

# The Violence of Justice Policy: Risk Assessments and the Criminalization of Indigenous People



by Ashley Kyne

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**THERE IS WIDESPREAD DISCRIMINATION** in the Canadian criminal justice system.

Indigenous Peoples represent 4.5 percent of the Canadian adult population<sup>1</sup> but 26.3 percent of new admissions to federal prisons.<sup>2</sup> Compared to non-Indigenous offenders, Canadian Indigenous offenders are over-represented among those in structured intervention units (formally known as administrative segregation), released later in their sentence, and are often denied parole.<sup>3</sup> Both legislative and judicial attempts to address the overrepresentation of Indigenous Peoples<sup>4</sup> have been ineffective, as overrepresentation has increased since the late 1990s.<sup>5</sup>

There is a similar overrepresentation of Indigenous Peoples in the criminal justice system in the United States, Australia, and New Zealand (with conviction or incarceration rates ranging from three to ten times higher than non-Indigenous Peoples).<sup>6</sup> Although the culture and experiences of Indigenous groups vary widely between (and within) these countries, they all face similar challenges in learning how to maximize the fairness and effectiveness of a European-imposed justice system not suited to Indigenous histories, culture, language, and conceptions of justice.

## Classifying “High Risk”

But how does this dynamic unfold?

Almost all decisions in the criminal justice system (e.g., bail, sentencing, parole, community supervision conditions)

are influenced by a formal or informal assessment of an individual’s risk of reoffending. Risk assessment is necessary to apportion limited resources most effectively.<sup>7</sup> As a prolific activity in the criminal justice system, offender risk assessment engages in the ubiquitous task of determining the likelihood of a future event. Although practitioners decide whether or not an offender should receive treatment, risk assessment scales are just one piece of the puzzle that informs reoffending.<sup>8</sup> Risk assessments measure the probability of reoffending and can be understood as a prognostic tool. Hence, risk is determined by various factors that describe an individual’s risk as more or less dangerous.

Existing risk assessment tools and core risk factors tend to predict recidivism better for non-Indigenous offenders but worse for Indigenous offenders.<sup>9</sup> Furthermore, Indigenous offenders are more likely to be classified as high-risk.<sup>10</sup>

**In many ways, this is the core of institutional discrimination in the system: Based on factors due to colonialism, Indigenous offenders are deemed high risk and, therefore, subjected to even more colonialism.**

It is a cycle of criminalization that ensures the statistics at the outset endure.

For example, a recent study by Muir et al. revealed

that colonialism likely contributes to elevated scores on the Structured Assessment of Violence Risk in Youth (SAVRY) for young Indigenous offenders.<sup>11</sup> Colonialism reduces opportunities for protective factors like cultural involvement, which reduces the likelihood of future criminal activity. While this issue may appear unique to the SAVRY, many Indigenous-specific protective factors are not included in most risk assessments for youth and adults.

### **A Culturally Sensitive Risk Assessment?**

Moreover, Indigenous scholars have criticized the neglect of culture in risk assessment.<sup>12</sup> We are missing an essential piece of the puzzle, and assessment practices for Indigenous offenders — though better than nothing — are not good enough.

### **No risk assessment tool currently in use has been developed in a culturally responsive way or has considered the possibility of culturally specific risk factors for Indigenous offenders.**

It has been argued that commonly used risk assessment scales overclassify Indigenous Peoples as high-risk because they are assessed using risk factors potentially irrelevant to Indigenous offenders.<sup>13</sup> Accordingly, risk assessment scales used by the Canadian correctional system are potentially harmful to and discriminate against Indigenous offenders.<sup>14</sup> Over-classification results may be severe, as a lack of appropriate identification inhibits suitable treatment for Indigenous offenders. The overestimation of recidivism for Indigenous offenders may also neglect other important risk factors not included in risk assessment scales.

This crucial gap in risk assessment research/practice takes on particular importance given a recent Supreme Court of Canada ruling regarding the applicability of risk assessment tools with Indigenous offenders.<sup>15</sup> In this case, a Métis federal prisoner contended that the risk assessment scales used by Correctional Services Canada (CSC) were not validated with Indigenous populations, rendering them harmful due to the potential for discrimination. During his trial, Ewert challenged five psychological and actuarial risk assessment tools, including the Hare Psychopathy Checklist–Revised (“PCL-R”), the Violence Risk Appraisal Guide (“VRAG”), the Sex Offender Risk Appraisal Guide

(“SORAG”), the Static-99, and the Violence Risk Scale–Sex Offender (“VRS-SO”).

This case has generated considerable debate and attention in Canada and internationally, and its exact implications have yet to be discovered. Still, one thing is clear: the Supreme Court mandates that risk tools must be appropriately validated for this population. Given that risk assessment scales are not working well for Indigenous offenders, we must understand why this is the case and how to improve risk assessment practices.

An endeavour like this involves two core components: content and process. Examining the content of risk assessments will help criminal justice personnel understand risk factors for crime among Indigenous Peoples. This process may involve culturally specific risk factors (i.e., apply uniquely to Indigenous Peoples, likely due to the legacy of colonialism and genocide), culturally salient (i.e., more critical for Indigenous Peoples compared to non-Indigenous Peoples), or universal risk factors that need to be measured in more culturally informed ways. Conversely, the process of risk assessment consists of weaving existing research methods. Current risk assessment scales have taken an exclusively Western, colonial epistemological approach that has silenced Indigenous perspectives and research methodologies.<sup>16</sup>

### **Reconciliation and Criminal Justice Policy**

Canada’s Truth and Reconciliation Commission (TRC) developed 94 Calls to Action for our country to move forward with reconciliation, and Calls to Action 30, 36, and 37 call for us to eliminate the overrepresentation of Indigenous Peoples in custody, provide culturally appropriate services to prisoners, and provide more support for Indigenous programming in community corrections.<sup>17</sup>

That is not to say there is a “fair” representation of Indigenous Peoples in custody. In fact, the Calls to Action stated above are evidence of systemic discrimination against Indigenous Peoples, who are disproportionately populated in prison compared to their white counterparts. Indigenous Peoples experience the colonial weapon of racialized criminality.<sup>18</sup> In other words, this problem is not new. Indigenous Peoples are incarcerated in extreme numbers and have also experienced imprisonment since the

formation of Canada. For many, prisons become the “new residential schools.”<sup>19</sup>

Despite the federal government’s meagre attempts to address these injustices, these injustices thrive in Canadian society today and, as discerned with risk assessments, are entrenched in the criminal justice system.<sup>20</sup> This fundamental insight cannot be discarded and must be foregrounded in any discussion of the impact of trauma and risk factors for Indigenous Peoples. A shift away from the language of “overrepresentation” could reorient the application of assessing the risks and needs of Indigenous Peoples. Although such a shift will not dismantle the colonial structures that identify our current understanding of Indigenous Peoples’ experiences in custody, a meaningful shift in the colonial production of Indigenous criminalization might lead to the questioning and rejecting of the violence of state justice policies.

## CITATION

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## ENDNOTES:

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<sup>3</sup> Public Safety Canada, Preliminary observations of the operation of Correctional Service Canada’s structured intervention units, Public Safety Canada, October 26, 2021, [www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2022-siu-iap/2022-siu-iap-en.pdf](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2022-siu-iap/2022-siu-iap-en.pdf); Public Safety Canada, 2019; Office of the Correctional Investigator, Annual Report of the Office of the Correctional Investigator 2013-2014, Minister of Public Works and Government Services Canada, June 27, 2014, <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2013-2014>.

<sup>4</sup> Criminal Code (R.S.C., 1985, c. C-46) s. 718.2(e); R. v. Gladue [1999] 1 SCR 688.

<sup>5</sup> Public Safety Canada, 2019.

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<sup>12</sup> Tamatea, 2017.

<sup>13</sup> Tamatea, 2017.

<sup>14</sup> B. Perley-Robertson et al., 2019.

<sup>15</sup> Ewert v. Canada [2018] SCC 30

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<sup>20</sup> Ewert v. Canada [2018] SCC 30