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## **The Journal**

*On Politics* is a peer-reviewed academic journal published by the University of Victoria Undergraduates of Political Science. It aims to encourage and facilitate undergraduate scholarship by providing students and recent graduates with a unique opportunity to have their work published in a formal medium. The editors of *On Politics* are drawn from the undergraduate student body and the journal publishes writing from a variety of theoretical perspectives, both intra- and interdisciplinary.

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## **Editors**

Mary Heeg, Editor-in-Chief  
Xaviere Schneider  
Sarah Atkinson  
Sarah Grunert  
Timur Shaban

## Contributors

**Katie Curry** is a fifth-year political science and environmental studies double major student. Her research interests are in political ecology, global climate governance, and international political economy. Katie also serves as an executive for UVic's Model United Nations club and a director-at-large for the Undergraduates of Political Science.

**Jesse Green** is studying political science at the University of Victoria and will be graduating in Spring 2020. His coursework has primarily been in the subfields of comparative politics and Canadian politics. Green's research interests include surveillance practices, the media, and queer issues.

**Abby Koning** is a political science student with a minor in the human dimensions of climate change. She is most interested in various aspects of Canadian politics and has worked for both the federal and provincial public service and on multiple municipal election campaigns. This is the second paper Abby has published in *On Politics*.

**Julianna R.C. Nielsen** is a fifth-year undergraduate student in the departments of history and political science with research interests in decolonization, borders, and migrations, understood historically and theoretically. Her paper, published in this journal, was honoured to be awarded with the 2018/19 James Wattie Memorial Essay Scholarship in International Relations.

**Paula Rasmussen** is pursuing a political science honours degree with a minor in global development studies. She is a settler living on the unceded territory of the Songhees, Esquimalt, and WSÁNEĆ peoples who is interested in researching Indigenous resurgence and decolonial politics, specifically within a Canadian context. She is currently writing an honours thesis that examines the role of non-Indigenous allies in the process of decolonization.

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# Foreword

Mary Heeg, Editor-in-Chief

Power is central to the issues studied in political science. Balances of power—like the balance portrayed on this cover—are easily shifted, affecting every layer of our societies from the macrocosmic to the mundane. From the meaning of a universal human community to the implications of opening a dating app, power structures and distributions shape the world around us. In the Fall 2019 issue of *On Politics*, five undergraduate authors take on issues of power and its distribution, raising questions fundamental to the study of political science and to our understanding of the world in which we live.

Starting with an issue of global scale, Julianna R.C. Nielsen examines Immanuel Kant and W.E.B. Du Bois’s understandings of cosmopolitanism, the commitment to a universal human community. Nielsen argues that Du Bois exposes the Eurocentrism of Kant’s understanding of a universal community. In her critique of Kant, Nielsen reveals the power relations underpinning conceptions of universality which often have—and continue to—rely on exclusionary formations of an “other.”

Paula Rasmussen also addresses how power imbalances enable and are used to justify the mistreatment of groups perceived as an “other.” Rasmussen argues that Canada has not fundamentally changed the conditions under which Indigenous women were forcibly sterilized during the eugenics movement of the early twentieth century. In this examination of the power relations that support colonialism, Rasmussen shows not only how these enabled the perpetration of such offenses in the first place but also how the same colonial structure continues to allow coerced tubal ligation and allows governments and medical practitioners to avoid accountability for their actions.

Abby Koning also examines the flow of power within the Canadian state, but in a very different context: the role of federalism review in division of powers disputes, governments’

capacity to achieve their goals, and political strategy. Koning shows how federalism cases both shape the distribution of power between the federal and provincial governments and reflect the power of the judiciary to determine governmental powers. However, Koning argues that federalism judgements rarely constrain governments' aims; another interesting comment on the nature of political power and its distribution.

In this issue's third Canadian politics paper, Katie Curry examines the interplay of political power and party platforms. Curry illuminates how—despite a relative lack of power—the Green Party exerts significant influence on the other parties' environmental policies. She argues that the threat of a “Green wave” prompted the Liberals and New Democrats to take stronger environmental positions and the Conservatives to take a dismissive stance. Curry's essay shows how those with relatively less power can still leverage influence based on structural factors.

This issue opens with Nielsen's essay on issues of universal belonging and concludes with Jesse Green's paper on surveillance on Grindr. Green's paper shows how the power relations involved in an action as seemingly inconsequential as opening a dating app have societal ramifications just as Nielsen's questions of universal belonging do. Green argues that the surveillance occurring on Grindr is greater than that which occurs on heteronormative dating apps such as Tinder and Bumble. Despite the negative consequences of this more intrusive surveillance, stemming from the power differential between corporations like Grindr and their users and between potentially marginalized users and those seeking to do them harm, Green argues that Grindr has positive effects as well. Grindr gives gay, bisexual, and pansexual men a “safer, faster, and less location-based” way to meet others, thereby shifting power at least somewhat more to a marginalized group. From macrocosmic questions of universal belonging to the seemingly mundane action of opening a dating app, this issue's authors illuminate the complex workings of power—and the distribution of power—in our world.

# On Becoming Cosmopolitan: An analysis of Kant and Du Bois on the question of universal belonging<sup>1</sup>

Julianna R.C. Nielsen

*'THE PERPETUAL PEACE': A Dutch innkeeper once put this satirical inscription on his signboard, along with the picture of a graveyard.*

— Immanuel Kant<sup>2</sup>

*Sleep, then, child,—sleep till I sleep and waken to a baby voice and the ceaseless patter of little feet—above the Veil.*

— W.E.B. Du Bois<sup>3</sup>

Immanuel Kant (1724–1804) and W.E.B. Du Bois (1868–1963) gestured to the tragedy of (post-)Enlightenment theories of progress, the sense that the ‘end’ conditions of Peace, Justice, and Freedom are so distant in time as to only be realized by the individual of the ‘present’ in death. Despite having recognized this tragic problem, in jest and in lament, Kant and later Du Bois continued to articulate theories of historical progress and place their hopes for future generations in visions of a world becoming more Peaceful, Just, and Free. Central to these visions of

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<sup>1</sup> I respectfully acknowledge that this paper was researched and produced on the unceded Coast Salish territories of the Lekwungen and WSÁNEĆ peoples, whose historic relations with the land continue to this day. In a paper which ultimately speaks to the necessity of retrieving the memories, stories, ontologies, and philosophies of those *excluded* from the stories ‘we’ tell ‘ourselves’ about where ‘we’ are going, and how, it is important to remain mindful of our locations within the colonial pasts and presents.

<sup>2</sup> Immanuel Kant, “Perpetual Peace: A Philosophical Sketch,” in *Political Writings*. Ed. H.S. Reiss, & Trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1991), 93.

<sup>3</sup> W.E.B. Du Bois, *The Souls of Black Folk* (New Haven & London: Yale University Press, 1903/2015), 161.



humanity's progress, expressed in the political writings of both authors, is the development of a community of universally shared values, commitments, and rights alongside the emergence of the *cosmopolitan*, the 'citizen of the world' and the sense of 'universal belonging.' This paper engages with the question of how one might interpret Du Bois's theory of cosmopolitanism in relation to that of the Enlightenment project articulated by Kant by comparing how they understand the processes and mechanisms advancing their cosmopolitan visions.

To be more explicit, I mean to consider how the two theorists set up the concept of the *cosmopolitan* in relation to processes of *cosmopolitanization*.<sup>4</sup> Through this analysis, I advance that while Du Bois shares with Kant a general theory of historical progress, he critiques Kant's project with a crucially different understanding of what it means to (a) seek knowledge and to (b) participate in the development and expression of a universal political community. This paper begins by distinguishing the concept of the *cosmopolitan*, and his/her *cosmopolitanism*, from similar concepts and visions before moving to a brief discussion of what is at stake in defining, and theorizing the development of, a universal political community. After laying these foundations, I return to this paper's thesis and compare how the writers understand the processes through which an individual may know oneself and the world, and then negotiate, as one among many, universal morals, cultures, and laws.

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<sup>4</sup> Walter Mignolo notes, as will be discussed in greater detail later, how the vision of *globalism* may be associated with the processes of *globalization*. But, while theorists may speak of *cosmopolitanism*, the concept of *cosmopolitanization*—as a process of realizing a belief in, or commitment to, a vision of cosmopolitanism—remains undeveloped, ambiguous, and not an "accepted word" in most dictionaries. Mignolo asks readers to consider the processes and visions which are "highlighted" and "hidden" by the (non-)existence of particular concepts in an age of Colonial-Modernity. My aim is to consider that which is 'hidden' by the lack of a 'recognized' term. Walter Mignolo, "Cosmopolitanism and the De-colonial Option," *Studies in Philosophy and Education* 29 (2010): 119.

## The Cosmopolitan & Cosmopolitanism

Although cosmopolitanism may be associated with globalism and internationalism, the visions should not be conflated, and, for the purposes of this paper, it is worth defining the general idea of the cosmopolitan to avoid confusion and ambiguity.<sup>5</sup> The etymology of term *cosmopolitan* may be traced back to the Greek words “κόσμος” [world] and “πολίτης” [citizen], taking the meaning of “belonging to all parts of the world” in the eighteenth and nineteenth centuries.<sup>6</sup> The cosmopolitical, then, pertains to ‘a community of citizens of the world,’ and cosmopolitanism may be understood as a commitment unto, or vision thereof.

Kant articulates the processes of globalization in relation to the development of a “cosmopolitan constitution,” in that increasing trade, travel, and communication on a global scale sets the conditions in which “continents distant from each other” may be felt to be connected, particular communities bound in a common fate rather than existing independently.<sup>7</sup> Additionally, he understands these processes as providing the conditions for internationalism, the gradual expansion of a “federal association” of states for the purpose of “securing the freedom of each state in accordance with the idea of international rights.”<sup>8</sup> Kant

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<sup>5</sup> In their explication of the term *cosmopolitanism*, Ulrich Beck and Natan Sznaider start from the assumption that “there is no uniform interpretation of it,” nor are there ‘distinct fault lines’ between the “competitive terms” mentioned. Ulrich Beck, and Natan Sznaider, “Unpacking cosmopolitanism for the social sciences: a research agenda,” *The British Journal of Sociology* (2010): 382.

<sup>6</sup> “Cosmopolitan, *adj.* and *n.*” & “Cosmopolite, *n.* and *adj.*” OED Online. March 2019. *Oxford University Press*.  
<http://www.oed.com.ezproxy.library.uvic.ca/view/Entry/42259?redirectedFrom=cosmopolitan+&> (accessed March 20, 2019).

<sup>7</sup> Kant, “Perpetual Peace: A Philosophical Sketch,” 106. The concept of ‘cosmopolitan hospitality’—an essential element of the “cosmopolitan constitution,” which allows, to some extent, the expansion of trading and growth of inter-personal global relations—will be discussed later.

<sup>8</sup> Kant, “Perpetual Peace: A Philosophical Sketch,” 104. Kant understands the state of nature, the state of the international system, as existing as a state of war: “no state is for a moment secure from the others in its independence and its possessions [...] and there is no way of counteracting this except a [federal]

occasionally explains cosmopolitan relations and ‘rights,’ the dynamics between citizens of world, through analogies with international relations and ‘rights,’ the dynamics between states; but, he understands the former as less concerned with international political sovereignties and borders and more concerned with a universal *human* community than the latter.<sup>9</sup>

To understand how cosmopolitanism is positioned within Kant’s general theory of historical progress, it is crucial to first consider how the thinker sees “antagonism within society”—produced by the ‘innate’ “*unsocial sociability* of men”—as the force driving the ‘natural’ development and ultimate realization of the human species’ inner capacities.<sup>10</sup> Expecting and giving ‘resistance,’ in the context of an antagonistic society, the individual eventually, and ‘rationally,’ enters into a civil society wherein he is forced to “obey a universally valid will under which everyone can be free,” to be disciplined as to the greatest benefit and growth of self and community.<sup>11</sup> Sankar Muthu, too, locates theories of antagonism and resistance centrally within Kant’s political thought, distinguishing between “resistance for equal worth,” in the interests of “our common humanity,” and “resistance for greater worth,” in the interests of one’s own will.<sup>12</sup> Antagonism and the resistance engendered, then, may be thought of as conducive to the assertion of one’s own dignity through the development of ‘universal,’ ‘reciprocal’ rights, but also to the

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state of international right, based upon enforceable public laws to which each state must submit.” Kant, “On the Common Saying: ‘This may be true in theory, but it does not apply in practice,’” 91–2.

<sup>9</sup> Kant, “Perpetual Peace: A Philosophical Sketch,” 128. Kant writes: “As for cosmopolitan right, I pass over it here in silence, for its maxims are easy to formulate and assess on account of its analogy with international right.” Note that, for Kant, ‘cosmopolitan rights’ are not analogous with domestic rights, within civil constitutions—the relations through which ‘rights’ are preserved resemble a horizontal federation rather than a vertical centralized state.

<sup>10</sup> Kant, “Idea for a Universal History with a Cosmopolitan Purpose,” 44.

<sup>11</sup> *Ibid.*, 46.

<sup>12</sup> Sankar Muthu, “Productive Resistance in Kant’s Political Thought: Domination, Counter-Domination, and Global Unsocial Sociability” in Katrin Flikschuh and Lea Ypi (eds.), *Kant and Colonialism: Historical and Critical Perspectives* (Oxford: Oxford University Press, 2014), 69.

engagement in projects to assert one's will and supposed 'superiority' over others.<sup>13</sup> Kant certainly sees the development of "*cosmopolitan existence*"—"the highest purpose of nature"—as advanced by a kind of productive resistance and the assertion of self-worth as a matter of one's "right" to engage in peaceful relations rather than of another's "philanthropic principle of ethics."<sup>14</sup>

For the most part, Du Bois's understanding of the general concept of cosmopolitanism aligns with the Kantian articulation of a "universal community" wherein "a violation of rights in *one* part of the world is felt *everywhere*."<sup>15</sup> Moreover, Du Bois expresses the moral development of humanity through a similar framework of antagonism and resistance by the assertion of self-worth: "In other periods of intensified prejudice all the Negro's tendency to self-assertion has been called forth[. . . and] in the history of nearly all other races and peoples the doctrine preached at such crises has been mainly self-respect."<sup>16</sup> And, again, one's belonging to the human community is articulated as an innate 'right' rather than something that "must be vouched for by some white man"—by someone who has supposed and imposed his superiority and feels himself philanthropic.<sup>17</sup>

However, in his political writings, Du Bois is critical of the cosmopolitan designs articulated by Kant, discussing the "conflicting construction of the self" in light of seeing oneself "as

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<sup>13</sup> Muthu, "Productive Resistance in Kant's Political Thought," 74. & Kant, "The Metaphysics of Morals," 134.

<sup>14</sup> Kant, "Idea for a Universal History with a Cosmopolitan Purpose," 51. & Kant, "The Metaphysics of Morals," 172. In one instance, Kant defends Chinese and Japanese resistance to Western imperial designs, acknowledging that they had "wisely placed restrictions" on European trader-colonizers (like those who had oppressed and brought violence upon Subcontinental Asia) who had arrived, and requested hospitality, on false pretences. In this case, the nations resisted subjugation and asserted their worth with productive resistance. Kant, "Perpetual Peace: A Philosophical Sketch," 107.

<sup>15</sup> Kant, "Perpetual Peace: A Philosophical Sketch," 107–8. Kant's own emphasis.

<sup>16</sup> Du Bois, *The Souls of Black Folk*, 40.

<sup>17</sup> *Ibid.*, 115.

an ‘other’ and as ‘a problem’”<sup>18</sup> in a society where to be white is to express “the one fundamental tenant of our practical morality.”<sup>19</sup> In this way, Du Bois questions how it is ‘black folk’ might come to know and assert themselves through the lens of a society that defines and denigrates ‘their difference’—‘their deviation’—from ‘the (white, male, etc.) norm.’ Further, his critique is underpinned by the idea that contact between peoples since the emergence of ‘Enlightenment rationality’—wherein “we do not associate with each other, we associate with our ideas of each other”—has failed to produce the kind of productive resistance that advances reciprocal rights and mutual respect.<sup>20</sup> The “future world-citizen,” according to Du Bois, will be attuned to these processes restricting the expression and discovery of the ‘universal human community’ to a particular people, and will feel that no group “can be deprived of a voice in their government and of the right to self-development without a blow at the very foundations of all democracy and all human uplift.”<sup>21</sup>

Setting the political writings of Du Bois and Kant next to each other, and seeing where their views diverge on particular issues, brings attention to some of the central contentions and debates within theories of *cosmopolitanism* and the *cosmopolitan*. First, there is the question of to what extent individuals articulate their belonging to particular groups (of national, religious, ethnic etc. character) and to humanity as a whole—and to what extent they privilege one over the other, or subsume one within the other.<sup>22</sup> Following from this, one might also consider how

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<sup>18</sup> Nasar Meer, “W.E.B. Du Bois, double consciousness and the ‘spirit’ of recognition,” *The Sociological Review* 67, no.1 (2019): 52. For Du Bois, so Meer argues, the conception of ‘self’ is “culturally embedded and socially mediated,” leading him “to argue that self-recognition is a form of cultural recognition which, necessarily, sees one’s cultural identity in connection with the cultural identities of other members of one’s community.”

<sup>19</sup> W.E.B. Du Bois, *Darkwater: Voices from within the Veil* (Mineola: Dover Publications, inc., 1920/1999), 20.

<sup>20</sup> Du Bois, *Darkwater*, 86.

<sup>21</sup> *Ibid.*, 89.

<sup>22</sup> Beck and Sznajder argue that national and cosmopolitan belongings are not mutually exclusive, but that the symbols and realities of a cosmopolitan condition may lay “behind the façades of persisting national spaces,” and vice-

imperial/colonial/white supremacist discourse structures ‘dominant’ perceptions of, and interactions with, ‘other’ particular groups in relation to a universal conception of a particular expression of humanity. Second, there is the question of how cosmopolitan designs of ‘universal belonging’ come to be developed and acted upon—intentionally or not—through processes of *cosmopolitanization*. This question calls on researchers to consider the extent to which *cosmopolitanization* gives form to the ‘universal community’ ‘from above,’ defined by assimilative processes of conforming to some expression of ‘universality,’ or ‘from below,’ characterized by the expansion and strengthening of pluralistic expressions of cosmopolitan existence(s).<sup>23</sup>

### Knowledge Seeking

In 1784, Kant articulated the Enlightenment’s motto: “*Sapere aude!* Have Courage to use your *own* understanding!”<sup>24</sup> This motto remains a constant theme through the political writings of (post-)Enlightenment thinkers who express the value of the processes of knowledge seeking—over knowledge having—through the maintenance and re-articulation of the principle of going beyond, and challenging, that which has been inherited as ‘Truth’ and ‘knowledge.’ For both Kant and Du Bois, *how* knowledge is sought, and the processes through which one comes to know oneself and the world, is significant to the

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versa. Beck & Sznajder, “Unpacking cosmopolitanism for the social sciences: a research agenda,” 388.

<sup>23</sup> Walter Mignolo, “The Many Faces of Cosmo-polis: Border Thinking and Critical Cosmopolitanism.” *Public Culture* 12, no.3 (Fall 2000): 745. Mignolo describes a “cosmopolitanism from above” as one that “only connects from the centre of the large circle [Europe] outward, and leaves the outer places disconnected from each other;” whereas, a cosmopolitanism from below is based on “a pluricentric world” advanced through a “project that connects the diverse subaltern satellites appropriating and transforming Western global designs.” His framework of ‘below-above’ shapes my own approach to understanding the (post-)Enlightenment processes of cosmopolitanization.

<sup>24</sup> Kant, “An Answer to the Question: ‘What is Enlightenment?’,” 54. “*Sapere aude!*” also takes the translation, “Dare to know!”

cosmopolitan project, insofar as individuals around the globe come to know one-another and understand their place within, and duties unto, the ‘universal human community.’ The goal of this section is to tease out how both writers understand the structures and processes enabling/disabling knowledge of ‘self’ and ‘others’ in relation to the emergence, expansion, and discovery of common humanity and the cosmopolitical community.

Kant writes that “Enlightenment is man’s emergence from his self-incurred immaturity”—his casting away of “dogmas and formulas,” which “are the ball and chain of his permanent immaturity”—through his public use of reason, a capacity which is ‘naturally endowed’ to mankind.<sup>25</sup> He is concerned with giving an account of what it means to make ‘public use of reason,’ and advancing a particular understanding of the conditions, and constitutions, in which the free and public use of reason might flourish.<sup>26</sup> Then, through his discussion of ‘hospitality’ and its associated communicative rights, Kant’s argument for the dismantling of the ‘artificial restraints’ on public reason extends beyond the domestic sphere to the global one. Kant explains ‘hospitality’ as the right of men “to present themselves in the society of others”—a right which makes it possible to “enter into peaceful mutual relations,” to offer the exchange of tangibles and intangibles, and, above all else, to communicate.<sup>27</sup>

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<sup>25</sup> *Ibid.*, 54–55.

<sup>26</sup> The public use of reason, according to Kant, is identified “as a man of learning addressing the entire *reading public*.” *Ibid.*, 55. Further, Kant contemplates the place of long-standing, imposed, and sometimes unexamined institutions, norms, and conventions in the public realm, and suggests that these ‘artificial constraints’ ought to be removed as advance the Enlightenment project and humanity’s escape from a state of ‘immaturity’: “Men will of their own accord gradually work their way out of barbarism so long as artificial measures are not deliberately adopted to keep them in it.” *Ibid.*, 59.

<sup>27</sup> Kant, “Perpetual Peace: A Philosophical Sketch.” 106. Later in the *Metaphysics of Morals*, Kant reinforces the idea that the right of ‘hospitality’ allows for offers to be voiced to, and negotiated with, ‘foreign’ societies, but does not assert the necessity to agree to requests made. It is a right insofar as “all nations may unite for the purpose of creating universal laws to regulate the intercourse they may have with one another.” Kant, “The *Metaphysics of Morals*,” 172.

Communication across geographical, linguistic, and religious boundaries—particular modes of belonging and differentiation understood by Kant as natural and purposeful means to “separate the nations and prevent them from intermingling”—then moves humanity away from conflict and “towards greater agreement over their principles” and “mutual understanding” within the framework of global cultural and moral development.<sup>28</sup>

But, as J.K. Gani has argued, scholars ought not abstract the “*concept*” of cosmopolitan hospitality out of its historical “*conception*,” at the risk of obscuring “its links to colonialism and practices of racialization.”<sup>29</sup> So, in an effort to consider how his theories of race affect his political writings, I turn to Kant’s ethnographic writings where he asserts:

In the hot countries the human being matures in all aspects earlier, but does not, however, reach the perfection of those in the temperate zones. Humanity is at its greatest perfection in the race of the whites. The yellow Indians do have a meagre talent. The Negroes are far below them and at the lowest point are a part of the American peoples.<sup>30</sup>

Kant’s positioning of the ‘white race’ above racialized ‘others’ is, perhaps, not surprising; but it is something to remain mindful of as the paper proceeds to discuss the place of ‘Europe’ in his articulation of the cosmopolitan project, and the kinds of knowledge enabling its advancement. As it becomes clear towards the end of Kant’s articulation of his ‘idea for a universal history,’ the knowledge he perceives as necessary for enlightenment—for the world’s advancement towards its ‘cosmopolitan goal’—can be found internally, which is to say, within ‘European’ history, philosophy, art, and science: from the ancient Greeks onward, and through ‘Europe’s revolutions,’ “we

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<sup>28</sup> Kant, “Perpetual Peace: A Philosophical Sketch.” 114.

<sup>29</sup> J.K. Gani, “The Erasure of Race: Cosmopolitanism and the Illusion of Kantian Hospitality,” *Millennium: Journal of International Studies* 45, no.3 (2017): 429.

<sup>30</sup> Immanuel Kant, “Physical Geography,” In Emmanuel Eze (ed.), *Race and the Enlightenment* (Cambridge, Mass & Oxford: Blackwell, 1997), 63. Accessed via [300c] course handout.



shall discover a regular process of improvement in the political constitutions of our continent (which will probably legislate eventually for all other continents).”<sup>31</sup> More than locating where ‘humanity’s development’ may be observed, where knowledge of the ‘universal’ type might be accessed, Kant contemplates, and assumes, the value of forgetting that which may not be ‘valued’ by “our remote descendants” who will supposedly be interested only in acts relating to the achievement of a cosmopolitan end—the universalization, and de-localization, of European parochialisms.<sup>32</sup>

Du Bois pushes back against, but also describes the feeling of, being positioned “apart from the human family” and made “ahistorical” by the discourses of scientific racism and European superiority advanced by Kant and other Enlightenment thinkers.<sup>33</sup> He writes, for instance, of the constructed-ness of the ‘white race,’ and the “deliberately educated ignorance of white schools” which speak to the development of ‘European civilization’ in relation to the stasis, or backwardness, of societies articulated as beyond ‘Europe.’<sup>34</sup> Furthermore, Du Bois articulates how knowledge of self and the world is barred by contemporary and day-to-day manifestations of the ‘color-line,’ where prejudice against racialized bodies is rationalized as “the natural defence of culture against barbarism, learning against ignorance, purity against crime.”<sup>35</sup> Du Bois, observing the ways in which ‘white’ and ‘black folk’ interact in an American context, writes:

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<sup>31</sup> Kant, “Idea for a Universal History with a Cosmopolitan Purpose,” 52.

<sup>32</sup> Ibid., 53. & Mignolo, “Cosmopolitanism and the De-colonial Option,” 126.

<sup>33</sup> LaRose T. Parris, *Being Apart: Theoretical and Existential Resistance in Africana Literature* (Charlottesville & London: University of Virginia Press, 2015), 1.

<sup>34</sup> Du Bois, *Darkwater*, 23. Du Bois articulates the feeling of critiquing the representation of ‘Europe’—its histories, its empires—by “world-mastering demi-gods” and not being listened to, “even when we pointed silently to their feet of clay.” Ibid., 20. Here, with this reference to an Old Testament prophesy, Du Bois points to the crumbling and fragile foundations of Europe, upon which later (oppressive) empires and states stand precariously.

<sup>35</sup> Du Bois, *The Souls of Black Folk*, 9.

The world about flows by him in two great streams: they ripple on in the same sunshine, they approach and mingle their waters in seeming carelessness,—then they divide and flow wide apart. It is done quietly; no mistakes are made, or if one occurs, the swift arm of the law and of public opinion swings down for a moment.<sup>36</sup>

This social and legal segregation—the ‘color-line’—has prevented, so Du Bois argues, the emergence of “a community of intellectual life or point of transference where the thoughts and feelings of one race can come into direct contact and sympathy with thoughts and feelings of the other.”<sup>37</sup> Du Bois describes another facet of knowledge through his metaphor of ‘the veil,’ which “connotes not only physical social barrier but also modalities of knowing,” and through his discussion of how knowledge of self, ‘others,’ and the world are conditioned by the perceptions and discourse of “the nature and location of one’s being in the world.”<sup>38</sup>

In a sense, Du Bois turns the Enlightenment project upon itself, exposing the discursive and institutional mechanisms of oppression obscured by hegemonic and inherited discourses and systems of white superiority, supposed as the ‘natural’ and ‘just’ ordering of the world in its local and global dimensions. Echoing, in one instance, Kant’s exclamation—“It is so convenient to be immature!”—Du Bois writes: “we seldom study the condition of the Negro to-day honestly and carefully. It is so much easier to assume that we know it all.”<sup>39</sup> In the context of early twentieth century European imperialisms, and in the midst of rising global struggles for national self-determination, it is significant that Du

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<sup>36</sup> Ibid., 137.

<sup>37</sup> Ibid., 138.

<sup>38</sup> Anthony Monteiro, “W.E.B. Du Bois and the Study of Black Humanity: A Rediscovery,” *Journal of Black Studies* 38, no.4 (March 2008), 607. From the position of ‘within the veil,’ Du Bois writes of the “sense of always looking at one’s self through the eyes of others, of measuring one’s soul with the tape of a world that looks on in amused contempt and pity.” Du Bois, *The Souls of Black Folk*, 5.

<sup>39</sup> Kant, “An Answer to the Question: ‘What is Enlightenment?’,” 54. & Du Bois, *The Souls of Black Folk*, 103.

Bois articulates universal history as “the history of the [steadily increasing] discovery of the common humanity of human beings” by humans, and suggests that “the destinies of this world will rest ultimately in the hands of darker nations,” who at the time of his writing formed “two-thirds of the population.”<sup>40</sup> In other words, Du Bois both challenges European claims to know the world universally and proposes another way of “knowing and being in the world,” developing a cosmopolitan community, from the position of civilizations, cultures, and individuals peripheralized and obscured ‘within the veil.’<sup>41</sup>

### **Cosmopolitical Participation**

Finally, after having discussed the processes of knowledge seeking in relation to the development of a universal human community, I turn to a conversation around how Kant and Du Bois understand the development and expression of cosmopolitan belonging as it pertains to the participation and representation of each particular (individual and local) community in relation to the universal community. Central to this discussion is the question of to what extent it is ‘appropriate’ to intervene in, and guide, the strivings of ‘others’ for Peace, Justice, and Freedom in the interest of ‘humanity as a whole.’

Struggling with this question, Kant expresses that there might be ‘benefits’ to the violation of the rights of racialized and marginalized peoples in that “it may bring culture to uncivilized peoples” and “it may help us to purge our own country of depraved characters;” however, he ultimately cannot justify the violations of human rights, nor violent colonial practices, wherein “these supposedly good intentions cannot wash away the stain of injustice from the means which are used to implement them.”<sup>42</sup>

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<sup>40</sup> Du Bois, *Darkwater*, 86 & 27.

<sup>41</sup> Monteiro, “W.E.B. Du Bois and the Study of Black Humanity: A Rediscovery,” 610.

<sup>42</sup> Kant, “The Metaphysics of Morals,” 173. Then, as Martin Ajei and Katrin Filkschuh argue, Kant harshly condemns the “the right to enslave, the right to invade, the right to liberate, the right to civilize” through a theory of reciprocal

Yet, Kant's story of *cosmopolitanization*—of the world becoming more universally Peaceful, Just, and Free—is one that sees the gradual development of man from “the lowest level of animality to the highest level of humanity,” towards “the standard model of humanity” centering ‘Europe’ and peripheralizing—denying the humanity shared with—people and societies which are seen to fall short of those standards.<sup>43</sup> Constructing and imposing a sense of “colonial difference,” of a world divided between “barbarian” and “civilized” peoples and society, Kant articulates progress as an assimilative process of bringing the former into the latter.<sup>44</sup> In another sense, Kant's cosmopolitan project is something to be ‘participated in’ by people who shed their particular attachments and commitments, which are defined as ‘particularities’ in relation to assumed and imposed ‘European-universalities.’<sup>45</sup>

From the position of ‘within the veil’—from the periphery of Kant's Eurocentric model—Du Bois sees that “the title to the universe claimed by White Folk is faulty.”<sup>46</sup> Of the “burning desire to spread the gift abroad,” motivated by this sense of the universality and superiority of ‘whiteness,’ Du Bois writes: “War, murder, slavery, extermination, and debauchery,—this has again and again been the result of carrying civilization and the blessed gospel to the isles of the sea and the heathen without the law.”<sup>47</sup> So then, considering the processes through which “there must come a loftier respect for the sovereign human soul,” Du Bois eloquently argues:

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human rights, which make it impermissible to make exceptions for oneself in the interest of imposing a will unilaterally. Martin Ajei and Katrin Filkschuh, “Colonial Mentality: Kant's Hospitality Right Then and Now,” in Katrin Flikschuh and Lea Ypi, eds. *Kant and Colonialism: Historical and Critical Perspectives* (Oxford: Oxford University Press, 2014), 231-2.

<sup>43</sup> Kant, “Idea for a Universal History with a Cosmopolitan Purpose,” 48. & Mignolo, “Cosmopolitanism and the De-colonial Option,” 121.

<sup>44</sup> Mignolo, “Cosmopolitanism and the De-colonial Option,” 122.

<sup>45</sup> Mignolo, “The Many Faces of Cosmo-polis: Border Thinking and Critical Cosmopolitanism,” 744.

<sup>46</sup> Du Bois, *Darkwater*, 18.

<sup>47</sup> Du Bois, *Darkwater*, 18. & Du Bois, *The Souls of Black Folk*, 123.

Herein the longing of black men must have respect: the rich and bitter depth of their experience, the unknown treasures of their inner life, the strange endings of nature they have seen, may give the world new points of view and make their loving, living, and doing precious to all human hearts.<sup>48</sup>

Here, he speaks of the role of education for the emancipatory purposes of knowing oneself and the world, of discovery and assertion of histories and experiences of self and ‘others,’ together, in the expression of a common humanity.

Du Bois’s vision of the cosmopolitan, then, is grounded in a sense of the universality of human particularities, cultivated by mutual respect, by the acknowledgement of ‘common humanity and destiny,’ and by “sympathy and cooperation” between communities, rather than “almsgiving.”<sup>49</sup> As others have argued, Du Bois sees the advancement of humanity in the preservation, growth, and expression of particular “moral and aesthetic insights,” which, together, come to shape a sense of belonging to, and universal compatibility with, the cosmopolitan project.<sup>50</sup> In another sense, Du Bois sees the process of *cosmopolitanization* as a striving “not singly but together” towards “a new human unity.”<sup>51</sup>

## Conclusions

By way of conclusion, I have considered the political writings of Kant and Du Bois on the question of how it is that cosmopolitan visions of the future come to be realized and advanced through theories of human progress, arguing that the two writers diverge significantly on the questions of how (a) knowledge of self and the world is sought and of how (b) the

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<sup>48</sup> Du Bois, *The Souls of Black Folk*, 82–83.

<sup>49</sup> Du Bois, *The Souls of Black Folk*, 139.

<sup>50</sup> Meer, “W.E.B. Du Bois, double consciousness and the ‘spirit’ of recognition,” 53.

<sup>51</sup> Du Bois, *The Souls of Black Folk*, 10 & 68.

universal community is expressed in relation to particular belongings and identities. It is my contention that this approach to understanding *cosmopolitanization* complicates and nuances the ways in which Du Bois is understood as critiquing *and* completing the Kantian vision of Enlightenment progress towards perfect and universally Peaceful, Just, and Free ends within a cosmopolitan context.

Most significantly, perhaps, Du Bois exposes the limitations of Kant's vision of the universality of a particular European mindset and way of being, speaking to the harm done to humanity, collectively, by 'modern-colonial' projects and assimilative processes asserting such a narrow singularity of what it means to be a 'citizen of the world.' In doing so, Du Bois asks his readers—of the early 20th century as much as those of today—to (re-)examine commonly held assumptions regarding conceptions of 'our universally held values and identities' and 'their particular mores and traditions,' restraining knowledge and participation. Further, and crucially, Du Bois brings attention to the ways in which social and political institutions construct and manage the differentiation between 'our universality' and 'their incompatible particularities,' (re-)affirming 'our' sense of normality against those deviations which are subsequently denigrated as lacking, or opposing, those characteristics and commitments 'we' all supposedly hold. Du Bois, then, may be interpreted as reversing the Kantian universalization of a particularism in his project to assert cosmopolitanism as universal expressions of, and mutual respect for, global particularisms.

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# Colonizing Racialized Bodies: Examining the Forced Sterilization of Indigenous Women and the Shameful History of Eugenics in Canada

Paula Rasmussen

## A Case of Systemic Racism in Canadian Healthcare

In a hospital record dated July 14, 1961, Dr. Tecson, a psychiatrist at the Essondale Provincial Mental Hospital in British Columbia, wrote the following statement:

This twenty-two year old Indian girl was admitted in 1955...she is a known mental defective who has always been incorrigible, wild, underdisciplined and promiscuous... Sterilization is therefore strongly recommended to prevent patient from having illegitimate children which the community would have to care for..."<sup>1</sup>

Regrettably, this statement is representative of the stance of many eugenically-minded doctors who carried out the practice of forced sterilization against Indigenous women in Canada throughout the early 1900s. Although this practice supposedly ended in the early 1970s, when formal sterilization legislation was finally repealed, it has become clear that four decades later, the issue of involuntary Indigenous sterilization is still pervasive in the contemporary Canadian context.<sup>2</sup>

In July 2017, the Saskatoon Health Region commissioned an external review in response to reports of Indigenous women

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<sup>1</sup> Karen Stote, "The coercive sterilization of Aboriginal women in Canada," *American Indian Culture and Research Journal*, 36, no. 3 (2012): 122.

<sup>2</sup> Elizabeth Rule, "Seals, Selfies, and the Settler State: Indigenous Motherhood and Gendered Violence in Canada," *American Quarterly* 70 no. 4 (2018): 749.

being coerced into tubal ligation after giving birth at a Saskatchewan hospital. Yvonne Boyer, a Métis lawyer, senator, and coauthor of the external review, highlights how this issue reveals the “systemic racism in the Canadian healthcare system.”<sup>3</sup> Since the release of the report, several more Indigenous women from across Canada have contacted Boyer with similar stories, revealing how widespread this issue truly is.<sup>4</sup> Systemic racism in health care is not unique to Canada. For example, in Peru, the 1966 Reproductive Health and Family Planning Programme has led to the coerced sterilization of over 260,000 Indigenous women in poor and rural communities.<sup>5</sup> However, in a “liberal democracy” such as Canada, such oppressive practices seem, in theory, less likely to occur. This raises the question, how have the Canadian state, affected Indigenous women, and other stakeholders (such as international human rights organizations) approached the issue of forced Indigenous sterilization in Canada, both historically and in the contemporary era? This paper argues that despite escalating pressure from the international community to prevent and explicitly criminalize coerced sterilization in Canada, and resistance, primarily in the form of litigation, from Indigenous victims of involuntary tubal ligation, the Canadian state has done little to fundamentally change the conditions that existed during the eugenics movement in the early 20<sup>th</sup> century, under which such dehumanizing and violent practices were condoned and perpetuated by the settler state.

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<sup>3</sup> Yvonne Boyer, “Healing racism in Canadian health care,” *CMAJ*, 189, no. 46 (2017): 108.

<sup>4</sup> Alex Soloducha, “Saskatchewan Indigenous women file lawsuit claiming coerced sterilization,” *CBC*, October 27, 2017, <https://www.cbc.ca/news/canada/saskatchewan/sask-indigenous-women-file-%20lawsuit-claiming-coerced-sterilization-1.4348848>.

<sup>5</sup> Jelke Boesten, “Free choice or poverty alleviation? Population politics in Peru under Alberto Fujimori,” *European Review of Latin American and Caribbean Studies* 82 (2007): 13.

## **International Concerns over Canadian Human Rights Violations**

Since the release of the external review, Canada has faced condemnation from the international community on various fronts. Amnesty International has called on the federal government to take more concrete steps towards preventing and criminalizing sterilization without free, full, and informed consent. They have also emphasized the importance of appointing a special representative to hear from Indigenous women and to “learn what justice would look like for the survivors.”<sup>6</sup> Furthermore, on December 7, 2018, the United Nations Committee Against Torture released an official report which requested that the Canadian state “take legislative and policy measures to stop women from being sterilized against their will” and classified coerced sterilization as a form of “torture,” “gender-based violence,” and a “violation of medical ethics.”<sup>7</sup> Similarly, the World Health Organization, UN Women, and other agencies have categorized any form of involuntary sterilization as a “gross violation of fundamental human rights.”<sup>8</sup> Despite the pressure from the international community, the federal government has not taken steps to appoint a special representative to examine the prevalence of forced sterilization or explicitly outlaw the practice in the Canadian Criminal Code. Instead, official statements from parliament reveal that the government is taking a “public-health approach” to the issue and working to ensure “culturally appropriate health care is available across the country.”<sup>9</sup> This approach is inadequate because it frames the issue

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<sup>6</sup> Kristy Kirkup, “Amnesty International calls for accountability on coerced sterilization of Indigenous women,” *CTV*, November 12, 2018, <https://www.ctvnews.ca/canada/amnesty-calls-for-accountability-on-coerced-sterilization-of-indigenous-women-1.4174239>.

<sup>7</sup> Darryl Dyck, “TRC heard concerns about coerced sterilization of Indigenous women, says Murray Sinclair,” *The Canadian Press*, November 22, 2018, <https://www.cbc.ca/news/indigenous/trc-concerns-coerced-sterilizations-murray-sinclair-1.4917321>.

<sup>8</sup> Kirkup, “Amnesty International.”

<sup>9</sup> Kristy Kirkup, “Indigenous sterilization victims fear inaction as feds eye examination,” *The National Post*, December 18, 2018,

as a public-health issue rather than a fundamental violation of human rights or an extension of colonialism and white supremacy. Furthermore, it is an ineffective approach because it is not an official legislative measure that holds the responsible medical practitioners accountable for their harmful actions.

## **Historic Recurrence? Examining the Eugenics Movement in Canada**

In Alberta, under the Sexual Sterilization Act, which was in effect from 1928 to 1972, over 2,800 women were sterilized after being declared “defective” and unfit to produce children.<sup>10</sup> Once a patient was diagnosed as ‘mentally defective,’ the Alberta Eugenics Board did not need to obtain consent for sterilization from the patient or their family. Indigenous women were disproportionately targeted by this legislation. In the four years between 1969 and 1972, Indigenous and Métis people accounted for more than 25 percent of all sterilized patients, while representing only 2.5 percent of the population.<sup>11</sup> One of the victims of Alberta’s sterilization legislation, Leilani Muir, launched a lawsuit against the Alberta government and won a \$740,000 settlement in 1996.<sup>12</sup> Muir was the first Indigenous woman to successfully sue the provincial government and inspired more than 800 other women to launch lawsuits of their own. Unfortunately, in 1998, the Alberta government, under Premier Ralph Klein, realized it would lose these lawsuits and “decided to invoke the notwithstanding clause to limit the

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<https://nationalpost.com/news/canada/indigenous-sterilization-victims-fear-inaction-as-feds-eye-examination>.

<sup>10</sup> Jana Grekul, Arvey Krahn and Dave Odynak, “Sterilizing the “Feeble-minded”: Eugenics in Alberta, Canada, 1929-1972,” *Journal of Historical Sociology*, 17, no. 4 (2004): 358.

<sup>11</sup> Leonardo Pegoraro, “Second-rate victims: The forced sterilization of Indigenous peoples in the USA and Canada,” *Settler Colonial Studies*, 5, no. 2 (2015): 163.

<sup>12</sup> Jaipreet Viridi, “Canada’s shame: the coerced sterilization of Indigenous women,” *New Internationalist*, November 30, 2018, <https://newint.org/features/2018/11/29/canadas-shame-coerced-sterilization-indigenous-women>.

constitutional rights of the victims to sue.”<sup>13</sup> Currently, over 60 Indigenous women who have experienced involuntary sterilization are part of a class-action lawsuit that was launched against the Saskatoon Health Region in 2017. They are each claiming seven million dollars in damages.<sup>14</sup> In 2015, two Cree women, Tracy Bannab and Brenda Pelletier, reported being pressured into being sterilized on the basis of their Indigenous status. This caused other Indigenous women to come forward with similar allegations, claiming that they had been targeted based on their race, the number of children they had, or previous substance abuse problems.<sup>15</sup> Alisa Lombard, a lawyer representing these women and working at Maurice Law (the first Indigenous-owned law firm in Canada) claims that this issue can be explained as a case of “systematic institutional racism and discrimination.”<sup>16</sup> The current resistance coming from affected Indigenous women, in the form of litigation, and the attempts of Indigenous women to seek reparations throughout history represent ways in which Indigenous women have attempted to change their conditions of oppression. However, the failure of the federal government to fully acknowledge the abuse that these women have faced or compensate them for their incalculable losses illustrates the Canadian state’s sustained refusal to assume responsibility for the historical and present-day colonial injustices faced by Indigenous peoples throughout Canada.

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<sup>13</sup> Graham Thompson, “Leilani Muir helped shine light on Alberta’s dark past,” *Edmonton Journal*, March 16, 2016, <https://edmontonjournal.com/news/politics/graham-thomson-leilani-muir-helped-shine-light-on-albertas-dark-past>.

<sup>14</sup> Viridi, “Canada’s shame.”

<sup>15</sup> Betty Ann Adam, “Saskatchewan women pressured to have tubal ligations,” *Saskatoon StarPhoenix* June 13, 2018, <https://thestarphoenix.com/news/national/women-pressured-to-have-tubal-ligations>.

<sup>16</sup> Viridi, “Canada’s shame.”

## Indigenous Women as Primary Targets of the Colonial Project

As Karen Stote argues, the control of Indigenous women's reproductive capacities has historically been "central to the strategic and systematic targeting of Indigenous peoples for assimilation into Canadian society."<sup>17</sup> As indicated above, Indigenous women in Canada were disproportionately affected by laws in the early 1900s that sought to sterilize people declared 'mentally unstable' and therefore incapable of responsible parenting. During this time, eugenicists wanted to keep the Canadian "race" pure by sterilizing unfit people. This form of racism was based on "scientific" ideas about the genetic inferiority of certain biological traits. Some women, including white upper- and middle-class women, were encouraged to reproduce, while the reproductive abilities of other women, such as Indigenous and migrant women, were considered a threat to the social order.<sup>18</sup> Many famous Canadian women's rights advocates, such as Nellie McClung and Emily Murphy, were in favour of sterilization legislation that targeted "feeble-minded" women.<sup>19</sup> Angus McLaren reveals that sterilization was seen by many as an effective method of "eliminating the wastage of human life involved in perpetuating the unfit."<sup>20</sup> It was also viewed by some as a method of reducing the number of impoverished people to whom the government would need to provide assistance and as a "means of curtailing revolutionary tendencies in the masses."<sup>21</sup> In other words, the practice was employed by the state as both a mechanism to maintain colonial order and as a way to escape the responsibility for the conditions of Indigenous people's lives.

Elizabeth Rule illustrates the various ways in which Indigenous women have been a primary target of the colonizing

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<sup>17</sup> Karen Stote, *An Act of Genocide: Colonialism and the Sterilization of Aboriginal Women* (Halifax: Fernwood Publishing, 2015), 26.

<sup>18</sup> Pegoraro, "Second-rate victims," 163.

<sup>19</sup> Grekul, Krahn and Odynak, "Sterilizing," 362.

<sup>20</sup> Angus McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945* (McClelland and Stewart, 1990): 101.

<sup>21</sup> Stote, "The Coercive Sterilization," 125.

project, both historically and currently. As Rule states, “[I]ike the land itself, the settler state views Indigenous women as what could be—and must be—conquered and controlled as a way to secure and maintain Indigenous dispossession.”<sup>22</sup> An Anishinaabe woman involved in the lawsuit against the Saskatoon Health Region claims that, due to traditional Indigenous beliefs, she considers a woman’s ability to reproduce “sacred.”<sup>23</sup> As mothers of the nation, Indigenous women are often seen as the “culture bearers” of their communities, and therefore an attack on Indigenous motherhood can be viewed as an attack on the “survival of Indigenous nations, cultures, and traditions for future generations.”<sup>24</sup> The Canadian state has employed other techniques of breaking the link between one generation and the next through assimilationist policies, such as the residential school system or the “sixties scoop,” which forced Indigenous children out of their communities and into non-Indigenous families.<sup>25</sup> Like forced sterilization, the justification for these policies relied on the underlying notion that Indigenous mothers are incapable of caring for their children. Therefore, gender-based violence against Indigenous women, in the form of coerced sterilization, can be understood as both a way to undermine Indigenous women and as a strategy for the Canadian state to separate Indigenous peoples from their lands, thereby furthering the colonial project.

Furthermore, as Stote claims, it could be argued that the sterilization of Indigenous women “allows the Canadian state to deny responsibility for and avoid doing something about the deplorable conditions in most Aboriginal communities,” conditions which are the direct result of colonization.<sup>26</sup> In other words, it is more cost-effective for the state to continue to condone forced sterilization than it is to change the structural conditions under which Indigenous communities continue to face

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<sup>22</sup> Rule, “Seals,” 743.

<sup>23</sup> Soloducha, “Saskatchewan.”

<sup>24</sup> Rule, “Seals,” 750.

<sup>25</sup> Marie D. Ralstin-Lewis, “The continuing struggle against Genocide: Indigenous women’s Reproductive Rights,” *Wicazo Sa Review* (2005): 82.

<sup>26</sup> Stote, “The Coercive Sterilization,” 140.

disproportionately low standards of living. Arguably, one of the main reasons that Indigenous women continue to face gender-based violence, such as forced sterilization, is because the Canadian state continues to avoid accountability for the intergenerational trauma faced by Indigenous peoples and for the theft of Indigenous lands and resources.<sup>27</sup> Medical professionals in Saskatoon justify their decisions to coercively sterilize Indigenous women by claiming that they do not want more children to be born into situations of abuse and negligence, without acknowledging the greater structural causes of the poor conditions into which Indigenous children are born. Although the federal government may not be actively enacting legislation promoting the practice of forced sterilization, they have done little to change the conditions under which such dehumanizing practices continue to be justified.

### **The Colonial State in Canada: ‘Genocide Proper’**

In the current context of reconciliation in Canada and with the close of the Canadian Truth and Reconciliation Commission, the term “genocide” has come to occupy a prominent position in Canadian public discourse. Frequently, this concept is discussed in the context of “cultural genocide” and used to describe the efforts of the Canadian state to assimilate Indigenous peoples into settler society, through policies such as residential schooling.<sup>28</sup> However, rarely is it acknowledged that the Canadian state performed, and continues to perform acts that constitute what Stote refers to as “genocide proper.”<sup>29</sup> According to Article II of the 1948 Convention on the Prevention and Punishment of Genocide, the following acts constitute genocide:

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<sup>27</sup> Erika Dyck and Maureen Lux, “Population Control in the “Global North”?: Canada’s Response to Indigenous Reproductive Rights and Neo-Eugenics,” *Canadian Historical Review* 97, no. 4 (2016): 492.

<sup>28</sup> Matthew Wildcat, “Fearing social and cultural death: Genocide and elimination in settler colonial Canada – an Indigenous perspective,” *Journal of Genocide Research* 17, no. 4 (2015): 392.

<sup>29</sup> Stote, *An Act of Genocide*, 30.



“Killing members of a group; causing serious bodily or mental harm to members of a groups; deliberately inflicting conditions of life calculated to bring about a group’s destruction in whole or in part; imposing measures to prevent births within a group; and forcibly transferring children from one group to another.”<sup>30</sup>

It can be argued that Canada has carried out various forms of genocide against Indigenous peoples throughout history. Notably, it has upheld coercive sterilization as a “measure to prevent births within a group.”<sup>31</sup> This paper argues that the forced sterilization of Indigenous women should be conceptualized as a pre-emptive and insidious form of genocide, which illustrates the broader political and intergenerational implications of gendered and racialized forms of violence in Canada. Although the contemporary legal and political context in Canada differs from the context of the eugenics movement in the early 20<sup>th</sup> century, the current reports of forced sterilization in Saskatchewan and other provinces throughout the nation mirror a shameful history of dispossession and genocide in Canada and reveals the consequences of misremembering (or disremembering) this history.

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<sup>30</sup> United Nations, Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

<sup>31</sup> Ibid.

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# **When, For What, and For Whom? Federalism Review and the Exercise of Political Power in Canada**

Abby Koning

Federalism is a staple in discussions of Canadian politics and, although complicated in reality, is put into action by two rather simple sections within Canada's written constitution. The division of powers found in sections 91 and 92 of the *Constitution Act, 1982* provides the basis for Canada's federal framework, but understanding what Canadian federalism consists of in its entirety requires much deeper investigation. To provide some insight into this aspect of constitutional politics in Canada, I will focus on a comparison of court cases that illustrates the complex relationship between governments, courts, and federalism.

First, I will compare two reference cases to the Supreme Court of Canada (SCC) to demonstrate three ways in which the Canadian constitution affects the exercise of political power of governments. Dealing with reference cases that focus on the division of powers, the purpose of this case study is to examine how the judiciary's role in determining how jurisdiction delineated in the constitution enforced through federalism review influences the way in which governments legislate. Following this comparison, I will discuss three main points: a) the presence of federalism review in division of powers disputes; b) the impact federalism review has on governments' ability to achieve their objectives; and c) the use of federalism review as a political strategy. The constitution affects the exercise of political power within Canada by involving the judiciary in the legislative process; however, while federalism review plays a substantial role in political disputes, it ultimately can do little to stop governments from achieving their desired outcomes, and it may also be used as

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a means to achieve desired policy, thereby providing another avenue through which to fight political battles.

I will begin by providing a brief overview of the cases in my comparison. First, I will outline the case of *Attorney General of Nova Scotia v. Attorney General of Canada, 1951* (subsequently referred to as the Inter-delegation Case). In this case, as outlined by Monahan, the Nova Scotia legislature attempted to pass a law that would allow its provincial government and the federal government to delegate their respective legislative power to the other level of government. The federal government was also in favour of this legislation, but the SCC upheld the decision of the Supreme Court of Nova Scotia regarding the reference: the legislation would violate sections 91 and 92 of the constitution. Due to the exclusivity with which the division of powers is allocated within the constitution, delegating power would result in a breach of this exclusivity, regardless of the consent of both provincial and federal governments.<sup>1</sup> The impact of this decision was meant to ensure an adherence to Lord Atkin's ideal of "watertight compartments," as to do away with this notion would be to leave "the whole scheme of the Canadian constitution...entirely defeated."<sup>2</sup> With the SCC ruling, the precedent of restriction on this type of legislation would now apply to all provinces.

The second case I will be examining is that of *Attorney General of Manitoba v. Manitoba Egg and Poultry Association, 1971* and its subsequent appeal to the SCC, commonly referred to as the Manitoba Egg Reference. As described by Russell, Knopff, and Morton, Quebec passed legislation that permitted Quebec's egg marketing agency, le Fédération des producteurs d'œufs de consommation du Québec (FEDCO), to restrict egg imports from other provinces to protect the interests of Quebec's own egg producers. In response, impacted provinces restricted the import

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<sup>1</sup> Patrick Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Ontario: The Carswell Co. Ltd, 1987), 160.

<sup>2</sup> John Saywell, *The Lawmakers: Judicial Power and the Shaping of the Canadian Federalism* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2002), 245-246

of broilers, a significant export for Quebec. Disadvantaged by Quebec's restrictions and only marginally aided by the broiler regulations, Manitoba decided to pursue a reference case in the Manitoba court system. Hypothetical regulations were referenced that mirrored the regulations that had been enacted in Quebec.<sup>3</sup> Russell et al. underline the hypothetical nature of Manitoba's reference, labelling it "hypothetical in the extreme," as Manitoba did not even import eggs and the regulations were never formally enacted.<sup>4</sup> Despite their theoretical nature, the Manitoba Court found that the regulations were not within provincial jurisdiction, as legislating trade and commerce is a federal power.<sup>5</sup> Following this ruling, Manitoba then brought the case to the SCC in an appeal, and the same decision was upheld. By appealing the first ruling, even though the decision benefitted Manitoba, the province ensured that the ruling made by the SCC would apply to all provinces and would disallow the Quebec regulations.

### **The Use of Federalism Review in Political Disputes**

The contrast between the Inter-delegation Case and the Manitoba Egg Reference reveals the recurring role, despite political circumstances, that the judiciary plays in policy decisions. In the Manitoba Egg Reference, the disagreement on policy was interprovincial, and the reference case was used to resolve this disagreement. Alternatively, in the Inter-delegation Case, both Nova Scotia and the federal government endorsed the legislation in question, but a reference was used to pre-empt any third-party challenge to the legislation. These cases show that the SCC is frequently involved in cases relating to the division of powers, regardless of the existence or nonexistence of intergovernmental disagreement. It is understandable that in a case where governments disagree on the legitimacy of a law, or in political disagreement in general, a third party would be turned to

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<sup>3</sup> Peter Russell, Rainer Knopff, and Ted Morton, *Federalism and the United States* (Ottawa: Carleton University Press, 1993), 153.

<sup>4</sup> *Ibid.*

<sup>5</sup> Saywell, *The Lawmakers*, 260.

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in order to resolve, or at least put an end to, the conflict. While this was the case in the Manitoba Egg Reference, the Inter-delegation Case did not involve a dispute between the governments involved; in fact, it was rather the opposite. As Monahan states of Nova Scotia's proposed legislation, "[a]ll governments stood to gain from removing such restraints on alienation."<sup>6</sup> Consequently, we can see through the differences in the context behind these cases being brought to court that, with or without intergovernmental disagreement over legislation, the judiciary's influence will be present.

The purpose of this paper is to examine how the constitution, via federalism review, impacts the exercise of political power. By involving federalism review in the preservation of the division of powers, governments' abilities to exercise their legislative power is restricted by the SCC, rather than by the influence of opposing sovereign governments. The judiciary therefore participates in the exercise of political power by being inserted into legislative jurisdiction.

After establishing the authority of the judiciary in determining the constitutional legitimacy of a law, the consequence of relying on the judiciary to settle political (dis)agreements cannot be ignored. Should the SCC even become involved in cases with no political misalignment? Weiler argues that federalism does not necessarily imply federalism review<sup>7</sup> and, in viewing the written portion of the constitution, it does not.<sup>8</sup> However, the constitution of Canada involves more than the text of the *Constitution Act, 1982*. As Monahan explains, federalism review has been commonly considered by legal scholars to be implicit within the facilitation of Canadian federalism.<sup>9</sup> Using this reasoning, I, like Monahan, consider federalism review to be entrenched in Canadian federalism,

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<sup>6</sup> Monahan, *The Charter, Federalism and the Supreme Court of Canada*, 160.

<sup>7</sup> Paul Weiler, "The Supreme Court of Canada and Canadian Federalism," *Osgoode Hall Law Journal* 11, no.2 (August 1973): 234, <https://digitalcommons.osgoode.yorku.ca/ohlj/vol11/iss2/2>.

<sup>8</sup> Monahan, *The Charter, Federalism and the Supreme Court of Canada*, 221.

<sup>9</sup> *Ibid.*



established through the division of powers being written into the constitution.

Weiler argues that the judiciary is excessively involved in constitutional matters involving the division of powers and cites the Manitoba Egg Reference as an example of this, asserting that differentiating between “political” and “legal” disputes is an important distinction.<sup>10</sup> Weiler’s main cause for concern is that in applying its rulings, the SCC does not account for what he deems to be solely political factors and nuances that make up federalism cases.<sup>11</sup> In the Manitoba Egg Reference, Manitoba’s irritation with Quebec was not that its legislation had potentially entered federal jurisdiction, but rather that Manitoba was unhappy with the implications of the legislation for its egg producers. The original argument was not a legal one but was instead politically and economically motivated. If Weiler’s argument is applied to the Inter-delegation Case, there is even more reason to restrict the involvement of the court, as there was no disagreement to resolve. According to Weiler, courts do not have the necessary political experience to ensure that the decisions being made are correct for political interests: “the courts [produce] a series of decisions whose total impact was a constitutional straitjacket that prevented an adequate political response to Canadian social needs.”<sup>12</sup>

Contrary to Weiler’s arguments, Greschner maintains that the SCC acting as an “umpire,” the same term used by Weiler to describe the role of the courts he denounces, is “ideal.”<sup>13</sup> Greschner commends this role of the courts as a constitutional referee, insisting that they keep the “game” of legislation fair and balanced.<sup>14</sup> Where Greschner advocates for the courts to be an impartial umpire of Canadian federalism, Weiler argues strongly against the level of involvement this umpire plays. In the Manitoba Egg Reference, the rationale of Greschner’s argument

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<sup>10</sup> Weiler, “The Supreme Court of Canada and Canadian Federalism,” 226.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, 238.

<sup>13</sup> Donna Greschner, “The Supreme Court, Federalism and Metaphors of Modernization,” *The Canadian Bar Review* 79, no.2 (2000): 48, HeinOnline.

<sup>14</sup> *Ibid.*, 56.

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is clear: without a court to turn to, and if Quebec is unwilling to compromise, interprovincial tensions over this (and related) issues could continue to mount. But, in the Inter-delegation Case, judicial review barred a federal-provincial agreement to delegate powers in a way that would presumably assist in facilitating an effective and cooperative use of federalism. In a third interpretation, MacKay offers that the SCC is necessary and beneficial in its role, but that rather than operating as an umpire, it operates as a “player” participating in the “game” of federalism.<sup>15</sup> This explanation of the role of the SCC aligns with what is revealed through the comparison of the Inter-delegation case and the Manitoba Egg Reference. With the regular, and increasing,<sup>16</sup> use of federalism review to resolve political disputes, the SCC is now more on par with governments in terms of the shaping of legislation:<sup>17</sup> they restrict not only the laws that can be passed but also influence the compromises reached between governments. Regardless, acting either as an umpire or a player, the SCC is undoubtedly a fixture of the “game.” Furthermore, as discussed later, its role in administering federalism is an instrument of political strategy that brings it deeper into the political fray.

Considering these two cases with the various arguments referenced above, I argue that federalism review is what reinforces and defines the division of powers in how it affects a government’s ability to exercise its political power. However, finding a balance between the basic purpose of the SCC in federalism rulings (to ensure legislation abides by the constitution) and allowing elected governments the freedom to exercise their democratic powers provided to them through voters is necessary to ensure that federalism maintains a level of practicality. All the same, federalism review, having become increasingly utilized by various parties and generally accepted as necessary in the workings of federalism, will remain present

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<sup>15</sup> Wayne MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore,” *The Canadian Bar Review* 80, no.1&2 (2001): 248, HeinOnline.

<sup>16</sup> Monahan, *The Charter, Federalism and the Supreme Court of Canada*, 151.

<sup>17</sup> MacKay, “The Supreme Court of Canada and Federalism,” 255.

regardless of the level of intergovernmental disagreement present in a case.

### **The Impact of Judicial Decisions**

Arguments about the role of the SCC and the necessity of federalism review aside, how influential are these judicial decisions? In both reference cases, although the initial decision restricted the legislative powers of the provincial or federal government, agreements were reached despite the ruling that provided the players with a political work-around. If we accept that federalism review is implied in the division of powers, or at least accept that its use is to be expected, then restrictions on governments' legislative powers will be legally, not just politically, enforced; however, it is evident through this case comparison that these legal limitations do not always restrict the policies desired by governments, but rather the means by which they achieve an end.

As examined, judicial rulings on political matters are common. However, in both cases, a decision was reached by the SCC, the impact of which was eventually negated by subsequent political agreements between political and federal governments. In response to the ruling in the Inter-delegation Case, provinces would delegate responsibility to federal administrative bodies (or vice versa) which was not deemed unconstitutional as administrative powers were not considered to constitute legislative action. This allowed for the creation of the Canadian Egg Marketing Agency (CEMA) in response to the Manitoba Egg Reference decision. CEMA, a federal board, delegated some regulatory power that had been within federal jurisdiction to provincial boards.<sup>18</sup> Following the Inter-delegation Case, the ruling in *P.E.I. Potato Marketing Board v H.B. Willis Inc.* created an alternative, constitutionally-viable way to delegate jurisdiction and established the precedent that led to the establishment of

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<sup>18</sup> Russell, Knopff, and Morton, *Federalism and the United States*, 154.

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CEMA.<sup>19</sup> In both cases, the limitation enforced by the SCC on a province's jurisdiction ended up being relatively inconsequential. These examples illustrate what Monahan deems "the central law of the federalism equation: it is *always* possible to do indirectly what you cannot do directly."<sup>20</sup> Mallory goes so far as to say that federalism review is a "marginal" process as far as federalism politics are concerned.<sup>21</sup> Aligning with this notion, and in contrast to Weiler's use of the Hughes quote ("the Constitution is what the judges say it is"),<sup>22</sup> Donald Smiley states that "federal aspects of the Canadian constitution...have come less to be what the courts say they are than what the federal and provincial Cabinets...determine them to be."<sup>23</sup> In a rudimentary sense, it is true that federalism review causes limitations on legislation; in both cases, a policy goal was halted initially. However, using various strategies in wielding their political power, governments can sidestep these limitations.

Weiler would suggest that, especially in cases involving governments in agreement, there is an opportunity for governments to avoid entering the legal sphere and encountering unwanted judicial rulings. If an agreement can be reached and a goal can be accomplished regardless of the content of a judicial ruling, is there a purpose for federalism review? Smiley points out the importance of maintaining provincial sovereignty as outlined in the Rowell-Sirois Report,<sup>24</sup> prompting the question: is a more restrictive stance on federalism review to protect provincial legislative power worth enforcing at the expense of a higher level of intergovernmental cooperation? Taking this concern into account, federalism review does play a peripheral role in ensuring

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<sup>19</sup> Monahan, *The Charter, Federalism and the Supreme Court of Canada*, 160-161; Russell, Knopff, and Morton, *Federalism and the United States*, 154.

<sup>20</sup> Monahan, *The Charter, Federalism and the Supreme Court of Canada*, 161.

<sup>21</sup> J.R. Mallory, *The Structure of Canadian Government* (Toronto: Macmillan, 1971), 387.

<sup>22</sup> Weiler, "The Supreme Court of Canada and Canadian Federalism," 225.

<sup>23</sup> Donald Smiley, "The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism," *The Canadian Journal of Economics and Political Science* 28, no.1 (February 1962): 59, <https://www.jstor.org/stable/139263>.

<sup>24</sup> *Ibid.*, 57-58.

the foundational demands of the division of powers are recognized: disallowing laws that explicitly legislate within the constitutional territory of another government. Although administrative delegation was deemed to be constitutionally viable, at least some limit on legislative delegation will always be preserved.

Federalism review limits a government's ability to freely legislate, but it does not necessarily limit governments' ability to achieve policy goals. Bringing the efficacy of federalism review into question further examines the position of a broader purpose of federalism review than simply administering decisions on the validity of legislation. What other purposes can it, and does it, serve politically? This question leads us to the next finding in my comparison—federalism review can be used as a political tool.

### **Federalism Review as a Political Strategy**

The final point of comparison highlights the multiple reasons federalism review might be utilized. On the surface, the purpose of federalism review is to determine whether legislation complies with the division of powers laid out in the constitution by existing within the legislative jurisdiction of the legislating government. This was clearly the purpose of federalism review in the Inter-delegation Case: both the province and federal government sought to pass the legislation, but there was concern that a constitutional challenge from another party could arise. However, in reviewing the Manitoba Egg Reference, we see that federalism review can be used for alternative or additional reasons. In the Manitoba Egg Reference, the Manitoba government used federalism review as a strategy to prevent Quebec enacting regulations that were unfavourable for Manitoba. But why might federalism review, a process through the court system that is meant to be politically impartial, be used as a political tool by governments? To understand how federalism review can be used to impact political power, it is important to examine the context within which federalism review was used in these cases and the events that preceded its use.

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In the Inter-delegation Case, Nova Scotia used federalism review as a tool to foresee any constitutional challenges to legislation. This is the scenario most commonly associated with federalism review, but there are multiple other reasons why governments turn to this.<sup>25</sup> Even in the Inter-delegation Case, it is clear that the use of federalism review as a political strategy is present in the Nova Scotia legislature. Even without disagreement between the involved governments, the possibility of a challenge from an outside party caused the legislation to be put to a reference. The use of federalism review to resolve any type of breach of the division of powers is entrenched in Canada's legislative process and therefore provides a tool that is readily available for those who wish to use it.

Puddister points to reference cases acting as a useful political strategy, with the reasoning attributed to the “absence of democratic accountability for judicial decision-making” and the ability for provinces to insert themselves in decisions.<sup>26</sup> Manitoba skillfully used the tool of a reference case in a way that ensured its own Supreme Court's ruling applied to a Quebec law. In the discussion arising from the first comparison, I indicate that Canadian federalism has implied the use of federalism review, thus involving the SCC in the ways outlined in that section. However, involving Puddister's analysis, it is important to note that both cases were reference cases; therefore, a government itself invited the court to be involved in the process. Puddister notes that with reference cases involving federalism review, the court's role is expanded: through reference cases, governments are provided the ability to “empower...a court...with management and control of matters related to public policy.”<sup>27</sup> Not only is the SCC an instrumental part of Canadian federalism, but governments also utilize resources that ensure and heighten its involvement.

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<sup>25</sup> Kate Puddister, “The Canadian Reference Power: Delegation to the Courts and the Navigation of Federalism,” *Publius: The Journal of Federalism* (2018): 13, <https://doi.org/10.1093/publius/pjy034>

<sup>26</sup> *Ibid.*, 3, 5.

<sup>27</sup> *Ibid.*, 2.

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Three findings have emerged through the comparison and contrast of the Inter-delegation Case and the Manitoba Egg Reference: federalism review is rooted in the Canadian approach to federalism; judicial rulings through federalism review may have little influence on the end effect of policy; and governments turn to federalism review for more than its prescribed role of upholding the constitution. In this analysis, I have only partially covered the expanse of federalism in Canadian politics. Considering the extent to which federalism impacts various areas of the political sphere, paying attention to how it influences the use of political power is essential in understanding the role of the constitution in more detail.

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# In Canada, the Green ‘New Deal’ Looks More Like a Green ‘Bidding-War’

Katie Curry

*This paper was written in June 2019, prior to the federal election. It was not updated to reflect the results of the 2019 federal campaign or election results.*

## Introduction

May 16, 2019: the Liberals and the New Democratic Party (NDP) ‘duel’ over the ownership rights of a motion to declare a climate emergency in Canada.<sup>1</sup> With upwards of 80 per cent of existing Liberal, NDP, and Green voters citing climate as a “top five” issue in the upcoming election, ownership of this motion, and over environmental issues in general, has become a decisive factor.<sup>2</sup> All three parties are producing radical environmental platforms with plans to rapidly tackle emissions, in an attempt to attract this 80 per cent of the electorate. Success in doing so will be paramount for the 2019 Canadian federal election.

Despite this, the Green Party of Canada has been largely excluded from the academic literature on Canadian political parties. This lack of academic attention is arguably due to the Green Party’s niche status and dispersed, weak support base. However, over the past decade, the Green Party has witnessed a ‘Green Wave,’ as they call it, winning their first parliamentary seat in 2011 and their second seat in the most recent by-election, in May 2019. This is coupled with breakthroughs in their respective provincial legislatures, Prince Edward Island in

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<sup>1</sup> CBC News. 2019, “House of Commons declares a climate emergency ahead of pipeline decision,” June 18, 2019.

<https://www.cbc.ca/news/politics/climate-emergency-motion-1.5179802>.

<sup>2</sup> Paris Marx, 2019, “Liberal concessions on the environment leave the Greens and NDP battling for climate-motivated voters,” *CBC News*. June 17, 2019.

<https://www.cbc.ca/news/opinion/climate-battle-1.5177447>.

particular with eight seats, as well as three in each British Columbia and New Brunswick, and one in Ontario. Most of the literature on green parties focuses primarily on Europe, which has little value when trying to explain the situation in Canada.<sup>3</sup> Instead, this paper will employ the theoretical framework put forth by Bonnie Meguid in "Competition between unequals: the role of mainstream party strategy in niche party success" to explain and predict how the three mainstream Canadian political parties are responding to this new-found Green strength.<sup>4</sup>

Using Meguid's theoretical framework,<sup>5</sup> this paper will attempt to answer the following question: how has the emergence of the Green Party as an electoral threat to the NDP and Liberals (and consequently, the Conservatives) forced the three parties to change their approach to environmental policy? I argue that the emergence of the Green Party threatens the NDP and the Liberals and has forced the two parties to take dramatically stronger stances on environmental issues, in an attempt to acquire and maintain the support of the centre-left electorate. As demonstrated by Meguid's framework for analyzing niche party success, the accommodative strategies employed by the NDPs and the Liberals on environmental policy may cause a 'bidding-war' over environmental issues on the centre-left. Meguid's framework is also useful for explaining the Conservative Party's response to the situation. The framework helps to explain why parties are pursuing different strategies, especially in terms of policy responses, and renders it possible to make predictions about what to expect in the upcoming 2019 Canadian federal election.

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<sup>3</sup>Richardson, Dick and Chris Rootes 1948. 1995;1994;. *The Green Challenge: The Development of Green Parties in Europe*. London: Routledge.

Bomberg, Elizabeth E. and MyiLibrary. 1998. *Green Parties and Politics in the European Union*. London; New York: Routledge.

Muller-Rommel, Ferdinand, and Thomas Poguntke. 2002. *Green parties in national governments*. New York; Florence: Routledge.

<sup>4</sup> Bonnie M. Meguid, 2005, "Competition between unequals: The role of mainstream party strategy in niche party success," *American Political Science Review* 99 (3): 347-59.

<sup>5</sup> Ibid.

Meguid distinguishes between ‘mainstream’ and ‘niche’ parties. Mainstream parties are usually powerful governmental actors.<sup>6</sup> They have name recognition, better access to media, and established status as governmental actors, which give them strategic political advantages over smaller parties.<sup>7</sup> In Canada, the mainstream parties are clearly the Liberals and the Conservatives. This paper will also classify the NDP as a mainstream party. This is a contested concept, though it is beyond the scope of this paper attempt a more precise classification. However, it is sensible to classify the NDP as such given their broad national support base and integral role in Canadian political discourse. Niche parties differ from mainstream parties in three major ways.<sup>8</sup> First, niche parties do not adhere to a class-based alignment of politics. Economic demands are a lower priority than the issues politicized by a niche party, which were previously outside the realm of party competition.<sup>9</sup> The most obvious example here is of green parties, which emerged internationally in the 1970s as a response to under-discussed issues of environmentalism, nuclear disarmament, and nuclear power.<sup>10</sup> Second, niche parties are novel in that the issues they raise do not usually coincide with existing partisan lines of division.<sup>11</sup> Their appeals may cross-cut the electorate in untraditional ways. Third, niche parties delineate themselves further by limiting issue appeals.<sup>12</sup> Rather than being bound by a comprehensive policy platform like their mainstream counterparts, niche parties adopt positions on only a very limited set of issues. This often results in the niche party being perceived as a single-issue party by voters, and their success often relies on the salience and attractiveness of their issue at the given time.<sup>13</sup>

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<sup>6</sup> Meguid, “Competition between unequals: The role of mainstream party strategy in niche party success,” 347-59.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

Green parties, and especially the Green Party of Canada, fit Meguid's definition of a niche party. In Canada, the Green Party has historically been perceived as a minor party, whose main policy concerns are environmental protection and "adoption of sustainable modes of economic development."<sup>14</sup> The Canadian Green Party also maintains several policy positions beyond environmental issues, such as support for social justice and grassroots democracy.<sup>15</sup> Founded in 1983, the federal Green Party's support remained under one per cent until the 2004 federal election, where it jumped to over four per cent.<sup>16</sup> In 2011, Elizabeth May, the leader of the party, became the first elected Green Party Member of Parliament (MP) in Canadian history.<sup>17</sup> In 2013, independent MP Bruce Hyer (who was formerly an NDP MP) joined the Green Party, which increased the party's parliamentary representation to two MPs until the 2015 general election.<sup>18</sup> In May 2019, Paul Manly became the second Green MP, winning his seat in the riding of Nanaimo-Ladysmith in a by-election. Following this victory, the Green Party declared that "a Green vote does count," sending a strong message to the other parties that it was time to get serious about climate issues.<sup>19</sup>

Relatively speaking, the success of the Green Party of Canada has been minor compared to green party success in many other Western democracies. Since 1960, over 54 per cent of green and other niche (such as radical right and ethno-territorial) parties have held a seat in the national legislature in Western Europe.<sup>20</sup> It

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<sup>14</sup> Belanger, Eric. 2017. *Third Parties in Canada: Variety and Success. Canadian parties in transition: Recent trends and new paths to research*, 188. Fourth ed. Tonawanda, New York, USA; Toronto, Ontario; University of Toronto Press.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Belanger, "Third Parties in Canada: Variety and Success."

<sup>19</sup> CBC News, 2019, "A Green vote does count!: MP-elect Paul Manly on what the party's Nanaimo victory means," May 7, 2019. <https://www.cbc.ca/news/canada/british-columbia/q-and-a-green-party-paul-manly-1.5126295>.

<sup>20</sup> Meguid, "Competition between unequals."

is significant to note that the success of these niche parties is not concentrated only in a few countries, but rather is consistent across all of them: thirteen countries in Western Europe have seen at least one niche party surpass the five per cent threshold, and all eighteen countries (surveyed by Meguid) have seen at least one niche party hold office.<sup>21</sup> Niche parties, such as the Green Party, struggle to achieve extensive representation in Canada due, in part, to the first-past-the-post electoral system.<sup>22</sup>

## Theoretical Framework

Meguid's main argument is that institutional and sociological interpretations of niche party strength are limited. Institutional theories posit that electoral rules, governmental types, and the structure of the state and its institutions, either constrain or facilitate niche party electoral advancement.<sup>23</sup> Sociological approaches suggest that niche party support varies according to the socioeconomic conditions and the value orientation of society.<sup>24</sup> These theories fail to account for niche party's electoral performances in many key examples, as static institutions cannot account for variation in a niche party's vote share over time, and also downplay the role of other political actors. Meguid's framework illustrates the critical role that the powerful 'mainstream' political actors play in shaping the success of niche parties. Meguid claims that "parties competing for voters are faced with two possible strategies: movement toward (policy convergence) or movement away from (policy divergence) a specific competitor in a given policy space."<sup>25</sup> This is based on

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<sup>21</sup> Ibid., 2.

<sup>22</sup> Belanger, "Third Parties in Canada: Variety and Success."

<sup>23</sup> Harmel, Robert, and John D. Robertson. 1985. "Formation and Success of New Parties: A Cross-National Analysis." *International Political Science Review* 6 (4): 501-23. <http://dx.doi.org/10.1177/019251218500600408>.

<sup>24</sup> Golder, Matt. 2003. "Explaining Variation in the Success of Extreme Right Parties in Western Europe." *Comparative Political Studies* 36 (May): 432-66.

Inglehart, Ronald. 1998. *Modernization and Postmodernization*. Princeton: Princeton University Press.

<sup>25</sup> Ibid.

the logic of Budge, Robertson, and Hearl, who argue that parties make themselves competitive by highlighting the issues on which they have a competitive advantage, rather than by putting forward contradictory policies on the same issue.<sup>26</sup>

Meguid outlines three political strategies taken by mainstream parties in competition over policy areas: accommodative strategy, adversarial strategy, and dismissive strategy.<sup>27</sup> The accommodative strategy involves policy convergence—it is typically employed by parties hoping to draw voters away from a threatening competitor. The adversarial strategy works by increasing the policy distance between parties, encouraging voter flight to the competing party. In the dismissive strategy, taking non-action is a deliberate tactic—“by not taking a position on the niche party’s issue, the mainstream party signals to voters that the issue lacks merit.”<sup>28</sup>

Meguid’s second thesis is that “parties compete by altering policy positions *and* the salience and ownership of issue dimensions,” and therefore that “established parties must decide whether to recognize and respond to the issue introduced by the niche party.”<sup>29</sup> For example, when a mainstream party employs an accommodative tactic, they thereby undermine the uniqueness of the niche party’s platform, which gives like-minded voters a choice between the two parties on the issue. In doing so, the mainstream party challenges the niche party’s ownership of the issue, trying to become the new owner. Given the greater legislative advantage, governmental effectiveness, and overall material advantages, the mainstream party usually has more power in adopting the issue.

Meguid’s theory has explanatory power when examining the Canadian case study, as this case fits the model of mainstream

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<sup>26</sup> Ian Budge, David Robertson, and Derek Hearl, 1987, *Ideology, Strategy and Party Change: Spatial Analyses of Post-War Election Programmes in 19 Democracies*. Cambridge: Cambridge University Press.

<sup>27</sup> Meguid, “Competition between unequals.”

<sup>28</sup> *Ibid.*, 2.

<sup>29</sup> *Ibid.*, 3.

party versus niche party competition. Applying the theoretical knowledge of the strategies (accommodative, adversarial, or dismissive) to what behavior we see Canadian parties exhibiting can help to explain their actions, and potentially to make some predictions about the outcome of the upcoming election.

## **Empirical Assessment**

The competition for the centre-left is dominated by the Greens, the Liberals, and the NDP. Both the Liberals and the NDP are showing early indications of pursuing the accommodative strategy for environmental policy in an attempt to garner the support of the centre-left of the electorate. The following section will examine the policy responses put forth by the Liberals, the NDP, and the Conservatives respectively. However, first it will examine the Green Party's platforms and targets in order to establish a baseline with which to compare accommodative, adversarial, and dismissive strategies. Due to the vast scope of policies which could be examined, this paper will limit its examination to the various parties' stances on emissions targets, declaring a climate emergency, carbon pricing, plastic waste and pollution, fossil fuels, and energy and electricity.

The Green Party released their official Mission Possible and Vision Green platforms in 2019, outlining their objectives regarding environmental policy for the upcoming 2019 federal election. The Green Party set an emissions target for greenhouse gas emissions at 438.6 Mt (60%) reduction of GHGs below 2005 levels, to be achieved by 2030, as well as net zero-emissions target by 2050, figures which are nearly twice as ambitious as any of their competitors.<sup>30</sup> They intended on declaring a climate emergency and insisted that climate change must be addressed as a non-partisan issue. Regarding carbon pricing, they planned to introduce revenue-neutral taxes through a carbon fee and dividend system and place carbon tariffs on countries with lower carbon

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<sup>30</sup> Shake Up The Establishment, "Vote". <https://www.shakeuptheestab.org/vote> (accessed June 11, 2019).



tax rates. For plastic waste and pollution, the Greens intended to add pollution prevention to the Canadian Environmental Protection Act (CEPA) mandate and establish a task force to reduce pollution in the Great Lakes, as well as setting a goal for zero waste in Canada. They plan to remove all fossil fuels from the Canadian electricity grid by 2030, ending fossil fuel imports and only using domestic sources while eliminating all subsidies. They also intend to pass legislation to keep Canada's west coast free of crude oil supertankers, establish a Federal Ministry of Energy Transition Plan to transition from a fossil fuel-based economy to one based on renewable energy, work with provinces to place a moratorium on horizontal fracking, and work to establish petroleum and natural gas reserves to secure domestic petroleum supply in the event of shortages.<sup>31</sup> Regarding energy and electricity, the Greens will phase out and decommission nuclear facilities, as well as sequestering the associated radioactive waste sites.<sup>32</sup>

In response to these Green policies, the Liberals appear to be pursuing an accommodative strategy. The Liberals have established emissions targets at 219.3 Mt (30%) reduction of GHGs below 2005 levels, to be achieved by 2030 (Paris Agreement Targets). They introduced a motion on May 16, 2019 to declare a national climate emergency, coincidentally—or not—ten days after Paul Manly won the second Green seat. The Liberals have implemented a federal carbon tax for all provinces that do not have a sufficient provincial carbon-pricing provision. They are reducing waste production, including banning single-use plastics by 2021, and have an additional plan to phase out coal-fired energy and fossil fuel industry subsidies over time to meet Canada's G-20 commitments.<sup>33</sup> For energy and electricity, the Liberals support renewable fuels and bioproducts and plan to increase investment in transmission lines, smart power grids, and

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

renewable energy.<sup>34</sup> These strategies all indicate positive action on climate and environmental policies and support the claim that the Liberals are pursuing an accommodative strategy in an attempt to outbid the Greens on their niche issue.

The NDP is also showing early signs of pursuing an accommodative strategy. They have set an emissions target, slightly more ambitious than the one set by the Liberals, though notably less than the Greens' target, of 281 Mt (38.4%) reduction of GHG below 2005 levels by 2030, and have presented plans to monitor progress via an independent Climate Accountability Office.<sup>35</sup> They introduced a motion in the House of Commons on May 15, 2019, to call for a national climate emergency (which was defeated on May 16, 2019, as a result of the Liberals hoping to frame this policy response as their own).<sup>36</sup> The NDP intends to continue the Liberal carbon pricing program, including offering rebates to households while reducing breaks given to big polluters. Additionally, the NDP will ban single-use plastics across Canada by 2022, recycle those already in circulation, and hold companies responsible for the entire lifecycle of plastics. Regarding fossil fuels, the NDP will immediately fulfill Canada's G-20 commitment to eliminate fossil fuel subsidies and redirect the funds to low carbon initiatives. They also plan to invest \$3.5 billion in carbon-free electricity by 2030, 100% non-emitting electricity by 2050, and to connect provincial power grids together. These policy responses are all consistent with an accommodative strategy and are indicative of the 'bidding-war' taking place on the centre-left. The policies pursued by the NDP are very similar to those pursued by the Liberals, illustrating how both parties are trying to take ownership of the environmental issue area.

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Kady O'Malley, 2019, "Competing 'climate emergency' motions set to hit the House this week," iPolitics, May 14, 2019.

<https://ipolitics.ca/2019/05/14/competing-climate-emergency-motions-set-to-hit-the-house-this-week/>.

Conversely, the Conservatives seem to be taking an adversarial approach to the issue, which is consistent with Meguid's theory. They have made an unconfirmed commitment (pending 2019 platform release) of a 219.3 Mt (30%) reduction of GHGs below 2005 levels, to be achieved by 2030.<sup>37</sup> They are not declaring a climate emergency, but rather have brought forth amendments to the Liberals' motion. The Conservatives intend to scrap the carbon tax completely. Regarding fossil fuels, they plan to end oil imports and rely only on Canadian oil production and refinement, as well as end the ban on tanker traffic in northern BC. With respect to energy and electricity, they aim to create a "national energy corridor" for Canadian oil, gas, electricity, and telecommunications, as well as repeal Bill C-69, which revamped environmental assessments of energy projects.<sup>38</sup> All of these policy responses are adversarial to those taken by the Greens, Liberals, and NDP. By attacking environmentalism, the Conservatives may, perhaps, hope to strengthen the Green Party and enable them to draw votes from the Liberals and the NDP, thereby allowing more room in the centre/centre-right for the Conservatives to pick up less environmentally mobilized voters. As Meguid notes, "the enemy of my enemy is my friend."<sup>39</sup>

## **Discussion & Conclusion**

Meguid's framework has two limitations when transposed onto Canada: Canada's electoral system and Meguid's assumption of a two-party system. Belanger (2015) notes that: "Canada offers an institutional environment that is usually hostile to the emergence of third parties because of the first-past-the-post electoral system, which introduces important distortions between the number of votes and the number of seats won by minor

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<sup>37</sup> Shake Up The Establishment. "Vote". <https://www.shakeuptheestab.org/vote> (accessed June 11, 2019).

<sup>38</sup> Ibid.

<sup>39</sup> Meguid, "Competition between unequals," 4.

parties.”<sup>40</sup> However, this contextual caveat should only increase the incentives for the Liberals and the NDP to pursue accommodative strategies in order to avoid splitting the environmental vote. Conversely, it should incentivize the Conservatives to pursue an adversarial strategy, in an attempt to split the environmentalists in the same manner. Meguid tests her theory in France, which has a run-off electoral system, rather than a first-past-the-post or proportional representation system, so this cannot be seen as a serious limitation to transposing the theory onto the Canadian case study. A second limitation is that Meguid’s framework examines changes in shares of vote triggered by responses to niche parties in two-party systems. Meguid’s frame of reference only examines cases where there is a centre-left and a centre-right party—Canada is an outlier in this regard as the traditional ‘mainstream’ party has been a centre, brokerage party. Regardless of the centrist nature, as long as the Liberals have a large number of environmentalist voters who may defect to the Greens, the application of the theory still holds.

Meguid’s theory certainly has explanatory power when examining the behaviour of Canadian political parties, but can it help us make predictions about the future? It is hard to tell, as Meguid’s multivariate analysis of niche party vote percentage only takes into account the strategies of two mainstream parties, versus Canada’s three. For ACAC (accommodative-accommodative, as with Liberals and NDP), the niche party vote percentage is supposed to decrease by a percentage on  $-1.52$ .<sup>41</sup> With DIAC (dismissive-accommodative, as with Liberals and Conservatives), niche party vote percentage is supposed to decrease by only  $-0.92$  per cent. However, Meguid stresses that relative intensity or hesitation (the speed and intensity with which parties propose platforms) on behalf of the mainstream party has a significant impact on these values. In the Canadian context, it is

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<sup>40</sup> Robert Harmel and John D. Robertson, 1985, “Formation and Success of New Parties: A Cross-National Analysis,” *International Political Science Review* 6 (4): 501-23. <http://dx.doi.org/10.1177/019251218500600408>.

<sup>41</sup> Meguid, “Competition between unequals.”

too soon to tell what will happen, and who will consequently take ownership over this issue dimension.

However, as Meguid argues, there are also long-term consequences for party *equals* (i.e. between mainstream parties) created by the competition between unequals. By acknowledging the niche party's issue (be it through accommodative, dismissive, or adversarial strategies), the mainstream party is inherently prioritizing it, and therefore including it in the mainstream political debate.<sup>42</sup> This competition over climate politics in Canada has brought environmental issues to the headlines. If one believes that a stronger stance on environmental issues is a positive thing, this is a normatively valuable development.

The electorate will determine the priorities in Canada's 2019 federal election, answering to the bidding-war over climate policy taking place on Canada's political left. Nevertheless it is essential that this issue be brought to the forefront of the political agenda, regardless of the manner in which it occurs. In Elizabeth May's words on June 18, 2019: "this is a national security issue, it is time we started treating it as one."<sup>43</sup>

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<sup>42</sup> Ibid.

<sup>43</sup> CBC News. 2019. "House of Commons declares a climate emergency ahead of pipeline decision". June 18, 2019.

<<https://www.cbc.ca/news/politics/climate-emergency-motion-1.5179802>>.

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# Who's Watching You? More Than Just Your Date

## Surveillance and Privacy on Grindr

Jesse Green

### Introduction

The dawn of social media and smart phones brought online dating into your pocket and make dating applications an almost essential tool in millennial dating. What types of surveillance practices does Grindr, an app specifically marketed towards gay, bisexual, and pansexual men, enable and what impact do these practices have on the communities that use Grindr? How is this different from the effects of dating apps not marketed towards the queer community? Grindr and other dating apps, such as Tinder or Bumble, collect and make available all sorts of users' sensitive information. Similar to other social media applications, such as Facebook, dating apps facilitate significant levels of both top-down surveillance and surveillance conducted on the individual level, or peer-to-peer surveillance. However, these dating apps are tools to meet people to form romantic connections, not tools to keep up with the lives of people that one has already met. So, while there is a level of peer-to-peer surveillance enabled by these apps, it is mostly carried out by strangers, not an individual's peers. This new surveillance is having interesting impacts on the LGBTQ+ community through apps like Grindr. In his paper on the geography of gay social media, Yoel Roth argues that Grindr is shifting queer spaces and they way in which we think about them, in both the physical and metaphorical sense; due to the high level of peer-to-peer

surveillance that is introduced, which makes meeting other queer people safer, faster, and less location-based.<sup>1</sup>

There are two types of surveillance in regards to dating apps. First, there is top-down surveillance carried out by Grindr and other affiliated companies mostly for the purposes of providing targeted advertising and maximizing profits. Second, individual users of these apps are able to conduct their own surveillance of individuals, whether their intentions be benign or malicious. In writing this paper, I argue that the surveillance practices occurring on Grindr are more significant than those of heteronormative apps, due to heightened privacy sensitivities and the type of peer-to-peer surveillance which is enabled by Grindr. I will begin by discussing the specific nature of surveillance being carried out. Secondly, I will discuss the legal ramifications of the two types of surveillance being facilitated by Grindr and similar apps; here I will also examine the privacy policies of Grindr and heteronormative dating apps. Thirdly, I will discuss the broader societal impacts of both types of surveillance enabled by Grindr and how these styles of surveillance fit into the broader narrative of relevant existing academic literature. Finally, I will conclude, that while the top-down surveillance practices of Grindr are more intrusive than those of Bumble or Tinder, it is the peer-to-peer aspect of Grindr that has more serious societal and legal implications.

### **What is Happening with Grindr?**

There are two sides of surveillance occurring on dating apps. The first is top-down surveillance, which is more similar to the traditional types of surveillance and privacy concerns that we usually think of when discussing our online privacy. This first type of surveillance has tangible impacts and more clear legal ramifications and limitations, so it will compose the bulk of discussion in this section. The second is the peer-to-peer

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<sup>1</sup> Yoel Roth, "No Overly Suggestive Photos of any Kind," *Communication, Culture & Critique* 8, no. 3 (2015): 437-439.

surveillance that is carried out by all of those using the application and the wider societal impacts that this style of surveillance has. In contrast with top-down surveillance, this type, peer-to-peer, has less clear and tangible impacts and is also therefore not as restricted or governed by appropriate laws. While similar types of surveillance are carried out across other dating platforms, such as Tinder and Bumble, the ramifications of the type of surveillance enabled by these applications is more significant regarding Grindr and other queer dating apps because they ask for more sensitive information than apps which are not marketed towards a specific sexual orientation or experience. Lastly, regarding the legal implications of these styles of surveillance, I discuss them mainly in the context of Canada, but also utilize examples from other jurisdictions to gain a better understanding of the spatial effects of surveillance and support my main argument.

Top-down surveillance is the sort of traditional method of surveillance that we often think about regarding the Internet and privacy violations. This often involves companies capturing, processing, and selling or using our personal information for all kinds of things from research to targeted advertising. Beyond the basic information users have to provide mostly for authentication purposes, Tinder, Bumble, and Grindr ask for a whole host of personal information including name, age, location, photos, device information, and log and usage information, such as how many messages someone sends and receives and what advertisements they click on.<sup>2</sup> In the case of Grindr, this personal information extends to users' HIV status, preferred sexual position, and "tribe" (or "type," i.e. bear, twink, etc...), and in regards to location information it provides other users with your location down to the exact meter, in contrast with other apps

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<sup>2</sup> Bumble, Privacy Policy s.1. (2018). <https://bumble.com/it/privacy> (March 2019); Grindr, Privacy Policy s. 1. (2018). <https://www.grindr.com/privacy-policy/> (March 2019); Tinder, Privacy Policy s. 3. (2018). <https://www.gotinder.com/privacy> (March 2019).

which only give location down to the exact kilometer.<sup>3</sup> While much of this information is voluntarily given up by users, with the exceptions of device information, log and usage information, and the partial exception of location information, the fact that Grindr asks for so much more sensitive information than other apps is particularly interesting. However, why must any of this information be collected anyways? While on the peer-to-peer side of things information is voluntarily given up to tell other users about yourself before chatting with them, the top-down side of surveillance is less well-intentioned. According to the apps concerned, users' information is collected for research purposes, other "business purposes," and to offer a so-called personalized experience to users via targeted advertising.<sup>4</sup>

While on the top-down side of things users' information is being collected and processed, something very different is happening on the peer-to-peer side of surveillance on Grindr. First, those with malicious intent can utilize the peer-to-peer surveillance enabled by Grindr to potentially harm users of the app. For example, police in Egypt have used Grindr to locate and arrest queer men.<sup>5</sup> Furthermore, profiles on Grindr are ordered by proximity to the user, so even if user B has his location off, someone could figure out with reasonable certainty how far or close user B is based on the distances of users A and C.<sup>6</sup> On a lighter note, Roth also argues that the location features of Grindr are shifting queer relations to the online world and impacting queer geography in unexpected ways by making meeting other queer people faster, easier, and less based on location.<sup>7</sup> Many of the peer-to-peer aspects of surveillance on Grindr rest in a legal grey area, and for that reason discussion of peer-to-peer surveillance will be limited in the next section, while top-down surveillance will take the front seat, as the next section will

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<sup>3</sup> Grindr, Privacy Policy s. 1; Bumble, Privacy Policy s. 4.

<sup>4</sup> *Ibid.*, s. 1-2; Grindr, Privacy Policy s. 2-3; Tinder, Privacy Policy s. 5-6.

<sup>5</sup> Russell Brandom, "Designing for the crackdown." *The Verge*, April 25, 2018.

<sup>6</sup> Roth, "No Overly Suggestive Photos of any Kind," 440.

<sup>7</sup> *Ibid.*, 440-441.

discuss the legal ramifications and limitations of these styles of surveillance enabled by Grindr and other dating apps.

### **Privacy and Intrusion in Dating Apps: What About the Law?**

Currently, most privacy laws are more reactive than proactive, so there is not much that pertains to dating apps specifically as they are a relatively new technology, at least in terms of Canadian regulation. Albury, Burgess, Light, Race, and Wilken highlight how social media applications are gold mines for corporations interested in the collection of personal information.<sup>8</sup> This is particularly interesting in regards to dating apps because of both how they are shaped by gender and sexuality and how they are shaping gender and sexuality. This section will discuss Canadian laws and regulations, so will refer to the Personal Information Protection and Electronic Documents Act (PIPEDA), which deals with private sector companies and data privacy. I will also briefly highlight privacy concerns in the United States of America (USA) and China. The USA is important to discuss because that is where much of our digital information passes through and is stored, and China is as well because that is where Beijing Kunlun Tech, Grindr's parent company, is located.<sup>9</sup> Additionally, in this section I will also draw on relevant privacy policies from Grindr, Tinder, and Bumble as well as incidents and privacy complaints from other jurisdictions that are particularly interesting or relevant to the Canadian context.

PIPEDA sets out ten principles in Schedule 1 of the act on how organizations should behave in regards to privacy.<sup>10</sup> The principles that are most important to the case of Grindr are those

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<sup>8</sup> Albury, Kath, Jean Burgess, Ben Light, Kane Race, and Rowan Wilken. "Data Cultures of Mobile Dating and Hook-Up Apps: Emerging Issues for Critical Social Science Research." *Big Data & Society* 4, no. 2 (2017): 2.

<sup>9</sup> Grindr, Privacy Policy s. 6; Jon Russell, "Chinese Gaming Firm Buys 60% Of Gay Dating App Grindr For \$93M," Tech Crunch, January 11, 2016

<sup>10</sup> Canada, *Personal Information Protection and Electronic Documents Act (PIPEDA)*, (2015), s. 4.1-4.10.

of consent and of limiting collection of information.<sup>11</sup> The principle of consent suggests that when giving consent, individuals should be made aware of what information is being collected, for what purposes, and with whom it is being shared. However, Grindr's privacy policy does not mention who its parent company is and only mentions one of its third-party partners. It also mentions that information collected by third parties is subject to the privacy policies of those third parties and not Grindr.<sup>12</sup> For Grindr to obtain truly informed consent from users, it should specify who its parent company is in its privacy policy and make sure that users' information is subject to similar privacy policies when shared with third parties. While Grindr's privacy policy does provide a link to one of its advertising partners privacy policies, MoPub to be specific, it is unreasonable to expect users to read both privacy policies.<sup>13</sup> Depending on how PIPEDA's consent principle is interpreted, Grindr could be seen as operating in a legal grey area. The reason for this grey area, is that PIPEDA's principles are reactive, rather than proactive.

On a more serious note, Grindr seems to be in violation of the principle of limiting collection. PIPEDA clearly states that "the collection of personal information shall be limited to that which is necessary for the purposes identified by the organization."<sup>14</sup> Despite this, Grindr collects and shares your profile information, which includes things such as HIV status and preferred sexual position, with third parties.<sup>15</sup> The collection and sharing of such sensitive information surely is not necessary, yet Grindr does it anyway. In Europe, the Norwegian Consumer Council filed a complaint on this exact topic after research came out that claimed it was not necessary to share such information for analytical and functionality purposes.<sup>16</sup> The council also complained about the dissemination of other personal

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<sup>11</sup> Ibid., s. 4.3-4.4.

<sup>12</sup> Ibid., s. 4.3; Grindr, Privacy Policy s. 3 and 6.

<sup>13</sup> Grindr, Privacy Policy s. 3.

<sup>14</sup> PIPEDA, S. 4.4.

<sup>15</sup> Grindr, Privacy Policy s. 3.

<sup>16</sup> Natasha Lomas, "Grindr hit with privacy complaint in Europe over sharing user data," Tech Crunch, April 3, 2018.

information, such as location, tribe, and intention (i.e. friends, relationship, etc..) that was being shared and transmitted in an unencrypted format.<sup>17</sup> In addition to these privacy concerns, there was also a breach of Grindr that revealed user's exact location, raising questions about security.<sup>18</sup> Given this information and point of view, it is clear that Grindr is in violation of the principle of limiting collection, and arguably the principle of consent as well, and that these concerns should be addressed by the Privacy Commissioner of Canada.

However, beyond the extent of Canadian law there are other privacy concerns and implications that should be considered. As mentioned before, both the USA and China are of concern for Canadian users of Grindr. As mentioned earlier, Grindr is owned by the company Beijing Kunlun Tech, which is based in China.<sup>19</sup> This carries significant security implications, considering that Grindr's privacy policy clearly states that users' personal data may be shared by their parent company.<sup>20</sup> Fish writes that this means that the Chinese government could theoretically access personal data from Grindr via Beijing Kunlun Tech. Interestingly enough, despite privacy and security concerns regarding the Chinese government, in their section on transmission of data to other countries, Grindr's privacy policy uses the USA as an example of a place with "less stringent" privacy laws where users' data might end up, but does not mention China at all.<sup>21</sup> However, it should be noted that in a rather recent development, the USA has asked Beijing Kunlun Tech to sell Grindr due to privacy and security concerns.<sup>22</sup> Broader geopolitical and international trade consequences aside,

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<sup>17</sup> Ibid.

<sup>18</sup> Tom Capon, "Another security breach at Grindr reveals users' exact location," *Gay Star News*, September 18, 2018.

<sup>19</sup> Jon Russell, "Chinese Gaming Firm Buys 60% Of Gay Dating App Grindr For \$93M," *Tech Crunch*, January 11, 2016

<sup>20</sup> Grindr, Privacy Policy s. 3.

<sup>21</sup> Isaac Fish, "China has access to Grindr activity. We should all be worried," *Washington Post*, April 9, 2019; Grindr, Privacy Policy s. 6.

<sup>22</sup> Fish, "China has access to Grindr activity. We should all be worried."

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the USA targeting of companies due to privacy and security concerns is significant, but that does not mean that the USA does not pose privacy and security concerns of its own that users should be worried about.

In their privacy policy, Grindr specifically states that user information may be processed in other countries and users might therefore be left without a legal remedy in the event of a privacy breach- as mentioned before, Grindr uses the US as an example of one of those countries.<sup>23</sup> Other dating apps have varying levels of transparency and clarity. Tinder, for example, states that cross-border data transfers may take place, and that in the case of data leaving the European Economic Area (EEA), privacy is preserved through the use of standard contractual clauses. It is unclear in the privacy policy if these types of agreements are used in data transfers leaving countries not in the EEA.<sup>24</sup> Bumble, on the other hand, is a little more similar to Grindr. Their privacy policy goes as far as to list several countries where Bumble's global servers are located, but information located on those servers is protected only by local laws and not by further contractual obligations, as is the case with Tinder.<sup>25</sup> While these differences in policy are relatively minor, they are something that future research on the topic could explore, perhaps as an interesting case study on the globalization of surveillance and privacy regulations.

Back to the issue of privacy and security of users' information on dating apps. As touched on previously, Grindr's privacy policy stipulates that users' personal information may be processed in other countries such as "the United States, where laws regarding Personal Data may be less stringent than the laws in your country."<sup>26</sup> The fact that the privacy policy specifically calls out the USA is very interesting, so let us examine the relevant USA legislation to understand why that is and what could happen to personal information that is processed there. On the corporate side of things, current privacy regulation is

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<sup>23</sup> Grindr, Privacy Policy s. 6.

<sup>24</sup> Tinder, Privacy Policy s. 7.

<sup>25</sup> Bumble, Privacy Policy s. 11.

<sup>26</sup> Grindr, Privacy Policy s. 6.



particularly sparse. There is currently no equivalent of PIPEDA in the USA at the federal level, although there is a similar law in California and allegedly a privacy law in the works at the national level that would be the first of its kind.<sup>27</sup> If a law like this actually passes in the USA, be it more similar to Canadian or European standards, it would be a major win for privacy advocates across the west due to the high level of data that is processed in the USA. Meanwhile, on the government side of things there exists a complex array of legislation that dictates when the government may access data and obtain personal information. For example, parts of the FISA Amendments Act of 2008 states that “the Attorney General and the Director of National Intelligence may authorize jointly” a request for electronic communication information.<sup>28</sup> This act includes a section which specifically pertains to individuals that are not citizens of the US and not located in the US.<sup>29</sup> Given the recently discussed information, the US should adopt proactive privacy regulations that limit the actions of companies such as Grindr and also take actions to protect individuals’ right to privacy.

### **The Larger Implications for Society and Privacy**

So, what do all of these surveillance practices and privacy implications mean for society as a whole and for our privacy? As discussed earlier in this paper, there are two types of surveillance that are enabled by Grindr and other similar apps. The first is the more traditional top-down surveillance that involved the collection and sharing of personal information by Grindr, in order to conduct research and make more money by targeting specific advertisements to certain users. In our modern world of the Internet and social media this type of surveillance is not uncommon and occurs across other dating apps like Bumble and

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<sup>27</sup> Marcy Gordon, “Prospects brighten for US law to shield online consumer data,” *Post Register*, April 8, 2019.

<sup>28</sup> United States Congress, FISA Amendments Act, (2008), s. 702-703.

<sup>29</sup> *Ibid.*

Tinder. What is particularly concerning, however, is the collection of particularly sensitive personal information such as location data and in the case of Grindr, a users' HIV status. Also, a unique concern for Grindr users is the possibility of a data breach that could potentially out users and put them at risk. Overall, the concerns stemming from top-down surveillance are not particularly unique to Grindr, so when discussing these implications, I will wrap it into a broader discussion of privacy implications and draw on appropriate academic literature. Next, I will discuss the peer-to-peer side of the surveillance practices enabled by Grindr and their wider societal implications. Primarily, Grindr's peer-to-peer surveillance has impacted society in a particularly unique way by fundamentally shifting queer geography and how we think about and conceptualise queer space. Overall, Grindr is a good example of the broader privacy implications of the type of top-down surveillance enabled by social media, but still has some specific concerns, and is also a particularly unique example in relation to peer-to-peer surveillance, due to the fact that the app is marketed specifically towards gay, bisexual, and pansexual men.

There are several different models of surveillance that have been discussed by privacy scholars, but which one fits Grindr best? The panoptic model, surveillant assemblage, and ubiquitous surveillance all have elements that are relevant to the type of surveillance enabled by Grindr, so I will briefly discuss each one in terms of how they relate to Grindr's surveillance, and will then make an argument as to which model(s) fit best and why. First, the panoptic model describes surveillance as a sort of prison, where subjects are aware of the possibility that they could be being watched at any time, but they do not know when or if that is, so they self censor themselves and their actions.<sup>30</sup> This interpretation envisions a sort of dystopian big-brother state, so in that respect it is perhaps inaccurate, but it does contain some kernels of relevancy. If we can conclude that it is reasonable to believe that most people are at least somewhat aware of the types

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<sup>30</sup> Michel Foucault, "Panopticism," in *Discipline & Punish: The Birth of the Prison*, 1975. 3-4.

of surveillance enabled by Grindr and other social media applications, then the panoptic model still applies, only in a modified form. Users of social media are aware that their data is being collected and that they are being monitored by their peers so they censor themselves due to the possibility of being watched. Whether they are afraid of the government or their grandmother seeing their posts is irrelevant in this case because the end result is the same.

Moving on from the panoptic model, there are other models that are still more applicable. One of these is the concept of ubiquitous surveillance. Andrejevic argues that surveillance is becoming an everyday occurrence because of its commercialization, such as data collection by companies in order to make targeted advertisements.<sup>31</sup> The ubiquitous nature of surveillance is obviously relevant to our discussion of Grindr, but the wider concept of a surveillance assemblage is even more accurate to the case of Grindr. The core concept of the surveillant assemblage is its unclear and networked, or rhizomatic nature. In this understanding the structures from which surveillance is carried out are neither hierarchical or concrete.<sup>32</sup> Furthermore, the key point to the surveillant assemblage and to the type of surveillance enabled by Grindr is that surveillance is not carried out by a big-brother state or dystopic corporation but by *everyone*.<sup>33</sup> This notion that surveillance is carried out by everyone and not just a single body is arguably more invasive than Foucault's panoptic model. The surveillant assemblage model is most accurate to Grindr's situation because it takes into account both the top-down and peer-to-peer surveillance that is happening. This means that the earlier example of police in Egypt using Grindr to locate and arrest queer men and the other example of a data breach fit perfectly into this model of surveillance

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<sup>31</sup> Mark Andrejevic, "Ubiquitous surveillance," in *Routledge handbook of surveillance studies*, 2012. 97-98.

<sup>32</sup> Kevin Haggerty and Richard Ericson, The surveillant assemblage. *The British Journal of Sociology*, 51, no. 4 (2000): 606-609.

<sup>33</sup> *Ibid.*, 617-618.

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because they are not an exception to the model, as would be the case in the panoptic model, but an example of it.

Broader privacy implications and models aside, how do these types of surveillance impact society? As briefly touched on earlier, Grindr is fundamentally shifting queer geography and queer space. Roth argues that queer dating apps such as Grindr are redefining queer communities by shifting them from a physical space, which has usually taken the form of a concentrated area within large cities, or “gay neighbourhoods,” to a more online space, which manifests itself in Grindr and other queer social media. Because of this online space, there is no longer a need for gay neighbourhoods, so they are diminishing in terms of overall size and how widespread they are.<sup>34</sup> This is a consequence of the peer-to-peer surveillance enabled by Grindr—prior to apps like this, queer people would often flock to gay neighbourhoods because it was a place of safety where they could be their true selves.<sup>35</sup> Miles highlights two consequences of this shift: first, that a shift towards an online community may not always be positive due to the nature of social media, and second, that apps like Grindr change the nature of what constitutes community and physical encounters.<sup>36</sup> He also raises the question of whether or not online communities can compete with physical communities.<sup>37</sup>

Miles’s research feeds further into Roth’s observations about Grindr, highlighting how the geography of Grindr’s interface presents users with a list of other users ordered by proximity, making it faster, easier, and safer for queer men to meet other queer men, and ultimately leading to a face-to-face meeting between two users.<sup>38</sup> Taking the observations of Roth and Miles it seems like the location aspect of Grindr and other similar apps serves as the link between online and physical queer

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<sup>34</sup> Roth, “No overly suggestive photos of any kind,” 440-441.

<sup>35</sup> Sam Miles, “Sex in the digital city: Location-based dating apps and queer urban life,” *Gender, Place & Culture* 24, no. 11 (2017): 1597-1596

<sup>36</sup> *Ibid.*, 1597.

<sup>37</sup> *Ibid.*, 1598.

<sup>38</sup> Roth, “No overly suggestive photos of any kind,” 439-440.

communities. Grindr makes it easier to find other queer men, but the physical element of the queer community still exists because people that meet over these apps still need somewhere to go, it is just less important now than it was before the Internet. As a side note, it should be mentioned that both Roth and Miles, as well as most academic literature on the topic, look specifically at gay, bisexual, and pansexual men; while that is not a problem for my research as I am looking specifically at Grindr, it would be interesting to compare and contrast this case with studies of queer women or trans folk; however, the current array of existing research does not allow for a thorough analysis.

## **Conclusion**

Overall, due to the sensitive information collected by Grindr, that information being the personal information of queer men, there are heightened privacy concerns both in the top-down side of surveillance and in the peer-to-peer side of things. Personal information, including the identities, location, and HIV status of queer men is collected and processed by Grindr, its parent company, and their third-party partners across several different countries. This means users may not have a legal remedy in the event that their privacy rights are violated and it puts queer men in a particularly vulnerable spot should there ever be a data breach, particularly queer men still in the closet. On the peer-to-peer side of things, queer men in places less LGBTQ+-friendly, such as Egypt, could be targeted and even arrested or otherwise harmed through their use of Grindr. On a less dark note, Grindr is also fundamentally shifting queer geography and space by partially shifting the queer community online and working to eliminate the need for gay neighbourhoods. The various types of surveillance, privacy, and security issues at play here can be understood through Haggerty and Ericson's concept of the surveillant assemblage, which sees surveillance as non-hierarchical, networked, and not concrete. In conclusion, while the overall surveillance practices of Grindr are not too different from those of heteronormative dating apps, the effects are not

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only more severe but are also different in several ways due to the sensitive nature of the information given up to these apps and the social and political history behind the LGBTQ+ community.

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