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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5. See Part II, below.

6. Malakieh, supra note 2 at 54.

7. Ibid.

8. Ibid.


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.\textsuperscript{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.\textsuperscript{13} Second, criminal justice reform does not address the expansion of law enforcement powers that lack adequate transparency and oversight.\textsuperscript{14} Third, the justice system increasingly skews powers towards police and prosecutors, while removing it from judges.\textsuperscript{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.

\textbf{II. ENDURING PROBLEMS IN THE CRIMINAL JUSTICE SYSTEM}

\textbf{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

\textsuperscript{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.
continue to be over-represented in the criminal justice system. 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, which requires sentencing judges to accord “particular attention to the circumstances of Aboriginal offenders” and consider all appropriate punishments other than imprisonment. The provision was enacted in part to reduce the incarceration rates of Indigenous persons. 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. 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.” 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.” 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). 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.

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. 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. 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. Between 2002–2012, the incarceration

18 Criminal Code, RSC 1985, c C-46, s 718.2(e).
21 Ipeelee, ibid at para 59.
22 Ibid.
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.\textsuperscript{28} Today, Indigenous women are more likely than any other group of persons to be incarcerated.\textsuperscript{29}

Empirical studies demonstrate that in many cases, judges neither apply section 718.2(e) of the \textit{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.\textsuperscript{30} The results showed that approximately 40 percent of decisions did not mention section 718.2(e) of the \textit{Criminal Code}.\textsuperscript{31} Furthermore, judges did not consider relevant systemic and background factors in one-third of the decisions.\textsuperscript{32} Indigenous defendants were sentenced to imprisonment in roughly 87 percent of the decisions that researchers examined.\textsuperscript{33}

In many jurisdictions, there are no Gladue report writers, and no Gladue reports.\textsuperscript{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.\textsuperscript{35} Roughly 86 percent of Nunavut’s population are Innu persons.\textsuperscript{36} In 2020, defence counsel requested that the Nunavut Court of Justice order the first ever Gladue report in the territory.\textsuperscript{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.\textsuperscript{38}

Data on over-policing is also bleak.\textsuperscript{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-
force incidents. Racial profiling results in significant consequences. In addition to demeaning human dignity and violating equality, it causes physical and psychological harm. 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. 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.

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. 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. They also lack access to educational, rehabilitative, and recreational resources. Many defendants who are detained pending trial will lose their employment and access to housing. 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.

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. 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. Defendants who are experiencing homelessness may be unable to abide by a curfew, especially when they

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44 Myers, supra note 10 at 666–67.


46 Ibid.


lack access to a homeless shelter space.\textsuperscript{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.\textsuperscript{52}

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

Then there is the interrelated problem of plea bargaining, which resolves most criminal charges, and diverts most defendants away from trials.\textsuperscript{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.\textsuperscript{56} Yet two cognitive biases also play a major role in pushing defendants to plea bargain: loss aversion and anchoring.\textsuperscript{57}

Consider loss aversion first. The term implies that the fear of loss drives one’s decisions more than the prospect of equal gains.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{61} The term “charge stacking” (or overcharging) implies that officers lay multiple charges for the same conduct.\textsuperscript{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

\begin{thebibliography}{99}
\bibitem{52} \textit{Ibid.}
\bibitem{53} \textit{Ibid} at 84–97.
\bibitem{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.
\bibitem{55} See e.g. Canada, Department of Justice, \textit{Plea Bargaining}, by Milica Potrebic Piccinato (Ottawa: Department of Justice, March 2016), online: <www.justice.gc.ca/eng/rp-pr/cjs-sjc/lp-pji/pb-rpc/pb2-rpc2.html> (estimating that percentage to be 91 percent).
\bibitem{59} Tversky & Kahneman, \textit{ibid} at 298.
\end{thebibliography}
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

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.
67 Bibas, “Plea Bargaining Outside Trial,” supra note 60 at 2518.
73 Chesnay, Bellot & Sylvestre, ibid at 178–79.
long periods of time.\textsuperscript{75} Yet punishment cannot fix many of crime’s root causes that are economic, structural, and psychological in nature.\textsuperscript{76}

In some cases, criminalization also raises the risk that individuals will endanger their lives in order to avoid arrest and punishment.\textsuperscript{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.\textsuperscript{78} People generally have no idea about the quality or potency of drugs that they purchase illegally.\textsuperscript{79} Some narcotics may be laced with other substances — such as fentanyl — that can lead to drug overdoses and death.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{83} Yet the opioid epidemic is causing unparalleled death and devastation despite harsh drug-enforcement policies.\textsuperscript{84} According to Statistics Canada, roughly ten people died per day from opioid-related deaths between January 2016 – March 2018.\textsuperscript{85} Approximately 95 percent of these deaths are accidental.\textsuperscript{86} Or, consider the worst kept secret about the ineffectiveness of strict drug enforcement policies: the omnipresence of illicit drugs in prisons.\textsuperscript{87} If the State cannot stamp out illicit drug use within a prison, it surely cannot do so outside of its walls.

\begin{thebibliography}{99}
\bibitem{75} Skolnik, “Homelessness and Unconstitutinal Discrimination,” \textit{supra} note 70 at 82–83.
\bibitem{79} \textit{Ibid.}
\bibitem{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.
\bibitem{83} RM Solomon & SJ Usprich, “Canada’s Drug Laws” (1991) 21:1 J Drug Issues 17 at 20, citing \textit{The Opium and Drug Act, SC 1911, c 17.}
\bibitem{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.
\end{thebibliography}
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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92 Ibid.
93 Ibid.
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. There continues to be a
higher prevalence of substance use disorder amongst inmates than the general population. Some studies indicate that between 70–80 percent of federal inmates have a substance use problem. As discussed more below, many correctional facilities do not offer sufficient
substance use treatment for inmates.

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

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. 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. 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.

95 Ibid.
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).
101 Ibid.
102 Ibid.
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. The ancillary powers doctrine allows judges to recognize new police powers that aim to fill legislative gaps. Since the doctrine was developed nearly four decades ago in R. v. Dedman, 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. For instance, the Supreme Court upheld the constitutionality of roving random vehicle stops. It created the police power to detain persons for investigative purposes, and to stop and frisk individuals for safety reasons. The Supreme Court has also observed that Parliament can abolish, constrain, or modify common law police powers that judges have created. 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. For one, judges would not create new police powers unless they were lawful and constitutional. 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. 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. 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. Aside from research

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108 Fleming v Ontario, 2019 SCC 45 at para 42 [Fleming].
111 R v Ladouceur, [1990] 1 SCR 1257 [Ladouceur].
113 Mann, ibid.
114 Fleming, supra note 108 at para 42.
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.
¹²³ R v Grant, 2009 SCC 32 at para 68.
¹²⁵ Piccinato, supra note 55 at 6.
¹²⁶ R v Golden, 2001 SCC 83 at para 56.
law is portrayed in the following way. 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. The trial is painted as the default process that assesses the accused’s guilt. 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.

In practice, most of this never happens. The majority of criminal accusations are resolved informally through plea bargaining. 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. 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. In cases where defendants plead guilty or plea bargain, judges play a far smaller role than if the case went to trial.

Most convictions happen in the penumbra of criminal trials, where prosecutors enjoy vast discretion, much of which is unreviewable. Compared to judges, prosecutors’ independence and discretionary decisions are accorded far greater protection in many respects. The majority of these decisions are insulated from judicial review. 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.” Judges ensure that the prosecution respects its constitutional duty to disclose all relevant evidence to the defense. 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. 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. Prosecutors’ discretion,

132 Ibid.
133 Piccinato, supra note 55 at 6.
136 Barkow, supra note 15 at 871.
138 Ibid.
139 R v Anderson, 2014 SCC 41 at para 50 [Anderson].
141 Anderson, supra note 140 at paras 57–61.
142 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.\textsuperscript{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.\textsuperscript{145} Prosecutors can only take so many cases to trial, and overburdened legal aid counsel can only advance so many claims.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.


\textsuperscript{147} Stuntz, “The Uneasy Relationship,” ibid at 34–35.


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


154 Ibid. The quoted portion is the title of Butler’s article.
impacting marginalized persons and groups, and perpetuating disadvantage.155 Transformed 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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corrections. 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. 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. 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 combating 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. The expressive function of criminal law distinguishes it from other areas of the law, such as tort law. In certain cases, incarceration expresses an appropriate and proportional response to particularly egregious forms of wrongdoing. 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

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

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.

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. It lacks many aspects of criminal law and procedure. For instance, many crimes do not specify the requisite fault element. Most judicially created police powers have not been codified. Nor have a significant portion of defences, such as necessity, entrapment, and mistake of fact.

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. In other words, the Code should be cohesive, organized, logical, and reflect the state of criminal law accurately. 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. 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. 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. The third code would govern all matters related to

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175 Healy, ibid at 9.
177 Simester & Shute, supra note 130 at 4.
178 Del Buono, supra note 176 at 279.
punishment and sentencing. The final code would encompass criminal evidence and incorporate portions of the Canada Evidence Act that apply in criminal trials.

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. This could be achieved by downgrading certain low-level crimes to a third category of non-criminal offence that exists in other jurisdictions: contraventions. 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.

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. Although the 2021 government budget plans to revive the Law Reform Commission for a five-year period, the Commission should be a permanent fixture. 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. As Roderick MacDonald notes, law reform efforts should be consistent with a more democratic process that respects the value of legal pluralism. 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. 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. For this reason, the criminal law should be used only as a last resort where less coercive measures cannot address the relevant conduct.

See e.g. United States Sentencing Commission, Guidelines Manual 2018 (§ 3E1.1).
Friedland, “Reflections,” supra note 176 at 279.
Michael Bohlander, Principles of German Criminal Law (Portland: Hart, 2009) at 27.
Spratt, supra note 156.
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.

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.

204 Ipeelee, supra note 20 at para 85.
205 Sewrattan, supra note 203 at 132, 136–37.
208 Ibid.
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. Jurisdictions such as England, Wales, and Victoria (an Australian state) have implemented sentencing commissions (as have more punitive jurisdictions, such as the United States). Sentencing commissions aim to fulfil several aims, which tend to vary across jurisdictions that implement them. 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. Moreover, these commissions conduct empirical studies to identify the extent to which there is parity in sentencing. In the 1980s, a temporary sentencing commission existed in Canada. Although it recommended that the government establish a permanent sentencing commission, the recommendation has not been implemented. Later commissions and government reports also recommended that the government establish a sentencing commission.

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. Second, sentencing commissions can help detect sentencing disparities, and modify sentencing guidelines to correct for excessive variability in punishment. Third, by consulting with a broad range of stakeholders, sentencing commissions can better incorporate the community’s views within penal policy. Fourth, sentencing commissions can improve transparency and expand the public’s knowledge about sentencing, and increase their confidence in it.

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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214 Ibid.
215 Ibid.
221 Freiberg & Gelb, supra note 213 at 10.
222 Ibid.
the appropriate sentencing range. Judges can depart from these guidelines where it would be contrary to the interests of justice. Other jurisdictions — such as Northern Ireland, Scotland, and South Korea — have already implemented sentencing guidelines. Moreover, various Canadian government reports and commissions have suggested that sentencing guidelines should be imposed. Some studies indicate that sentence disparity decreased in jurisdictions that imposed sentencing guidelines.

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). Second, other scholars note that even if sentencing guidelines promote parity in sentencing, they may increase the mean severity of offenders’ sentences. 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. 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.

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

**Footnotes**

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

Certain European countries employ graduating economic sanctions that avoid these problems. 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. 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. 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.

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. 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. Graduating economic sanctions have the potential to curb some of the worst penal excesses that disproportionally 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. 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. Many individuals neither

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238. *Ibid* at 67–73.


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

245 Owusu-Bempah & Wortley, supra note 2 at 281–82.
252 Ibid.
253 Ibid.
254 Ibid.
Canada authorized police officers to conduct random traffic stops. 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. 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. 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.

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

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. This approach would be justified on the ancillary powers doctrine’s inconsistency with the separation of powers and the rule of law. 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.  
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).  
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*.\(^{279}\)

\(^{268}\) *Ibid.*

\(^{269}\) Myers, *supra* note 10 at 666–67.


\(^{271}\) Bennett & Larkin, *ibid* at 75.

\(^{272}\) *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.


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. Given the COVID-19 pandemic and its impact on detainees, courts have shifted towards electronic monitoring as an alternative to remand in custody. 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.

Lastly, bail reform should favour supportive approaches to pretrial release. The justice system generally employs coercion to ensure that defendants attend court and respect their bail conditions. Police officers may undertake compliance checks, arrest defendants who breach their conditions, and lay criminal charges accordingly. 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. Some US cities also provide free transportation to defendants in order to increase court attendance. 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. As Palma Paciocco notes, plea bargains should produce just outcomes that meet certain substantive requirements. First, the plea deal should accurately reflect the defendant’s factual guilt based on admissible evidence. Second, defendants should not accept plea bargains for offences that are intrinsically unjust or discriminatory. Furthermore, plea bargaining should include procedural safeguards that

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286 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>.
mitigate defendants’ loss aversion and that prevent undue pressure to plead guilty. According to this model, criminal justice reform should incentivize prosecutors to avoid charge stacking, screen out weak cases optimally, and bargain more equitably.

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. 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). 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.

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). 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. For example, officers frequently respond to calls related to mental illness, such as mental wellness checks and mental health crises. Police officers have a disproportionate number of interactions with people experiencing

293 Ibid.
297 Covey, ibid at 1281–84.
homelessness. Police are often called to deal with intoxicated persons and substance use issues. 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. Many use-of-force incidents stem from proactive policing interventions, or calls related to a mental health crisis. 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.

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. 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. In higher-risk situations, the State could dispatch specialized teams that are comprised of crisis intervention workers and police officers.

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 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. For federal prosecutions and prosecutions in most provinces, prosecutorial guidelines currently impose a lower standard of “reasonable prospect of conviction” to proceed with charges. 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. Other provinces, such as British Columbia, impose a more demanding threshold: the substantial probability of conviction. 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. Several provinces such as Quebec, British Columbia, and New Brunswick use this model. Other provinces, such as Alberta, have developed pilot projects that involve pre-charge screening. 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. 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. 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.

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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. 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. In order to decrease barriers to treatment and foster inclusivity, correctional services must also ensure that culturally appropriate services are widely available.

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. Offenders run essential parts of the program. They organize and take part in treatment sessions, resolve disputes between participants, and promote compliance with rules. Research shows that therapeutic communities can foster offenders’ psychological wellbeing, improve safety, decrease self-harm rates, and reduce offender misconduct in prison. Meta-analysis studies show that therapeutic communities are amongst the most successful forms of treatment for inmates with substance use disorder. Beyond therapeutic communities, correctional services should also provide adequate opioid substitution therapy (OST) that diminishes the likelihood of drug overdoses. Despite their importance, many prisons do not offer OST programs. Some correctional facilities do offer such programs, yet impose significant barriers and waiting times. Studies demonstrate that when OST is provided during incarceration and upon release from prison, the likelihood of overdose declines.

Third, correctional services must promote greater vocational and educational programs for inmates. The majority of federal inmates’ education levels are below grade 10.
Furthermore, over 60 percent of federal inmates were unemployed at the time they were arrested. 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). Yet many studies demonstrate that vocational and educational programs improve inmates’ employment prospects and reduce recidivism rates. 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. Correctional services should help ensure that individuals have access to housing and employment prior to release.

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. 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. Given their therapeutic and restorative nature, these specialized courts can help address the over-incarceration of Indigenous persons. By establishing such courts, the State would also honour the Truth and Reconciliation Commission’s recommendations to establish Indigenous justice systems, as well as the United Nations Declaration on the Rights of Indigenous Peoples.

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
of the province.\textsuperscript{343} The presiding judge, clerks, court employees, and legal-aid counsel are all members of the Cree community.\textsuperscript{344} The Court incorporates traditional Cree principles into the sentencing process, and accords significant importance to the defendant and the community’s particular needs.\textsuperscript{345} Other jurisdictions — including Akwesasne, Kahnawake, and the province of British Columbia — have also created Indigenous courts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{349} Certain jurisdictions already have various specialized courts in place, such as mental health courts, drug treatment courts, domestic violence courts, and more.\textsuperscript{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.\textsuperscript{351} Domestic violence courts may also increase victim and offender satisfaction with the criminal justice process.\textsuperscript{352} Other studies indicate that the general public favours certain types of problem-solving courts.\textsuperscript{353} More recently, commissions of inquiry have called for the implementation of specialized domestic violence courts.\textsuperscript{354}

\begin{footnotesize}
\begin{enumerate}
\item[343] Elena Marchetti & Riley Downie, “Indigenous People and Sentencing Courts in Australia, New Zealand, and Canada” in Bucerius & Tonry, \textit{supra} note 2, 374 at 376–78.
\item[345] Marchetti & Downie, \textit{ibid}.
\item[347] \textit{Ibid} at 2–3.
\item[348] Boothroyd, \textit{supra} note 339 at 920–22.
\item[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.
\item[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.
\end{enumerate}
\end{footnotesize}
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...
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. 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.

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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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