime does not warrant custodial time. N.J. does not have a lengthy record. In fact, he only has one prior entry. He is poor, addicted, transient and has been diagnosed with FASD. His moral culpability falls on the lowest end of the spectrum. He has no money to pay a fine. With one exception, the only available sanction left is one that carries a probation order. The criminal law does not afford the court an adequate tool to accomplish the objectives set out in s.718 of the *Criminal Code*. Imprisonment is excessive and doesn't comply with the principle that the sentencing court exercise the least amount of restraint.⁵⁰ Fines are not to be imposed if the offender cannot satisfy them.⁵¹ The imposition of a suspended sentence or conditional discharge leaves N.J. more vulnerable to recidivism than any other sentencing option. In these circumstances, defence counsel should fiercely advocate for the exception: the absolute discharge.

Experiential evidence dictates that eventually local businesses will cry out that the criminal courts are not doing enough to protect their corporate enterprise. These corporate voices are right. The criminal justice system is not doing enough to protect their corporate interests because they *cannot* do enough to protect their corporate interests. The blunt force of the criminal law is not equipped to “cure” addiction, intergenerational trauma, poverty, and mental illness.

We should no longer be comfortable using N.J. as both exemplar of and justification for the criminal law's harsh and draconian measures in lieu of adequate public health resources. Instead, concerns about the effects of poverty, addiction and mental health should be addressed at city hall with a view to receiving more public health funding, as echoed by the recent movement to defund the police.

These strategies should be viewed as strides in reformist efforts rather than a solution to Canada's burgeoning population of administrative offenders. By implementing these strategies we can start to engage in a decisive shift toward decarceration and the intelligent, equitable, and efficient reform imagined by the pilot projects.

III. CONCLUSION

Removing these administrative orders may not be sufficient, but it is a necessary component in the battle against Indigenous over-incarceration. Should the optimal route not be chosen now this does not mean that critics of the current sentencing regime should throw up their hands. We have a responsibility to ensure that sentencing tools are no longer limited to methods of control and oppression. We have a responsibility to communicate to the public the havoc these orders wreak on the lives of the accused with

⁵⁰ *Criminal Code*, RSC 1985, c C-46, s 718.1.

⁵¹ *Ibid* at s 734.1.

little or no discernable benefit to the protection of the public. Only then will a normative shift occur that allows policy choices calling for greater investment in social and situational interventions.