DECIDING TO DEPORT: CONSIDERING COLLATERAL IMMIGRATION CONSEQUENCES IN ONTARIO BASED COURTS

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Abstract

This dissertation unpacks how migrants with criminal convictions are governed across the immigration and criminal punishment systems in Canada. The analysis traces processes that span these two domains and contribute to the program of removal for criminality. I draw from debates on immigration law to provide a historical review of legislation governing deportation from 1869 to 2002, when the current *Immigration and Refugee Protection Act* was enacted. I trace the rationalizations for amendments to this legislation introduced by the *Faster Removal of Foreign Criminals Act* (FRFCA) in 2013. The analysis then shifts to consider how knowledge of deportation for conviction and sentence impacts processes in the criminal system. I review how knowledge of the program of removal is accessed and deployed by court actors. I also examine the effects of the consideration of immigration consequences on sentencing outcomes. I reviewed 188 cases and conducted 13 interviews with judges, defence counsel and immigration lawyers in support of this effort.

This research reveals the complex exchange of knowledges, actors, and technologies across the assemblages of the immigration and criminal punishment systems. I demonstrate the clear reliance of government officials on racialized ideas of citizenship in legislating deportation. I establish the repetition of racist logics over time, including in support of the FRFCA. I then demonstrate the interweaving of logics of race with knowledges of court processes. I reveal that amendments to the program of removal introduced via the FRFCA were justified as delimiting the authority of court actors to consider deportation. I also show that judges continue to contemplate the collateral immigration consequences of sentencing post-passage of the FRFCA.

I argue that judicial discretion is shaped by a myriad of factors, including knowledge of legal principles, information specific to the geographical location of the court, and the background of the judge. The interweaving of this information is shown to have varied effects for the program of removal, with some migrants being protected from deportation by court actors through sentencing. Opportunities for resistance to removal are thus argued to exist in the points of tension in implementation of the program of removal across the immigration and criminal systems in Canada. This work also reveals that racialized knowledge guides judicial decision making on migrant sentence. Racialized migrants are produced through these processes as outside of the citizenry of Canada. The work thus confirms that the immigration and criminal punishment systems in Canada function in tandem to support racial governance.

Dedication

To my mother, the strongest force
And to my husband, the greatest support

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I am so fortunate to have had the opportunity to work with several amazing people throughout my doctoral studies, from a wide variety of institutions. The gratitude I feel to have been offered this support is significant. I don't know why or how it happened, but I am a very lucky person.

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I am someone who has directly benefitted from the history of racist immigration policies in Canada. My mother's ancestors migrated to Canada through the land grant system. My father, a white citizen of the United Kingdom, immigrated here in the 1960s, when migration from England was explicitly promoted. To the migrants who came before and after, who were subjected to coercive practices that moved them outside of membership when my family was admitted without question – this work is for you.

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Acronyms

African Canadian Legal Clinic (ACLC)

Canada Border Services Agency (CBSA)

Children's Aid Society (CAS)

Citizenship and Immigration Canada (CIC)

Committee on Citizenship and Immigration (CIMM)

Faster Removal of Foreign Criminals Act (FRFCA)

Immigration and Refugee Protection Act (IRPA)

Immigration Appeal Board (IAB)

Immigration Appeal Division (IAD)

Immigration Division (ID)

Immigration and Refugee Board (IRB)

Immigration, Refugees and Citizenships Canada (IRCC)

Member of Parliament (MP)

New Democratic Party (NDP)

Opium and Narcotic Drug Act (ONDA)

Public Safety and Emergency Preparedness (PSEP)

Special Inquiry Officer (SIO)

Introduction - "Foreign" Offenders, Deportation, and the Criminal System in Canada

The legal landscape governing migrant[1] removal from Canada for criminality established in the *Immigration and Refugee Protection Act* (IRPA) was significantly changed with the passage of the *Faster Removal of Foreign Criminals Act* (FRFCA) in June 2013. This legislation restricted access to appeal a removal order issued based on criminal conviction and sentence[2] to the independent, administrative Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB). Permanent residents[3] were formerly extended the right to appeal their deportation if they had been sentenced to *less than two years* imprisonment. The FRFCA limited this right of appeal to permanent residents sentenced to incarceration for *less than six months*. Jason Kenney, Conservative Member of Parliament and then Minister of Citizenship and Immigration, asserted the necessity of these changes with the following statement:

> violent foreign criminals, convicted by Canadian courts of law, are walking our streets when they should no longer be in Canada because they have lost the privilege of being here… To be a foreign national in Canada, whether as a visitor or as a permanent resident, is a privilege. It is not a hard one to keep. All we ask of the individual is… if that individual wants to maintain

[1] Throughout this dissertation I reference "migrants" and "immigrants" to Canada, generally; both terms are used in reference to persons who were not granted Canadian citizenship by *jus solis* or *jus sanguine* and who obtained status through immigration to this country. I also refer to "foreign nationals" and "permanent residents." These are legal terms that connote distinctions in status. As explained at section 2 of the IRPA*, "foreign national* means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person", while "*permanent resident* means a person who has acquired permanent resident status and has not subsequently lost that status under section 46."

[2] Subsection 36(1)(a) states that both permanent residents and foreign nationals may be found to be inadmissible on grounds of serious criminality for

> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.

[3] Pursuant to subsection 63(3) of the IRPA, *only* permanent resident and protected person are extended the right of appeal to the IAD against a removal order decision. No such right exists for foreign nationals.

> permanent residence… that the individual not commit a serious crime (Kenney, 24 September 2012).

Kenney contended that permanent residents were avoiding deportation by asking criminal courts to lower their sentences, thereby protecting their right of appeal. The Minister pointed to the actions of the courts during debate, stating:

> many courts have actually given foreign nationals sentences of two years less a day, with what is pretty clearly the expressed intent of allowing them access to this appeals process. That is to say that someone who might otherwise have received a longer sentence is actually given a lighter sentence precisely so they can delay their removal from Canada. This has actually had, I think, a negative influence on strict sentencing for foreign criminals convicted of serious crimes (Kenney, 24 October 2012).

With the enactment of the FRFCA, and the institution of limits on access to appeal, it was held that courts would no longer be able to impose a sentence that was low enough to preserve a migrant's right to appeal their removal.

I was working at a Toronto based citizenship and immigration law firm as a Senior Legal Services Associate and Manager of Legal Research and Writing when the FRFCA was passed. My clients included migrants who were facing deportation from Canada for criminality. Despite being described within the FRFCA as "foreigners," my clients were all long-term residents of Canada. They were well established here and had few (if any) direct links to the country to which they would be returned. Yet with the enactment of Bill C-43 and the imposition of limits on the right of appeal, their personal circumstances would likely no longer be considered before removal. This felt incredibly unfair and I wanted to understand how the changes introduced by the FRFCA had been justified in Parliament. I was also keenly aware of the potential collateral

effects of these legislative amendments on the criminal punishment system[4] in Canada. Canadian courts had begun to consider immigration consequences at sentencing when the legislation was being debated, although (and in contradiction to Kenney) this was not an established and consistent practice (*R. v. Hamilton*, [2004] O.J. No. 3252; *R. v. Kanthasamy,* 2005 BCCA 135; *R v. Critton,* [2002] O.T.C. 451). The amendments introduced by the FRFCA nevertheless heightened the necessity of judicial assessment of potential removal, given the link between access to appeal and sentence length. I thus wanted to understand how, if at all, criminal court processes had been impacted by these legislative changes. Finally, I was interested in tracing the effects of the FRFCA and any resulting shifts in criminal court practices on the relationship between immigration and criminal systems in Canada. While scholars had examined the intersections of these domains in other countries, material emerging from the Canadian context was limited at the time (although see Chan, 2005; Coté-Boucher, 2008, 2018; Dauvergne, 2008, 2013; Pratt, 2001, 2005, 2012).

This dissertation is the product of these interrogations into the drafting and passage of the FRFCA and its effects on court practices. The empirical research conducted in support of this project was guided by the following four inter-related research questions:

1. How was the program of removal promoted by the FRFCA rationalized by Parliamentarians? What knowledge and discourses, including of "foreigness" and migrant criminality, were referenced during debates of this legislation?

[4] I adopt language of the "criminal punishment system" from the work of Mariame Kaba (2020). In utilizing this concept, Kaba recognizes that rather than achieving "justice," the criminal punishment system is violent, corrupt, and injurious. Despite claims to the contrary, the system also does not function to address actions that are "harmful." Instead, the system "discourages people from ever acknowledging, let alone taking responsibility for, the harm they have caused" while also allowing people to "avoid" the responsibility of holding "each other accountable" (para. 10). The purpose and function of the system is thus not to achieve justice; it is to punish.

2. What information on immigration outcomes is presented in court for consideration when sentencing migrants following the passage of the FRFCA? How do court actors navigate their authority to consider this material and how does information on removal shape their discretionary decision making?
3. How are sentencing outcomes directed by ideas of citizenship, including those promoted in support of the FRFCA?
4. What do these analyses reveal about the relationship between the immigration and criminal punishment systems in Canada?

These research questions were explored via two qualitative methods. The first was documentary analysis. I examined Parliamentary debates of immigration legislation targeting migrants for removal based on criminality from 1869 to 2013. I additionally reviewed case law issued between 1910 and March 2021 where immigration outcomes were considered by judges. The second qualitative method employed in this dissertation was semi-structured interviews. I conducted interviews with judges, immigration lawyers, and defence counsel. My interviewees were asked to explain their understanding of the intersections between the immigration and criminal systems, as well as how the consideration of immigration outcomes shapes court processes. Further information on these methods is provided in Chapter 1 of this dissertation.

I was able to trace processes of removal unfolding across the immigration and criminal punishment systems through the analysis of this empirical material. What was revealed was not only how these domains interweave to support deportation, exchanging knowledges of migrant criminality and foreignness, but also the spaces of tension that continue to exist between these systems. It is in these points of tension that opportunities for resistance to removal are revealed. The importance of identifying these spaces for resistance cannot be overstated. Migrants subject

to removal are ripped from their homes, families, and communities. They are removed to countries where they may have never lived and where they may face a risk to their lives. And it is specifically racialized migrants who are subject to these processes, facing the compounding impact of racial governance across the noted domains. I have worked in the field of immigration for long enough to have seen the consequences of removal on not only migrants but their families and friends. It is not an overstatement to say that peoples lives depend on this effort to resist. I hope that this work makes even a minor contribution to this goal.

Border Criminologies

I am guided in this work by scholarship from the subfield of border criminology. Scholars of border criminology have been primarily concerned with tracing how "states around the world have put the criminal justice system to work in managing mass mobility" (Bosworth, 2017, p. 373). Border criminologists draw from a range of disciplines and theoretical concepts in support of these analyses. They also consider a variety of topics related to migrant criminalization. They trace, for example, the incorporation of criminal machinery into the immigration system (Bosworth, 2017; Bosworth & Kaufman, 2011; Bowling, 2013; Leerkes & Broeders, 2010). Border criminologists additionally highlight the lack of legal protections for migrants subject to criminal practices (Dauvergne, 2013; Kaufman, 2013; Pratt, 2012). And they consider how differences in the use of criminal machinery between the immigration and criminal systems impact our understanding of key criminological concepts, including punishment (Kaufman, 2013; Macklin & Templeman, Forthcoming; Simon, 1998; Wacquant, 1999). They ask, for example, how the imprisonment of migrants for immigration purposes, and not as a sanction for an offence, alters our conceptualization of incarceration (Pratt, 2012).

Through these investigations, border criminologists have sought to understand the "constitutive relationship between borders, migration control and criminal justice" (Bosworth, 2017, p. 376; see also Bowling, 2013; Pickering, Bosworth & Aas, 2015). While some scholars in this field have focused exclusively on tracing the increasing overlap in systems of immigration and criminal punishment[5], others have continued to highlight the ways in which these domains remain distinct. Kaufman (2013) is insightful on the necessity of more nuanced analyses attending to difference. The author states that while it is important to acknowledge the "expansion of the criminal law into the realm of migration, the use of criminality to describe migrants, and the development of policing practices along the national border," this focus on processes of criminalization may miss the "series of non-criminal trends" at play in the governance of migrant mobility, "such as the expansion of administrative detention and the curtailment of due process for non-citizens" (p. 174-175). Kaufman (2013) emphasizes that *"in many ways contemporary migration control practices depend less on a connection between immigration and crime than on the particular non-criminal nature of foreignness*" (p. 174-175; emphasis added). It is thus critical that border criminological scholarship attend to not only the intersections between immigration and criminal punishment domains but also their ongoing distinctions.

My work contributes to the subfield of border criminology in three key ways. First, it shifts the analysis down from a broad overview of legislative changes and governmental action taken to limit migrant movement across borders. It focuses instead on revealing how processes of

[5] These analyses of overlap generally follow from the work of Stumpf (2006). Stumpf (2006) developed the term "crimmigration" to conceptualize what she identifies as the merging in both substance and procedure of the immigration and criminal punishment systems. Despite Stumpf's (2006) own recognition of differences between these systems, scholars now contend that the ubiquity of the crimmigration concept has encouraged an "overemphasis on the process of criminalization" within the scholarship on contemporary practices of migration (Kaufman, 2013, p. 174).

migrant removal actually unfold across the immigration and criminal punishment systems in Canada. These empirical analyses of process in turn uncover the nuances of migration control highlighted by Kaufman (2013). For example, my work establishes how changes to the program of removal introduced by the FRFCA were justified in Parliament, including based on knowledge of court decision making. It also reveals that judicial discretion to decide on sentence is informed by knowledge of collateral immigration consequences. I confirm though that there are a myriad of factors that intersect with these considerations of deportation to shape judicial decision making. This includes knowledge of relevant legal principles, the geographical location of the court, and the individual experiences of the judge. These factors are also confirmed through this research to effect outcomes on sentence for migrants, and specifically whether a sanction is applied that will protect a migrant from removal. It is by producing these fine grained analyses of the process of sentencing that my work demonstrates how the criminal punishment system contributes to enacting the program of removal and how court actors resist deportation.

Second, my work addresses a gap in the literature through its empirical focus on court decision making on migrant files in the *Canadian* context. Research on court consideration of collateral immigration consequences has emerged from scholars in the United States and the United Kingdom, as discussed below. There is currently no scholarship that examines how decisions on migrant sentence unfold in the space of Canadian courts (for a doctrinal discussion, see Edelmann, 2013; Templeman, 2014). My study responds by unpacking the myriad of discourses, knowledges, and actors who contribute to processes of sentencing unfolding in the space of the court. It also traces the effects of decision making for migrant removal.

Finally, my work is significant because it demonstrates how ideas of race structure immigration legislation on deportation and court processes involving migrants. Examinations of

racial governance are limited in border criminological scholarship, as demonstrated below (although see Parmar 2020). It is not explored, for example, how racist logics have directed the development of immigration systems across diverse international contexts (see, though, Chacón, 2012). It is also not clear how discourses of race and racial identity inform the practices of removal that unfold between immigration and criminal punishment systems. I address this gap by showing how logics of race have been promoted to rationalize shifts in the Canadian program of removal since the legislation of deportation in 1877. I also reveal how these logics are deployed in the criminal system during the sentencing of migrants. I argue that the promotion of ideas of race across these systems serves to position racialized migrants as distinct from and outside of the homogenous, White Canadian population. I thus contend that the immigration and criminal punishment domains operate in tandem to exclude racialized migrants from the citizenry and to justify their deportation. This adds further nuance to the position promoted by Kaufman (2013). It confirms that processes of removal are not only shaped by knowledges of immigration and criminality, but also that the development and implementation of deportation programming is critically shaped by logics of race.

Examinations of Process

The analysis of processes of removal undertaken in this study adds to scholarship from border criminologists that specifically draw from Michel Foucault and that employ his analytics of power and government (Bosworth, 2017). Foucault demonstrated the importance of examinations of the multitude of relations of power that extend beyond the state and that function to direct the conduct of others (Pratt 2005). This type of analysis de-centers the state and requires sensitivity to the various heterogenous processes, actors, and knowledges that contribute to the governance of conduct. It also acknowledges that power can have both negative

and coercive and productive and positive effects (Coutin, 2005; Pratt 2005). Border criminologists who draw from Foucault produce fine grained analyses of the multiple forms of power, programs, knowledges and discourses at work in both coercive and productive citizenship practices unfolding across immigration and criminal punishment systems (Aas, 2011, 2014; Eriksson, 2016).

We see the use of Foucault's analyses of power and government in the work of Moffette (2018). Moffette (2018) examined immigration policies in Spain. The author asked "how policymakers, politicians, and officials name, define and act upon… migration, as well as how legal categories contribute to reifying it as "irregular" or "illegal"" (p. 12). Moffette (2018) found that migration is governed through regimes of probation, where migrants are kept in a "space time of legal liminality", during which their desirability is continuously assessed by a range of actors scattered through space and time and working across multiple scales (p. 135). Moffette contends in his analysis that illegality is thus not a static concept derived from legal definitions of exclusion alone; instead, illegality refers to the period of legal liminality (or transitional citizenship) during which migrant desirability is assessed and from which migrants may move to other forms of citizenship, closer to inclusion.

Pratt (2005) similarly draws from Foucault in her examination of the processes directing detention practices in the Canadian context. Pratt (2005) recognizes that, like imprisonment, the detainment of migrants is not the result of a singular decision or event but the culmination of myriad practices and decisions of a variety of agents operating at different points in the detention process. There are also various alliances, networks and technologies involved in the operation of immigration detention centres, including private companies who utilize coercive criminal technologies such as body restraints (Pratt 2012). Also drawing from Agamben (1998), Pratt

(2005) is clear that detention centers are not criminal but quasi-judicial, administrative entities that exercise sovereign authority to decide on the exception – who may enter and who is excluded from the nation state. Pratt explains that detention centres are thus liminal spaces, "zones of exclusions;" the migrants confined within are caught between the border and territory, with some being destined for inclusion and others facing certain deportation. In these liminal and exceptional spaces, the sovereign power to decide on the exception thus coexists with productive regimes of government that contribute to migrant inclusion in the nation.

Finally, Aas (2011) again draws on analytics of power and government from the work of Foucault to attend to the ongoing importance of sovereign regimes in the governance of immigration. Aas (2011) explored the formation of transnational surveillance networks deployed in the enactment and management of borders of nation states within the European Union. The author argued that these surveillance networks are guided by logics of crime and security, supporting sovereign interests by justifying the exclusion of specific groups of migrants on the basis of crime prevention. However, Aas (2011) notes that these networks are also driven by the logic of gate opening, facilitating the mobility of "bona fide travelers," who are generally distinguished from the class of "subcitizens" otherwise excluded from the territory. We thus again see from the work of Aas (2011) the coexistence of coercive sovereign powers with productive regimes of government.

Criminal Courts and Migration

This dissertation additionally contributes to border criminological work through its examination of migrant sentencing in the Canadian context. Border criminologists have paid limited attention to the effect of interactions between immigration and criminal punishment systems on the

operations and practices of courts. There is currently no literature on decision making in Canadian courts on migrant files.

A small body of research has been produced in the United States and the United Kingdom that examines the prosecution of immigration offences (Albrecht, 1997; Aliverti, 2013; Chacon, 2012; Eagly, 2010). Border criminologists in these states have also explored the introduction of immigration enforcement actors into the courts, as well as prosecutorial and judicial access to new administrative tools of enforcement (Aliverti, 2017; Eagly, 2013, 2017; Light, 2014). For example, in her work examining decision making of criminal actors in the United Kingdom, Aliverti (2013) establishes that immigration status is a significant consideration during decision making at bail and sentencing, with migrants being more likely to be kept in confinement than citizens. Eagly (2010) similarly determines that authorities involved in building cases against migrants have access to, and take advantage of, resources from the immigration system. This includes the use of detention without bond, interrogation without the reading of rights, arrest without probable cause of a crime, and sentencing without probation. Aliverti (2013) adds to border criminological scholarship by arguing that the lack of provision of due process protections to migrants in the criminal courts has transformed practices of prosecution and sentencing into regulatory activities, lowering procedural safeguards to facilitate administrative exclusion and expulsion. In raising this argument, Aliverti (2013) points to the fact that the coupling of detention and deportation with criminal sanctions offends the principles of proportionality that guide the court. Practices of punishment are thus reshaped by the interaction of immigration and criminal systems.

Eagly (2017) interestingly points to three reforms introduced in California that attempt to address the coercive impact of prosecution and sentencing for migrants. These reforms required

that prosecutors consider immigration consequences during plea bargaining. They also reduced the possible terms of imprisonment for misdemeanors in California to ensure that sentences would not trigger the removal process, and they instructed law enforcement to hold migrants for removal only when they had been convicted of serious crimes. Eagly (2017) argues that these reforms point to the ways in which the criminal system can be used to *resist* removal, specifically through the "disentangling" of "criminal adjudication from immigration enforcement" (p. 36). Eagly's work reveals that while the authority to decide on the exception does not sit with actors in the criminal system, processes of adjudication and enforcement can function to protect migrants from practices that would result in their exclusion. The criminal system is herein reactive to processes in the immigration system, with productive effects.

Scholarship has emerged from the United States on the consideration of collateral consequences in courts that further complicates any story of the relationship between these two systems. Jain (2016) demonstrates that in many instances court actors are not even aware of the status of a defendant. Immigration consequences of conviction and sentence are discussed as "invisible punishment" (p. 1199; see also Travis, 2003). Where these ancillary effects are known, the scholarship has identified variability in criminal outcomes for migrants during both prosecution and at sentencing (Eagly 2013; Jain 2016). Focusing on the plea-bargaining process, Jain (2016) demonstrates that prosecutors carry significant discretion to direct immigration enforcement, stating that "even in low-level criminal cases, prosecutors can control important civil outcomes such as deportation, public benefits, and professional licensing" (p. 1199). The consideration of collateral consequences during prosecution has varied results, depending on prosecutorial motivation; while some prosecutors may seek to mitigate collateral immigration

outcomes, others use the threat of administrative removal to force a migrant to plead to a harsher criminal penalty in exchange for avoiding deportation (Jain, 2016, p. 1201).

Eagly (2013) additionally points to the impact of locale on immigration outcomes, noting differences in discretionary approaches to the consideration of collateral consequences across three localities in the United States: Los Angeles County, California; Harris County, Texas; and Maricopa County, Arizona. Eagly (2013) shows that outcomes depend on the discretionary weighing of migrant status in each locale and the established policies and procedures in relation to the more general federal immigration-enforcement effort. While court actors in California used their discretion to shield migrants from coercive immigration practices, in Texas these actors used their discretion to punish migrants by imposing harsher *criminal* court outcomes, and in Arizona discretionary decisions were directed at supporting the federal enforcement program.

Race and Border Criminology

Finally, this study adds to the work of border criminologists by examining how race structures immigration law and practice in Canada. Border criminologists provide very limited examination of whether and how racist narratives inform practices within and between the immigration and criminal punishment systems. This lack of scholarly attention to race in the literature has been acknowledged (Bosworth, 2017). In 2015, for example, Yolanda Vázquez explained that:

> despite the volumes of words that exist on this issue in other disciplines… the role that race has played or continues to play in the transformation of immigration law and border enforcement in the United States during the last fifty years hasn't received as much attention (Vázquez, 2015, para. 2).

The minimal scholarship available that does attend to race focuses specifically on the differential outcomes of immigration and criminal punishment practices for migrants based on

their racialization. We learn, for example, from the work of Simon (1998) that the overrepresentation of migrants of colour in immigration detention demonstrates that these spaces are used as mechanisms of social control, pursuing certain groups for exclusion (see also Bosworth & Kaufman, 2011). With respect to criminal court processes directed towards racialized migrants, we learn from Jain (2016) of the disproportionate prosecution of African-American men for offences carrying mandatory minimums. Jain writes that these biased practices in turn result in the disproportionate experience of collateral consequences by this population (p. 1233).

Chapter Outlines

This dissertation unfolds across six chapters. Chapter 1 begins by outlining the theoretical framework and conceptual tools that are utilized in this dissertation. I begin by considering Foucault's scholarship on power. I then argue that sovereign and biopolitical power inform the program of removal in Canada. I review scholarship that describes how to trace the channeling of power into strategies of government. This work identifies key analytical tools that support scholarly examinations of power. I then explain how these tools may be used to unpack the development and operation of the program of exclusion via the passage of the FRFCA, as well as the effects of this legislation on court practices and broader implications for understanding the relationship between immigration and criminal systems in Canada. In this chapter, I also introduce the four key concepts that guide the analysis in this dissertation, namely assemblages, citizenship, jurisdiction and discretion. I explain how this study utilizes the conceptual tool of "assemblages" to define the relationship between immigration and criminal punishment domains, with processes of exclusion being described as interweaving across these two systems. Citizenship is then explained as a key rationality directing the development and operation of the

program of removal, while jurisdiction and discretion are described as legal tools promoted in support of the enactment of (and resistance to) this program. The chapter ends with a discussion of the methods used to gather and review data for this project.

Chapter 2 provides an overview of the history of immigration law in Canada targeting the exclusion and removal of migrants from 1869 to 2002. It begins by tracing the introduction of immigration law in Canada in 1869. It explains how this legislation was informed by racist thinking about citizenship, with specifically White Britans being sought for migration to Canada. Racialized migrants were comparatively defined as undesirable and excluded from the nation. It then considers the justifications for the introduction of legislation defining migrants with criminal convictions as undesirable and excludable in law. The chapter traces how these rationales were interwoven with racist ideas to inform amendments to the program of removal over time. The overview ends in 2002, with the introduction of the IRPA, exploring how ideas of race informed the development of laws of admissisbility and removal in the current Act.

Chapter 3 moves to a review and discussion of the FRFCA. Through an analysis of Parliamentary debates and government publications, this chapter provides a detailed account of the primary rationalizations for the program of removal promoted within this legislation. These rationalizations are identified as: 1) Foreigners have lost the privilege of residing in Canada; 2) Serious foreign offenders are not being deported; and 3) Judges are interfering with deportation efforts. Examination of these narratives demonstrates how sovereign and biopolitical power are directed through the program of removal towards the exclusion of migrants convicted of criminal offences. The analysis additionally confirms efforts of the Canadian government to guide the conduct of judges via restriction of appellate protections, which effectively confirm the jurisdictional authority of immigration actors alone to decide on deportation. The analysis further

demonstrates the embedding of racial thinking into immigration legislation (Thobani, 2007), including specifically via discursive references to migrant foreignness and dangerousness. This legislative review supports the broader effort to understand the complexity of the relationship between the immigration and criminal punishment systems. For example, the analysis confirms that knowledge of crime and criminality is accessed and deployed by Conservative politicians[6] in debates of the FRFCA, thereby demonstrating the interweaving of immigration and criminal assemblages. Yet it is also demonstrated that this legislation reaffirms distinctions between these domains through confirmation of the authority to deport as lying directly with adminstrative actors.

Chapter 4 examines how judges navigate the lines of jurisdictional authority to consider immigration outcomes at sentencing following the enactment of the FRFCA. It begins by confirming that despite the contention of Conservative Parliamentarians that courts were consistently intervening to prevent deportation, the authority to review removal in practice had not in fact been settled by the time that the FRFCA was being debated. Through an examination of historical sentencing decisions, this chapter demonstrates that judges had instead taken one of two approaches. First, many judges refused to consider immigration outcomes at sentencing, stating that the decision to deport was under the authority of the immigration system. To rationalize these decisions, these actors drew from narratives of privilege and right that were at play in the immigration domain. These discourses were interwoven with knowledge of removal as distinct from criminal penalties, together directing the use of tools of jurisdiction to effectively affirm the separation of authority between the immigration and criminal systems. In contrast, a second set of decisions upheld the authority of judges to review immigration outcomes through

[6] When referencing "Conservative politicians" or "Conservative Parliamentarians," this dissertation is specifically referring to elected Members of Parliament from the Conservative Party of Canada.

arguments that removal is a *personal circumstance* that is relevant at sentencing. These decisions do not undermine the separation of authority between the immigration and criminal systems; instead, they function to bring considerations of collateral consequences within the scope of authority of judicial actors at sentencing. These jurisdictional contests are acknowledged in this chapter to have been settled by the Supreme Court through the decision in *Pham*. I argue that the Court amalgamates discourses and knowledges from across the preceding decisions in their final judgement. The Court establishes, for example, that removal remains under the authority of the administrative system, with the court noting that deportation is not a penal consequence. The Court concomitantly contends though that immigration outcomes are a relevant factor for judges to examine in individualizing a sanction. I argue that this decision from the Supreme Court effectively introduces a tightrope of authority. While judges do not hold the authority to decide on removal, they must consider deportation using their jurisdiction at sentencing. The interweaving of information and actors across these assemblages then has productive effects, namely where judges render decisions that prevent removal. I argue that these decisions confirm that practices of removal interweave across the immigration and criminal punishment domains, with judges then exposing the limits of the governance of migration through their decision making.

Chapter 5 examines how decision making on migrant files in criminal courts at sentencing actually unfolds in practice. Drawing from a review of case law and interviews, this chapter unravels the various actors and discourses that are at play in the criminal courts at sentencing. I begin by considering what knowledge and evidence of inadmissibility is presented by court actors in the sentencing hearing. I also ask how this knowledge shapes the use of legal technologies (i.e., statutes, precedent, principles, etc.; see Rose & Valverde, 1998) by defence

and Crown counsel, and what discourses (including those drawn from the immigration system) guide these actors when working on migrant files. I then examine how judicial actors are guided at sentencing by a multitude of forms of knowledge, including precedent but also their own background and experiences and court location. These factors are confirmed as critically impacting decision making on migrant files.

The sixth and final chapter considers the effects of the program of removal. It begins with a critical examination of how racist discourses have been infused into Canadian immigration law and policy. It confirms that processes of removal are informed by and contribute to programs of racial governance in the settler state. It then considers how decision making in the criminal courts supports colonial efforts to maintain a white, homogenous nation and citizenry. It examines specifically how ideas of race, including those that structure the immigration system, are deployed in decision making on sentence for migrants. It demonstrates that judges make decisions on inclusion and exclusion that draw from racist logics about identity but are justified as egalitarian through reference to legal principles. Even where migrants are liminally included via sentencing, processes of racialization serve to position these migrants as distinct from white citizens, thereby maintaining broader structures of race (Razack, Smith, & Thobani, 2010). The criminal system and immigration system are recognized here as interweaving to support racial forms of governance at play in Canada.

The dissertation concludes with a broad appraisal of the unique contributions made by this study. It reviews for example the significant and novel empirical analysis of how migrants are sentenced in Canada. It unpacks how the analysis adds to border criminological scholarship, namely through the argument that to understand how migrants with convictions are governed requires a detailed and nuanced examination of practices of removal enacted within and between

the immigration and criminal punishment systems. It reiterates that this consideration of processes impacting removal supports the argument made throughout this dissertation that these domains exist in a complex and dynamic relationship. Areas of future analysis are then highlighted, including the need for additional research to support the contention of the importance of geographical location for judicial decision making on migrant files. The dissertation ends with closing considerations on the implications of the work.

Chapter One - Studying Removal: Theoretical Tools and Methods

This study draws from and contributes to border criminological scholarship inspired by the work of Foucault on power and government. Foucault employed a genealogical method to trace the multiple forms of power he identified, the channels taken by power, and the discourses that power permeates (as cited in Murdocca, 2014, p. 10). As explained by Murdocca (2014), a genealogical method requires the historical tracing of "social, political, and cultural phenomena…with a particular focus on contingency (the ways in which the historical past assists with our understanding of the present) and on discursive power" (p. 10). This examination is not linear; instead, as Foucault (1977) writes, a genealogical analysis "rejects the metahistorical deployment of ideal significations and indefinite teleologies. *It opposes itself to the search for "origins"*" (p. 140). Any search for origins would otherwise be focused on capturing ""that which was already there", the image of primordial truth fully adequate to its nature" (Foucault, 1977, p. 142). A genealogical analysis must comparatively

> cultivate the details and accidents that accompany every beginning…wherever it is made to go, it will not be reticent – in "excavating the depths," in allowing time for these elements to escape from a labyrinth where no truth had ever detained them. The genealogist needs history to dispel the chimeras of the origin… He must be able to recognize the events of history, its jolts, its surprises, its unsteady victories and unpalatable defeats – the basis of all beginnings, atavisms, and heredities (Foucault, 1977, p. 144-145).

The goal of a genealogical analysis is thus to understand the ways in which an institution or program of government has emerged via a tracing of the (perhaps) erratic and non-linear channels through which power infusing these phenomena has traversed.

This study utilizes a genealogical method to provide a history of the present, considering contemporary deportation legislation and practices of removal post-2013. By engaging with documentary and interview-based research[7], I identify and trace the sovereign and biopolitical powers that infuse both immigration legislation targeting migrants for removal and the decision making of court actors on files involving migrants. I consider how these two forms of power are directed by historical, racist knowledges and discourses that continue to inform the Canadian immigration system. I then trace how these logics are applied to processes of removal that unfold in the criminal punishment system. Four key concepts are deployed in support of this analytical work: assemblages, citizenship, jurisdiction and discretion. These concepts, which will be explained in more detail below, assist in identifying and unpacking the intersections and distinctions between the immigration and criminal punishment systems.

Forms of Power Directing Exclusion

Sovereign Power and Governing Mentalities

One of the modalities of a genealogical method is exploring the role of power in bureaucracies, systems, and institutions. In this project, I specifically trace the historical and contemporary operation of power as expressed through the program of removal within the Canadian immigration system. As noted, two forms of power inform the phenomena under study: sovereign and biopolitical power. Foucault relayed that the sovereign mode of power characteristic of pre-modern societies relied on instruments that functioned to forcefully assert sovereign authority over the territory and its subjects. Where a subject dared to transgress the authority of the sovereign through violation of the law, sovereign power would be reaffirmed

[7] See the final section of this chapter, entitled "Methodology" for further information about the qualitative methods employed in this dissertation.

through the imposition of sanctions that were "bodily, bloody and spectacular" and that "literally and painfully inscribed…the power of the king, on the bodies of the condemned" (Pratt, 2005, p. 11). Law was determined here to be the singular instrument of the sovereign, with authority maintained and affirmed through obedience to the law.

At the close of eighteenth century a new "art of government" or "governing mentality" supplanted the former sovereign mode of power. Two processes were identified as contributing to this shift in the West: the movement away from feudalism and towards the establishment of "territorial, administrative and colonial states," and the advance of religious dissidence and dispersion that raised questions of how to govern oneself in order to achieve salvation (Foucault, 2007, p. 88; see also Gordon, 1991). Government became concerned at this time with the management of the population, relations amongst individual subjects, and "things" (i.e., wealth, resources, territory and borders) (Foucault, 2007, p. 96). Social and economic life were rendered governable through programs generated by experts and professionals who supplied new bodies of knowledge, strategies, and technologies for the conduct of conduct (Hunt, 1993, pp. 310-311).

The shift towards population regulation appears antithetical to the brutal sovereign mode of power attributed to the pre-modern period. Sovereign power did not simply cease to exist, however. Instead, as explained by Dean (2010), the practice of sovereignty had to "be reconciled with this burgeoning and proliferating art of governing" (p. 122).[8] Foucault (2007) wrote that with the emergence of these new governing mentalities:

[8] Note that disciplinary regimes were similarly reconfigured by this new governing mentality. Disciplinary power, which emerged at the end of the eighteenth century with the advance of the Enlightenment, promoted a radically distinct approach to punishment as compared to sovereign power by focusing on the improvement of the human condition (Murdocca, 2014). Individuals convicted of criminal offences were no longer viewed "as enemies of the king's peace but as deviations from a social norm to be corrected and restored" (Simon, 1998, p. 81). Rather than being focused on affirming sovereign authority through force or coercion, punishment had shifted to center on "transforming" or "normalizing" the offender through regulation and surveillance (Pratt, 2005, p. 12). Foucault was also clear that disciplinary power was functional across civil society, and no longer confined to the judicial system. As explained by Rose (2000) "The calculated modulation of conduct according to principles of optimization of

> it was no longer a question…of how to deduce an art of government from theories of sovereignty, but rather, given the existence and deployment of an art of government, what juridical form, what institutional form, and what legal basis could be given to the sovereignty typical of a state (p. 106).

The task for scholars is thus to unpack how sovereign power is now directed towards the management of the population and not simply forcefully imposed.

Following these insights, I consider how sovereign power is deployed towards regulating migrants convicted of criminal offences via the program of removal promoted by the FRFCA. I trace references within debates of this legislation to state authority over the colonial territory and the decision on who may enter and remain. I also note the deployment of historically significant narratives of the "privilege" and "right" of migrants to enter and remain in the nation. Altogether, I argue that these discourses operate to justify the use of immigration law to enact the program of removal, thereby promoting sovereign power via the management of the migrant population. This analysis again contributes to border criminological scholarship through it focus on *processes* of migrant criminalization and removal.

Biopolitical power

I contend that the operation of sovereign power is shaped by a biopolitical concern with the population. Foucault (1997) identified the concept of biopower to describe "power's hold over life… the acquisition of power over man insofar as man is a living being, that the biological came under State control" (p. 239-240). Unlike sovereign or governmental powers that focus on the conduct of individuals, biopower is addressed towards the population as a political problem.

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benign impulses and minimization of malign impulses is dispersed across the time and space of ordinary life" (p. 325). Through internalization of rules and regulation, free citizens as a result begin to "self-discipline." Finally, contemporary relationships amongst sovereign, disciplinary, and governmental modes of power were conceptualized by Foucault as "'triangular' and interactive rather than linear and successive" (O'Malley, 2009, p. 2).

This power is enacted through strategies that intervene upon the collective and are directed by "truth discourses" built from knowledge of people and populations (Foucault, 1997, p. 243; see also Murdocca, 2013; Rabinow & Rose, 2006). Mechanisms of biopolitics are used to take "control of life and the biological processes of man-as-species ... ensuring that they are not disciplined, but regularized" (Foucault, 1997, p. 246-247). Crucially, through regularization, biopower functions to "make live and let die;" while death is outside of the reach of power, power *can* be directed towards the management of life (Foucault, 1997).

Foucault (1997) explains that state racism[9] operates as a technology of biopower, fragmenting the population into separate and distinct races that exist in a hierarchy. Those individuals who are identified as inferior through the process of racialization are then constituted as systemic threats (either internal or external) to the "population." The mechanisms of biopower, which again are focused on "making live," are directed towards the elimination of these threats[10] in order to protect the lives of the "population" (Foucault, 1997, p. 256). Biopower as directed by ideas of race can be traced to colonization where the strategies of intervention that resulted in the death of Indigenous populations and civilizations were justified through reference to racial hierarchies (Murdocca, 2014).

The analytic of biopower is utilized in this study's examination of the justifications for the program of removal. I identify the promotion of narratives of "foreignness" [11] and

[9] Defined by Foucault (1997) as "a way of introducing a break into the domain of life that is under power's control: the break between what must live and what must die" (p. 254)

[10] Foucault (1997) writes that to "let live" requires the death of the threat. He explains that he does not mean here that the enemy must be murdered, but that they may be "indirectly" killed, including through "the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on" (p. 256). With this expansive definition in mind, the analytic can be applied to this study's examination of expulsion.

[11] The amendments under review during these debates apply only to permanent residents. The IRPA is specific in stating that the category "foreign nationals" comprises all persons who are not Canadian citizens *or* permanent residents. See section 2(1) of the IRPA for further reference.

"dangerousness" in debates of the FRFCA, which support the direction of sovereign power towards expulsion via a biopolitical concern over the population of "citizens." The offences of specifically racialized[12] migrants are referenced to underscore this danger. I utilize the analytic of biopower to unpack how these discursive activities reproduce narratives of racial difference, thereby contributing to the constitution of racialized people as always foreign and always criminal and justifying their deportation from Canada. I then identify how these discourses interweave with racist logics at play in the criminal system to justify the application of sentences to racialized migrants that result in their deportation. Altogether, these dual processes of removal and sentencing operate to maintain the power of white citizenry in Canada. Through this effort, this dissertation works to fill the identified gap in border criminological knowledge on processes of racial governance that structure the operation of immigration systems.

Murdocca (2013) warns that "reliance upon Foucault's notion of the biopolitics of state racism can have the effect of…conflating race with biology" (p. 19). Murdocca clarifies that to avoid this reification of race and biology, the task for scholars "is to break apart and uncover the very epistemologies and ontologies that are defined through colonial projects in our analysis of racial formations and racial forms of governance" (p. 20). Scholars must carefully trace the historical antecedents of knowledges of race deployed in the present, considering how these logics function to identify and classify difference.

This dissertation builds on these insights, working to unpack the genealogy of race-based epistemologies that are reproduced within political discourses to justify governance programs targeting migrants for removal. For example, discourses surrounding the deaths of Georgina

[12] Following the work of Walia (2013), racialization is conceptualized as comprising "the social, political, economic, and historical processes that utilizes essentialist and monolithic racial markings to construct diverse communities of colour" (56). From Goldberg (2002), we further learn that these processes are both spatially and geographically constructed and unbounded from time (see also Murdocca 2013).

Leimonis and Todd Baylis in 1994 – two individuals constructed as white citizens of Canada – and the foreign, Jamaican migrants purportedly involved in their murders have been repeated throughout political debates of exclusionary immigration legislation, including of the FRFCA in 2012. Despite claiming knowledge of the events, politicians have consistently relied on and promoted erroneous information on both the circumstances resulting in the murders and of the immigration status of individuals involved during these legislative debates. These political discourses, for example, make reference to epistemological knowledge of the inherent criminality and violence of "Jamaican" men, who are recognized as foreign and distinct from citizens. This knowledge is contrasted with logics of the purported civility and innocence of the white victims who are within the population of citizens. The result of the reproduction of these racial formations of Black, Jamaican men as foreign criminals who attack innocent, upstanding white citizens has been to justify the expansion of the program of removal since 1994.

Tracing the Operation of Power

Rationalities, Programs, and Technologies

Following Foucault's genealogical method, and recognizing the emergence of "governing mentalities," I specifically examine how sovereign and biopolitical power operate within strategies of government directed towards the expulsion of migrants with criminal convictions. Scholars have advocated the use of three primary concepts to study the ways in which power is transformed to conduct conduct, namely rationalities, programs, and technologies (see Rose & Miller, 1992). The operation of power is directed by rationalities that specify "who or what is to be governed," why and how they should be governed, and to what end(s) (Rose, O'Malley, & Valverde, 2006, p. 84; see also Garland, 1997). Rationalities thus provide "a diagram of power or governance" by clarifying the problems of government, the preferred outcomes of governmental

regimes that address these problems, and the strategies required to achieve resolutions (O'Malley, 2021, p. 33). Rose and Miller (1992) explain that political rationalities are translated into programs of government that prescribe how to address social problems and/or direct conduct in practice. These programs are then rendered operable though heterogeneous technologies that include, but are not limited to, law.

Rationalities that direct power can be discerned from regularities in discourse. Discourse, in turn, is a way of using language to represent knowledge held on "a particular topic at a particular historical moment" (as cited in Murdocca, 2014, p. 11). Analyses of discourse thus operate to uncover knowledges of both the problems of government (the "who or what" and "to what ends") and of the technologies promoted as necessary to manage these problems in practice (the "why and how") (Rose & Miller, 1992, p. 177. See also Hunt & Wickham, 1994; O'Malley, 2021, p. 33) Knowledge provides information on the subjects and objects to be governed, the ideal outcomes for a population, and how to attain these objectives through the use of technologies (Foucault, 2007). This knowledge, as discursively referenced in rationalities, then directs how to exercise power (Foucault, 2007, p. 102).

Following these insights, this study examines the justifications for the FRFCA that supported the direction of sovereign and biopolitical power towards migrant exclusion for criminality through the program of removal. I trace these rationalities by unpacking the various forms of knowledges and discourses promoted during debates of the FRFCA. I unpack the multiple techniques deployed in support of removal, including legislative amendments and the tools of jurisdiction and discretion. I also consider how the program of removal shapes criminal court processes, directing decision making on sentence in practice.

Interweaving Assemblages

The analysis herein of the operation of power via the program of removal relies on the concept of "assemblages" (Foucault, 1980). As explained, border criminological work is specifically concerned to understand how migrant criminalization and removal is produced via the interweaving of the immigration and criminal punishment systems. I contribute to this scholarship by considering what forms of knowledge, discourses, actors and practices interact across the assemblages of the immigration and criminal systems in Canada to guide the enactment of the program of removal. This investigation expands on the work of border criminologists by engaging in an analysis of the processes that unfold across the assemblages of these domains.

The notion of the assemblage derives from Foucault's discussion of the social apparatus. According to Foucault (1980), the social apparatus was traversed by a multitude of heterogeneous elements, including "discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions" (p. 194). With these conceptual parameters in place, Foucault was able to identify and distinguish the various modes of power and rationalities that interweave within a given context, shaping the operation of programs in practice. Scholars have since highlighted the limits of this conception of the "social apparatus" for analytical investigations of power, in particular because it fails to recognize the "heterogeneity, contingency, and the decentred character of governance" (Brady, 2016, p. 15). The concept of the assemblage has been instead promoted as an analytical resource.

I specifically rely in this study on the work of Li (2007) and Valverde (2015) on assemblages. These authors are careful to explain that the analytic of assemblages draws

attention to the ways in which heterogeneous elements may be combined, including partially, in the work of government. This combining and re-combining of disparate technologies and resources in the enactment of programs of governance requires effort on the part of actors. It may result in the shifting of elements across interweaving assemblages at play in separate systems, to be used by actors operating at various scales and in diverse geographical spaces.

The (re)combining of elements is crucial to the operation of power following the emergence of new arts of government. Scholars have recognized that programs of government now take multiple forms and are undertaken by a multitude of authorities beyond the state who contributed to the administration of life (Pratt, 2005, p. 13; see also Rose & Miller, 1992). As O'Malley (2009) explains *"*the vision of government being exercised by one omniscient centre was displaced by one in which there are many centres of knowledge and many centres of government and self-government" (p. 3).[13] Given this fragmentation, the deployment of governance strategies now requires complex assemblages of a variety of forces and various parties being mobilized in pursuit of desired goals (Rose & Miller, 1992, pp. 281-282; see also Li, 2007, p. 276). Any examination of governmental programs must be situated within an analysis of the relations that contribute to their enactment (Rose & Miller, 1992, pp. 281-282; see also Collier, 2009).

Scholarship on assemblages further acknowledges that the interweaving of elements across diverse systems creates the possibility for resistance to programs of governments by persons or things who "refuse to respond according to the programmatic logic that seeks to govern them" (Rose & Miller, 1992, p. 190). As Foucault emphasized, "any act of governance must take account of the self-regulating order of things" (O'Malley, 2009, p. 3). In governance scholarship

[13] The term governance has been deployed to connote this decentered form of government that seeks to conduct or regulate conduct.

there is thus a recognition of the freedom and will of individuals to both adopt strategies as practices of self-governance and to resist these processes. Subjects retain agency, and are thus not simply created by government; instead, they take in power relations and transform them in articulating themselves as subjects (Brockling, Krasmann, & Lemke, 2011, p. 12). According to Brockling, Krasmann, and Lemke (2011) the adoption and implementation of programs is always shaped by social a priori, with subjects only able to understand themselves within the historically determined field of possible experiences (p. 13-14). All instances of governance are, as a result, recognized as incomplete (Hunt & Wickham, 1994; Li, 2007). Governance is also perpetual and defined by failure. As explained by Li (2007), there is always a gap between the anticipated implementation of a plan and its realization. This is in part because governmental power has limits. For example, there is always an intrinsic limit on the ability of government to rearrange established sets of relations and processes that have "histories, solidarities and attachments" (Li, 2007, p. 277). There will always be parts of these relations and processes that cannot be reconfigured. Li (2007) summarizes their position as follows: "For me the concept of limits points to the ever-present possibility of a switch in the opposite direction: the opening up of governmental rationality to a critical challenge" (p. 277).

I draw on these insights throughout this dissertation by highlighting the ways in which discourses, knowledges, and technologies at play in the assemblages of the Canadian immigration and criminal punishment systems dynamically interweave to shape the governance of criminally convicted migrants. For example, I identify how knowledge of migrant convictions, sentences, and recidivism is employed in legislative debates and in the promotion of the program of removal. Knowledge of the judicial consideration of criminal offences was also utilized by Parliamentarians to justify the restrictions to immigration legislation introduced; judges were

described as thwarting removal processes by imposing sentences that allowed convicted migrants to maintain their right to appeal their deportation in the immigration system. Legislative amendments in turn govern the conduct of judges by limiting the availability of sentences that will protect migrants from removal without appeal. This knowledge moves across multiple scales, being drawn from provincial criminal courts to justify shifts in federal programs. I additionally consider the ways in which knowledge of federal removal is accessed and discussed within practices of sentencing in local criminal courts. Judicial actors in particular are positioned as promoting narratives acknowledging the authority of federal immigration actors to decide on removal from Canada, thereby supporting the governance strategies at play.

These efforts to govern across assemblages are recognized as incomplete, however, given the resistance of multiple immigration and court actors to these governance strategies. For example, despite their acknowledgement of the limits of their jurisdictional authority, judges still draw from established sentencing processes and principles to protect migrants from removal. They rely on knowledge of exclusion processes gathered from immigration actors, interweaving this information in practices of sentencing with established legal principles and practices to render sanctions that allow migrants to remain in Canada. There are thus ongoing distinctions between the immigration and criminal systems, with judicial actors exposing the limits of the governance of migration.

Discourses of Citizenship

I examine throughout this study how knowledge and discourses of foreignness and citizenship direct biopolitical powers towards the exclusion of migrants via the sovereign program of removal. The sovereign power to decide on exclusion is again demonstrated in this dissertation to be informed by a specific concern with the safety of the "population" of Canadian citizens.

Discourses of "dangerous" and "foreign" criminals solidify the positioning of migrants convicted of criminal offences as a biopolitical problem. The channeling of biopolitical and sovereign power through the program of exclusion in the immigration system is rationalized as addressing these concerns. The practice of removal is thus fundamentally directed by ideas of citizenship and racial difference.

Razack, Smith, and Thobani (2010) explain that scholarly considerations of racial logics at play in the governance of migration must be linked more broadly to "the white settler colonial project" (p. 18). Colonization is understood by these authors to be continuously unfolding and sustained by a multitude of interweaving projects that produce conceptions of belonging, citizenship, and exclusion (Thobani, 2007). Racist logics are integral to these projects, functioning to generally position racialized peoples as underserving of protection from the nation and thus justifying their violent casting out (Razack, 2000; see also Walia, 2013). In the current study, I consider how references to the criminality and migrant status of racialized offenders serves to sustain colonial projects that depend on knowledge of the nation as comprised of a homogenous white settler population. This is confirmed, for example, in discourse deployed in support of the FRFCA that positioned migrants as "foreigners" to negate inclusion. In these legislative debates, politicians relied on knowledge of the country of nationality of alleged migrant offenders to sustain discourses of foreigness. Canadian Parliamentarians specifically made repeated references to the offences of "Jamaican" foreign nationals when promoting amendments to legislation expanding grounds for migrant removal. Being identified as "Jamaican" ensured the positioning of migrant offenders as distinct through a race-based conception of citizenship. These racist logics continually operate to justify the use of biopolitical technologies that exclude racialized migrants from the nation on the basis that they are "foreign"

and thus do not have the "right" to remain in Canada. At the same time, these logics reaffirm colonial claims to territory and shape race-based criteria for "citizenship."[14]

These racist ideas were also at play in the space of the court, including where judges repeated discourses of Blackness in sentencing decisions reviewed in support of this study. Decisions rendered on files involving migrants were additionally shaped by references to "culture." Culture functions in the court as a stand in for race, operating to justify variability in treatment across differently racialized groups. Crucial to this study is thus a recognition that racial ontologies have been produced through discourses of cultural difference. This includes in White settler societies that systemically reproduce logics of cultural difference to justify the imposition of mechanisms of biopower that continue to function to separate and exclude. In Canada, for example, references to the cultural difference of Indigenous populations have supported the production of legal strategies governing land claims (Berger, 1977). The White settler is constructed in these discourses as the civilized inhabitants of Canada, who worked to establish the nation in the otherwise cold, barren lands populated by Indigenous populations (Berger, 1977). Murdocca (2013) cautions though that cultural difference, as an analytic category, should not simply be understood as a "social construction," stating that "instead, appeals to, and designations of, cultural difference codify and depend on the political and moral rationalities that underpin historical trajectories of colonialism and racism" (21). A genealogical analysis of discourses of cultural difference is thus necessitated to understand their utilization in the present.

[14] The production of citizenship through processes of governance focused on migration has been discussed in the work of Pratt (2005). Pratt writes specifically that "detention and deportation, and the borders they sustain, are key technologies in the continuous processes that make up citizens and govern populations" (p. 1). Exclusion is similarly recognized in the current study as a technology that contributes to the production of citizenship. However, this analysis moves further by identifying the ways in which citizenship is constructed by racist logics that guide the deployment of removal.

References to cultural difference and the reproduction of racist logics within the systems of immigration and criminal punishment are understood to be shaped by the political rationalities of liberalism and neoliberalism. Liberalism, which emerged with the new arts of government, promoted governing at a distance (Gordon, 1991; Rose, O'Malley & Valverde, 2006). This governing mentality recognized "the freedom of rights-bearing subjects under the law," whose activities existed outside of the realm of politics (Rose & Miller, 1992). Civil society and the economy were understood as self-governing and autonomous, and individuals were unamenable to direct government ordering and control. Political authority under liberalism was thus limited; as explained by Rose and Miller (1992), "the ideal of a totally administered society was abandoned, and government was confronted with a domain that had its own naturalness, its own rules and processes, and its own internal forms of self-regulation" (p. 179). Governmental focus shifted instead towards indirect management of the population to achieve maximal functioning (Rose & Miller, 1992, p. 179). This strategy of governance thus operated through non-political actors in "private realms" (Rose, O'Malley, & Valverde, 2006).

Any strategies imposed by government had to be based upon a knowledge of the autonomous civil society. As explained by Gordon (1991) "society and its economy can and must only be governed in accordance with, and in respect for, the laws of that nature" (p. 15). This includes, for example, knowledge of the "contractual notions of mutual obligations" between individuals and society, and the resort to legislative formats to remedy failures to uphold these obligations (Rose & Miller, 1992, p. 180; see also Gordon, 1991). Law is not used here as a tool of sovereign intervention. As explained by Gordon (1991),

> It is a concern with the adequate technical form of governmental action… rather than with the legitimation of political sovereignty…which determines the specific importance of the rule of law for economic liberalism (p. 19).

Law emerges as a technique of governance that is directed by the discursive recognition of the natural order of civil society and that functions to support government programs that do not disturb these autonomous relations but maximize functioning through regulation. This mode of technical intervention through law is rationalized through reference to security. It is only as a result of security that individuals can retain their naturally held freedom and autonomy. As summarized by Foucault in his 5 April 1978 lecture at the Collège de France "liberty is registered not only as the right of individuals legitimately to oppose the power, the abuses and usurptions of the sovereign, but also now as an indispensable element of governmental rationality itself" (as cited in Gordon, 1991, p. 19-20). Consistent with this conception of law as a mode of regulation, liberalism can be conceived as a practical rationality that arranges "specific governmental programs and policies for the ordering of social life" (Pratt, 2005, p. 15).

Critically, though, and according to Goldberg (1993), liberalism naturalizes racist exclusions. This liberal political rationality

> seeks foundations in universal principles applicable to all human beings or rational agents in virtue of their humanity or rationality. In this, liberalism seeks to transcend particular historical, social, and cultural differences: It is concerned with broad identities which it insists unite persons on moral grounds, rather than with those identities which divide politically, culturally, geographically, or temporally (p. 5).

Individuals are assumed to share a common "moral value" regardless of any personal differences, and as a result there should be no distinctions in political or legal status. Yet, both

Goldberg (2002) and Razack (1998, 2007, 2010) highlight that this obscures ongoing exclusions from citizenship and subjugation rationalized through knowledges and discourses of race. As explained by Razack (1998) the rhetoric of equality and freedom "masks how historically organized, and tightly constrained individual choices are" (p. 24). This leads to the paradox described by Goldberg (2002) wherein he holds that "race is irrelevant, but all is race;" there is no difference between individuals given their shared common standings in a liberal moral framework, and yet processes of racialization continue, producing both inclusions and exclusions from political, social, and legal status (p. 6). To maintain the fallacy of equality then requires negation of difference (Razack, 1998).

In the Canadian immigration context, Parliamentarians justify the legislative expansion of opportunities for removal of "foreign" nationals on the basis that they have lost the privilege and right to reside in Canada as a result of their criminality. Racist logics that position criminality as inherent to the individual, thereby negating processes of racialization, support these governance efforts under liberalism. Meanwhile, the consideration of collateral consequences at sentencing within a discussion of liberal legal principles (including proportionality) masks the operation of racist logics. Despite relying on references to cultural difference in their decision making, judges justify sentences that result in the exclusion of racialized migrants as egalitarian through application of these legal principles. Both the immigration and criminal punishment system thus perpetuate processes of racialization that support exclusion from the Canadian state.

Notably, sentences are applied that protect racialized migrants from automatic deportation. Migrants are here able to access the appellate process if issued a removal order. As a result, these migrants are not fully excluded from the nation through deportation. And yet, they are also not included, being subject to removal. Migrants with sentences that protect their right of

appeal thus support their ongoing "liminal" inclusion in the nation (Coutin, 2005). To unpack these decisions, I rely on the work of Razack (1998) who explains that the Canadian state is willing at times to extend protection to display its "tolerance" and "fair mindedness" (Razack, 1998). These decisions still rely on and reproduce gendered (and) racist logics however, thereby ensuring that the migrant is outside of the nation state despite being liminally included. As explained by Bannerji (2000), migrants are confirmed through these narratives as "incommensurable" with the nation, thus producing an "ethnic" form of citizenship (as cited in Razack, Smith, & Thobani, 2010, p. 21). I explore these processes of liminal inclusion further in Chapters 2 and 5, focusing in particular on the narratives of protection applied to Carribean women who are positioned as the victims of "foreign" and "dangerous" racialized men.

Tools of Jurisdiction and Discretion

In this effort to unpack the processes of exclusion unfolding across the assemblages of immigration and criminal punishment systems, I focus specifically on tracing the operation of the legal machineries of jurisdiction and the tool of discretion. I rely on the work of Rose and Valverde (1998) to support this examination. These authors explain that within his discussion of emerging governing mentalities, Foucault shifted attention away from the juridical model as the primary mode of encoding power towards an examination of the dispersal of power, including through the operation of a "legal complex:" namely, "the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms and forms of judgment" (Rose & Valverde, 1998, p. 542). Jurisdiction and discretion are tools in this legal complex. According to Rose and Miller (1992), the heterogeneous elements of the legal complex operate as tools that "translates aspects of governmental programme into mechanisms that establish,

constrain, or empower certain agents" and that contribute to the conduct of conduct in combination with extra-legal processes (p. 189; see also Rose & Valverde, 1998, p. 546).

Drawing from these insights, I focus on untangling how removal is facilitated by the legal tools that "huddle under the legal umbrella of jurisdiction" (Valverde, 2009, p. 154). Tools of jurisdiction, including precedent, are used to situate the authority to decide on deportation squarely with actors of the immigration system. This is turn supports the enactment of the program of removal. As Valverde (2015) explains,

> jurisdiction disputes, in law, are disputes about who rules not just over a space but also over a particular spatiotemporal event, or more accurately a type of event, taking place on space… In other words, by deciding the 'who governs' question, the game of jurisdiction simultaneously but implicitly determines how something is to be governed (pp. 83-84).

The wielding of tools of jurisdiction thus facilitates the "governance of legal governance," deciding who governs what, and how (Valverde, 2009, p. 141).

Amendments to the program of removal introduced via the FRFCA were rationalized by Conservative Parliamentarians based on knowledge of court intervention in enactment of deportation. It was claimed that judges were imposing sentences that would protect migrants from removal following a consideration of immigration consequences, thereby undermining sovereign authority to decide on exclusion. Restrictions on access to appeal in the immigration system were in turn justified as preventing these judicial practices. In this way, changes to the program of removal promote sovereign power through strategies consistent with the new arts of government by also restricting the ability of judges to consider collateral consequences in practice. Judicial conduct is thus conducted through these legislative shifts. These jurisdictional

moves are interpreted as attempting to reaffirm the distinctions in operations between the domains of immigration and criminal punishment.

These strategies targeting migrants convicted of criminal offences for removal may be conceptualized as instances of governance through crime. Emerging from the work of Simon (2007), "governing *through* crime" refers to the discursive reference to crime to legitimize political strategies and the exercise of power in order to guide the conduct of others regardless of the actual motivations for the programs imposed (p. 5; see also Pratt, 2005, p. 19). Simon (2007) explains that as a result of the growth in efforts to govern through crime, there is an increasing visibility of "technologies, discourses, and metaphors of crime and criminal justice" across a variety of institutions "where they can easily gravitate into new opportunities for governance" (p. 4-5). Simon (2007) identifies this emergent rationality for governance in part through his discussion of the three strikes law in the United States. He conveys that this legislation emerged as a result of a growth in public distrust of governing institutions, specifically the judicial system. As Simon (2007) states "The three strikes law… promises to substitute rigorous rules for the soft and untrustworthy judgment of judges and other government officials insulated by bureaucracy and expertise from direct engagement with the public" (p. 156). Logics of crime and public safety were promoted by politicians in debates of changes to legislation governing administrative removal through reference to both the danger of the criminal migrant to the Canadian public and the interference of the judiciary in efforts to remove these migrants from Canada. Deportation fits within this framework as a technology of exile, ensuring the removal of "threatening persons and behaviours…from the community more or less permanently" (Simon, 2007, p. 172). These measures are not designed to correct or normalize (as with disciplinary

tactics) but to incapacitate through expulsion in order to maintain internal security (Simon, 2007, p. 173).

Again, I highlight throughout this study that despite the identified jurisdictional limits, processes that inform practices of exclusion continue to be enacted and resisted in the assemblage of the court. For example, I demonstrate that judges have continued to consider collateral consequences at sentencing, accessing knowledge of the program of removal through immigration actors. Considerations of collateral consequences are discursively positioned as distinct from practices of removal, however, contributing instead to determinations of the appropriate sanction as per criminal law principles and practices. The courts hold that they are thus not thwarting sovereign power expressed within programs of removal that limit their jurisdictional authority since they do not decide whether a migrant should be deported. Instead, courts assess if and how deportation may extend a sentence beyond what would normally be applied to a citizen, thereby rendering the sanction disproportionate according to established court practices. While judges appear at first to be resisting governmental powers to conduct their decision making, by discursively walking this tightrope of authority they are upholding the jurisdictional limits defined within the program of removal. Judges are in turn able to maintain the jurisdictional separation between the domains of immigration and criminal punishment, while continuing to consider potential immigration consequences and implement sentences that undermine the program of exclusion.

These jurisdictional moves are understood in this study to be facilitated by the operation of discretion. Following Pratt (2005), discretion is viewed herein as a legal technology (see also Pratt & Sossin, 2009). The analysis demonstrates that judges utilize the tool of discretion to import discourses and knowledges at play across a multitude of assemblages in the process of

sentencing. This includes the assemblages present in the immigration domain. Judges balance knowledge of removal and discourses highlighting sovereign authority and the protection of the public against knowledge of sanctions for the offence committed and the public perception of offending behaviour. Together, this information shapes the discretionary deployment of legal principles including proportionality, parity, and rehabilitation. Discretion thus allows judges to traverse the jurisdictional lines separating the immigration and criminal systems, using information gathered from multiple assemblages to direct court processes while acknowledging distinctions in authority between these domains. It is through the operation of discretion that the limits of the program of exclusion are revealed, with judges deciding to sentence migrants in ways that protect them from removal.

To summarize, this work draws on Foucault's genealogical method, tracing how sovereign and biopolitical power have come to inform the program of removal in the present. Using the tools identified in governance scholarship, I unpack the knowledges and discourses that underpin the political rationalities through which power has been translated into the program of removal, as well as the tools that support the implementation of this program in practice. These tools specifically include jurisdiction and discretion. I finally rely on the concepts of assemblage and citizenship to explore how knowledges and discourses of migrant criminality, foreignness, and immigration enforcement are shared between the immigration and criminal systems by various actors.

Methodology

I draw on two qualitative methods in support of this investigation of the governance of removal at the intersection of Canadian immigration and criminal punishment systems. These methods are document analysis and semi-structured interviews. I began this project with the collection,

review, and analysis of publicly available documentation detailing the development of immigration legislation targeting criminality. I systematically reviewed all House of Common debates from Parliamentary sessions since 1869, collecting information from those debates where a change in immigration legislation targeting criminality was introduced. This was a significant undertaking, requiring the review of several hundreds of pages of documentation. Unfortunately, much of the information gathered from these materials is outside of the scope of this current project, because the focus of this documentary research was on legislative shifts in the immigration system. This project more specifically examines how processes of exclusion are enacted and resisted within the criminal courts post-FRFCA. Yet, the analysis helped to understand the epistemologies of discourses and knowledges promoted in support of the FRFCA. I was able to trace the narratives supporting the historical evolution of programs in Canada targeting migrant exclusion to this more recent legislation. This material thus facilitated the genealogical analysis produced herein. I have been specifically able to utilize this information to trace the introduction and reproduction of racist logics throughout debates of the FRFCA. Connecting historical discourses to the operation of sovereign and biopolitical power in the present context in turn supported the analyses in Chapters 2, 3, and 6 of this dissertation.

The historical analysis further revealed that the effort to confine jurisdictional authority to decide on removal to the immigration system via the FRFCA is not new and/or novel. There has instead been previous efforts by the Canadian government to restrict judicial intervention in removal practices. The implications of this historical analysis for the conceptualization of the relationship between immigration and criminal systems is further explored in Chapter 2.

Three specific Bills, passed more recently (namely, between 1994 and 2011), ushered in the current program of removal for migrants convicted of criminal offences. These Bills are: Bill

C-44[15] (1994), Bill C-11[16] (2001), and Bill C-43[17] (2012). To investigate the justifications for these pieces of legislation, I expanded my research beyond the House of Common debates, collecting all publicly available documentation from governmental sources referencing the legislation. This includes any government reports completed prior to and in support of the development of the legislation, all Senate debates, and all meetings of the Standing Committee on Citizenship and Immigration. Again, this was a significant undertaking. The materials from Parliament alone were thousands of pages. They resulted in the production of approximately 375 pages of notes. These notes reproduced any discussion of migrant criminality and/or the program of removal undertaken in the materials. This more detailed overview has ensured that I have a fulsome understanding of all actors, discourses, and knowledges that contribute to the production of the current program of exclusion. This research informs the analysis presented in Chapter 2, 3, and 6 of the emergence and reproduction of discourses of foreignness, desirability, and criminality.

Finally, to supplement this review of publicly available documentation, I submitted three Access to Information requests. Through these requests, I specifically sought all publicly and privately produced materials related to Bill C-43 held by Immigration, Refugees and Citizenship Canada (IRCC), Canada Border Services Agency (CBSA), and Public Safety and Emergency Preparedness (PSEP). These requests were submitted in September 2019. Materials gathered from the CBSA and PSEP were ultimately of limited value, providing no additionally

[15] Introduced 17 June 1994. Titled *An Act to Amend the Immigration Act and the Citizenship Act and to make a consequential amendment to the Customs Act*.
[16] Introduced on 21 February 2001. Titled *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger (Immigration and Refugee Protection Act).*
[17] Introduced on 20 June 2012. Titled *An Act to Amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act).*

information beyond that gathered through my search of publicly available materials. IRCC closed my request in 2023 without provision of documentation.

After conducting this analysis, I turned to a review of case law. I gathered publicly reported sentencing decisions through a pre-set Lexbox alert for cases identified by the following key terms: "criminal," "immigration," and "deportation." This alert was in place from May 2019 until January 2021. It required that Lexbox track and identify any reported case that included the noted key terms. Lexbox gathered approximately 230 total cases via this alert, which were saved for me in a Lexbox account. I ultimately determined that 188 of these cases were relevant to this project, with the remaining cases not involving a specific consideration of collateral immigration consequences at sentencing (see list at Appendix B). Note that the search was limited to reported cases from Ontario based courts. This allowed for some restriction on the amount of material to be reviewed. The analysis then revealed that court location (both provincial and municipal environment) was a factor impacting decision making on migrant sentence. It is thus suggested in the Conclusion to this dissertation that further research be completed that analyzes practices employed across Canada in sentencing migrants.

I reviewed the 188 cases in this project manually, first reading through and summarizing each decision by copying out key paragraphs in a single word document. This resulted in 270 pages of notes. I colour coded these summaries to identify paragraphs describing key topics of interest, namely "status" of the defendant, their assumed identity (through reference to race and gender), considerations of immigration outcomes, and references to criminal law principles (see list in Appendix B). This initial review gave me a general sense of the landscape of decisions in the Ontario courts. I was able to identify some early patterns in the decisions, including with respect to how collateral consequences were discussed and how the discourses of dangerousness

and references to culture were differentially deployed in cases involving migrants of colour. While significant and time consuming, this review of case law made the amount of material feel less imposing; I felt that I had a better sense of the key points of analysis pursued in this dissertation following this review. Keeping the summaries in long form also supported my writing, allowing easy access to relevant colour coded paragraphs for inclusion in the chapters of this dissertation.

After this initial review, I created a separate Excel table where I input information for each case, subdividing the decisions based on outcome. There were three results impacting migrants that were identified from these decisions, namely: 1. the migrant was protected from removal, 2. their appellate rights were saved, and 3. they were both rendered deportable and their right of appeal was removed based on sentence. I used the Excel spreadsheet to create shorter summaries of each case in my own words. This helped me to gain a deeper understanding of the material. I was able to trace the primary actors contributing to court processes. I also traced the various discourses and legal tools deployed by judges in sentencing migrants. The differential use of legal precedents and sentencing principles was, for example, determined to be a primary factor shaping the outcomes identified. Deployment of these tools was connected to the discourses and knowledges (including of migrant inadmissibility) guiding court actors.

I collected sentencing hearing transcripts for the following five cases: *R v. Pham,* 2013 SCC 15; *R v. Zhou,* 2016 ONSC 3233; *R v. Thavakularatnam,* 2018 ONSC 2380; *R v. Brown,* 2015 ONSC 2976; *R v. Brissett and Francis,* 2018 ONSC 4957*;* and *R v. Garcia,* 2019 ONSC 5095. These cases were chosen based on their relevance to the specific research questions that guide this project. I additionally accessed docket material submitted to the Supreme Court in support of their consideration of *R v. Pham,* 2013 SCC 15, including: the Appellant's Record,

Arguments, and Factum; Her Majesty the Queen's Record, Arguments, and Factum; as well as Factum and Authorities from the British Columbia Civil Liberties Association, the Canadian Association of Refugee Lawyers, and the Canadian Centre for Refugees. These materials supported the analysis undertaken in this study by providing more detailed information on how the various legal tools (including legal precedent, sentencing principles, and objectives), discourses, knowledges, and actors interweave in practice in the process of sentencing migrants. I was able to unpack, for example, how the use of proportionality and punishment are shaped in practice by the spatial location of the court, knowledge of immigration inadmissibility available to the decision maker, and the circumstances of the convicted migrant.

Following this examination of the case materials gathered, I began coding my summaries of government documents using the qualitative data analysis software MAXQDA2020[18]. This process occurred after the examination of case law for two primary reasons: 1. The amount of material was daunting and I felt I needed further direction on key themes before undertaking the review; and 2. Because the primary focus of this dissertation is on court decision making, I felt that it was important to first engage with case law material that would support this analysis.

The review of case law ultimately proved crucial to the effort to code my summaries of governmental materials. I was able to focus the analysis on tracking key themes identified in the case law within the legislative summaries produced. This includes references to the identity of migrants, jurisdiction of the courts, sentencing principles and practices, as well as discussions of the relationship between immigration and criminal systems. MAXQDA2020 assisted in

[18] MAXQDA2020 allows the user to store all materials related to a project in one space. The user can then review and code material across these documents. Coded material is subsumed into tables for review by the user. This allows for easy examination of a variety of documentation based on key themes. Codes used in the analysis of material gathered in support of this study were as follows: "intersecting operations;" "proportionality;" "public safety;" "punishment;" "sentencing;" "serious criminality;" and "status and inclusion."

amalgamating the coded material for each theme into separate excel spreadsheet that I then downloaded. I pulled from these materials when writing the chapters of this dissertation.

I thereafter developed a series of questions that I used in semi-structured interviews (see Appendix B). The questions posed explored issues that arose from my review of case law and government documentation. I ultimately conducted 13 interviews[19] in total, from March 2021 to April 2021, with 3 judges, 5 defense attorneys, and 7 immigration lawyers. These legal actors were drawn from across Canada[20], thereby supporting an extension of the analysis beyond Ontario. Participants were recruited through various methods. I emailed one defense attorney who was identified in the case law examined. I also relied significantly on snowballing, asking individuals with whom I have professional relationships for referrals. These relationships were developed during the decade that I worked alongside immigration counsel as a Manager of Legal Research and Writing and Senior Legal Services Associate at a citizenship and immigration legal practice in Toronto, Canada. While I did seek to interview Crown attorneys, my requests were all denied. No specific explanation was provided for these refusals. Interviews were conducted via zoom, recorded, and subsequently transcribed. I coded these materials without technological assistance based on key themes identified in the review of case law and legislative debates, including for example discussions of jurisdiction, legal principles, and/or knowledge of immigration outcomes. I then pulled key quotes and stored this material altogether without identifying information in the web application Notion. This allowed me to review the emergent material from the interviews based on identified themes without knowledge of the source of the quotes. As per the Ethics Protocol approved for this study, participant identity has been cloaked

[19] These interviews were conducted in accordance with York University's Ethics Protocols.
[20] The breakdown of location of interviewees is as follows: Judges were all located in Ontario; 3 defence lawyers were located in Ontario, 1 was located in British Columbia, and 1 was located in Alberta; 4 immigration lawyers were located in Ontario, 1 was located in British Columbia, and 1 was located in Alberta.

using an assigned letter (i.e. participant A/B/C) where information from these interviews is utilized in this dissertation. Letter assignments were based on order of interview and worked backwards (i.e. beginning with Z, and moving to Y, then X, etc.).

Interviewing these legal actors supported a more in depth examination of the processes of sentencing that interweave with the program of exclusion. I was able to gather practical information, for example, on when and how status is discussed in criminal court, how information on immigration outcomes is gathered by defence attorneys, and what legal principles specifically apply to considerations of removal at sentencing. I was additionally able to collect information on the variety of factors that shape sentencing outcomes beyond consideration of immigration consequences, including considerations relevant to the location of decision makers and their backgrounds. This information ultimately supported the analysis presented in Chapter 5, which examines how the process of sentencing migrants actually unfolds in practice. Knowledge of how counsel and judges practice law was otherwise unavailable from the review of case law alone. Yet, it was critical to understanding how the program of exclusion is enacted and resisted in the space of the court.

Conclusion

This chapter has introduced the theorectical framework and key conceptual tools that guide the work in this study. Chapter 2 adds further background by providing a fulsome analysis of the development and passage of immigration law on exclusion and removal in Canada from 1869 until 2002. The remainder of the dissertation then examines the FRFCA and sentencing post-passage of this legislation and the rendering of the decision in *Pham*. I begin the substantive analysis by tracing the forms of power that inform the program of exclusion through a review of legislative debates of the FRFCA in Chapter 3. I employ a genealogical approach in this work,

exploring how this program has emerged through a consideration of the evolution of immigration law targeting migrants with conviction for removal from the Canadian context. I additionally trace discourses of judicial intervention in migrant removal deployed by Parliamentarians, and the proposed effect of the amendments introduced by the FRFCA for jurisdictional oversight of deportation. The study then moves to unpack how sentencing decisions on migrant files are rendered post-passage of the FRFCA.

Chapter Two: Governing Criminally Convicted Migrants through Law

I explore the antecedents to the contemporary program of criminal inadmissibility and removal in this chapter, focusing in particular on tracing the racist discourses that have justified the historical direction of sovereign power towards deportation. Migrants convicted of criminal offences in Canada or abroad have been barred from entering and/or remaining in this nation since the first iterations of immigration legislation. Canadian immigration legislation has also been oriented towards limiting the movement of marginalized populations into the nation from inception, including racialized migrants and individuals facing economic and health challenges. These two strands of exclusion have been braided together in law; marginalized migrants have been tied to various criminal offences, thereby justifying the exclusion of entire populations from Canada, *and* restrictions on the passage of migrants convicted of criminal offences and their remainder in Canada have been justified through reference to racist thinking. The result is the systemic link in Canadian immigration legislation between race and crime, with racialized migrants appearing always outside of citizenship, dangerous and deportable.

This chapter begins by tracing the initial development of immigration law in Canada. It notes how logics of race were promoted to rationalize restrictions on movement from inception of this legislation. It also explores when deportation emerged as a technology of governance, tying shifts in law to racist ideas of desirability and dangerousness. The chapter then reveals the amendments to immigration law introduced during the "liberal era." It argues that while these changes were positioned as promoting the rights of *all* migrants, including through the removal of explicitly racist references in law, immigration legislation continued (and continues) to be structured by logics of race. The chapter ends by unpacking the establishment of the current regime of removal for criminality in 1994, following the "Just Desserts" murder and the death of

Todd Baylis in Toronto, Ontario, Canada. It clearly explains how racist thinking informed the changes in law introduced at this time. It then considers how this regime was maintained via the enactment of the IRPA in 2002.

Race, Desirability and Exclusion: The Inception of Deportation in Law

Racialization was foundational to the construction of the Canadian national subject at the time of settlement. Indigenous populations were characterized as uncivilized and lawless before being violently dispossessed of their land by White settlers who imagined themselves as the civilized, first "true subjects" of the colony (Thobani, 2007, p. 13; see also Berger, 1977; Razack, 2000).[21] Citizenship has thus been demarcated by processes of racialization from inception of the Canadian state, with citizen status being limited to White settlers.

These ideas of race were then deployed in support of immigration law, further reaffirming distinctions between White national subjects and racialized outsiders. Logics linking race and desirability can be traced to the first immigration legislation passed in 1869, titled *An Act Respecting Immigration and Immigrants, 1869*. The focus of this legislation was on populating the vast Canadian territory. Few barriers were placed on the passage of White foreign nationals across the border. This effort to settle Canada was a key tactic in maintaining colonial rule over the nation. As explained by Thobani (2007),

> The colonizing migrations of European settlers created overseas populations to govern and develop colonies in the interests of European powers, and were intended to be a permanent affair in white settler societies. Immigration policies across the British Empire were intimately

[21] This explanation of colonialism is woefully limited. For further information, please see: Simpson, A (2014). *Mohawk Interruptus: Political Life Across the Borders of Settler State*s. Durham: Duke University Press; Coulthard, G (2014). *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. Minneapolis: University of Minnesota Press; Patrick Wolfe (Dec. 2006), "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4, pp. 387–409; Palmater, P. (2014). "Genocide, Indian Policy, and Legislated Elimination of Indians in Canada". *Aboriginal Policy Studies*, 3, no. 3.

> linked to this imperial goal: All the British colonies of settlement – Canada, Australia, New Zealand and South Africa – were from the first deeply committed to the dream of becoming outposts of the "British race" (p. 81).

While the Canadian state actively sought to encourage the migration of White Britons, racialized migrants were explicitly *discouraged* from migrating (Thobani, 2007).[22] The migration of White British subjects in turn supported the maintaince of homogeneity in the nation. By specifically defining inclusion and exclusion based on race, the population of White persons in Canada then confirmed their claims to the land that they colonized (Thobani, 2007).

Processes of exclusion driven by ideas of race are particularly evident in the treatment of Chinese migrants in Canada. In the 1870s, the Canadian government endorsed the entry of Chinese nationals into the nation but only on a temporary basis to assist with the construction of the cross Canada railway. Racist rhetoric fueled the acceptance of these migrants, who were viewed as "easy to secure, more servile than other workers and willing to work for wages that were 30 to 50% less than those paid to white workers" (Kelley & Trebilcock, 2010, p. 95). By the 1880s, however, complaints from White Canadians over the ongoing entrance and long-term residence of Chinese labourers had reached the House of Commons. The settlement of the Chinese population of course challenged British claims to territory that hinged on the homogeneity of the citizenry. In response, the Prime Minister assured the House that he also objected to the permanent settlement of these labourers and that he would "join to a reasonable extent in preventing a permanent settlement in this country of …Chinese immigrants" once the railway was completed (as cited in Kelley & Trebilcock, 2010, p. 96). The complaints of White

[22] Although this was not explicitly stated in legislation. The only prohibition on landing in Canada that was prescribed in the immigration legislation of 1869 was against individuals identified as "lunatics, idiotic, deaf and dumb, blind or infirm" (at section 11).

citizens continued to intensify. In 1884, a Royal Commission was appointed to examine Chinese migration. Emphasis was placed on the purported criminality of the Chinese migrant community. The commission received testimony alleging that Chinese persons "gambled compulsively and kept gaming-houses for this purpose and for the purposes of prostitution" (Kelley & Trebilcock, 2010, p. 96). The entire Chinese community was also denigrated for their use of opium. Although White persons in Canada also used this drug, witnesses to the commission held that it was *because* these vices were corrupting White "Canadian" youth that Chinese migration should be terminated. The Commission ultimately determined that restriction on Chinese migration would be advisable (Kelley & Trebilcock, 2010).

The migration and permanent settlement of Chinese nationals was then severly curtailed with the passage of the *Chinese Immigration Act* in 1885 (Kelley & Trebilcock, 2010, p. 98; see also Thobani, 2007, p. 90). This legislation restricted Chinese migration via the imposition of both a head tax of $50 and limitations on the number of Chinese persons that could be carried on a ship (1 for every 50 tons of cargo, as compared to the limit of 1 for every 2 tons of cargo imposed on European migrants under the *Immigration Act*) (Kelley & Trebilcock, 2010; Thobani, 2007; Ungerleider, 2007). Chinese migrants who were already in Canada and who were allowed to remain were further subjected to exclusionary citizenship practices through the passage in 1885 of the *Electoral Franchise Act* (Kelley & Trebilcock, 2010). This legislation excluded Chinese persons from federal franchise even where they had been naturalized. Justification for this legislation drew from narratives that positioned Chinese migrants as always outside of citizenship, with Prime Minister MacDonald calling this group "sojourners to Canada" who had no "British instincts or British feels or aspirations, and therefore ought not to have a vote" (as cited in Kelley & Trebilcock, 2010, p. 98).

We have here direct discursive ties between race, foreignness, and criminality to justify migrant exclusion. We see the positioning of Chinese people as separate from the homogenous White citizenry, with the former racialized group being imagined as foreign threats to "citizens" of Canada given their alleged criminality. This biopolitical concern with the population then justified the direction of sovereign power towards the deportation of Chinese migrants. Racist ideas of criminality and foreignness thus clearly structured migrant exclusion in early immigration laws in Canada, producing racial forms of governance.

These processes of exclusion again supported White colonial claims to Canada. As explained by Thobani (2007), it is through their encounters with "strangers" in the nation, and their recognition of migrants as dangerous and outside of the population, that White settlers further fomented their claim to the state. Ahmed (2000) is insightful here, writing:

> it is the recognition of others that is central to the constitution of the subject. The very act through which the subject differentiates between others is the moment that the subject comes to inhabit or dwell in the world. The subject is not, then, simply differentiated from the (its) other, but comes into being by learning how to differentiate between others (p. 24).

Racist logics structuring Canadian immigration practices were not limited to discussions of Chinese migrants. Despite the efforts to settle the west with farmers, Black migrants were identified as undesirable and discouraged from moving to Canada in 1896. Justification for the exclusion of Black migrants relied on racist ideas of suitability to the climate of Canada, positioning Black folks as thus distinct from, and outside of, the population of White people who settled the land. Japanesse migrants were also subjected to racist exclusion. Trade unionists representing White Canadian fishermen specifically sought to limit the migration of people from Japan after an increasing proportion of the licenses for fishing were granted to this population in

1892 (Kelley & Trebilcock, 2010, p. 146; Thobani, 2007). These union members relied on racist stereotypes in promoting their position, contending that Japanese persons were "dishonest, unclean, immoral, and unable to assimilate" (Kelley & Trebilcock, 2010, p. 146). Altogether, the states identification and exclusion of these varied racialized groups upheld colonial claims to territory, reaffirming the right of the homogenous White population to citizenship in the settler nation.

The entry of "criminals or other vicious classes" was not explicitly denied in law until 1872 (Hucker, 1975, p. 651). Deportation was also not legislated in these first instantions of immigration law. Removal was, however, utilized by the Canadian government at the time. This was acknowledged by Clifford Sifton, Canada's Minister of the Interior from 1896 to 1905, where he stated that removal was "the simplest and cheapest mode of dealing" with migrants, specifically those who were deemed "undesirable" and prohibited from entering the nation (as cited in Drystek, 1982, p. 409). Deportation was used, for example, to remove Black migrants where they entered the nation (Kelley & Trebilcock, 2010; Thobani, 2007). The lack of law on deportation was purposeful. According to W.D. Scott, the Superintendent of Immigration between approximately 1903 and 1925, the Department of Immigration had taken note of the situation emerging in the State of New York where, following the sanctioning of deportation, decisions to remove were being increasingly challenged through *habeas corpus* applications (Roberts, 1988, p. 15). Superintendent Scott contended that placing removal outside of law would avoid similar situations where "the speculative lawyer may by habeas corpus proceedings give a good deal of trouble before the case has been gotten out of the country" (as cited in Roberts, 1988, p. 58).

The first instance of immigration legislation sanctioning deportation emerged in 1902, when the federal government amended the *Immigration Act* to allow for the return of migrants who had entered Canada despite being excluded in law (Drystek, 1982). This included migrants with criminal convictions, as well as individuals who were "insane… idiots, blind…or suffering from chronic venereal disease" (Drystek, 1982, p. 410). This historical tie of criminality to deportation represents an early instance of the intertwining of immigration and criminal punishment systems in Canada. While racialized people were still discouraged from migrating, with limits being placed on entrance based on nationality (i.e., via head taxes and cargo requirements), the 1902 legislation did not explicitly prohibit their movement into the nation.

Grounds for removal were expanded in 1906 with the passage of a new *Immigration Act* under the Minister of the Interior, Frank Oliver. According to Minister Oliver, the sole focus of this legislation was supporting the Department of Immigration in its effort to "deal with undesirable immigrants" (Oliver, 13 June 1906, p. 5201). Drafting of this legislation specifically followed several cases where decisions on removal were challenged under *habeas corpus;* the new legislation thus sought to clarify and systematize removal (Kelley & Trebilcock, 2010). The 1906 Act sanctioned the deportation of any migrant who, within the first two years of landing,[23] had "committed a crime involving moral turpitude, or become an inmate of a jail or hospital or other charitable institution" (at section 33). Deportation would be ordered by the Minister of the Interior, following their consideration of the facts of migrant criminality. The wide discretionary authority offered to the Minister to decide on removal was justified by Oliver as necessary "in order to make the provisions effective" (Oliver, 13 June 1906, p. 5256). Minister Oliver further

[23] According to Roberts (1988), the Department of Justice later relaxed this timelimit, allowing the deportation of any migrant who had arrived to Canada after 13 July 1906, when the *Immigration Act* came into effect (p. 63)

contended that there must be trust placed in "the government not to do injustice under the enlarged power" (Oliver, 13 June 1906, p. 5256).

Between 1906 and 1907, the anger of White populations in Vancouver, British Columbia over the migration of racialized persons continued to rise, resulting in riots and the destruction of predominantly Asian neighborhoods. These events followed the arrival in Vancouver of close to 5000 East Asian people. There was a concomitant increase in arrival of Chinese and Japanese migrants to the west coast. East Asian migrants purportedly faced difficulty in assimilating to Canada; Mackenzie King argued that these individuals were unemployed and, as a result, hungry and suffering from illness. According to King, East Asian migrants were thus incompatible with the "Canadian climate and way of life" (Kelley & Trebilcock, 2010, p. 149). Repetition of these racist ideas of climate suitability reified the connection between race and foreignness. Several additional barriers to movement of racialized populations were thereafter introduced. For example, an increase in the landing money required from East Asian people was applied (from $50 to $200) and a Canadian delegation to Japan was sent to (successfully) limit Japanese migration to Canada (Kelley & Trebilcock, 2010; see also Thobani, 2007).

The *Opium Act* was passed in 1908, and it was specifically designed to target Chinese nationals. This legislation was again unconcerned with the consumption of the drug by White people in Canada. Instead, and as explained by Roberts (1988), the legislation was developed based on the "view that outsiders and aliens caused unrest – a claim which underlay the use of law to control and deport immigrants" (p. 49). The adoption of this legislation represents an additional strand in the structure of programs supporting racial governance. While racialized migrants were not explicitly prohibited from entering Canada, and thus not deportable based on their race alone, the drafting of legislation specifically directed towards the criminalization of a

racialized group supported the effort to remove these foreigners from the nation based on criminality.

A new *Immigration Act* was passed in 1910. This new legislation defined grounds for removal under section 40. This legislation held that deportation would be applied to any migrant who:

> Has been convicted of a criminal offence in Canada, or has become a prostitute or an inmate o a house of ill-fame, or by common repute has become a procurer or pimp or person living on the avails of prostitution, or has become a professional beggar or a public charge, or an inmate of a penitentiary, jail, reformatory, prison, hospital, insane asylym or public charitable institution, or enters or remains in Canada contrary to any provision of this Act (section 40).

The expanded legislation thus continued to support the removal of migrants for criminality, thereby maintaining the interconnections of the immigration and criminal punishment systems in Canada.

The new law also functioned to further "formalize" decision making on admissibility and deportation (Kelley & Trebilcock, 2010). Despite the calls for trust in the government raised by Minister Oliver in 1906, the *Immigration Act* of 1910 was specifically focused on relieving "the situation…in which the government has to exercise an arbitrary authority in the exclusion of immigrants" (Oliver, 19 January 1910, p. 2134). Minister Oliver explained that:

> When the existing law was introduced, it was not expected that there would be such an extensive enforcement of the exclusion provisions, and practically there was no machinery provided – authority was given and under that authority an order issued. This is felt to be an arbitrary method for this country, so it is deemed advisable that machinery should be provided

> for dealing with these cases, each case to be on record so that its merits may be understood by the public (Oliver, 19 January 1910, p. 2134).

These amendments followed a series of critiques of government decision making on both detention and removal. According to Roberts (1988), for example, the Department of Home Authorities in Great Britain complained that migrants being returned for criminality had never "previously shown any such obnoxious characteristics as were attributed to them" by the Canadian government (as cited in Roberts, 1988, p. 59).

With the passage of the 1910 Act, Boards of Inquiry were extended the authority under section 42 to "sit and decide on the merits of the cases brought before it" with "a record of each case being kept" (Oliver, 19 January 1910, p. 2134). Decisions to remove could then be challenged to the Minister (as per section 42) (Kelley & Trebilcock, 2010; Roberts, 1988). This legislation additionally created the concept of domicile, which prohibited the removal of any migrant who had been landed in Canada for at least three years based on their engagement in criminality (as per section 40).[24]

These shifts should not be confused with a concern for the legal rights of migrants. This is evident when we examine the practices of Boards of Inquiry post-1910. Kelley and Trebilcock (2010) explain that migrants who were subjected to Board investigations could be excluded from any proceedings considering their removal. Migrants also had no right to contest any evidence and/or witnesses testifying in support of their deportation, nor were they given the opportunity to present material to the Board for consideration (Kelley & Trebilcock, 2010; Roberts, 1988). The new Act additionally included section 23, which specifically prohibited criminal courts from hearing cases of deportation, thereby confirming the authority to remove as lying solely with the

[24] Grounds for domicile were eventually increased to 5 years in Canada in 1919 (Kelley and Trebilcock, 2010).

Department of Immigration. Sovereign authority to deport could thereafter be effected without challenge. Migrants were left without recourse even where orders for deportation were issued on the basis of a "misunderstanding or misinterpretation of the law or regulations, or of illegal evidence, error, informality, or omission" (Roberts, 1988, p. 198). As Roberts (1988) explains, "as long as the Department was not caught exceeding the law or violating procedures laid down in the Act and regulations governing deportation, it had a virtual free hand insofar as the courts were concerned" (p. 199). Recognition of the limited procedural protections available to migrants ultimately led C.F. Fraser to conclude in 1940 that Canadian practices of deportation were the most arbitrary when compared to removal processes in Great Britain, Northern Ireland, South Africa, Australia and New Zealand (Roberts, 1988). Fraser additionally held that the Canadian judiciary was the most apathetic in intervening in these processes (Roberts, 1988). Fraser specifically stated that:

> the most notable feature of deportation cases in Canada is the apparent desire to get agitators of any sort out of the country at all costs... [T]he executive branch of the government, in its haste to carry out this policy ... displayed a marked disregard for the niceties of procedure (as cited in Roberts, 1988, p. 195).

The 1910 legislation additionally granted the Governor-in-Council the authority to prohibit from landing in Canada any migrant who had arrived other than by continuous journey (at section 38(a)). This legislation was specifically targeted at limiting the movement of Asian migrants to Canada, including specifically East Asian populations (Kelley & Trebilcock, 2010; Mawani, 2018). The Governor-in-Council could also prohibit under the 1910 Act the landing of "any race deemed unsuited to the climate or requirements of Canada" (at section 38(c)). In debating the need for these provisions, Minister Oliver stated:

> Subsection (c) is to give the government arbitrary power to prohibit the landing of any class of people. Suppose there was a sudden influx of people from some undesirable Asiatic or African country, we could, without ceremony, simply say: You cannot land (Oliver, 22 March 1910, p. 5853).

The Minister explicitly indicated the desire for White migrants to Canada, stating that:

> in the administration of the work of immigration, there is a preference shown, and properly shown, to the people of our own race… It is the policy of this government to secure the settlement of our vacant lands, by adding to our population those who will add to our citizenship, as well as to our labour. That is our policy and in carrying out that policy we use due endeavour to secure the additions to our population from the people of our own blood (Oliver, 22 March 1910, p. 5850).

The 1910 legislation thus represents the first instance where racialized migrants were explicitly excluded in law from the nation. Established racist logics of suitability justified the prohibition of racialized groups (who were understood to be inherently distinct from the accepted population of White persons). These amendments to immigration law in turn supported a racial form of governance that produced migrants of colour as foreign and removable. Racialized migrants prohibited by the Governor-in-Council from entering the settler state could then be deported from Canada under section 40, explored above, having entered and remained contrary to provisions in the Act.

It is also notable that even with these restrictions on the migration of racialized populations into Canada introduced in 1910, single Black Caribbean women *were* extended the ability to migrate as domestic workers in 1911. The Department pathologized the sexualities of these women, however, describing them as "morally degenerate, sexually depraved and

endowned with a fecundity more animalistic than human" (Thobani, 2007, p. 92). The Superintendent of Immigration, W.D. Scott, even stated: "The most common causes for sending these girls back were tuberculosis and immorality. We deported quite a large number and I am afraid even then not all the undesirables were reported to us for deportation" (as cited in Browne, 2002, p. 101). Ideas of gender thus additionally structured logics of race that informed the development of early Canadian immigration law and policy. Like with Chinese and Japanese migration in the late 19th century, there was a willingness shown by the Canadian government to extend *temporary* entrance to some racialized migrants. Yet, these practices were clearly structured by racist and gendered ideas of difference. In this instance, racialized migrant women were clearly positioned as undesirable, immoral, and foreign. Their presence in the nation was tolerable, however, so long as it remained temporary.

Restrictions on the migration of racialized groups and the promotion of deportation of these individuals continued throughout the World Wars and the Great Depression. For example, in 1922, the *Opium and Narcotic Drug Act* (ONDA) was amended, allowing for the removal of even domiciled migrants on the basis of drug-related convictions (Roberts, 1988). These measures were specifically aimed at supporting the removal of Chinese migrants who continued to be imagined as dangerous threats to the population given their purported disproportionate involvement in the trade of opium (Roberts, 1988). In 1922 the Canadian government additionally revised its agreement with Japan, moving the quota down from 400 to 150 Japanese persons annually (Kelley & Trebilcock, 2010). In 1923, Canada passed the new *Chinese Immigration Act*, which removed the head tax and instead prohibited the movement of (almost)

all Chinese nationals into the nation.[25] In support of these provisions, MacKenzie King, then Minister of Labour, stated that it was "impossible ever to hope to assimilate a white population with the races of the Orient" and, even if achievable, assimilation would result in "the loss of that *homogeneity* which ought to characterize the people of this country if we are to be a great nation" (as cited in Kelley & Trebilcock, 2010, p. 206). The Canadian citizenry obviously continued to be understood as comprised of a homogenous, White population; all other racialized groups are positioned by King as foreign to this community of citizens. Finally, Canada enacted security measures in 1939 that allowed for the internment of migrants from "enemy nations" with whom the state was at war (Kelley & Trebilcock, 2010). While applied to a wide variety of persons in the nation, including individuals identified as communists, fascist and/or radicalists, the policy was used excessively and arbitrarily against people of Japanese descent (Kelley & Trebilcock, 2010). Approximately 22, 000 persons of Japanese descent were forcible incarcerated via these security measures (Kelly & Trebilcock, 2010, p. 279).

It is interesting to note that the Canadian government did resume its efforts to recruit domestic workers from the Caribbean in 1942. Women immigrating from the Carribean continued to be marked by allegations of immorality and undesirability that were promoted in 1911. For example, the Director of Immigration, F.C. Blair stated the following:

> a good many years ago there was a movement of skilled domestics from Guadeloupe and it was very popular at first, but within a relatively short time it became very unpopular and in the end we had to bring about the return of most of them to their native country and not a few with illegitimate children born here (Mackenzie, 1988, p. 128).

[25] According to Kelley and Trebilcock (2010), the legislation continued to allow for the entrance of Chinese persons who were "merchants, students, diplomats and their staff, or Canadian-born Chinese children who had left for educational or other purposes" (p. 206-207).

Ideas of race thus continued to be shaped by gender-based logics to justify even the liminal inclusion of racialized, immigrant women in the nation. Carribean women were temporarily allowed to migrate. Their fulsome inclusion was, however, prohibited given their assumed immorality and fecundity. These racist logics again sustained the conception of Canada as belonging to the White population of settlers.

The exclusion of racialized migrants continued following the end of World War II. Despite immigration policy being focused on populating the vast Canadian land, then Prime Minister Mackenzie King made clear that it was still White migrants who were being sought (Ungerleider, 2007). In his *Statement on Immigration*, King relied on distinctly racist logics to justify the exclusion of racialized migrants. In doing so, King reproduced the binary between White citizens of the nation and racialized foreigners that sustained the colonial settlement of Canada. Through reference to sovereign power, King clarified that the state would:

> consider applicants for entry into Canada, examine them on a basis of suitability and physical fitness, and make arrangements for their orderly movement and placement. . . *I wish to make it quite clear that Canada is… perfectly within her rights in selecting the persons whom we regard as desirable future citizens. It is not a "fundamental human right" of any alien to enter Canada. It is a privilege*…the people of Canada do not wish, as a result of mass immigration, to make a fundamental alteration in the character of our population. Large-scale immigration from the orient would change the fundamental composition of the Canadian population (King, 1947, p. 2644-6).

King effectively affirms through this speech the tie of race, desirability and foreignness that had been promoted to justify racist exclusion from inception of immigration law in 1869. Racialized migrants continue to placed outside of the population. The population also continues to be

imagined as homogenous and White. King further justifies these exclusionary measures through reference to concepts of "privilege" and "right," which promote sovereign authority to deny the entry of racialized migrants to the nation (for a further discussion, see Chapter 3). Like with migrants subject to removal, racialized persons facing exclusion from Canada are without access to recourse.

The statutory framework for removal established in 1910 was maintained until 1952 when a new *Immigration Act* was passed (Kelley & Trebilcock, 2010; Roberts, 1988). A wide swath of people were prohibited from entrance into Canada via the 1952 legislation, including individuals identified with a mental illness and/or those persons who had stayed (even temporarily) in a mental institution, as well as "homosexuals" and individuals convicted of drug offences (pursuant to section 19 of the Act). Newly established "Special Inquiry Officers" (SIO)[26] were additionally given the ability to refuse admission on the basis of migrant "nationality, ethnic group, geographic area of origin, peculiar customs, habits and modes of life, unsuitability with regard to the climate, probable inability to become readily assimilated" (Canadian Council for Refugees, 2000). These provisions were consistent with previous efforts to prohibit the entrance of racialized migrants to Canada, simply substituting ethnic group and nationality for race (Hawkins, 1988; Kelley & Trebilcock, 2010).

With respect to removal, under this new legislation decisions to deport would be rendered by SIOs. Migrants could appeal these decisions to the newly established Immigration Appeal Board (IAB), however.[27] These appellate boards were not independent, though, and consisted of

[26] Under section 11 of the 1952 Act, SIOs are identified as immigration officers-in-charge who are nominated by the Minister to act in the role. The legislation further states that these officers have the "authority to inquire into and determine whether any person shall be allowed to come into Canada or to remain in Canada or shall be deported."
[27] Note that Hawkins (1988) names the Boards as "General Board of Immigration Appeals," writing that the shift to Immigration Appeal Boards did not come until later (p. 126). For ease, I have employed the language of "Immigration Appeal Boards" here.

immigration officials who were nominated to the role by the Minister of Immigration[28] (see section 12 of the Act; Kelley & Trebilcock, 2010).[29] Further, and as per section 31(2) of the Act, only appeals directed to the Board by the Minister would be heard. Appeals could also only be reviewed on legal grounds (Kelley & Trebilcock, 2010). All remaining appeals would be heard by the Minister overseeing immigration. Authority was also granted to the Minister to overturn decisions of the IAB, pursuant to subsection 31(4) of the Act (Hawkins, 1988; Kelley & Trebilcock, 2010). With the passage of the 1952 Act, the Minister effectively held "total authority in relation to deportation over those immigrants who were not yet Canadian citizens and did not yet have Canadian domicile" (Hawkins, 1988, p. 123).

The "Liberal" Era of Immigration Law

The provisions around admissibility and removal included in the *Immigration Act* of 1952 were importantly subject to critique. For example, in 1954 the Canadian Bar Association called for the establishment of a quasi-judicial appeal board, claiming SIOs were exercising their power to decide on removal arbitrarily and without reason (Hawkins, 1988; Kelley & Trebilcock, 2010). The Supreme Court similarly condemned the wide discretion extended to SIOs to refuse entrance to the nation with its 1956 decision in *A.G. for Canada v Brent,* [1956] S.C.R. 318, 2 D.I.R. (2d) 503. And the Minister had become overwhelmed with cases from migrants seeking to appeal their removal orders (Hawkins, 1988).

Following the decision in *Brent,* an Order in Council was issued that outlined those countries whose citizens were preferred for migration, thereby removing the discretionary

[28] The Department of Immigration and Colonization was established in 1917, with responsibility for the control of immigration and settlement being transferred from the Department of the Interior (Kelley & Trebilcock, 2010)
[29] They could also not hear appeals from individuals convicted of drug offences and/or migrants who were subject of a medical certificate determining them to be insane, epileptic, mentally or physically abnormal, or suffering from Tuberculosis (Kelley & Trebilcock, 2010, note 77, p. 572).

authority of SIOs to decide on exclusion (Kelley & Trebilcock, 2010, p. 333). Nationality thus became the discursive measure for inclusion in place of race and ethnicity. Explicit traces of racism were then removed from immigration legislation in 1962 with the implementation of new *Immigration Regulations.* The authority of the IAB was also expanded with these Regulations. According to the Department of Citizenship and Immigration[30], the regulations would ensure that migrants had access to a completely independent appellate board. With this legislation, the IAB could hear the appeals of any migrant subject to a deportation order (and not simply those cases directed to the Board by the Minister) (Kelley & Trebilock, 2010; Law Reform Commission, 1976). The Minister continued to retain the authority to hear appeals of appellate board decisions (Hawkins, 1988). The changes ultimately proved insufficient to address concerns with the arbitrariness of decision making, however, given that the proclamation of "complete independence" of the Board was "more illusory than real" (Law Reform Commission, 1976, p. 9).

Ongoing allegations of procedural unfairness with respect to deportation eventually led the Minister of Justice in 1964 to hire Joseph Sedgwick to review the reasonableness and correctness of procedures of arrest, detention and deportation of migrants from Canada (Hawkins, 1988). In his final report, Sedgwick determined that the actions of the IAB were beyond reproach. Sedgwick wrote that migrants were properly informed of their rights to counsel and of the opportunity to give evidence and submission in support of their appeal (Hawkins, 1988). Sedgwick did state though that the Board (and not the Minister) should be granted final authority with respect to decisions on appeal. Sedgwick additionally held that the ongoing prohibition on judicial review of immigration decisions should be retracted, with the Exchequer

[30] The Department of Immigration and Colonization became the Department of Citizenship and Immigration in 1950 (Hawkins, 1991)

Court being granted the ability to review appeals from the IAB on questions of law, and with migrants being granted acces to a final appeal at the Supreme Court of Canada (Hawkins, 1988).

A White paper was then tabled in Parliament in 1966 by then Minister of Manpower and Immigration[31], Jean Marchand (Kelley & Trebilcock, 2010). The paper opened by stating that "There is a general awareness among Canadians that the present *Immigration Act* no longer serves national needs adequately" (Marchand, October 1966, p. 5). After reviewing the nature of deportation and processes of appeal, the paper claimed that Canadians had "become aware" of the lack of independence of the IAB from the Minister, which contributed to public unhappiness. The paper thus concluded that justice "must be seen to be done" through the institution of a robust and independent adversarial process (Haigh & Smith, 1998). Altogether these critiques pressed for reform to the *Immigration Regulations* governing the appellate process.

In November 1967, the *Immigration Appeal Board Act* was passed. This legislation implemented almost all of the recommendations made in the Sedgwick report and the White Paper (Haigh & Smith, 1998). It specifically provided that the IAB would operate as a court of record, under its own seal and separately from the Department of Manpower and Immigration, thereby ensuring independence in decision making. Decisions rendered by the Board could be appealed to the Supreme Court of Canada on questions of law, though. The prohibitions on judicial review of immigration decisions were thus lifted. In introducing this legislation, the Parliamentary Secretary to the Minister, John Munro, argued that while a non-citizen's presence in Canada is a privilege, that they "should not be deported without a right of appeal" (as cited in Haigh & Smith, 1998, p. 266). This suggests a softening of the position promoted by King; while sovereign authority is still promoted, migrant access to due process protection is secured via this

[31] The Department of Manpower and Immigration replaced the former Citizenship and Immigration in 1966 (Hawkins, 1991).

legislation. Finally, it was confirmed that when reviewing deportation decisions, the Board could consider any humanitarian and compassionate grounds that would justify granting special relief against removal (Haigh & Smith, 1998). These considerations would only follow a decision that the appeal on legal grounds had failed.

A massive backlog in appeals to the IAB accrued almost immediately after passage of the 1967 legislation (Hawkins, 1991). By 1970, there were 4,000 cases awaiting adjudication, with approximately 400 additional appeals being filed every month. The Liberal Government again asked Joseph Sedgwick to prepare a report on this issue. Sedgwick ultimately determined that the backlog was the result of the extension of the right of appeal to *all* persons in Canada. As a result of this generous policy, migrants were entering the nation as visitors to avoid examination under the *Immigration Act*, filing applications for permanent resident, and then appealing any refusals (Hawkins, 1991). Sedgwick thus recommended that the right of appeal should be restricted and specifically denied to visitors who applied for landed immigrant status from within Canada (Hawkins, 1991). Amendments were then passed to the *Immigration Appeal Board Act* in 1973 that abolished the universal right of appeal from a deportation order, limiting this right to permanent residents (Hawkins, 1991).

Following several reports to Parliament and public consultations recommending significant restructuring of the immigration system,[32] a new *Immigration Act* was passed in 1976 (Hawkins, 1991). The former expansive list of prohibited migrants was replaced with categories of inadmissibility. Migrants were now inadmissible based on their conviction for a criminal offence in Canada, for example (Black, 1978). These objective measures of inadmissibility

[32] Specifically, the Green Paper tabled in the House of Commons by the Minister of Immigration on 3 February 1975 and hearings of the Special Joint Committee of Parliament conducted across Canada (Black, 1978).

removed the interpretive requirements of earlier legislation that linked criminality to subjective determinations of offences (i.e., crimes of "moral turpitude") (Black, 1978; Hawkins, 1991).

With respect to removal, the 1976 Act eliminated the concept of domicile, thereby extending the possibility of deportation to *all* non-citizens in Canada, regardless of how long they had resided in the country (Black, 1978; Kelley & Trebilcock, 2010). The Act also extended to any individual subject to removal investigations the opportunity for a "full and impartial immigration inquiry" (Hawkins, 1991). These inquiries were to be conducted by "adjudicators," namely specially trained immigration officers removed from the process of evidence production (as compared to SIOs). Any evidence gathered would be provided to adjudicators, who would then render a decision on admissibility (Hawkins, 1991). Migrants subject to investigation were also to be advised of their right to counsel and, if removal was ordered, reasons for the decision had to be provided (Hawkins, 1991). Permanent residents continued to retain the right to appeal a removal order to the IAB. The Act established that appellate boards could consider in tandem factual, legal and humanitarian and compassionate grounds of appeal (Black, 1978; Hawkins, 1991). Based on these changes offering migrants increasing access to due process protections, the legislation was touted as officially ushering in the liberal era of Canadian immigration law and policy (Hawkins, 1991).

Altogether, these shifts in law across the mid-20th century appear to divert from the previous effort to exclude based on logics of race and criminality. While migrants with convictions continued to be excluded from Canada, and thus removable from the nation, they were extended due process protections to challenge these decisions. Racist forms of exclusion, including based on nationality, were also removed from law. This was not a whole new world, though. As detailed in the next section, racist logics of migrant foreignness and criminality that

structured early immigration law and practices in Canada continued to be accessed and deployed to justify exclusion and removal following this "liberal" era.

The Current Regime of Removal

Under the 1976 Act, *all* permanent residents had access to a right of appeal except those individuals named in a "security certificate" issued by the Minister or the Solicitor General (Chan, 2005). These certificates were based on security or intelligence reports alleging that the migrant was inadmissible on grounds of organized crime, criminal conspiracy, terrorism, war crimes and/or crimes against humanity, or that they were a danger to the security of Canada or a senior member of a government involved in terrorist activity (Haigh & Smith, 1998). Further limitations on the right of appeal were then introduced in 1994. It is these changes that ushered in the current era of removal legislation in Canada.

Amendments to the *Immigration Act* were introduced via Bill C-44, which was tabled before Parliament in June 1994 (Chan, 2005; Dent, 2002; Haigh & Smith, 1998; Hassan-Gordon, 1996). This legislation included provisions that would allow the Minister of Citizenship and Immigration[33] to designate any permanent resident found to be inadmissible because of criminality as a "danger to the public." The requirements for designation were outlined in sections 19(1) and 27(1) of the *Immigration Act*, and included that the migrant had been issued a deportation order and had committed an offence for which a possible term of imprisonment of ten years or more could be applied (Haigh & Smith, 1998). Designation as a danger would in turn eliminate access to appeal a removal order issued for criminal inadmissibility (Chan, 2005; Dent, 2002; Haigh & Smith, 1998; Hassan-Gordon, 1996).

[33] Oversight of immigration was transferred from the former Department of Manpower and Immigration to the Department of Citizenship and Immigration Canada in 1993 following the passage of the *Department of Citizenship and Immigration Act of 1994* (42-43 Elizabeth II, C.31).

The tabling of this legislation followed two highly publicized events in Toronto: the death of Georgina Leimonis during the *Just Desserts* shootings and the death of Toronto Police Services officer Todd Baylis. Both Leimonis and Baylis were White Canadian citizens (Dent, 2002). The media identified the perpetrators of both offences as Black, Jamaican migrants to Canada (Corelli, 12 August 1996; Mascoll, 5 November 2007). Racialized migrants once again clearly emerged as a foreign threat to White Canadians via these discourses.

The media further stated that these individuals were *not* citizens of Canada and that they were *not* legally in the country (Corelli, 12 August 1996; Mascoll, 5 November 2007). Clinton Gayle was eventually convicted of the shooting death of Todd Baylis. He was erroneously identified by the media as having evaded removal from Canada through the appellate process, having been issued an order for deportation based on his criminal convictions (Mascoll, 5 November 2007). The introduction of danger opinions via Bill C-44 was clearly meant to address this perceived failure of the immigration system to remove such a dangerous threat. In reality Gayle only remained in Canada because of an administrative issue – his immigration file had been lost. Similarly, while the men involved in the shooting death of Georgina Leimonis were identified as non-citizens, they were all actually permanently residing in Canada. One individual who was associated with the events was a temporary migrant to the country; however, this individual was later exonerated of all charges (Mascoll, 5 November 2007). The deaths of Leimonis and Baylis were therefore not the result of the actions of migrants and/or the terrible culmination of deficiencies in removal of criminals from the nation.

Despite these clear errors, media discourses contrasting Black foreign men as offenders to White Canadian victims were accepted as factual in Parliament. This is unsurprising given their reproduction of established knowledge tying criminality and foreignness to racialized

people, who have been historically positioned as distinct from and a threat to the homogenous White population. For example, the Minister of Manpower and Immigration, Sergio Marchi, justified Bill C-44 by pointing to the actions of a "criminal element" he claimed had "infiltrated" the immigration system, thereby causing Canadian "citizens" to question the "merits" of the system itself (Marchi, 19 September 1994). Marchi argued that the implementation of "danger opinions" would help to address this loss of confidence in the immigration system by supporting the removal of "undesirables" who were said to have previously used the appeal process to delay their departure from Canada (Marchi, 19 September 1994). We can further see the acceptance of racist narratives during debates of Bill C-44 when MP Sharon Hayes noted the necessity of the legislation, citing the death of Todd Baylis specifically and the ongoing threat of migrants. MP Hayes tied this threat to Black, Jamaican men in Canada, stating:

> this weekend in a national news report… it was reported that Canada returned 227 deportees to *Jamaica* from January to July of this year, one-quarter of the total from all sources. It also pointed out that wealthy countries such as Canada are viewed by some countries as dumping our problems on them.
>
> We need to equip those in the trenches not just with a book of rules but with the tools to do the job. We need to assure the shopkeepers, the businessmen, the parents and the police, *Canadians* by birth or by choice that they do not need to *fear the system that should protect them* (Hayes, 22 September 1994, p. 6013-6014).

Minister Marchi and MP Hayes' statements clearly reflect the historically significant discursive link between racialized migration, foreignness, and criminality. Racist logics continue to operate to justify the use of immigration law to exclude racialized migrants from the nation on

the basis that they are foreign criminals and thus do not have the "right" to remain in Canada. Danger opinions are effectively an additional tool used in the effort to govern via ideas of race.

Notably, references to both the Just Desserts murders and the death of Todd Baylis have continued to inform immigration legislation since the passage of Bill C-44. This includes the FRFCA. For example, Minister Jason Kenney stated that these two events confirmed that "foreign criminals" are able to "walk freely on our streets when they should have been sent home at the earliest opportunity" (Canada, 24 October 2012). Kenney further held that Todd Baylis was "killed by a foreign national who was delaying his deportation" (Canada, 24 October 2012). Kenney argued that

> the fact that he was able to make an IAD appeal and delay his deportation contributed to the fact *that Jamaican citizen Clinton Gayle was in Canada to kill police Constable Todd Baylis*. We can never let that sort of thing happen again (Canada, 24 October 2012).

Kenney's statements both here and throughout the debates of the FRFCA blatantly deploy racist logics. Kenney not only ties Gayle specifically to his nationality by describing him as a "Jamaican citizen" but does so in the context of discussing the need to remove "foreign criminals" who abuse Canadian systems and threaten Canadian citizens. Jamaican men are again positioned as non-citizens who threaten Canadians and abuse our systems. The connection between race via reference to nationality, foreignness, and criminality is clear and present.

Importantly, and according to Pratt (2005), as a result of the passage of Bill C-44 and the introduction of restrictions on the right of appeal based on a *potential* sentence, Black male migrants faced the compounding impact of discrimination in both the immigration and criminal punishment systems. Because of these amendments, decisions of police, prosecutors and judges became central to administrative determinations of dangerousness (Pratt, 2005). Danger

decisions in the immigration system that were based on charge and conviction would necessarily reproduce the systemic racisms that mar the operations and practices of the criminal punishment system. Pratt (2005) confirms here the connections between the immigration and criminal systems in terms of their contributions to the governance of racialized persons via processes of exclusion.

The current IRPA extended restrictions on access to appeal removal for criminality when it was enacted in 2002. Prior to the passage of this legislation, public concern over enforcement of removal was a primary focus of debates on the need for new immigration laws. At the end of the 1990s, several reports were produced that alleged ongoing problems with the removal process even after the enactment of Bill C-44 (Citizenship & Immigration Canada, 1997, 1998). It was contended that removal continued to be "delayed" by individuals who did not have a legal right to remain in Canada, having been found to be inadmissible (Citizenship & Immigration Canada, 1997, 1998).

One specific factor identified as contributing to delay was the danger opinion process (Citizenship & Immigration Canada, 1997, 1998). Like the process of appeal to the Minister introduced in 1910, migrants subject to danger opinions could no longer access independent review of their personal circumstances. Instead, these considerations would have to be put before the Minister of Citizenship and Immigration during danger opinion proceedings. A backlog of materials from migrants responding to danger opinions thus quickly accumulated (Citizenship & Immigration Canada, 1997, 1998; Haigh & Smith, 1998). Migrants subjected to danger opinion proceedings would then be allowed to remain in Canada while awaiting Ministerial consideration of these materials.

In place of danger opinions, the IRPA introduced s. 64(2), which limited the right to appeal a deportation order resulting from a determination of inadmissibility to permanent residents who had been sentenced to a term of imprisonment of less than two years. The introduction of s. 64(2) represented a move towards more "mechanical" rules and away from discretion in decision making on removal (Dent, 2002). The Minister was again relieved of the responsibility of review of applications. Migrants found to be inadmissible would now lose their right of appeal based on *objective* considerations of sentence alone (Sinha & Young, 2001). The threshold of less than two years for access to the right of appeal was specifically introduced to mirror the division between federal and provincial incarceration, with the former resulting from a sentence of two years or more. According to Elinor Caplan, then Minister of Citizenship and Immigration, this division adequately captured for removal without appeal those migrants who had engaged in "serious criminality," as per the IRPA. The Minister specifically stated: "You speak to any of the prosecutors and they will tell you that you have to do something pretty serious in this country or be a repeat offender before you get a two-year sentence to serve in a federal penitentiary" (Canada, 8 May 2001). Knowledge of criminal law and practice was thus accessed to inform the development of the IRPA, confirming the interweaving of the domains of immigration and criminal punishment in Canada.

The potential consequences of these mechanical rules for racialized migrants were highlighted during debates of the IRPA. These debates specifically pointed to the noted intersections of the immigration and criminal punishment systems. It was held that the racism that mars the processes of criminal law and practice would result in the (continued)[34] disproportionate exclusion of racialized migrants from Canada. This was argued by Erica

[34] That racialized migrants were disproportionately subject to removal based on criminality after passage of Bill C-44 was confirmed by Chan (2005) and Barnes (2009), respectively.

Lawson (Policy and Research Analyst, African Canadian Legal Clinic (ACLC)) during debate of the Bill before the Standing Committee on Citizenship and Immigration in May 2001. Lawson stated that the ACLC was concerned that the Bill contributed to the perpetuation of racism in Canada. In support of this position, Lawson highlighted that Bill C-44 drew from the criminalization of Black Canadians through its connection to the Just Desserts shootings. While the IRPA replaced the "danger opinions" introduced by Bill C-44 with limits on right of appeal under s. 64(2), Lawson stated that the legislation would continue to disproportionately impact Black men. In support of this position, Lawson (like Pratt, 2005) highlighted the ongoing social-context in Canada that saw Black men being overpoliced and overincarcerated by the criminal punishment system (Canada, 2 May 2001).

Lawson contended that legislators needed to take an "anti-racist perspective," which would entail considering the "particular experience that people have" with greater surveillance, arrest, conviction, and incarceration *before* passing legislation that would then remove their rights of appeal. Lawson held that criminal inadmissibility and the loss of the right of appeal should not be based on an assessment of objective factors alone (like sentence length) and instead should consider "the subjective experience of people's lives" (Canada, 2 May 2001). It was argued that:

> When we consider that there has been a history of proposing things to keep out African-Canadians, to criminalize African-Canadians, and enacting legislation that reflects that, we need to think about how the bill continues to do that (Canada, 2 May 2001).

Lawson was repeatedly challenged by Committee Members who claimed to be insulted by her arguments, contending that Canadians were not racist, nor was immigration legislation. For example, MP Lynn Yelich responded to Lawson by stating:

> I'm really almost insulted by your remarks, Ms. Lawson, that you think Canadians are so racist. I found in your presentation you remarked often that we are against black people …I find that almost a little offensive, because that's not what we are (Canada, 2 May 2001).

MP Yelich's remarks deny the influence of racist logics on the development of systems in Canada. At the same time, Yelich relies in her statement on racialized ideas by contrasting Canadians to Black people. The IRPA was ultimately passed, with section 64(2) remaining unchanged.

Following passage of the IRPA, the process of removal for criminality unfolds as follows: A report on inadmissibility would be prepared by a designated officer from either the CBSA or IRCC. Permanent residents and foreign nationals should be given the opportunity to make submissions to the officer who is assessing their admissibility before the report is written. If after considering these submissions the officer still decides to prepare the report, the matter is then transferred to a delegate of the Minister of Public Safety. If the Minister's delegate is of the opinion that the report is well founded then it may be referred to the Immigration Division (ID) of the IRB for an admissibility hearing. It is at this admissibility hearing that a deportation order may be issued against the convicted migrant if they are in fact found to be inadmissible (IRCC, 2017). At this point, even though a removal order has been issued, as noted, some permanent residents may still have access to an appeal of this decision. The right of appeal for inadmissibility is defined under ss. 63(3) of the IRPA as follows:

> A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

The definition of eligibility to file an appeal is then provided under s. 64, which in 2002 limited access to permanent residents sentenced to less than two years imprisonment. Those permanent residents who retained the right of appeal, and who wished to challenge their removal order, could file their appeal to the IAD of the IRB (see Figure 1, Appendix A for a summary of this process). A hearing would then be convened, after which the IAD Member could make one of three decisions: allow the appeal, stay the removal order, or dismiss the appeal (see s. 66 of the IRPA). If the appeal was allowed, the original decision to issue a removal order would be set aside and a new determination would be made (see s. 67(2) of the IRPA). If the removal order was stayed, the person concerned could remain in Canada for a specified period under certain conditions imposed by the IAD (see s. 68 of the IRPA). Finally, if the appeal was dismissed, the CBSA could remove the person from Canada (see s. 69 of the IRPA). This decision to dismiss the appeal could be appealed in some circumstances to the Federal Court of Canada (see s. 72 of the IRPA).[35]

Conclusion

Two critical points ultimately emerge from this review of the embedding of knowledges of race and criminality in immigration law and policy. First, racist logics have clearly structured the development and passage of immigration legislation in Canada. Discourses of foreignness, desirability, and criminality have been consistently repeated to justify exclusionary laws, the expanded use of removal and limitations on access to appeal. This legislation perpetuates a racial form of governance that contributes to the maintenance of the White Canadian settler nation via the exclusion and removal of racialized migrants. Second, the introduction of objective criteria

[35] Migrants facing removal may also delay their deportation via submission of an application for a Pre-Removal Risk Assessment, permanent residence under Humanitarian and Compassionate Grounds, or a Temporary Resident Permit. For further information on these various options, see IRCC, 2017.

for removal into immigration law based on conviction and/or sentence length potentially compounds these racist outcomes given the structural conditions in the criminal punishment system that have resulted in the overpolicing and overinaceration of racialized people. The analysis demonstrates the interweaving of immigration and criminal punishment systems, noting how knowledge of migrant criminality shaped the development of early immigration law and practice. It also suggests that the interactions of these systems supports racial forms of governance through the criminalization, exclusion and expulsion of racialized migrants.

As Chapter 3 will demonstrate, these processes of racialization inform the amendments of the program of removal introduced via the FRFCA. This is confirmed through an analysis of the rationalizations for the legislative amendments introduced by the FRFCA. I specifically trace throughout the legislative debates the interweaving of knowledges of criminal offences and court processes with contentions that migrants subjected to removal are foreign threats to the citizenry. I also consider the jurisdictional arguments promoted in the development and passage of this legislation. I argue that the FRFCA was rationalized as affirming the jurisdictional authority of the state to decide on removal. The implications for understanding of the relationship between immigration and criminal punishment systems in Canada are highlighted throughout.

Chapter Three: The FRFCA

This chapter critically examines the development and passage of the FRFCA. The contemporary program of removal introduced by the FRFCA is facilitated by the operation of sovereign and biopolitical power. This chapter traces how these modes of power were directed towards the regulation and criminalization of migrants by untangling the knowledges deployed to justify the amendments introduced in the FRFCA. Three primary rationalities are identified and discussed herein. These rationalities are broadly categorized as follows: 1) Foreigners have lost the privilege of residing in Canada; 2) Serious foreign offenders are not being deported; and 3) Judges are interfering with deportation efforts.

This chapter traces these three rationalities in significant empirical detail through its examination of debates of the FRFCA. The analysis additionally considers the processes and practices of actors that are impacted by, and that implement, the progam of removal within and across the assemblages of the immigration and criminal punishment domains. The implications for conceptualization of the relationship between immigration and criminal systems in Canada are considered throughout.

Contextualizing the FRFCA

The FRFCA emerged from a review of inadmissibility provisions[36] commenced in 2010 by Citizenship and Immigration Canada (CIC),[37] in partnership with the CBSA (IRCC, 2012). Justifications for this interdepartmental review pointed to the need to ensure that decision makers assessing issues of inadmissibility continued to have access to the "tools necessary to maintain the integrity of Canada's immigration system" (IRCC, 2012). The review was also focused on

[36] Set out at sections 34-42 of the *Immigration and Refugee Protection Act*
[37] Now Immigration, Refugees, and Citizenship Canada.

examining "recurrent issues"[38] that had allegedly been flagged since the adoption and implementation of the IRPA in 2002 (IRCC, 2012).

This effort to review inadmissibility legislation was one component of a myriad of systemic changes being implemented in the immigration system by the Conservative government of the time. The arrival of over 700 migrants aboard the MV Ocean Lady and MV Sun Sea to the shores of British Columbia in October 2009 and August 2010 (respectively) preceded this overhaul. The migrants aboard these ships generally held Sri Lankan citizenship. In order to enter and/or remain within the Canadian state, Sri Lankan nationals must have prior authorization, including via the receipt of a visitor visa (IRCC, 2023). The individuals aboard the ship did not hold this authorization and were thus arriving to Canada without status. This in turn was conceptualized as threatening to the sovereign authority of the Canadian state to decide on who may enter and/or remain within the nation. Conservative politicians seeking to reassert sovereign control of the border quickly worked to pass a series of legislative amendments to the IRPA that would limit who could arrive and remain in Canada.[39] As explained by the Canadian Council of Refugees (2015), the legislative amendments introduced by the passage of these Bills were expansive and resulted in the provision of "extraordinary new powers" to the government (and specifically the Minister of Citizenship and Immigration) to criminalize, detain, and deport migrants from Canada.[40] Migrants, specifically refugees, were positioned in promotion and

[38] Identification and explanation of these issues was not provided by Citizenship and Immigration Canada and/or the Canada Border Services Agency (see IRCC, 2012).
[39] This includes Bill C-11, the *Balanced Refugee Reform Act*, passed on 29 June 2010; Bill C-49, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, presented on 21 October 2010. This legislation died in 2011 but was reintroduced as Bill C-4 on 16 June 2011. Bill C-4 died after the first reading but again the material was reintroduced, this time in Bill C-31, the *Protecting Canada's Immigration System Act*, tabled on 16 February 2012. Bill C-31 was passed on 28 June 2012; Bill C-60, the *Economic Action Plan 2013 Act, No.* 1, passed on 26 June 2013; Bill C-44, *Protection of Canada from Terrorists* Act, passed on 23 April 2015.
[40] Providing a detailed overview of these changes is beyond the scope of this chapter. For further information and critical discussion, please see: Krishnamurti (2012). "Queue jumpers, terrorists, breeders: representations of Tamil migrants in Canadian popular media". *South Asian Diasporas in Canada*, vol. 5; Atak, Hudson & Nakache (2018).

debates of these various pieces of legislation as "queue jumpers, scam artists, back-door home invaders" (as cited in Canadian Council of Refugees, 2015), and as "illegals," "irregular arrivals," and "criminals" who abused Canadian generosity and endangered "the safety and security of Canadian communities" (Toews, 2010). The FRFCA continued this effort to secure the Canadian border through amendments to the program of removal. This legislation was similarly justified through the repeated positioning of migrants as "criminals," "foreigners," and threats to Canadian public safety and security (as discussed below).

The FRFCA was first introduced in the House of Commons as Bill C-43 on 20 June 2012. A broad range of amendments were proposed in this legislation, including to procedures for evaluating inadmissibility (Clauses 5 and 13); the extension of inadmissibility determinations to include otherwise admissible family members (Clauses 9 and 10); and to penalties imposed and access to relief following a determination of inadmissibility (Clauses 16 and 24). The power of the Minister of Citizenship and Immigration was also extended through the Bill, for example through the introduction of amendments allowing the Minister to prevent any temporary resident from either obtaining or renewing their status (Clauses 3, 6, 7, 8 and 11). Ministerial power to decide on requests for relief from certain forms of inadmissibility was formalized, and key considerations to be weighed during this process were set out in the legislation (Clauses 2, 3, 13,

"The Securitisation of Canada's Refugee System: Reviewing the Unintended Consequences of the 2012 Reform". *Refugee Survey Quarterly*, 37.1, pp. 1-24; Bates, Bond, & Wiseman (2016). "Troubling Signs: Mapping Access to Justice in Canada's Refugee System Reform". *Ottawa Law Review*, 47(1), pp. 71–72; Moffette & Aksin (2018). "Fighting Human Smuggling or Criminalizing Refugees? Regimes of Justification in and around *R v. Appulonappa*". *Canada Journal of Law and Society,* 33.1, pgs. 21-39; Kronick & Rousseau (2015). "Rights, Compassion and Invisible Children: A Critical Discourse Analysis of the Parliamentary Debates on the Mandatory Detention of Migrant Children in Canada". *Journal of Refugee Studies*, 28(4), pp.544–569; Rehaag & Grant (2015). "Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System". *Osgoode Legal Studies Research Paper Series*; Macklin (2013). "A Safe Country to Emulate? Canada and the European Refugee". In Lambert, McAdam & Fullerton (Eds.), *The Global Reach of European Refugee Law*, Cambridge: Cambridge University Press, pp. 99–131; Osterberg (June 2016). "Social Impacts of the Securitized Arrival Experiences of In-Canada Refugee Claimants". *Canadian Network for Research on Terrorism, Security, and Society*.

14, 15, 18 and 36(2)). Finally, Bill C-43 included regulatory amendments that created a formalized process for permanent residents to renounce their status (Clauses 20 and 21).

Primary among this wide swath of amendments was the effort to remove "foreign criminals" through changes to legislation governing deportation for serious criminality (Clause 24). This focus is evident from the title of the Bill. The Bill specifically proposed amendments to the definition of serious criminality outlined in section 64 of the IRPA. As detailed in Chapter 2, this provision regulates access to appeal a removal order issued against migrants found to be inadmissible on the basis of criminal conviction and sentence in Canada.[41] Permanent residents[42] lost the ability to appeal a determination that they were inadmissible if they had engaged in "serious criminality," which for the purposes of section 64 of the IRPA was formerly defined as any offence for which a term of imprisonment of at least two years was imposed. Clause 24 of the FRFCA curtailed access to appeal by redefining serious criminality as any offence for which a sentence of at least six months imprisonment had been applied.

Rationalizing the governance of criminally convicted migrants

Debates of Bill C-43 before the House of Commons and the Senate unfolded between 20 June 2012 and 30 May 2013. Conservative politicians rationalized efforts to govern migrants with convictions through deportation by arguing that "foreign criminals" had lost the privilege of remaining in Canada when they engaged in offending behaviour. Despite being inadmissible for serious offences, these foreigners were able to delay their removal from Canada by appealing their deportation. Conservative parliamentarians argued that access to the appellate process was

[41] Defined in s. 36(1)(a) of the IRPA as resulting from conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed

[42] Pursuant to subsection 64(2) of the IRPA, the right of appeal is extended only to permanent residents and is not available to foreign nationals.

being facilitated by judges in the criminal system who were lowering sentences on cases involving permanent residents to preserve their right of appeal in the immigration system. It was proposed that the resulting delays in removal introduced threats to the safety and security of Canadians, as serious foreign criminals were allowed to remain in the country while awaiting their appeal. Failure to remove criminally convicted migrants was further held to negatively impact the integrity of the immigration system. There was thus a need for governmental intervention to reaffirm sovereign authority over the territory by removing "foreign criminals," thereby protecting citizens of Canada and encouraging public confidence.

Conservative politicians held that deportation would be facilitated through legislative amendments that established expanded grounds for removal.[43] By restricting access to appeal a deportation order from two years to six months imprisonment, the sovereign technology of expulsion could be applied to a greater number of serious foreign offenders. It was finally asserted that these legislative amendments would not interfere with the promotion of fairness and migrant access to justice; while a migrant's personal circumstances would no longer be considered by the IAD[44] through the hearing of a removal order appeal, Conservative politicians proposed that these factors would still be before the courts, and that migrants could appeal any sanction that could result in deportation through the criminal system.

"Foreign Criminals" and the privilege of remaining in Canada

The foremost rationalization for the changes implemented relied on discourses describing migrants convicted of criminal offences as "foreign." By discursively positioning migrants as

[43] Note that although I emphasize the position of Conservative Parliamentarians here, I was also interested in tracing the arguments made by Liberals, members of the New Democratic Party, and other politicians throughout debates of the FRFCA.

[44] The IAD, which exists under the umbrella of the IRB, was introduced in 1989 with the passage of Bill C-55 (Immigration & Refugee Board of Canada, 2019).

outside of citizenship, Conservative politicians were able to argue that this group had no unqualified right to remain in the country. Their presence in Canada was instead described as a privilege that required adherence to legislative guidelines, including not to engage in criminal offending. Where foreigners failed to meet these requirements, they lost the entitlement of residence and were rendered deportable. With this position established, Conservative politicians could then move to the subsequent argument that these foreign criminals should be removed and that the FRFCA would facilitate this process.

We see historically significant narratives of foreignness, right, and privilege at play throughout the debates of Bill C-43 before Parliament. For example, during the second reading of the FRFCA on 24 September 2012 Conservative Member of Parliament (MP) Pierre Lemieux responded to presentations from the Liberal Party that raised concerns on the wide scope of the legislation by stating:

> The first is that being in Canada is a privilege. If a foreign criminal is guilty of a criminal act, the member is advocating that there should be no consequences, that the person should retain the privilege of being in Canada. That is absurd, both to me in the House and Canadians…If a foreign criminal is responsible for a criminal act here in Canada, who is the victim? Canadians are (Lemieux, 24 September 2012).

"Foreign criminals" are directly contrasted here to Canadian "victims." These foreigners have no right to remain in Canada and their privileged presence in the nation was lost when they violated Canadian laws and victimized citizens. This discursive contrasting of citizens as victims to foreign nationals as criminals was continued by Minister of Citizenship and Immigration Canada, Jason Kenney, during the third reading of the Bill before the House of Commons:

> Mr. Speaker, for too long, too many serious, dangerous, convicted foreign criminals have been able to delay their deportation from Canada for years and in too many cases have gone on to commit new crimes and create new victims in Canada. Canadians have had enough of this. When people come to Canada and violate the privilege of residency here by being convicted in a court of law of having committed a serious crime, they lose the privilege of staying in Canada and should be deported quickly (Kenney, 6 February 2013).

Reference was also made to the abuse inflicted by migrants on the "generosity" of Canadians, furthering the juxtaposition of citizens as victims and foreigners as criminals. Migrants are again situated as outside of citizenship, as "guests" of the nation who have failed to respect Canadian laws and values, thereby offending Canadian generosity and losing the privilege to remain. At the report stage in the House of Commons on 29 January 2013, Conservative MP James Rajotte stated:

> The measures in the bill would close the loopholes that currently allow individuals found inadmissible to Canada to remain in this country long after they have worn out their welcome. These tough but fair measures would ensure that serious foreign criminals would not be allowed to endlessly abuse Canadians' generosity (Rajotte, 29 January 2013).

George Platsis, Program Director at the Centre of Excellence in Security, Resilience, and Intelligence at the Schulich Executive Education Centre, and a presenter to the Standing Committee on Citizenship and Immigration (the CIMM) on 31 October 2012, echoed this reference to being a "guest" in Canada:

> When I live in another country, I am a guest in that home. When someone comes to our country, they're a guest in our home. I think it is a reasonable expectation that they respect our values, our laws (Standing Committee on Citizenship and Immigration, 31 October 2012).

Both biopolitical and sovereign power are promoted through the strands of discourse identified above. The primary reference to "foreignness" supports the direction of sovereign power towards expulsion by positioning migrants convicted of offences as outside of "the" population.[45] The boundaries of the population are maintained through the exercise of sovereign authority that has been reconfigured by the operation of biopower. As explained by Foucault (2007), the sovereign power to "take life or let live" is permeated by biopower, the focus of which is on "making live" and "letting die." Biopower is enacted over the population; what is crucial here, though, is that the authority to decide the contours of the population, in particular who is excluded, remains with the sovereign (Dean, 2001; Foucault, 2007; Salter, 2008).[46] While power is generally directed towards the political problem of the population following the trajectory of biopolitics, sovereign techniques continue to be applied against those who are outside of the collective and who threaten the life of the population. As explained by Dean (2001), "it is no longer so much the right of the sovereign to put to death his enemies but to disqualify the life – the mere existence – of those who are a threat to the life of the population" (p. 53).

In the present context, sovereign power is shaped specifically by a biopolitical concern with the welfare and interests of Canadian citizens. Migrants are again described as "foreigners"

[45] According to Foucault (2007), "population" refers to a collective entity with its own history, customs, and habits. With the advent of biopower, population becomes the focus of political power. Governmental techniques and rationalities are directed towards the fostering of life within this entity. Knowledge of the population (and not of a single individual and/or the will of the sovereign) directs these efforts.

[46] This is clarified by Dean (2001), who explains that following the agreements of Westphalia there emerges "these fictive self-governing political communities" that "have come to be represented as independent states. That is, they are political unities with definite territorial boundaries, secured by the principle of non-interference of one sovereign state in the internal affairs of another …The city-citizen game therefore concerns the panoply of techniques by which the members of a population are formed or form themselves into a political community, and by which they seek to exercise sovereignty…The relation of the arts of governing and sovereignty is not the replacement of one by the other but each acting as a condition of the other. On the one hand, the existence of nominally independent sovereign states is a condition of forcing open those geopolitical spaces on which the arts of government can operate" (p. 49-50).

and “guests” in this country. These “foreigners” are then discursively contrasted to “generous” citizens who are positioned as the victims of migrants that engage in criminality. Through this opposition, foreigners can be understood as a biopolitical problem because they represent a threat to the population of citizens. It is then in the interest of the population of Canadians to direct the sovereign technique of deportation towards these criminal outsiders.

These discourses contrasting citizens and foreigners were not without contestation. Those Parliamentarians opposed to the FRFCA focused their condemnations specifically on challenging discourses of “foreignness.” It was consistently highlighted throughout debates of the legislation that by curtailing access to appeal, the FRFCA would capture permanent residents that had lived in Canada their entire lives and were established both economically and socially despite their lack of citizenship status. These migrants could not be described as “foreign” and/or as outside of the Canadian population. For example, during the report stage of debates before the House of Commons on 29 January 2013, Elizabeth May, then an MP for the Green Party, stated simply:

> The permanent residents category is very large in this country for people who have literally been here all their lives, except for perhaps the first six months or two years of life. This legislation does not take into account any of those circumstances in deciding if people can be deported…(May, 29 January 2013)

During the second reading of the Bill before the House of Commons on 24 September 2012, Craig Scott, then an MP for the New Democrat Party (NDP), directly contested the language of “foreignness” and the juxtaposition of migrants and citizens, stating:

> the phraseology in the act refers to foreign criminals. For the 1.5 million or more landed immigrants or permanent residents in our country… the effect of that word “foreign” is to create this kind of us/them within our own society. Some consequences for some people will

> be much worse than for others, even though they are just as much members of our community and Canadians in our country as somebody who has gone to the next step and become a citizen (Scott, 24 September 2012).

Laurin Liu, an MP for the NDP at the time, added to this by highlighting the significant social and economic contribution of migrants:

> the Conservatives are promoting the mentality of "them against us." However, in our communities, the line between them and us is not black and white. With this bill, we run the risk of removing people who arrived at a very young age with their parents, have spent their lives in Canada, and cannot call anywhere else their home. They may not be Canadian citizens, but these people have contributed to our communities, have paid their taxes and are part of our society (Liu, 24 September 2012).

Finally, during debates before the House of Commons held on 4 October 2012, Alexandrine Latendresses, then an MP for the NDP, further clarified the ontological significance of the reference to "foreigner" through discussion of the meaning of this concept in French – one of Canada's two official languages, stating:

> When I hear government members using the word "foreigners" to describe people who live here as permanent residents, I am very unhappy, especially when it is the Minister of Immigration, who should be their champion, defending these people and supporting them. Moreover, the French word for foreigner, "étranger," also means stranger- someone not like us. It is as if they did not want to associate with foreigners or strangers (Latendresses, 4 October 2012).

Migrants are thus being positioned by the FRFCA as strangers within the nation. Linguistically, non-citizens, even permanent residents, are pushed outside of the population through their conceptualization as "étranger."

In reply, Conservative politicians simply repeated discourses reaffirming the boundary between foreigners and citizens. Minister Kenney in particular justified the references to foreignness in the legislation as being directed by the IRPA. The Minister stated that anyone who does not have citizenship is referred to as a "foreign national" in the Act. For example, during the report stage of the debates before the House of Commons on 29 January 2013, Minister Kenney raised the following point of contention:

> Mr. Speaker, at this point, I frankly do not understand it. Under the *Immigration and Refugee Protection Act*, and Canadian law more broadly, we refer to people who are not Canadian citizens as foreign nationals. Therefore, to say that a foreign national who has been convicted in a Canadian court for having committed a serious crime is a foreign criminal is a normal statement of legal fact. (Kenney, 29 January 2013)

This is, in fact, incorrect. The IRPA distinguishes (at section 2) between foreign nationals and permanent residents, and this language is adopted throughout the legislation, including at section 64. Regardless, the reference to purported knowledge of the legislative distinctions between citizens and foreign nationals operates here to facilitate the application of sovereign techniques of removal. Migrants without citizenship status are not of the population, even where they are established within the nation, and thus do not have an unqualified right to remain.

Conservatives additionally argued that recognition of even liminal inclusion of migrants within the nation (i.e., through access to appeal) threatens the interests of Canadian citizens by undermining the value of citizenship status. For example, during debates of the legislation before

the House of Commons on 3 October 2012, Conservative MP Paul Calandra responded to contestations on the use of discourses of "foreignness" raised by MP Helene Laverdiere of the NDP by asking (rhetorically):

> Is it the position of the New Democratic Party that the value of Canadian citizenship is so weak that the Government of Canada and the people of Canada should continue to carry on their backs individuals who do not make a commitment to this country?
>
> Is it the position of the NDP that those individuals who break the law should not suffer the consequences of not valuing Canadian citizenship enough to take out Canadian citizenship after many years, and of breaking our laws?
>
> Is it the position of the NDP that the value of Canadian citizenship is so low that we should not have laws in place to protect Canadians from coast to coast to coast? Is that what the NDP is saying? (Calandra, 3 October 2012)

Altogether these discourses again justify the direction of sovereign authority on the basis that migrants, even if established, are "foreign" and always outside of the population. This sovereign power is permeated by a biopolitical concern for the interests and welfare of generous citizens who, despite their efforts to support foreigners in Canada, are victimized by migrants. The population is thus depicted as comprised of "exalted" subjects. Exaltation of citizens in turn supports coloniality by concealing the violence that proceeded the origin of the nation; this narrative process venerating the figure of the citizen is a "necessary condition for the ongoing efficacy of national formation" (Thobani, 2007, p. 10).

These narratives of distinction are further evident from Conservative Parliamentarian's promotion of a June 2013 CIC press release in support of the FRFCA. This press release was entitled "Top 5 Reasons for *Faster Removal of Foreign Criminals Act*" (CIC, 2013). It listed the

names of five racialized men,[47] with information on their country of origin, the crimes they had committed, their sentences, and the time elapsed since a removal order had been issued against them for criminal inadmissibility. No further explanation was provided in the release, nor was it necessary. The public did not require further clarification to understand that these racialized men were "foreigners" in the nation, given the historical ties between race and foreignness. According to Canada's national story, the men described were already always outside of the homogenous White settler population (Jakubowski, 1997; Razack, 2000; Thobani, 2007; Walia, 2013). Simply listing the criminal information was also sufficient to confirm the necessity of the FRFCA, as it reaffirmed the accepted racist narrative that racialized migrants are dangerous and must be removed. Legislation limiting access to the nation becomes easily defensible in this colonial context. As Razack (2000) explains, "White citizens…come to believe that as the "original" inhabitants, they are both obliged and entitled to discipline the non-White Others who come to their borders" (p. 187).

Historically significant discourses of privilege and legal right identified in the primary rationalizations of the FRFCA further bolster these binary distinctions between the population of White settlers as citizens and racialized foreigners. Having discursively positioned migrants as outside of the population, the sovereign technique of exclusion is facilitated through reference to migrants' lack of legal rights (see Agamben, 1998). Conservatives again highlight that it is a privilege and not a right for foreigners to enter and remain in Canada. The privilege to remain is regulated by immigration law that codifies norms[48] for the conduct of migrants. Where

[47] Namely, Tran Trong Nghi Nguyen (colloquially referred to as "Jackie Tran"), Patrick De Florimonte, Gheorghe Capra, Cesar Guzman and Jeyachandran Balasubramaniam.

[48] As explained by Ewald (1990), a norm is "a rule of judgement and a means of producing that rule" (p. 154). Norms act as a means of regulation, setting out for both individuals and the population a standard for conduct. While norms do not require a "point of externality" (Ewald, 1990, p. 145-6), such as law, law as transformed through liberalism has become embedded with norms (Foucault, 1978). According to Dean (2010), law then is "compatible with normalizing practices" and is "produced with reference to the particular society" (p. 142). In the present

foreigners engage in criminality, thereby offending established norms codified in law, they lose this privilege. They can then be exiled, being outside of the population and thus reduceable to "bare life" with no access to legal right (Agamben, 1998).[49] Migrants are herein subject to the law but not subjects of the law (Agamben, 1998). Consistent with the political rationality of liberalism, migrant presence within the nation is precarious and dependent on adherence to Canadian laws, yet they have no legal recourse to prevent their exclusion if they offend legal requirements.

Crucially, and as explained by Razack (2010), race thinking is "the main technological tool" that starts this "process of eviction" from the law (p. 86). Race divides the world into those who are deserving of rights and those who are violently removed from the law (Razack, 2007). Maintenance of spaces of exception in turn supports the colonial project distinguishing between citizens and foreigners, with "violence against the racialized Other" being "understood as necessary in order for civilization to flourish" (Razack, 2007, p. 8). Suspension of the rule of law in the Canadian immigration context is shaped by the links between race, foreignness and criminality. These epistemological associations justify the expulsion of migrants from legal rights on the basis that they are outside of the population and a threat to national security. Sovereign power to exclude is expressed through this process.

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context, the law under review is immigration legislation that sets out conditions regulating the conduct of the population of migrants within the state.

[49] I appreciate here that there exists tension between the works of Agamben and Foucault, specifically in relation to the distinctions between zoe, or bare life, and bios, or political life. As Dean (2001) explains, Agamben would suggest that "there is a much closer and long bond between politics and life than Foucault allows... Agamben argues that … the constitution of political is made possible by a kind of exclusion of bare life from political life that simultaneously makes bare life a condition of politics" (p. 44). Life (or bios) is thus endemic to the genesis of sovereign politics by its exclusion (or zoe), and not because of the emergence of biopolitics. Agamben thus suggests a unitary theory of power in place of Foucault. Despite these distinctions, Dean articulates how the work of these two authors can be used together. While Foucault's articulation of two trajectories of rule allows for a more complex analysis of the government of subjects as compared to Agamben's unitary theory, it is also important to recognize that in attempting to govern, political actors are forced to draw "together aspects found along these two trajectories. And, to allow for Agamben, the point of articulation is found in the different conceptions of life" (Dean, 2001, p. 45) (see also Genel, 2006).

References to the privilege of residence in Canada and the lack of legal right to remain during debates of the FRFCA echo the established associations between whiteness and membership that were deployed in development of immigration law in Canada. As noted in Chapter 2, these racist narratives were specifically promoted by Prime Minister Mackenzie King in his 1947 *Statement on Immigration*. King again denied the right of racialized migrants to enter and remain within the Canadian state, stating that migration is a privilege and that the state has the right to choose migrants for entrance.[50] Repetition of these rationalities in the FRFCA depend on the same racist thinking in evicting migrants from the law. Sovereign authority is directed through these rationalities towards the expulsion of foreigners. This power is permeated by the biopolitical concern with the interests and welfare of white citizens who are threatened by strangers in the nation. Deportation of migrants ultimately serves to support the ongoing colonial project in Canada.

Finally, the above discussion contrasts the adoption of discourses of foreignness by Conservatives with the more tempered perspectives of Liberal and NDP Members of Parliament. While Conservatives promulgated conceptions of citizenship as delimited to individuals born within the nation, opponents from the Liberal and NDP parties countered with references to the long-term establishment of many permanent residents to demonstrate inclusion of some

[50] Use of discourses of privilege and right since King's 1947 speech is not limited to the FRFCA. For example, In Sedgwick's 1970 report for the House of Commons (described in Chapter 2 of this dissertation), he emphasized that migration to Canada is a privilege and not a right. In reproducing this discourse, Sedgwick then argued that public funds should not be wasted on consideration of any appeal by these migrants "solely to get rid of persons who do not meet our immigration standards". Later, in 1997, the *Not Just Numbers* report was provided to the Standing Committee. This report was prepared by the Canadian government, who was seeking to replace the former *Immigration Act*. In this reports consideration of purported "delays" of removal, it was highlighted that the government has a difficult time removing migrants who have "no legal right to be here". The report in turn stated that this failure to enforce removal has impacted the confidence of the Canadian public in the immigration system (Citizenship and Immigration Canada, 1997).

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"foreigners." Yet, these narratives also inherently promote the contingencies of "citizenship;" that membership requires years of residence and participation within the community, including through the payment of taxes (Isin & Turner, 2007). Despite attempting to undermine the dichotomization of citizens and foreigners - the "us versus them" mentality repeatedly referenced by Conservatives - these narratives continue to shore up biopolitical distinctions between citizens and non-citizens. They effectively permit the application of sovereign power towards those migrants who have not "established" themselves within the community, again reifying the biopolitical distinction between citizens and foreigners (for a similar discussion, see Anderson, Gibney & Paoletti, 2011).

Delays in deporting "serious offenders"

References to delays in deportation, the "seriousness" of migrant offending, and the need to protect Canadian citizens, inform the second set of rationalizations for the program of removal introduced through the FRFCA. Conservative politicians specifically argued that foreigners convicted of criminal offences were not being removed from the nation. The ongoing presence of these foreigners was said to undermine the safety of Canadian citizens. Based on these rationalizations, Conservatives proposed limitations on access to appeal to better facilitate the removal of "serious" foreign criminals.

Access to the appellate process through section 64 of the IRPA was specifically considered by Conservative politicians to be the cause of delays in deporting migrants. According to advocates of the FRFCA, by appealing their deportation, dangerous foreign criminals were being allowed to remain in Canada for years. This argument is well summarized in the following statement made by Minister Kenney at the report stage of the Bill before the House of Commons:

> In the past, by appealing to the IAD of the Immigration and Refugee Board, that would typically gain foreign criminals about nine months for that appeal to be heard. If that appeal was refused, they would then appeal that negative decision to the Federal Court. Occasionally they would then be able to further appeal the negative decision by the Federal Court to the Federal Court of Appeals. That takes serious convicted foreign criminals, who have already benefited from due process, including the presumption of innocence in our criminal system, and allows them to delay their deportation for, in that case, two to three years (Kenney, 29 January 2013).

Migrants convicted of criminal offences are again understood by Conservatives to be excepted from legal rights. Based on this logic, Conservatives recast the legitimate exercise of the right of appeal by migrants as a "delay tactic". This discursive move operates to justify the legal limits on access to appeal proposed to section 64, which facilitates the movement of migrants into the space of exception where they belong. Sovereign power can then be applied through removal.

This reinterpretation of access to the right of appeal relies on and reproduces racist thinking that positions migrants as foreigners. In support of their discussion of interruptions to removal, Conservative parliamentarians repeatedly referenced five cases involving racialized migrants that had been deemed inadmissible for serious criminality but not deported (also listed by CIC, above). This includes the case of Tran Trong Nghi Nguyen (colloquially referred to as "Jackie Tran"). Multiple Conservative parliamentarians repeated details of Nguyen's movement through the criminal and immigration systems to validate the argument of delays introduced by the appellate process. During the second reading of the FRFCA, MP Rick Dykstra provided the following synopsis of Nguyen's case:

> Jackie Tran, whose country of origin is Vietnam, committed the following crimes: assault with a weapon, drug trafficking, drug possession and failure to comply with court orders. The sentences ranged in length from a $100 fine to two years less a day imprisonment. Did he appeal? Absolutely, he appealed. His removal order was completed in April 2004 but his removal actually took place in March 2010. For nearly six years, that individual took advantage of our system, used every appeal mechanism available to him and remained in this country. There are those who are in this process as we speak and who have again, while appealing to stay here in Canada, committed crimes (Dykstra, 24 September 2012).

Dykstra here relies on racist thinking to position Nguyen as foreign by first mentioning his country of origin. No context is provided regarding Nguyen's level of establishment and/or status in Canada, nor is it required. Simply referencing that Nguyen was born in Vietnam is enough to demonstrate his foreignness regardless of his ties (whether familial, economic, educational, etc.) to Canada given the epistemological links between nationality, race, and exclusion. The MP then relies on a discussion of Nguyen's appeals to corroborate the Conservative position that this foreign offender was able to use the appellate process to delay removal. The logic underlying this argument is that, as a foreigner, Nguyen does not deserve access to these rights and should be removed from the law. It is further insinuated that failure to exempt Nguyen from legal rights introduced a threat to the Canadian public, given that some migrants (although not clearly Nguyen) commit further offences during the appellate process.

Minister Kenney elaborated on the significance of Nguyen's case where he stated the following during his speech before the House of Commons on 24 September 2012:

> Jackie Tran was running a youth drug gang in Calgary that was terrorizing the Vietnamese. His gang was involved in multiple murders. He always avoided getting caught on murder, but

> he was caught and prosecuted and sentenced on several offences, like assault with a weapon, drug trafficking, drug possession, failure to comply with court orders. It took us six years to remove him from Canada because on every one of those charges, which under the law ought to have led to his deportation, he used endless and redundant appeals to delay his deportation for up to six years. Therefore, that guy, who was running gunmen around Calgary and whose gang was responsible for slaughtering people on our streets, was able to stay here for six years (Kenney, 24 September 2012).

Minister Kenney deploys knowledge of Nguyen's purported engagement in organized crime and his alleged commission of multiple murders to demonstrate that foreigners are engaging in serious criminal offences. These allegations have not been substantiated, though; Nguyen has not been convicted of murder, nor was evidence provided by Kenney to support these claims. Yet this information is uncontested in the context of debates of the FRFCA, given the epistemological ties between race and criminality in the history of Canadian immigration legislation. Kenney further holds that, despite being a serious criminal who has lost the privilege to remain, Nguyen was able to delay his removal by accessing the appellate process. Kenney again relies on the racist logic that, being outside of the population and undeserving of legal rights, Nguyen should be evicted from the law in Canada.

Kenney additionally relies on racist thinking where he positions Canada as the saviour of racialized migrants. By referencing the interests of "Vietnamese" people in Canada, Kenney confirms that this group remains outside of the citizenry. The concomitant positioning of the amendments as necessary to protect this community of outsiders results in the promotion of the state as the protector of racialized populations. White settlers are confirmed as the rightful citizens of Canada, are exalted through their benevolence towards Vietnamese people (who are

within the state but outside of the population), and are also protected through changes to the law limiting dangerous foreigners' access to appeal (Thobani, 2007). Following Razack (1998), these discursive moves work to "turn oppressed peoples into objects, to be held in contempt, or to be saved from their fates by more civilized beings" (p. 3).

The contention that delays in removal threaten the safety of the Canadian population was repeated throughout the debates in Parliament. Conservatives again relied heavily on discourses distinguishing migrants as foreigners from citizens to justify the amendments proposed in the FRFCA. For example, on 4 October 2012, then MP Elaine Michaud of the NDP confirmed that the primary objective of legislative limits on removal was to ensure the protection of Canadians:

> We recognize the need to have an efficient justice system in order to deport real criminals who are not Canadian citizens to their country of origin. We do not support allowing these dangerous criminals, who put the safety of Canadians at risk, to stay in the country. If circumstances require it, we want to make sure that those people can be quickly deported to their country of origin in order to protect Canadians' safety (Michaud, 4 October 2012).

When speaking before the CIMM on 29 October 2012, MP Costas Menegakis confirmed the binary that positions "foreign offenders" as both outside of, and a threat to, the population:

> We have a responsibility to our citizens, which is that the people who we allow to walk our streets, shop in our communities, be around our children, and be in our schools are safe—that it is safe for our citizens. We do not have a responsibility to another country to take on those who would perpetrate criminal activity (Canada, 29 October 2012).

Speaking of the broader impact of the failure to remove on the economic security of Canadians, Conservative MP Corneliu Chisu stated the following before the House of Commons:

> The fact is that we need to remove criminals from this country for the safety of our country. The former legislation came with a heavy cost. Let us look at this legislation. How much can the taxpayers be expected to pay for the removal of a criminal from this country when it takes six, seven or eight years? That is a very important point. I invite my colleague to support Bill C-43, which will do exactly that. It will remove foreign criminals from the country and will save the Canadian taxpayers' money (Chisu, 29 January 2013).

Finally, it was argued that the integrity of the immigration system could only be upheld where Canadians were protected through limits on access to appeal. Referencing again Nguyen's case, MP Wladyslaw Lizon explained:

> Canadians do not want people like Jackie Tran walking our streets. Canadians want to feel confident in the integrity of our immigration system. They want the government to put the interests of victims and law-abiding Canadians ahead of criminals (Lizon, 29 January 2013).

Altogether, this racist thinking operates to confirm the necessity of the proposed legislation. Conservatives reference the convictions of racialized men to reaffirm that migrants are foreigners. By positioning this group as outside of the population, these migrants are then recognized as being undeserving of legal rights. The prevention of their removal through the illegitimate exercise of the right of appeal is argued to allow these dangerous foreigners to engage in further criminality. Sovereign power, shaped by a biopolitical concern with the population, is invoked through these discourses that rationalize the restriction of access to appeal. Limiting access to appeal addresses the problem of delay by facilitating the removal of foreign criminals sentenced to six months imprisonment or more immediately after a determination of inadmissibility is rendered by the state. While these migrants are subject to the law, with the passage of the FRFCA they are no longer subjects of the law.

The final discursive move underlying the FRFCA involved the characterization of migrants as "serious" offenders. This description operates to confirm the threat presented by foreign nationals who delay their removal. It was argued that limiting access to appeal to those migrants sentenced to less than six months imprisonment would ensure the removal of all "serious" offenders. "Seriousness" is thus tied to sentence length. Confirmation of the utility of this temporal measure of seriousness was provided by criminal actors throughout the parliamentary review of the FRFCA. These actors provided professional knowledge to support the Conservative position that the limited appellate rights would capture "serious" foreign criminals who threaten the safety of Canadians. For example, on 31 October 2012, Mr. Tom Stamatakis, President of the Canadian Police Association, confirmed that offences for which sentences of six-months or more are imposed represent instances of serious criminality:

> As a front-line officer, whether you're talking about a criminal act where innocent citizens in our country are being victimized by violence or other activities like that, or about a white-collar crime, where you have people who are losing life savings and having their entire lives destroyed, where there is a custodial sentence of a duration of six months, I think somebody has committed a serious crime... if we're talking about people who have received custodial sentences, even of six months' duration, in my experience as a front line police officer, that means these are people who are committing hundreds of offences (Canada, 31 October 2012).

Then MP Shelly Glover similarly drew from their knowledge as a former police officer to support the legislation, stating the following during the second round of debates before the House of Commons:

> I was a police officer for quite some time in the city of Winnipeg and dealt with what my colleague referred to as minor offences on a number of occasions, so I am quite shocked when

> I hear my colleague refer to these offences that are punishable by at least six months as being what she termed minor, offences like assault with a weapon, sexual assault, robbery, break and enter. These, to me, are not minor in any way, shape or form. These are crimes that involve victims (Glover, 4 October 2012).

The deployment of discourses of delay and seriousness that rationalize the legislative changes can be understood as instances of "governing *through* crime." According to Simon (2007), there has been a growth in governance based on rationalities of crime that has resulted in the increasing visibility of "technologies, discourses, and metaphors of crime and criminal justice" across a variety of institutions "where they can easily gravitate into new opportunities for governance" (p. 4-5). References to convictions and sentences are used by Conservatives to legitimize the strategy of removal and the exercise of sovereign power (Simon, 2007, p. 5; see also Pratt, 2005, p. 19). This knowledge specifically demonstrates the dangerousness of foreign migrants in Canada, and the seriousness of offences involving sentences of six months or more. The changes proposed to immigration legislation are rationalized as ensuring the removal of "threatening persons and behaviours…from the community more or less permanently" (Simon, 2007, p. 172). These measures are not designed to correct or normalize but to incapacitate through expulsion (Simon, 2007, p. 173).

Parliamentarians opposed to the legislation contested the knowledge promoted by Conservatives. These actors argued that the definition of serious criminality being proposed was overly broad. It was held that sentences of six months could be applied to a multitude of offences that would not be considered "serious". Knowledge of sentencing was then used by these opponents to specifically demonstrate the inconsistency between criminal practices and the discourses of seriousness promoted by Conservatives. For example, during the second reading of

the Bill before the House of Commons, then NDP MP Craig Scott referenced several offences carrying a possible sentence of six months that could not be considered "serious":

> We should think about some of the things in the Criminal Code that can attract six months, and they may not that often, such as stealing oysters, section 323, selling a betting pool, section 202, and the list goes on. There are lots of offences that can attract six months. We would like to think the system would never end up seeking to deport somebody for these kinds of offences, but the moment we go down from two years to six months, we actually enter that territory where these kinds of Kafkaesque possibilities are there (Scott, 24 September 2012).

MP Mike Sullivan from the NDP highlighted issues of proportionality introduced by the proposed expansion of the definition of "serious criminality" under section 64 during this second reading, as follows:

> It is difficult for me to start to guess what crimes people have committed can be used by this legislation. The example was given earlier of a person who happens to grow six pot plants. I know of such a person who grows them for his mother who has multiple sclerosis. It is not trafficking because he is giving them away, but he happens to grow six. Luckily, he has not been caught. If he had been caught, it would a minimum six-month sentence. With a six-month sentence, that person, if he were not from Canada, would be deported automatically for trying to do good. That is the kind of nuance that is missing from the bill. As described by my colleague… it is hitting a fly with a sledgehammer (Sullivan, 24 September 2012).

Several parliamentarians additionally noted that, given the recent passage of Bill C-10, the *Safe Streets and Communities Act,* the number of potential offences that would result in limited access to appeal had increased significantly. Describing their concern with the definition

of serious criminality and the impact of Bill C-10, then MP Andre Bellavance of the Bloc Quebecois argued the following during House debates:

> It is important to see the connection with the many minimum sentences that the Conservatives are incorporating into their bills. They have just added a bunch of sentences so that less serious crimes can be used as a pretext to deport people who could contribute to Quebec and Canadian society after they have made amends. The Conservatives are imposing more and more minimum sentences of one to two years in prison, without any regard for how serious the offence actually is and without taking into account the extenuating circumstances (Bellavance, 4 October 2012).

Helene Laverdiere, at the time an MP of the NDP, noted the effect of the widened net introduced by both the FRFCA and Bill C-10 very simply, stating before the House of Commons:

> With respect to simple natural justice, the right to appeal for crimes where the sentence is longer than six months is being removed, whereas previously an individual could not appeal when the sentence was longer than two years. This issue needs to be considered in a broader context. On the one hand, harsher minimum sentences are being imposed, and judges cannot reduce those sentences based on the specific circumstances of the case. On the other, the period beyond which an individual does not have the right to appeal is being reduced from two years to six months (Laverdiere, 3 October 2012).

Conservatives vehemently denied these critiques. Minister Kenney in particular rejected arguments that the passage of the FRFCA would result in the removal of migrants for offences that could not be described as "serious":

> If someone goes to a bar and has a bad night and gets into a fight, that person would not be affected by this. People who are convicted of shoplifting are not going to be deported. Those

> who have a minor fraud count of cheque cutting or a minor traffic offence are not going to get a penal sentence of six months or more. These are for people involved in things like drug trafficking, sexual assault, possession of a dangerous weapon, multiple assaults. These are the cases we are talking about. These are serious crimes according to the law and according to our courts, and they should have serious consequences (Kenney, 24 September 2012).[51]

Conservative parliamentarians additionally argued that "serious criminality" was already defined within the IRPA as being met by a sentence of six months under section 36(1)(a). Minister Kenney noted that this definition was in fact endorsed by the Liberal Party when they drafted the IRPA. During the report stage of the Bill before the House of Commons, Kenney stated:

> On this point, there has been a lot of obfuscation from the opposition members who have suggested that we will lower the bar for defining what constitutes a serious crime in immigration law. That is completely inaccurate. In 2002, when Parliament adopted the *Immigration and Refugee Protection Act*, it decided in its wisdom, under the leadership of a former Liberal government, to define "serious criminality" under the *Immigration and Refugee Protection Act* as a crime that had resulted in a penal sentence of six months or more. That is the law and we would not change the law in that respect. We hear all sorts of completely bizarre, risible scenarios from the opposition about how this would be applied (Kenney, 29 January 2013).

Conservatives argued that by defining "serious criminality" under section 64 of the IRPA as any offence sentenced to two years or more, the Liberal Party had not only introduced

[51] Kenney also denied that drunk driving would result in removal, stating "I am not aware of anyone in Canada who has ever been sentenced to a six-month prison sentence for a charge of driving under the influence. Perhaps if it is their 10th or 15th DUI conviction, perhaps if they ran into someone and their driving under the influence resulted in manslaughter, they would be affected by this provision" (Kenney, 24 September 2012). Ironically, in 2018, the Liberal Party passed their Bill C-46, which increased the possible term of incarceration for the offence from 5 to 10 years. The effect was to render migrants convicted of this offence inadmissible pursuant to section 36(1)(a) of the IRPA. They retain the right of appeal only if sentenced to less than six months imprisonment.

inconsistency in the legislation but had created a "loophole" for serious offenders to remain in Canada. The logic at play here again relies on a conceptualization of migrants as foreign and thus evicted from legitimately accessing legal rights. On 29 January 2013, then MP James Rajotte stated the following during their speech before the House of Commons:

> The measures in the bill would close the loopholes that currently allow individuals found inadmissible to Canada to remain in this country long after they have worn out their welcome. These tough but fair measures would ensure that serious foreign criminals would not be allowed to endlessly abuse Canadians' generosity (Rajotte, 29 January 2013).

Opponents of the FRFCA replied that defining "serious criminality" as exclusively based on a term of imprisonment of six months mischaracterizes the practice of sentencing. According to these parliamentarians, "seriousness" of an offence is clearly demarcated in that system by place of imprisonment. An offender sentenced to two years or more serves their term of incarceration in the federal system, while any sentence of two years less a day is served in the provincial system.[52] These opponents argued that there is comparatively no practice or legislation from the criminal punishment system that would suggest that a sentence of six months or less is "serious." Allowing access to appeal to those migrants sentenced to less than two years thus ensures that only "serious" offenders are automatically removed following a determination of inadmissibility. Those offenders sentenced to more than six months imprisonment would remain inadmissible but, by retaining the right of appeal, they could maintain liminal status in

[52] For example, NDP MP David Christopherson stated "Finally, I would point out it was the whole idea that suddenly someone could be removed without an appeal when they went to a federal prison, but now we will move it down to six months. There is a reason deuce less a day exists. There is a reason some people go to provincial institutions on a sentence of two years less a day and other people are sent to the penitentiary where they will be for many years, possibly decades, possibly the rest of their life. These are two completely different worlds of criminal behaviour. We need to ask the questions and we will. Why is it necessary to make such a dramatic change that results in unilateral action taken against people by removing their right to appeal? Part of the Canadian way is to give people their say, let them have their day in court" (Christopherson, 4 October 2012)

Canada while under the ongoing supervision of authorities. The incongruent definitions of serious criminality thus do not introduce a "loophole" but legislate a practically grounded approach to removal.

These disparate and multiple references to criminal law and practice demonstrate the ongoing interweaving of the immigration and criminal punishment systems. Yet, practices in these domains are also guided by distinct knowledges and discourse. These differential knowledges and discourses in turn support the implementation of strategies in these systems. While Conservatives presented knowledge to suggest that the changes to immigration legislation introduced by the FRFCA would result in the removal of "serious" offenders, opponents contested these discourses by similarly accessing knowledge of criminal law and sentencing from the criminal assemblage. As highlighted by border criminologists, knowledges and discourses are thus *selectively* drawn from across the assemblages in these systems.

According to Murdocca (2013), there is actually no legislative distinction in criminal law between "serious" and "non-serious" offences. There is additionally no established legal test to distinguish offences based on seriousness. Where crimes are constructed as "serious" in practice, the effect is to negate consideration of the historical context that shapes these characterizations. For example, Murdocca explains that drug crimes that have been described as "serious" are differentially applied in practice against racialized people in Canada. Yet, because of this characterization, racialized people who are charged with these offences are unable to contest the racist logics underlying drug legislation. Murdocca writes that the definition of offences as serious thus operates to mask "racial oppression by allowing it to be represented as a legitimate response to wrongdoing" (p. 166-167).

Contestations to the FRFCA that similarly focus on the racist thinking that imbues this legislation were undermined through discussions of "seriousness." We see this, for example, in Conservative responses to opponents that highlighted the practical effects of the changes for racialized persons in Canada. These opponents argued that limitations on access to appeal on the basis of length of imprisonment would negatively impact racialized migrants given their subjection to overincarceration. It was held that length of sentence cannot be considered an objective determinant of "seriousness" in this context. For example, during their presentation before the CIMM on 19 November 2012, Francisco Rico-Martinez, Regional Director for the Toronto Council of Agencies Serving Immigrants, drew on knowledge of the operation of the criminal system to make the following impassioned plea:

> The overrepresentation of visible minorities in the prison system is rooted in factors of poverty, economic inequality, and historical prejudice. That includes the over- policing of young Black men, a practice that results in racial profiling. The existence of racial profiling by police is well documented. It has been acknowledged to different degrees by various police services in Canada, including the Kingston police chief in 2005…Clause 24 in Bill C-43 will have an unintended and disproportionate impact on Black and other racialized permanent residents, particularly youth, a population that has been historically disadvantaged in Canada, and is already subject to routine suspicious scrutiny, negative stereotyping in media, and is often faced with longer sentences…Those who are subject to this provision can be deported regardless of how long they have lived in Canada. They will not have the right to appeal. There will be no consideration of the circumstances of the offence and potential for rehabilitation. There will be no consideration of the length of time they have lived here or their ties to family and community…Individuals who have lived all their lives in Canada,

> particularly those who came as infants or young children, would lose families, friends and communities when they are deported to a place they barely know or remember from before. They will have no family or community connections over there (Canada, 19 November 2012).

Focusing specifically on the negative effects of racist references in support of the FRFCA, then MP Jinny Jogindera Sims of the NDP stated the following during consideration of the Bill by the CIMM on 29 October 2012:

> we worry about legislation that is brought where the justification seems to be these way-out cases. When you try to formulate legislation in this manner, it leads, whether it's intended or not, to an impact on groups… the head of the Canadian Somali Congress said he believes the new bill will drastically increase the number of young immigrant males who are deported without appeal, including Somali refugees raised mainly in Canada. He notes that many of these young men have little or no connection to the land of their birth. They grew up here. This is their home (Canada, 29 October 2012).

Conservatives replied to these contestations by negating the responsibility of the government to consider the experiences of racialized migrants convicted of criminal offences in Canada. This refusal to examine how operations and practices of the criminal punishment system may have shaped experiences of overcriminalization are consistent with the discursive positioning of racialized migrants caught by the amendments to immigration law as "serious" foreign offenders. As explained by Thobani (2007), even after settlement in Canada, the welfare of migrants is not a "national responsibility, unlike that of 'real' Canadian families" given that these individuals are always considered to be outside of citizenship (p. 136). How a migrant's experiences with the criminal domain may be shaped by systems of inequality is not Canada's concern; the focus, instead, is on the welfare and interests of citizens alone. Sentences of six

months, regardless of the circumstances, are enough to confirm that foreign offenders are serious criminals who must be removed.

In refusing to consider the experiences of racialized migrants, Conservative politicians drew from liberal legal rationalities that assume equality. Race is of no consequence within these rationalities as all persons are assumed to be equal. This then "feeds the illusion that subordinate groups are not oppressed, merely different and less developed" (Razack, 1998, p. 24). Racialized migrants are thus not overcriminalized or overincarcerated; their disproportionate subjection to criminal practices is the result of individual choice. Their characterization as "serious offenders" and referral for deportation are in turn valid. These are offenders who have chosen to engage in serious offences, and who have been sentenced accordingly, thereby rendering them inadmissible in the immigration system. This rationality is clear, for example, in the following speech by Conservative MP Roxanne James made in response to the submissions of Rico-Martinez on 19 November 2012:

> You've said we need to rethink this bill specifically because of young, visible minority residents; I believe I wrote that down correctly. You seem to be indicating there's an imbalance in our federal penitentiary system. I'm wondering whether you're making excuses for people who commit crime. When you say that we need to rethink it because of a specific group, I have a bit of a problem with that because you said they have few choices of where they can do homework, maybe their language or cultures are different, maybe their skin colour is different… I simply want to let you know that I know lots of people who fit those categories, but they do not commit serious crimes. I'm wondering why you substantiate your viewpoints based on those specific things and why you're against this bill. That's the problem I have with your statements (Canada, 19 November 2012).

This sentiment was then confirmed by Julie Taub, an Immigration and Refugee Lawyer who appeared as an expert witness before the CIMM on 29 October 2012:

> So I'm sorry, but there have been lots and lots of examples of those who have come from the most horrendous conditions and have arrived in Canada as temporary residents, permanent residents, and they didn't enter into a criminal sphere, committing crimes….It's not an acceptable excuse, because I know from personal experience, it did not happen. And it doesn't have to happen (Canada, 29 October 2012).

When presenting before the Standing Committee on 31 October 2012, former Conservative MP Ed Holder went further, characterizing migrants convicted of offences caught by the expanded threshold as inherently "bad". MP Holder stated:

> From my perspective this works from a fairly simple premise: people who are convicted of committing serious crimes are bad, and innocent victims of crime are good. I think there's a basic premise of right and wrong here that doesn't seem to come across around the whole table, and I just don't know why, but the clear divide on this can't be more obvious (Canada, 31 October 2012).

Together, these arguments operate to mask the racist thinking that informs the legislation. Through this discourse of choice, Conservative politicians reaffirm that migrants sentenced to six-months or more are "serious offenders" who have the freedom to choose their actions and simply chose badly. They are being removed not because of who they are, but because of what they have chosen to do. As explained by Williams (1991),

> In our legal and political system, words like "freedom" and "choice" are forms of currency. They function as the mediators by which we make all things equal, interchangeable. It is,

> therefore, not just what "freedom" means, but the relation it signals between each individual and the world. It is a word that levels difference (p. 31).

With the passage of the FRFCA on 19 June 2013, the threshold for removal without appeal was lowered to six months. Migrants, defined as foreign criminals, would no longer be able to delay their removal by illegitimately accessing legal rights. The new legislation would ensure the capture and expulsion of these “serious” foreign criminals. The safety and security of Canadian citizens, who are victimized by this population of outsiders, would in turn be protected. Any suggestion that the legislation would disproportionately impact racialized migrants failed to recognize the freedom of these individuals; they have chosen to engage in serious criminality, have proven themselves to be bad and dangerous, and must therefore be removed.

Jurisdiction and Judicial Discretion

The final set of rationalizations for the FRFCA focused on judicial conduct. According to Conservative parliamentarians, migrants were able to maintain their access to the appellate process because judges in the criminal court were sentencing in a way that preserved the right of appeal. The legislative amendments were thus required to conduct the conduct of judges by limiting their ability to apply sentences that would protect migrants from immediate removal. With the proposed amendments, the jurisdictional authority to decide on removal would be confirmed as squarely with decision makers in the immigration system.

Discourses of judicial intervention promoted in support of this rationality drew on knowledge of sentencing decision making. Conservatives held that courts were considering migrant status when rendering a sanction. Sentences were then being lowered to protect migrants from deportation. These decisions were thus undermining the administrative program of

removal. Judicial consideration of immigration consequences was confirmed by Minister Kenney during his first speech before the House of Commons on 24 September 2012:

> We have all witnessed on a regular basis serious crimes that receive a minimum penalty, whether by judge or jury, of a minimum of two years. However, we have noticed across the country that courts are often using two years less a day to penalize individuals for their crime. At the same time it obviously changes the aspect of that criminal conviction, because it is less than two years, and therefore the scope of the current legislation does not allow us to pursue those individuals for the purpose of getting them out of the country and deporting them. Therefore, we would lower that threshold of two years down to six months... (Kenney, 24 September 2012).

Conservative Member of Parliament David Wilks added to Kenney's argument, stating that prosecutors were assisting migrants in avoiding potential immigration consequences by proceeding summarily in court on hybrid offences,[53] thereby allowing judges to impose lower sentences for offences where convictions are applied. The Conservative Member held that this approach resulted in a perversion of the immigration process, where migrants convicted of "serious" offences (defined by the Member as encompassing sexual assault, robbery, and fraud) were not being deported because they had been prosecuted summarily and thus received a sentence that protected their right of appeal, thereby allowing them to avoid removal (Wilks, 24 September 2012).

Limitations on access to appeal were hoped to have the indirect but corresponding effect of constraining judicial ability to devise a sanction that would prevent a migrant's (at least immediate) exclusion. Conservatives were here attempting to reconstitute jurisdictional authority

[53] Note that pursuant to subsection 36(3)(a), hybrid offences are always treated as indictable offences under the IRPA, regardless of how they were prosecuted. This statement from Member Wilks is thus inaccurate.

to decide on deportation that had been contested by sentencing decisions. The amendments to definitions of serious criminality under s. 64 of the IRPA would facilitate sovereign power by not only restricting the ability to appeal inadmissibility decisions in the administrative system, but also by (indirectly) governing judicial decision making.

Legal limits on access to appeal draw a boundary line around the authority to decide on removal. By limiting access to appeal, the FRFCA also operates to constrain the ability of judges to impose sentences that would protect migrants from immediate removal. The conduct of judicial conduct in turn ensures that the decision to remove lies solely with immigration actors. While judges never retained the ability to speak in the name of the law on removal, jurisdictional lines are reaffirmed by the indirect constraints on the legal power of judges.

These jurisdictional games demonstrate the tensions between the immigration and criminal punishment systems. While there are certainly governance strategies and processes that unfold across the assemblages of these domains, including where judges consider immigration information at sentencing, distinctions in practices in these systems persist. Judges ultimately cannot decide to deport, for example, which is acknowledged in the discourses promoted in support of the FRFCA. At the same time, sentencing decisions do impact the decision making of immigration actors. By limiting access to appeal, the FRFCA addresses potential impediments to administrative decisions to deport introduced via the criminal process by indirectly restricting judicial decision making. What this analysis thus demonstrates is the dynamic and complex relationship between the immigration and criminal punishment systems. While there are practices that occur across the assemblages of these systems, there are critical distinctions in the operations in each domain, including in their authority to decide on removal and sentence.

Curiously, members of the Conservative party argued that despite the proposed limits on the right of appeal, migrants would retain access to due process protections because criminal courts would continue to hear the personal circumstances (including their potential deportation) of foreigners at sentencing. The limits on access to appeal in the immigration system were thus not introducing unfairness in the removal process. They would simply eliminate the duplication of work across these systems, with humanitarian factors being now only considered in the criminal domain. This was expressed by Minister Kenney during debate of the Bill before the CIMM on 29 October 2012:

> A foreign national who is subject to the inadmissibility provisions of IRPA will have their day in a criminal court. They will benefit from all of the normal due process and natural justice of our criminal courts before they receive a sentence of, say, six months or more. They can even appeal that decision, so they have natural justice (Canada, 29 October 2012).

Reynaldo Reis Visarra Jr. Pagtakhan, an immigration lawyer acting as a witness in favor of the Bill, similarly argued that courts hear personal circumstances before rendering a sentence. As a result, the limitations on the right of appeal in the immigration system would not result in the loss of any due process protections:

> The immigrant who commits the crime, the convicted criminal, has the ability to argue at their sentence when a criminal judge, a Court of Queen's Bench judge, can take into account the victim impact statement, can take into account the issues of all the things they should be taking into account in sentencing, and also the particular circumstances of the individual. When you take into account all of those things, that is essentially what the immigration appeal does. It's not that we're taking away the rights to state what a circumstance of the individual

> criminal is. They can do that and the courts of appeal will recognize that (Canada, 7 November 2012).

When asked whether "serial criminals convicted of serious crimes" should retain the right of appeal, Mr. Pagtakhan stated:

> No, they have the right to discuss these issues at sentencing… Let the sentencing judge make the decision. The sentencing judge is hearing the evidence of the actual crime, the evidence of the police officers, the witnesses, the victims. At sentencing the judge can hear the argument of counsel for the defence… That is where the protection lies, and there is no necessity for an additional appeal. The protection is already there (Canada, 7 November 2012).

This discursive move to counter arguments pointing to the limits on due process protection introduced by the FRFCA treats the analysis conducted by the criminal courts and immigration tribunals as essentially indistinct. Conservatives are here reproducing broad arguments of overlap between these domains (Stumpf, 2006). This is particularly clear in the following statement by Conservative MP Rick Dykstra, made on 5 November 2012 during debates before the CIMM in reply to Robin Seligman, an immigration and refugee lawyer who appeared as a witness:

> It seems to me you're suggesting that when mental health becomes an issue with respect to the crimes that may have been committed by the individual, a person's ability to appeal or be heard fairly isn't within our justice system, that it's at the IRB. I'd like to get some clarification from you on that. I have to say that I disagree with you on that point. I think fairness is involved. I think judges, and juries when they are there, take into account someone's personal capacity to understand the crime he or she has committed (Canada, 5 November 2012).

The rationale being promoted in these statements is that the analysis of personal circumstances conducted in the criminal court is effectively the same as the analysis undertaken at the IAD. It is accurate that both criminal courts and the IAD consider personal factors in the process of sentencing and deciding on removal, respectively. However, the focus of their considerations are distinct; while courts review personal circumstances in individualizing their sentences, the IAD reviews these factors to determine the hardship of removal for the migrant (Berger, 2020; *Ribic v Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL)). To remove access to appeal on the basis that the criminal court conducts a similar analysis to the IAD thus represents an inaccurate conceptualization of the processes undertaken in these spaces.

Curiously, justification for the limitations on the right of appeal pointed to criminal court consideration of deportation and the need to curtail judicial practices at sentencing that resulted in migrant protection against immediate removal. The courts are concomitantly promoted as a legal space capable of hearing a migrant's personal circumstances, thereby acting as a proxy for the IAD, while also being constrained in their ability to consider removal at sentencing via the FRFCA. The logical hoops through which we must jump to follow this line of argument are numerous and tiring. Conservatives are effectively imagining the criminal courts as holding the authority to hear about personal circumstances (including deportation), but not partake in practices of removal.

Opponents of the FRFCA countered these discourses by citing information to suggest that it is in fact not settled that courts can consider immigration status. During debates before the CIMM on 28 November 2012, Liberal MP Kevin Lamoureux cited case law from the courts in Alberta to support this position:

> Alberta does not consider immigration implications when regarding a decision. I think that's a very important thing to recognize as a committee. In fact the decision states in paragraph 23, "Furthermore, it would be a strange and unfortunate legal system wherein a non-citizen could expect to receive a lesser sentence than a citizen for the same crime. No such distinction should be countenanced." I bring this up because in deliberating the six-month sentence many government members incorrectly contend that all criminal courts take into consideration immigration when making a decision, and therefore, the deportation change to six months is seen as being warranted. As many of you have now seen the correspondence, as it was sent to all committee members, this notion that immigration matters are considered across the board in Canada is incorrect, and I fear it will cause members to pass a clause that ultimately is based at the very least on a glaring falsehood (Canada, 28 November 2012).

Confirmation of this interpretation was provided by witnesses before the CIMM. Distinctions between sentencing and the administrative appellate process were also highlighted. For example, Mr. Richard Goldman, Refugee Protection Coordinator, stated the following:

> On this issue of whether judges are prepared to look at immigration considerations, it seems to me I've read contrary jurisprudence on this. If the committee is going to base its conclusions on the idea that judges across Canada are going to fully weigh humanitarian immigration considerations before rendering a sentence, I think you had better get very solid information on that before you go forward (Canada, 7 November 2012).

By contesting the similarity between the immigration and criminal systems, these witnesses were importantly providing knowledge to confirm the significant human rights violations that could result from the passage of the FRFCA. Robin Seligman made the following statement on the distinction between these domains before the CIMM:

> The benefit and the beauty of the immigration appeal division is that they can look at all the circumstances, not only the mental illness, if it comes up at that time. They can look at the best interests of children, the length of time they've been in Canada, and all those things. Really, it's not the area a criminal court should be looking at (Canada, 5 November 2012).

Andrew Brouwer, Representative for the Canadian Council for Refugees, stressed the potential consequences of the FRFCA in his speech before the CIMM:

> That denial of access to any humanitarian and compassionate consideration, in our view, is inconsistent with fundamental Canadian values of fairness and justice, particularly in those cases where we have very long-term permanent residents of Canada facing deportation. These are circumstances where it's exile, practically speaking, not deportation. They have no direct contact, no connection, anymore with the country of origin (Canada, 29 October 2012).

Altogether, these intervenors reaffirm the distinctions in processes between the courts and immigration system. While the courts do consider the circumstances of individual offenders in rendering a proportionate sentence, it was not confirmed at this time that they could alter a sanction based on the specific review of immigration status. The discourses of Conservatives on the need to govern judges were thus demonstrated to be based on incomplete and selective knowledge drawn from across the criminal assemblage. Further, given these distinctions, the concomitant effort to equate the consideration of personal circumstances in the courts with the immigration appellate process was undermined. As will be further demonstrated in Chapter 4, criminal actors do not have the authority to decide on removal. They thus are not clearly and absolutely engaged in the same considerations undertaken by the IAD.

Opponents to the FRFCA did note, however, the potential impact of the legislation on the courts. It was specifically argued that the FRFCA would contribute to increasing the backlog of

criminal cases, given that migrants would seek to contest any charges to avoid immigration consequences. This was stressed, for example, by Jinny Jogindera Sims, then MP for the NDP, during consideration of the Bill by the CIMM on 24 October 2012:

> Do you agree that removing the right to an appeal could in fact lead to even more judicial backlogs? It would remove any incentive for the accused to plead guilty, thus prolonging court proceedings (Canada, 24 October 2012).

The impact of the legislation on court processes was further suggested by Robin Seligman, who stated the following during their presentation before the CIMM:

> On a related matter, I was going to add that I have spoken to the criminal bar on this and they're very concerned because right now, as I said, 80% of cases are pleaded to. Pleading will stop in these cases because they could not take a chance. There's going to be a backlog. There are going to be *Charter* issues that are raised with delays in hearings. They're very concerned about it because there's absolutely no incentive to plead (Canada, 5 November 2012).

While processes are carried out across the immigration and criminal punishment domains, with decision making in one system having potentially significant impacts on the other, these systems remain distinct and even in tension. Interestingly, the Conservative arguments on consideration of humanitarian and compassionate factors in the criminal system confirm that while migrants are considered foreigners in the nation, their level of inclusion is shifting and varied. In the criminal system, they retain access to legal rights, including the right of appeal. They are not expelled from the law until they reach the administrative system, where they are subject to a deportation order. This suggests that the racialized and colonial effort to remove outsiders from the population depends on the jurisdictional separation between the administrative

and criminal systems. Without the limitation on access to appeal, and the concomitant constraints on judicial decision making, the racialized project of removal can be undermined.

Conclusion

The FRFCA received Royal Assent on 19 June 2013, bringing into effect the expansion to the scope of offences deemed "serious criminality" under section 64 of the IRPA. The three distinct rationalizations explored in this chapter supported the direction of sovereign power promoted in this legislation towards the expulsion of migrants from Canada, shaped by both a biopolitical concern for the population and a desire to conduct the conduct of judges.

This chapter contributes to border criminological scholarship through its examination of the promotion and passage of the FRFCA. It demonstrates, for example, the sharing of knowledge and discourses across intersecting assemblages of the immigration and criminal systems in support of the FRFCA. Parliamentarians drew on knowledge of migrant offending, including through the testimony of criminal actors. The FRFCA was additionally directed by an effort to conduct the conduct of judges, thereby influencing processes of sentencing in the assemblage of the court. Yet, these efforts were further instituted via shifts in immigration law that reaffirm distinctions in authority between the immigration and criminal justice systems. The relationship between the immigration and criminal systems appears from this analysis to be nuanced and complex. The next chapter of this dissertation adds to this examination by considering how judges navigate sentencing migrants following the passage of the FRFCA.

Chapter Four: Jurisdictional Contests in Sentencing Migrants

Collateral consequences…must not be permitted to dominate the exercise. The tail must not wag the dog so to speak.[54]

Whether judges consider collateral immigration consequences, and if they lower terms of imprisonment to preserve the administrative right of appeal, were hotly contested during debates of the FRFCA. For refrence, collateral consequences of conviction, including removal, are defined as civil outcomes of sentence (Travis, 2003). They are not punishment for the offence committed; instead, they are imposed subsequent to conviction and (in the case of migrant removal from Canada) based on an assessment of sentence. Given the significance of these consequences, it is critical that any additional impact of conviction and sentence be considered by judicial actors (Kanstroom 1999-2000).

As explored in the preceding chapter, Conservative politicians argued that the restrictions on access to appeal introduced by the FRFCA were necessary given judicial interference in the removal process. At the same time, supporters of the FRFCA held that the amendments would not result in an infringement on the rights of migrants given that their personal circumstances could and would be considered by judges in the criminal courts. Both positions were contested by opponents of the legislation, who held that the consideration of collateral consequences was not an established practice in the court system and that sentencing involves distinct processes from those undertaken in administrative appellate proceedings.

This chapter enters this debate by critically exploring whether judges retain the jurisdictional authority to consider immigration outcomes at sentencing. Through an analysis of sentencing decisions rendered pre-FRFCA, this chapter demonstrates that jurisdictional contests

[54] *R v. Urbe*, 2013 ONSC 6830

over the decision to remove were not settled when that legislation was introduced in Parliament. Courts had instead been in a long term and ongoing debate over whether (and how) deportation could be considered at sentencing. These questions of jurisdictional authority were finally addressed by the Supreme Court through its consideration of *R v. Pham* (2013 SCC 15), which was heard concurrently with debates of the FRFCA. I examine the docket materials submitted to the Supreme Court in support of this case and the final decision rendered to demonstrate how the various court actors involved navigated the questions of judicial authority to consider immigration outcomes at sentencing. I argue that the decision in *Pham* ultimately introduced a jurisdictional tightrope of authority, directing judges to both review collateral consequences in practice and to ensure that any decision rendered does not trammel on the authority of immigration actors to decide on deportation.

The chapter ends with an investigation of how judicial actors deploy the Supreme Court's guidance following the passage of Bill C-43. The analysis is informed by an analysis of case law and interviews I conducted with judicial actors. I demonstrate that judges generally follow the guidance established in *Pham*, tying their consideration of collateral immigration consequences to their authority at sentencing to apply criminal law principles. I argue that these practices of jurisdiction confirm the complexity of the relationship between the immigration and criminal systems in Canada; while considerations of removal may result in the application of sentences that prevent (or at least delay) deportation, the review of collateral consequences is consistent with the authority of judges at sentencing to consider personal circumstances in support of the effort to apply an *individualized* sanction. Recognition of these spaces of tension is critical for identification of opportunities for resistance to the program of removal. I contend though that jurisdictional contests that unfold across these legal assemblages nevertheless remain unsettled,

and some judicial actors continue to position the consideration of immigration outcomes as outside of their authority.

Jurisdiction, Borders, and Law

The analysis in this chapter adopts a conceptualization of jurisdiction as functioning to declare "the existence of law and the authority to speak in the name of the law" (Dorsett & McVeigh, 2012, p. 4; see also Pratt & Templeman, 2018; Valverde, 2009). The wielding of machineries of jurisdiction confirm legislative divisions of authority, with actors either asserting or refusing their legal power (Dorsett & McVeigh, 2012; Moffette & Pratt, 2020). These technicalities of jurisdiction are varied; this chapter is specifically concerned with the mechanisms of precedent and categorization (Dorsett & McVeigh, 2012). Through interpretation of legislation and legal reasoning, precedent functions to transmit authority. Legislation is considered and instructions are provided on how to apply relevant law in subsequent similar cases. Through precedent, then, the authority to decide in one situation is transmitted to another. Categorization comparatively operates to craft lawful relations by ordering law into distinct domains (Dorsett & McVeigh, 2012). Following Moffette and Pratt (2020), in the context of processes at the intersection of immigration and criminal punishment, categorization can be understood as establishing jurisdiction by confirming "what belongs to immigration law, criminal law, or other legal regimes" (p. 7). Finally, through this sorting, jurisdictional limits "simultaneously but implicitly determines *how* something is to be governed" (Valverde, 2015, p. 84). The "*how"* of governance is settled specifically via "the allocation of powers to different jurisdictions with distinct institutional habits and logics of governance" (Valverde, 2015, p. 84). The categorization of jurisdiction to deport as lying with immigration actors, for example, facilitates processes to support removal that have been established in that legal space. If authority to deport was

comparatively assigned to criminal actors, this would require a renegotiation of processes of removal to fit within practices of the court, where different legal principles, knowledges and discourses guide operations.

This study works to unpack the jurisdictional contests that unfold across the Canadian immigration and criminal systems. As confirmed in the preceding chapter, the FRFCA functioned to confirm the jurisdictional authority around decision making on deportation for criminality. The program of removal was categorized through this legislation into the domain of immigration. While this jurisdictional work was rationalized as constricting the ability of judges to interfere with the governance of migration, the analysis herein demonstrates that judicial actors continue to promote precedent confirming the authority to consider collateral consequences in practice. This introduces space for resistance to the process of removal where judges lower sentences to protect a migrant's right of appeal in the immigration system. Still, despite authorizing judges to review deportation in practice, this precedent does not conflict with the categorization of authority introduced by the FRFCA. Instead, precedent directs judges to examine migrant circumstances in the context of their jurisdictional authority to sentence under the *Criminal Code.*[55]

This analysis draws from scholarship that moves beyond traditional conceptions of jurisdiction and territory as linked to land (Dorsett & McVeigh, 2012; Gilbert, 2019; Maillet, Mountz & Williams, 2018; Pratt & Templeman, 2018; Sassen, 2006; Valverde, 2009). Modern conceptions of sovereignty tie authority over a population to presence in the geographical territory (Dorsett & McVeigh, 2012). Yet, as explained by Dorsett and McVeigh (2012), "territory is a legal concept that may or may not have a direct relationship to land" (p. 40). This is particularly significant when we consider how jurisdiction is linked to borders, for example, and the sovereign

[55] See sections 468 and 469 of the *Criminal Code of Canada*, 1985, c. C-46

authority to decide who can enter and remain within a nation. Like the concept of territory, scholars have expounded on the shifting nature of the border beyond the geographical boundaries of the nation (Arbel, 2013; Gilbert, 2019; Pratt, 2005). As explained by Arbel (2013), the border is not fixed and static but is "a moving barrier that is legally distinct from Canada's cartographic perimeter" (p. 68). Locating the border requires a consideration of institutional practices that produce inclusion and/or exclusion within the state, at the boundary of the nation, and/or outside of the cartographical limits of the state (Arbel, 2013). This includes processes of jurisdiction under review in this study that reconfigure the relationship between sovereignty, authority, and territory, confirming the ability of administrative actors operating *within* the state to decide on removal (for example), thereby moving the border into the nation (Pratt & Templeman, 2018).

Tracing Authority Across Assemblages

Valverde (2015) argues that scholars must consider how machineries of jurisdiction specifically function to direct the interaction amongst heterogenous governance programs unfolding within and between legal spaces. This includes programs of removal and processes of sentencing (Moffette & Pratt, 2020). As further clarified by Mawani (2018), these analyses of jurisdiction facilitate a tracing of the "multiple and competing foundations of law" and "the limits of legal control" (p. 118; see also Li, 2007, on limits to governance processes unfolding across interacting assemblages).

This investigation builds on these significant insights by unpacking the ways in which jurisdictional contests unfolding across the immigration and criminal punishment systems function to govern the enactment of the program of removal. The jurisdictional games that directed the FRFCA drew on knowledge from the criminal system on sentencing practices to support the (re)categorization of deportation. Categorization functions here as a tool of

jurisdiction that positions the governance of removal squarely within the administrative realm and strictly under the authority of immigration actors. Following the enactment of the FRFCA, judicial actors within the criminal system continue to engage in these jurisdictional games, however. While these actors acknowledge the sorting introduced by that legislation, thereby contributing to processes of jurisdiction that separate the governance of removal, they also draw on precedent that establishes their own authority to consider collateral consequences at sentencing, referencing knowledge from across the immigration system in support of the effort to individualize the sanction imposed. It is at this point of intersection of the multiple, interweaving legalities and jurisdictional contests in the space of the court that the limits of legal efforts to govern removal are revealed.

Judicial Considerations of Removal Pre-2013

Legislation governing migrant removal for criminality has been present in Canada since as early as 1905. The Minister overseeing immigration has consistently been imagined therein as holding the jurisdictional authority to decide on deportation based on criminality. Legislative amendments to immigration law were introduced in 1910 that specifically prohibited judges from interfering with decisions on deportation made by the Minister. As explained in Chapter 2, these changes followed a series of court decisions overturning orders of removal issued by administrative actors. The amendments operated to confirm authority around the governance of removal, with the power to wield the tool of deportation being categorized as rightfully within the jurisdiction of the federal government. Criminal courts could thereafter only intervene to review immigration decisions where it was determined that the Minister had exceeded the law or violated a procedural requirement (i.e., in the manner of issuing the order itself) (Roberts 1988,

p. 198-199). This thus prevented the court from continuing to interfere with deportation practices.

Despite these limits on the authority to deport, whether courts could consider immigration processes at *sentencing* (and before administrative examination of deportation) continued to be debated in practice. Beginning in the early twentieth century, courts upheld limitations on judicial jurisdiction to intervene in removal proceedings pre-issuance of a deportation order by distinguishing between penalties imposed in the criminal system and deportation. This is exemplified in the case of *R v. Alamazoff* (31 CCC 335 – 30 Man R 143 – [1919] 3 WWR 281 – 47 DLR 533). The defendant in this case was a citizen of Russia who was detained in June 1919, having been accused of creating or attempting to create a riot or public disorder in Canada and of having, without lawful authority, assume powers of government in the city of Winnipeg. The defendant was specifically subject to *immigration* detention and was awaiting a decision on whether he would be deported for his alleged criminality. Alamazoff thereafter applied to the criminal court for review of his detainment via a writ of *habeas corpus* in July 1919.

In support of this application, defence counsel made the argument that deportation proceedings are criminal, given that orders for removal are issued following charge and sentence (*R v. Alamazoff*, p. 145). The court replied, however, that a reading of the *Immigration Act* could not sustain this conceptualization because "the object and purpose" of administrative removal "proceedings is not to punish for an offence against the law of Canada" (*R v. Almazoff*, p. 145). Instead, these proceedings "ascertain whether or not the conditions upon which the alien was permitted to enter and reside in Canada have been complied with by him or whether they have been broken" (*R v. Alamazoff*, p. 145). These statements are consistent with the narratives of

privilege and right promoted throughout debates of immigration law in Canada;[56] migrants are specifically positioned here by the court as outside of citizenship, having only the privilege (and not the right) of remaining in Canada. Where they engage in criminality, migrants offend the norms that govern their ability to stay in the country. The sovereign is thereafter able to use their authority to decide on exclusion. This power does not sit with the criminal courts, who are responsible for applying punishment for the offence committed. Through these discursive moves, the court confirms the categorization of deportation as under the authority of the immigration system.

The contention that criminal penalties and deportation are separate tools was reiterated in *Mah Shin Shong* in 1923. The defendants in this case were convicted of infractions under the *Opium and Narcotic Drug Act.* The legislation specifically held at subsection 2 of section 5A that, following conviction and completion of any term of imprisonment, a migrant subject to the law would be kept in custody and deported. The defendants applied for review of their detainment to the court. Like in *Alamazoff,* the court found that they had no jurisdiction to consider the detainment of the defendants for deportation. Detention was determined to be imposed in addition to, and thus separate from, the penalty for the offence applied by the court.

Removal was also directly connected to "undesirability" in this case, by the dissenting judge, Justice Galliher. Galliher determined that the defendants had rendered themselves undesirable by engaging in criminal activities. According to the court, the sovereign state, which held the power to decide on inclusion and exclusion, would base their deportation decision on an assessment of desirability. This logic associating desirability with deportation was positioned as

[56] See Chapters 2 and 3 of this dissertation. The deployment of these narratives within the space of the court further confirms that these conceptions of foreignness, privilege and right were (and are) widely accepted in the Canadian context.

undermining the characterization of removal as "punishment," since the decision to deport was not based on the criminal act. The court stated that:

> while it is true the offender has placed himself in this category by committing a criminal offence, and in one sense it might be said to be an additional punishment, in the true sense I think it is not. It is, as I view it, rather that, the offender has by committing the act complained of, created a status so that under the Act he may be regarded as an undesirable, and a subject for deportation (*Re Mah Shin Shong; Re Sing Yim Hong*, 39 CCC 401-32 BCR 176 - [1923] 4 DLR 844, p. 404).

Knowledge of the distinction between deportation and penal consequences was later confirmed by the Supreme Court of Canada in 1933. The court explained that deportation is

> designed to afford the country some protection against the presence here of classes of aliens who are referred to in the statute as "undesirable". They are not attached to the criminal offence as a legal consequence following *de jure* upon conviction for the offence or imposable therefor at the discretion of the judicial tribunal. They flow from an administrative process (Reference as to the effect of the Exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings, 1933 S.C.R. 269, para 37)

These discursive moves separating punishment and deportation that guide the use of precedent entrench the separation of authority to remove into the neatly defined (and distinct) legal space of the immigration system. Yet, in acknowledging that the administrative regime holds the authority to deport, the courts are here engaging in the game of jurisdiction. They wade into the discussion of authority to clearly articulate how migration *should* be governed. They justify the established divisions of authority based on their discursive interpretation of deportation (the "*how*" of governance) as a sovereign technology that is wholly separate from criminal penalty.

Immigration and criminal punishment systems are imagined in these court cases as distinct. The authority for the enactment of the program of removal is clearly delimited to the immigration domain, while criminal courts are responsible for conviction and sentencing. In rendering sentencing decisions, however, courts have reached into the legal assemblage of the immigration system to draw on rationalities for the program of removal. Courts repeat the racist narratives of desirability, foreignness, and privilege propagated in the immigration system to justify their decisions that uphold the authority of the administrative system to exclude migrants convicted of criminal offences. The relationship between the immigration and criminal system is thus dynamic and interweaving. While lines of authority separating the immigration and criminal system are fortified through these decisions, discourses from the immigration domain are accessed by court actors to direct practices of sentencing unfolding in the space of the court.

The confirmed lines of jurisdictional authority separating these domains were renegotiated in the 1970s when courts began to show a willingness to use penal sanctions to protect migrants from deportation. These shifts were spurred by the removal of provisions from immigration legislation in 1967 that explicitly restricted judicial consideration of administrative removal decisions (Haigh & Smith, 1998; see Chapter 2). In reviewing potential immigration outcomes, courts continued to uphold the jurisdictional lines that had been set by precedent and that assigned authority for removal to administrative actors. They nevertheless justified their consideration of deportation at sentencing by positioning immigration outcomes as relevant *consequences* of conviction. These discursive moves reshape conceptions of deportation and criminal penalty to support judicial review of removal in practice.

For example, in *Regina v. Melo* (1975 OJ No 723), the Ontario court conditionally discharged Melo based on the recognition that while the defendant's offence was minor

(shoplifting), the immigration consequences of conviction would be grave. The use of the term "consequences" stands in as a marker for jurisdictional distinction; consequences are again not criminal penalties themselves but follow conviction (and since introduction of the IRPA, sentence) (Lafollette, 2005; Travis, 2003). Consideration of immigration outcomes through the lens of "consequences" would thus not interfere with the authority to remove since courts are not deciding on deportation. Instead, courts are using their authority to convict and sentence to consider the impact of criminal sanctions on the migrant, who faces potential removal. Jurisdictional limitations were in fact confirmed by the court where it wrote that the fact that a migrant may be deported is not in itself "a sufficient ground for granting a conditional or absolute discharge. It is one factor which is to be taken into consideration by a trial Court, in conjunction with all of the circumstances of the case" (*Regina v. Melo*, p. 516).

The court in *Melo* participates in the game of jurisdiction that is unfolding between the immigration and criminal system. Authority to deport continues to be bracketed and discursively limited to the administrative state based on distinctions between deportation and criminal penalty. The court does not rely on references to privilege and right within this discussion, however. Instead, the relationship between criminal punishment and removal are renegotiated, with deportation being more directly connected to sentencing through recognition of the practical ties between decisions on punishment and the program of removal. These discourses importantly do not unsettle the association of desirability, criminality and privilege that rationalize the sovereign authority to remove. They simply introduce knowledge of the associations between these practices to facilitate the judicial consideration of deportation.

The shifts in rationality brought by these new and novel discourses and knowledge of deportation and sentencing then direct the use of the tool of categorization by the court in *Melo*;

the court confirms the authority to remove as belonging to the state, while also recognizing for the first time how processes that inform the program of removal interweave across the heterogeneous assemblages of the criminal system to intersect with sentencing practices. It is through these discursive moves that the court is ultimately able to challenge the previously imposed limits on judicial authority established in precedent that were guided by distinct rationalities of difference between deportation and criminal punishment. The court in *Melo* is then able to undermine the program of removal by imposing a conditional sentence following consideration of knowledge of deportation.

The approach in *Melo* was repeated in subsequent cases, although variability remained in the way that judges deployed their discretionary authority to justify the consideration of immigration consequences. Decisions on migrant cases drew from traditional sentencing principles, for example, by treating immigration consequences as a "mitigating" factor (*R v. Johnson and Tremayne* 1970 4 C.C.C. 64, *Regina v. Sullivan* 9 C.C.C. (2d) 70, *R v. Critton*, [2002] O.T.C. 451), or as relevant to the application of principles of deterrence (*Regina v. Braithwaite,* [1996] O.J. No. 1650) and/or rehabilitation (*R v. Bratsensis*, (1974) 31 C.R.N.S. 71).

This guidance was not consistently followed, however, and some courts continued to render decisions refusing to consider immigration consequences. Like judgments issued pre-*Melo*, these courts justified their decisions based on a limited jurisdictional authority, referencing rationalities highlighting that the power to deport is held by actors in the administrative system. For example, in *R v. Fung* (1973 ALTASCAD 33), the Appellate Division of the Supreme Court of Alberta promoted once again the oft repeated line that being in Canada is a "privilege and not a right", stating that

> the immigration authorities are entitled to know that the appellant committed the offence. They are entitled to take that into consideration in determining whether to allow the appellant to remain in Canada (para. 1).

According to this decision, the state holds the jurisdictional authority to deport, and the criminal system cannot decide in a way that would undermine this duty to govern migration. The affirmation of these jurisdictional lines relies on historical narratives of migrant exclusion, being guided by racist logics of privilege and right to support the direction of sovereign power towards deportation. This position was further confirmed in *R v. Kerr* (18 Man R(2d) 230) where the Manitoba Court of Appeal determined that "the public interest in recording a conviction is not ascended by the disproportionate penalty of deportation" (see also *R v. Smith*, 105 O.A.C. 141, and *Regina v. Lasala*, [1999] O.J. No. 1322).

Greater consistency in rationalizing the review of deportation does emerge following the passage of the IRPA in 2002. This legislation first introduced provisions allowing for the automatic deportation of migrants where they were determined to be inadmissible following conviction and sentence, without access to appeal based on length of imprisonment. Deportation was firmly categorized through this legislation as under the authority of immigration actors. Precedent for the approach to sentencing migrants in cases following passage of the IRPA was then set in the appellate decision of *R v. Hamilton* (2004 O.J. No. 3252). The defendants in this case, Ms. Hamilton and Ms. Mason, had been convicted of trafficking in a narcotic. They received conditional sentences of six months and two years, respectively (*R v. Hamilton*, [2003] OJ No 532 (QL)). Ms. Mason, a permanent resident of Canada, was rendered inadmissible and deportable without access to the appellate process by this decision. When the Crown appealed

(arguing that the sentences were unfit given the seriousness of the offence), immigration consequences were raised for consideration.

In presenting the decision on behalf of the Ontario Court of Appeal, Justice Doherty reviewed the effect that a change in sentence would have on Ms. Mason's immigration status. The court reiterated the finding in *Melo* that immigration outcomes are relevant considerations (but not determinative) at sentencing:

> The sentencing process cannot be used to circumvent the provisions and policies of the Immigration and Refugee Act. As indicated above, however, there is seldom only one correct sentencing response. The risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender… (*R v. Hamilton,* para. 156).

Immigration consequences were specifically held by the court to be relevant considerations in the process of individualizing a sentence. Individualization is fundamental to the principle of proportionality. Traditionally, proportionate sentencing practices required that judges consider both the degree of seriousness of the offence and the culpability of the offender when rendering a sanction (718.1 of the *Criminal Code of Canada)*. Processes of individualization are here tied to assessments of blameworthiness (*R v. Ipeelee,* 2012 SCC 13, para 37). More recently, however, judges have directed their discretion towards a consideration of the personal circumstances (including aggravating or mitigating circumstances, and objective or subjective factors) of the individual being sentenced (Berger, 2020). According to Berger (2020) "this form of individualization involves drawing close to the offender…to reckon with the offender's experiences of suffering as a consequence of their wrongdoing," directing "attention to the other side of the proportionality equation: a sensitive, contextualized assessment of what counts as part

of "a sentence" or punishment, and of its true severity" (370). The court in *Hamilton* adopts this contemporary approach to individualization and proportionality. Consideration of immigration consequences as individual circumstances was thus recognized as relevant in assessing sentence severity to ensure proportionality.

The adoption of this approach to individualization does not allow, however, the application of sanctions that offend the principles of parity, rank ordering and spacing. Parity is included as a sentencing principle under subsection 718.2(b) of the *Criminal Code of Canada*. It requires that similar offences receive similar sanctions.[57] Rank ordering refers to the fact that more serious crimes should be treated more seriously and, relatedly, spacing requires that much more serious offences be treated much more seriously. Thus, sanctions must be "relatively" similar to be proportional (Morley, 2006; see also *R v. M (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269; for an academic consideration, see Lafollette, 2005; Von Hirsch & Wasik, 1997). In *Hamilton*, the court directed that while immigration consequences may be considered in individualizing a sentence, a reduction in sanction may only be applied if the final sentence imposed remained fit, as follows:

> If a trial judge were to decide that a sentence at or near two years was the appropriate sentence in all of the circumstances for Ms. Mason, the trial judge could look at the deportation consequences for Ms. Mason of imposing a sentence of two years less a day as opposed to a sentence of two years. I see this as an example of the human face of the sentencing process. If the future prospects of an offender in the circumstances of Ms. Mason

[57] It was clarified in *R. v. McDonnell*, 1 S.C.R. 948 that appellate courts must set out starting points and ranges of sentences for offences as guidelines for trial judges. It was then confirmed in *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79, 48 C.R. (3d) 154 (Alta. C.A.) that, beginning with the starting point provided, courts can vary a sentence within the set range based on personal circumstances. If the sanction proposed fits with the guidelines set by the appellate court, this would guarantee that sentencing remained an "individualized" process while minimizing disparity and ensuring proportionality.

> can be assisted or improved by imposing a sentence of two years less a day rather than two years, it is entirely in keeping with the principles and objectives of sentencing to impose the shorter sentence. While the assistance afforded to someone like Ms. Mason by the imposition of a sentence of two years less a day rather than two years may be relatively small, there is no countervailing negative impact on broader societal interests occasioned by the imposition of that sentence (*R v. Hamilton,* para 158).

The court in *Hamilton* pushes the game of jurisdiction forward. It recognizes the categorization of the authority to deport as established in the IRPA, thereby upholding legislative divisions of jurisdiction in practice. It specifically contends that the court may not "circumvent" the legal provisions for removal established in the IRPA. At the same time, the court contends that judicial authority at sentencing may be guided towards consideration of immigration outcomes within the process of applying criminal law principles. Through this process, sentences may be applied that protect migrants' right to appeal a deportation order, although the final sanction imposed must remain fit.

The court in *Hamilton* thus confirms the precedent set by *Melo* that allowed for judicial intervention in the deportation process through the authority held by judges at sentencing, without disturbing the jurisdictional boundaries between the immigration and criminal domains. The court does not explicitly rely here on distinctions between immigration and criminal penalties, however. Instead, the court introduces a new approach to rationalizing moves in the game of jurisdiction by directly connecting removal to judicial authority to apply criminal law principles at sentencing. While the immigration and criminal systems are distinguished based on jurisdiction, with immigration actors holding the authority to remove, knowledge of deportation may be accessed by court actors in the process of using their authority at sentencing. Through

this process, judicial actors may disrupt the program of removal, demonstrating the limits of legal governance directed towards criminal migrants. Again, this confirms the dynamic and complex relationship of the immigration and criminal systems in Canada.

Following *Hamilton*, courts generally continued to view migrant circumstances as relevant considerations when developing an individualized sanction. Sentences would be reduced to protect migrants from deportation through this individualization process but only if the sanction requested would not introduce disparity, thereby rendering the sentence disproportionate (*R v. Arganda*, 2011 MBCA 54; *R v. Kanthasamy*, 2005 BCCA 135; *R v. Leung*, 2004 ABCA 55; *R v. Morgan*, 2008 NWTCA 12). Still, though, variability remained in application of precedent across Canada in cases involving migrants. Appellate courts in particular would refuse to vary a sanction, even within a *de minimus* range, unless the appellant could demonstrate that the original sanction was "unfit" (*R v. Ariri*, 2010 ONCA 363; *R v. Barkza*, (2011) ABCA 273; *R v. Belemly*, 2010 ABCA 98; *R v. L.M.*, [2008] S.C.J. No. 31).

The FRFCA was presented to Parliament before these debates over court authority to consider immigration consequences in practice were settled at the SCC. As explored more fully in the preceding chapter, Conservatives promoted the FRFCA as reaffirming that the authority to decide on deportation lies with immigration actors. These Parliamentarians argued that these divisions of authority had been blurred by sentencing decisions like those in *Hamilton* and *Melo*. The limitations on access to appeal introduced by the FRFCA were positioned as facilitating sovereign power by not only restricting the ability to appeal inadmissibility decisions in the administrative system, but also by (indirectly) governing judicial decision making. Judges would be specifically limited in their ability to impose sentences that would protect a migrant's administrative right of appeal, which Conservative's held was delaying their deportation from

Canada. The legal governance of removal was clearly separated from the realm of criminal courts and categorized into the domain of immigration through this effort to guide judicial decision making at sentencing (Valverde, 2009). With these jurisdictional moves, the Minister of Public Safety was reconfirmed as holding "the authority to speak in the name of the law" (Dorsett & McVeigh 2012, p. 4). Foreign, undesirable migrants who had lost the privilege to remain by offending norms established in immigration law would now be excluded without interference of the court.

R v. Pham: Settling the Jurisdictional Game

As noted, while the FRFCA was being debated, the issue of judicial consideration of collateral consequences was being considered by the Supreme Court of Canada in the matter of *Pham*. Pham, a permanent resident of Canada, was sentenced in 2011 to two years in prison for the production and possession of marijuana for the purposes of trafficking. As a result of his sentence, Pham was found to be inadmissible to Canada for serious criminality. Bill C-43 had not yet received Royal Assent and s. 64(2) of the IRPA still allowed permanent residents facing removal to appeal their deportation if they had been sentenced to less than two years' imprisonment. The collateral consequence of Pham's sentence was therefore to remove his administrative right of appeal.

Pham applied to the Alberta Court of Appeal for review of this sentence on the basis that the immigration consequences he was facing were unknown at the time of sentencing. He asked that his sentence be reduced by one day, which would allow him to retain his right to appeal his removal from Canada in the immigration system. Counsel for Pham argued that courts had, at times, previously intervened to redress the potential for injustice caused by a sanction that would render the individual inadmissible under the administrative immigration regime, as confirmed

through the review of decisions in *Melo* and *Hamilton*. The respondent argued that the original sentence imposed was "fit", being within the normal range of sentences available for the offence in question. The Court of Appeal ultimately sided with the respondent, going so far as to argue that, given Pham's previous (albeit dated) convictions, the defendant had clearly "abused the hospitality that has been afforded to him by Canada" (*R v. Pham*, 2012 ABCA 203, para 24). The court thus found that it would be inappropriate "to fly in the face of a proper and acceptable joint submission regarding sentence under the circumstances of this case in order to undermine the provisions of the *Immigration Refugee Protection Act*" (*Pham*, 2012 ABCA 203, para 24).

By denying the jurisdiction to consider immigration consequences, and promoting the authority of the state to remove, the appellate court arguably decided on removal. This decision in turn demonstrates the complex intertwining of the criminal and immigration regimes. While the court discursively upholds that authority to govern deportation lies with actors in the immigration system, their justification for refusing to use their ability to intervene draws once again from rationalities deployed in the immigration domain. References to hospitality in the appellate decision specifically invoke ideas of privilege that were promoted in support of the exclusion of racialized migrants from Canada and that were repeated by judicial actors in the early twentieth century. Undergirded by race-based ideas of foreignness and desirability, migrants were recognized through these narratives as outside of the population and thus without the legal right to enter and remain in the state. Migrants are contrasted to kind and generous Canadians who are placed at risk where this population of dangerous foreigners is allowed to remain. The sovereign was thus understood to hold power to exclude these eternal outsiders, specifically where migrants offended the requirements of residency through commission of a criminal offence thereby demonstrating their risk to the public. These race-based logics guided

the appellate courts, sustaining the refusal of Pham's request to vary his sanction by one-day based on the narrative that he had offended Canadian generosity with his criminal behaviour. Pham thus remained inadmissible and deportable without appeal. The decision of the appellate court thus both confirmed the authority of administrative actors to decide on removal *and* contributed to practices of removal.

Pham appealed to the Supreme Court of Canada. Counsel for Pham argued that even though collateral consequences may be imposed outside the criminal law domain, they form a part of the web of personal circumstances that must be considered in the process of designing a fit sanction. According to Pham's counsel, to then ignore a collateral consequence as significant as deportation would offend the fundamental principle of sentencing, namely proportionality. Consistent with a contemporary approach to individualization (Berger, 2020), counsel clarified that proportionality requires a sentencing court to consider the severity of conviction and penalty on the individual *as a whole*. In its Factum to the Court, Pham's counsel wrote that:

> proportionality means that the punishment must fit the offence and the offender. The impact of a criminal conviction and sentence, particularly on the immigration status of an individual, is relevant in determining a fit sentence for that individual. While it cannot justify the imposition of a manifestly unfit sentence, it can and should affect where along a range an appropriate sentence will fall (*Pham*, Factum of the Appellant, p. 6).

Ironically, counsel for Pham was quick to highlight how the appellate court had offended the jurisdictional divisions between the immigration and criminal systems by overstepping their legal authority:

> Immigration administrative tribunals are not mandated to deal with criminal law issues. The criminal sentencing court is not the forum for deciding immigration issues. Sentencing judges

> (and appellate courts) must not usurp the function of the immigration authorities by pre-determining whether someone deserves to stay in Canada or "deserves" to be removed (*Pham,* Factum of the Appellant, p. 6).

The respondent in this case continued to hold that the original sentence was fit, and thus should not be reduced. The respondent further argued that immigration consequences are not a relevant factor at sentencing and that the sentencing process should not be used to circumvent the authority of the Minister of Immigration and the objectives of Parliament to remove migrants. Here, the respondent also clearly draws on a conceptualization of jurisdiction as instituting hard dividing lines of authority, requiring that decisions on deportation remain squarely on the shoulders of the state. This position fails to acknowledge how, in not amending the decision and effectively ensuring Pham's exclusion, the appellate court blurred these jurisdictional divisions.

In its final decision, the Supreme Court began by reiterating the historical position that deportation is not a true punishment. Removal was held by the court to be a secondary consequence of conviction and sentence applied outside of the traditional sentencing framework by actors in the administrative system. The authority to decide on removal was again confirmed as lying with the state. The Supreme Court did however decree that these collateral consequences are personal circumstances that impact proportionality, with removal again being conceptualized as impacting the severity of a migrant's sanction by extending it beyond what would have been imposed on a citizen (*R v. Pham,* 2013 SCC 15, para. 11; see also *R v. Suter*, 2018 SCC 34, para. 48). Confirming *Hamilton,* the consideration of removal was consequently held to be necessary in individualizing a sentence and might allow for a reduction in a permanent resident's sanction to ensure that they maintain their right of appeal. The Court further established that the final sentence imposed must not offend the principle of parity by being outside of the established

range of sanctions available for the offence in question. Judges were additionally warned that sentencing may not be used to circumvent the intent of Parliament to deport migrants with convictions. The Court wrote:

> The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.
>
> These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a de facto if not a de jure special range of sentencing options where deportation is a risk (*R v. Pham,* 2013 SCC 15, paras. 15-16).

The Supreme Court decision in *Pham* effectively reconnects to the earlier, varied court decisions on the consideration of immigration outcomes at sentencing. The Court confirms the legal categorization of jurisdiction that assigns authority to deport to the administrative state. Discourses and knowledge positioning deportation as a consequence of criminal penalty that were deployed in *Melo* direct the Supreme Court's decision making. While the Court does not repeat narratives of privilege and right that were upheld in *Almazoff, Mah Singh Shong,* and later by the appellate court in *Pham,* these discourses are also not directly contested. Instead, the Court holds that criminal actors may not upset the "will of Parliament" to remove through their consideration of immigration consequences. These discursive moves thus confirm the legal categorization of removal as within the authority of the sovereign. Race based ideas of privilege and legal right are also maintained by the silence of the Court; given that the power of the sovereign was assigned through the promotion of these racist narratives, and this authority is

then confirmed by the Court without contestation of these discourses, these race-based ideas are effectively upheld.

These conversations on authority that deploy discourses distinguishing between removal and criminal penalty omit consideration of the lived experiences of migrants. For individuals facing removal, deportation is unquestionably felt as equally (or more) punitive than penalties imposed by the court. This was repeated often during my interviews and in case law reviewed (*R v. Thavakularatnam*, 2018 ONSC 2380; see also Kanstroom, 1999-2000, for a theoretical perspective). One immigration lawyer interviewed stated:

> *It's like why is there this reluctance to acknowledge that we are punishing people*? Like why don't we wanna acknowledge that because that's what it is and they're always looking at it from the perspective of the imposer, who's ever doing this but like the person he's receiving this it's punishment. (Interview V, March 2022).

Another immigration lawyer reiterated this opinion, stating frankly:

> I do see deportation as a form of punishment. It doesn't matter… the constructs… oh, it's just the loss of a privilege, bullshit. It's a punishment. It's exile. And that's what they call it in some countries. It's exile and it happens to even citizens, right, there's a lot of repressive governments or whatever who will exile people. Its exile, it's a form of *punishment*… Sorry but I, you know… I see them as just piling on the punishment. And maybe its semantics. You know, loss of privilege. I mean if a judge sentences you to go to jail, it's a loss of privilege of your liberty, you know. Is that punishment, ya. So I think it's semantics when you say it's not punishment. You can hide behind a construct that says this is just lose of privilege but for the guy who is on the receiving end? Guess what it feels like? You know, you are ripped away from your family and sent away (Interview T, March 2022).

In tying review of collateral immigration consequences to assessments of the severity of the sanction (Berger 2020), the Court arguably acknowledges these lived experiences of deportation as punitive. Yet, as stated by my interviewee, the Court also relies on narratives positioning deportation as a *consequence* of conviction to support judicial consideration of these outcomes in practice. These discourses operate to maintain the legal lines of authority established in the IRPA, while also facilitating review of collateral consequences through judicial authority at sentencing. So, while deportation is punitive, it is not punishment according to the Court.

The effect of these discourses of distinction between deportation and criminal sanctions, and the concomitant recognition of the "will of Parliament to deport", functions to prohibit migrants from accessing legal rights (Agamben, 1998). According to the Supreme Court, the state is allowed to and wants to deport migrants. Courts cannot infringe on this authority, especially because deportation is not a punishment, and so the decision to apply this consequence is outside of the scope of authority of the Court. Several scholars have contested the conceptualization of deportation as distinct from criminal penalty (see Benslimane & Moffette, 2019; Chin, 2011; Kanstroom 1999-2000; Lafollette, 2005; Stumpf, 2009; Travis, 2003).

The Court additionally confirms the decisions in *Melo* and *Hamilton* that recognized the relevance of consideration of collateral consequences to the sentencing process. Following *Pham*, courts are directed to use their jurisdictional authority at sentencing to review the effect of immigration consequences on the severity of the penalty when individualizing a sanction. While courts cannot infringe on the authority of administrative actors by rendering sentences that protect migrants from removal, penalties may be reduced through the process of individualization. Any sentence applied must remain fit. Based on this decision, criminal courts

judges must now walk a tightrope of authority, ensuring that they review the possibility of deportation in individualizing a sentence but not rendering a penalty based on a decision to either include or exclude the migrant defendant. The operations of the immigration and criminal systems are once again positioned here as distinct, while the Court also acknowledges the practical intersection of programs of sentencing and removal that unfold across assemblages in these legal spaces. The decision in *Pham* further exposes the limits of legal programs governing migration, with courts being able to use their authority to consider immigration outcomes at sentencing and to apply sentences that protect migrants from (immediate) removal so long as the final sanction imposed remains fit. The interweaving of processes of removal across these assemblages may thus have productive effects.

Jurisdictional Processes at Sentencing

The concurrent passage of the FRFCA and the rendering of the decision in *Pham* raise critical questions for how judges now navigate the authority to sentence migrants. While the FRFCA categorized the jurisdictional authority to govern deportation as squarely within the administrative realm, consideration of these immigration consequences is a requirement at sentencing based on precedent post-*Pham*. One technicality of jurisdiction delimits the authority of the court (namely, to decide on deportation) while the other expands the scope of considerations required when enacting a separate authority (namely, at sentencing). How do judges walk this jurisdictional tightrope in practice, and what impact does decision making on sentence have for practices of removal post-2013?

Where collateral immigration consequences are raised for consideration[58], judicial actors have shown a willingness to consider the impact of sanctions on removal. During interviews with judges from Ontario courts, it was confirmed that these actors generally abide by the guidance from *Pham* that they tiptoe jurisdictional lines, engaging in an analysis of deportation as a personal circumstance relevant to proportionality without undermining the will of Parliament. One Ontario judge interviewed characterized their responsibility in deciding on migrant cases as follows:

> from an immigration perspective, it would be clearly inappropriate for a criminal judge to try to game this immigration system and cause a particular result… favourably or unfavourably to the accused, but it would equally be inappropriate for a criminal court judge not to consider what might happen, right, that's a factor just like job loss is a factor, just like licensing is a factor, just like driving prohibition is a factor, those are all relevant factors to the denunciatory, deterrent and rehabilatory elements of a sentence. Because we don't decide what's going to happen, we consider the possibilities (Interview Q, March 2022).

During a separate interview, judicial authority was characterized as operating concurrently or in parallel to the authority of administrative actors. It was recognized, however, that the process of decision making on sentencing and removal intertwine across these systems. Again, while judges are not deciding on deportation, their consideration of immigration outcomes through their authority under the criminal law is recognized as having a potential impact on the program of removal unfolding in the immigration system. This was relayed by an Ontario judge as follows:

[58] Despite the guidance in *Pham* (and subsequently in *R v. Wong*, 2018 SCC 25), and the expansion of the temporal borderland with the passage of the FRFCA, immigration consequences are still not regularly raised for judicial consideration. This significant issue is further explored in Chapter 5 of this dissertation.

> I have the jurisdiction to deal with the offender who is before me. So implications, what I do with that offender ultimately, may impact on other domains but … certainly it seems clear to me after the likes of *Pham* and after the likes of *Suter*[59] that this is indeed a jurisdiction that I have to exercise and that I can exercise, I can't do it in a way that works the doctrine of proportionality, I can't do that. Nor can I do it in a way that frustrates the intent of Parliament under IRPA so long, unless in doing so under my breath I still maintain the doctrine of proportionality or adhere to it. All right? To be truthful I think that that's very well the case. It may be that whatever I do frustrates IRPA. But so long as, the Supreme Court has in my view made clear, so long as what I'm doing is exercising fundamental proportionality and individualized proportionality, that's part of the grist for my mill as a sentencing judge (Interview P, March 2022).

The game of jurisdiction with respect to the program of removal is clearly ongoing. Despite the effort of Conservatives to restrict judicial consideration of immigration consequences through limitations on access to appeal, this practice has continued under the FRFCA. While judicial authority is tied to the application of criminal law principles at sentencing, thus confirming the delimited jurisdiction to govern deportation, it is understood that decisions in the criminal system may impact outcomes on removal given the dynamic interweaving of processes

[59] 2018 SCC 34. In *Suter*, the Supreme Court again clarified that judicial actors may consider collateral consequences in relation to the principle of proportionality:

> [48] Though collateral consequences are not necessarily "aggravating" or "mitigating" factors under s. 718.2(a) of the Criminal Code — as they do not relate to the gravity of the offence or the level of responsibility of the offender — they nevertheless speak to the "personal circumstances of the offender" (*Pham*, at para. 11). The relevance of collateral consequences stems, in part, from the application of the sentencing principles of individualization and parity: *ibid.*; s. 718.2(b) of the Criminal Code.[2] The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances. Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer "like" the others, rendering a given sentence unfit.

across the legal assemblages of these domains. The immigration and criminal systems are thus positioned as engaging in distinct governance practices (removal and sentencing, respectively) that are informed by intersecting processes, discourses, knowledges, and actors from across these legal spaces.

This tiptoeing of parallel jurisdictions can be similarly traced in sentencing decisions emerging from the court on migrant files that were sourced in support of this dissertation. We see this in the matter of *R v. Layugan* (2016 ONSC 2077). The defendant in this case struck a security guard with his car while leaving his place of employment late at night. He was thereafter found guilty of manslaughter, failing to stop, and criminal negligence causing death. In the sentencing decision on this case, the court noted that Layugan had no prior criminal record, significant positive familial relationships, and was married with three kids. He had worked in Canada continuously since his arrival in 2007 (*R v. Layugan*, para. 33-40). At the time of the offence, Layugan was not intoxicated; he was not driving erratically, recklessly, or at a dangerous speed; he did not instigate the situation that led to the accident; the situation resulting in the death of the victim was not his fault, given that it was very dark and noisy, and the victim was not wearing reflective gear; he had just finished a long shift; on first collision he did not have time to think about what to do and he returned 20 to 25 seconds after the collision, even staying to help after medical and emergency personnel arrived (*R v. Layugan*, para. 7-25). When Layugan was released on bail, he did not breach bail conditions that prohibited him from driving, even when his child was so sick that she needed to be taken to the hospital. This child ultimately died from pneumonia (*R v. Layugan*, para. 39). These very shocking and sad circumstances all contributed to mitigating the sentence imposed.

Crown counsel in this matter argued for the imposition of a two-year sentence for the offence of manslaughter, nine-months for failure to stop, and a stay for the remaining offence (*R v. Layugan*, para. 68). Defense asked for a sentence of six-months less a day, given the defendants exemplary life and his potential deportation (*R v. Layugan*, para. 62). Both criminal court actors submitted case law in support of their suggested sanctions to demonstrate parity, and both argued that these sanctions would meet the principles of sentencing required in this case, namely deterrence and denunciation. The court ultimately imposed a sentence of five months imprisonment, having specific regard to both the mitigating circumstances and the immigration consequences that the defendant faced. The court noted in its decision that regardless of the sentence imposed, the victim could not be revived. The defendant was determined to not be a risk to public safety or security and given his potential deportation, a sentence of six months less a day would be proportionate, thus meeting the requirements of *Pham* (*R v. Layugan*, para. 99-105).

The circumstances in *Layugan* are unique. Courts have been swayed to render sanctions that impact the program of removal on cases with less sympathetic facts. In the matter of *R v. Saffari* (2019 ONCJ 861), for example, the defendant was found guilty of offences related to communicating with a minor for sex. These offences carried mandatory minimum sentences of one year imprisonment. Defence counsel argued that these minimum sanctions violated Saffari's section 12 right under the *Canadian Charter of Rights and Freedoms*[60], stating that they were grossly disproportionate given his age, lack of criminal record, and potential deportation. Counsel asked that a six-to-nine-month sentence of imprisonment be imposed instead (*R v. Saffari*, para. 35-36). The Crown objected, stating that a sentence of twelve to fifteen months

[60] Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

would be proportionate based on the principle of parity. As a result, the Crown held that the defendant did not meet the burden of establishing the applicability of section 12 of the *Charter* (*R v. Saffari*, para. 5). Saffari was described in the sentencing decision as a 25-year-old, first time offender, with mental health "frailties" (*R v. Saffari*, para. 6). He was born in the Netherlands to Iranian parents and had been in Canada since the age of 18 (*R v. Saffari*, para. 12). A letter from an immigration lawyer was provided in this case that made clear that Saffari would be inadmissible because of his conviction, and that if he was sentenced to a term of imprisonment of six months or more, he would have no access to appeal (*R v. Saffari*, para. 14).

The court began its consideration of this matter with a review of the potential *Charter* infringement. It was held that the noted section helps to balance Parliament's aim to fashion appropriate penalties with an individual's right not to be subject to punishment that is grossly disproportionate. The test for "gross disproportionality" requires a determination of whether the sentence would be so excessive as to outrage the standards of decency so that Canadians would find it abhorrent or intolerable (*R v. Saffari*, para. 20-21). The court determined that a sentence of five months imprisonment would be fit, based on an assessment of precedent, the defendant's personal circumstances (specifically his potential deportation), and the application of the principles of denunciation and deterrence (*R v. Saffari*, para. 84). Given the discrepancy between the "fit" sentence and the mandatory minimum, the judge determined that the imposition of the mandatory sanction would be shocking to Canadians and thus grossly disproportionate (*R v. Saffari*, para. 88). In making this decision, the court specifically referenced the defendant's potential deportation, as follows:

> In my view, sentencing Mr. Saffari to one year in jail when the fit and proportionate sentence would be five months, having regard to his personal circumstances, frailties, and the collateral

> consequences, is intolerable and would be shocking to Canadians. In my view to impose the one-year mandatory minimum sentence, even having regard to the gravity of the offence, is grossly disproportionate. It is not merely excessive but is a sentence that is "so excessive as to outrage the standards of decency" and "abhorrent or intolerable" to society. It is a cruel and unusual punishment and violates s. 12 of the Charter. (*R v. Saffari*, para 90)

The court in Saffari engaged in a dynamic process, navigating the multiple interweaving legalities drawn from across the immigration, criminal, and constitutional regimes in Canada. Referencing precedent to direct their authority at sentencing, the court reviewed the potential immigration consequences. Based on this review, it was determined that application of the mandatory minimum sentence would offend the sentencing principles that guide the court's use of authority. A sentence was then applied that protected Saffari from immediate deportation, thereby undermining the program of removal.

In *R v Nassri* (2015 ONCA 316) the Ontario Court of Appeal was called on to replace a sanction that had been imposed *prior* to the passage of the FRFCA. The appellant in this matter had been sentenced to nine-months imprisonment for robbery and possession of a weapon for a dangerous purpose. As a result of this sentence, and with the coming into force of the FRFCA, he faced deportation to Syria without a right of appeal (*R v Nassri*, para. 1). Nassri was a 21-year-old permanent resident, having immigrated to Canada ten years earlier (*R v Nassri*, para. 7). He had no prior criminal record and demonstrated good rehabilitative prospects, being both in college and operating his own small business. Nassri enjoyed strong familial support and had many positive references (*R v Nassri*, para. 8).

The appellate court considered the potential immigration consequences flowing from the sanction imposed by the trial court. A letter from an immigration lawyer was submitted that

detailed how any attempt by Nassri to avoid deportation would be futile, given his conviction and sentence (*R v Nassri,* para. 19). Information on the conditions in Syria were also filed as an exhibit. These materials detailed the deteriorating conditions in that country, supporting the argument of the defense that Nassri would almost absolutely be subject to conscription if returned, leading to his involvement in the civil war underway in Syria (*R v Nassri,* para. 22-23). The appellant argued that given these collateral consequences, the original sanction was grossly disproportionate. It was further argued that, based on precedent, a sentence of six-months would be available in this matter (*R v Nassri,* para. 34).

The Court of Appeal considered the potential immigration consequences flowing from the sanction imposed by the trial court, as well as the conditions in Syria. It was determined that while incarceration was required, there was no lower limit for the offences defined within jurisprudence (*R v Nassri,* para. 29). A custodial sentence just under six months was therefore within the appropriate range. The appellate court further determined that removal of the defendant would be highly traumatic and would put Nassri in a position of extreme risk of physical harm or death (*R v Nassri,* para. 23). It was concluded that depriving the appellant of a right of appeal resulting in his removal to "one of the most dangerous places on earth" would be grossly disproportionate to this offence and to the circumstances of the offender (*R v Nassri,* para. 33). The sentence was reduced to six-months less fifteen days, again serving to interfere with the project of removal.

What *Layugan*, *Saffari*, and *Nassri* demonstrate is that courts continue to abide by the jurisdictional limits placed on their authority by the FRFCA even where indirectly intervening in the governance of removal. Each case reviewed confirms that the consideration of deportation is tied to the application of criminal law principles, specifically individualization, proportionality,

and parity. Through this authority to speak in the name of criminal law at sentencing, judges resist sovereign bordering practices. These decisions ensure that migrants either avoid inadmissibility altogether or, if found to be inadmissible, that they retain the right to appeal the resulting order for deportation. While judges must tiptoe the line of jurisdictional authority, through their decision making on sentence they demonstrate the limits of the program of removal that is informed by interweaving processes, actors and knowledges from the legal assemblage of the court.

The maintenance of lines of jurisdictional authority is further confirmed in cases where courts determined that they were *unable* to impose a proportionate sentence that would protect a migrant's right of appeal. We see this most clearly in *R v. Garcia* (2019 ONSC 5095), wherein the court took care to note that they are "not the gatekeeper with the authority to decide who stays and who goes" (*R v. Garcia*, para. 30) and that the criminal court is not equipped to decide on deportation. Instead, the decision stated that it was the role of the court to fashion a fit and proper sentence, which requires "considering immigration consequences as a component of personal circumstances but not manipulating them" (*R v. Garcia*, para 34). The court confirmed that they must "walk a very fine line" by assessing the circumstances of the offender (including deportation) but not skewing the sentencing process to avoid deportation (*R v. Garcia*, para. 35). Limits on the authority at sentencing inflect this judicial decision to apply a sanction that may result in deportation.

Even further, judicial actors who are unable to apply sentences that would protect migrants from removal use their jurisdictional authority in rendering written decisions on sanction to sometimes request that the individual *not* be removed, thereby continuing to intervene in the governance of migration. For example, in *R v. Munga* (2017 ONCJ 803) the

court confirmed that given the serious nature of the offence (possessing a weapon for the purpose of committing a criminal offence and knowingly uttering a threat to cause bodily harm) a suspended sentence of eighteen months was required (*R v. Munga*, para. 42). The court did consider though the conditions in Munga's country of origin, namely the Democratic Republic of the Congo ("DRC"). The court stated that if the conditions in DRC were as "horrific" as submitted materials suggested, that they sincerely hoped the defendant would not be deported (*R v. Munga*, para. 40; see also *R v. Hassan*, 2017 ONCA 1008; *R v. Seerattan*, 2019 ONSC 4340).

The court went further in *R v. Hassan* (2017 ONCA 1008). Hassan, a citizen of Iraq, was convicted of possession of cocaine for the purposes of trafficking. He received a sentence of two years' incarceration. This decision was appealed (*R v. Hassan*, para. 1). The appellate court reviewing the sentencing decision noted that immigration consequences had been reviewed and a sentence protecting Hassan from removal was outside of the range available for the offence. To impose a sentence of less than six months would thus render the sanction disproportionate. However, after reviewing the significant materials submitted in support of the appellant, including letters from immigration counsel and evidence of the defendant's rehabilitation, the court wrote that deporting Hassan would not be in the interest of Canadians (*R v. Hassan*, para. 12). The court asked that sentencing transcripts be provided to the CBSA by the defendant to ensure these comments were considered, thereby guaranteeing the direct intervention of the court in deportation processes (*R v. Hassan*, para. 13).

While it may appear that precedent has settled judicial navigation of the jurisdictional tightrope that confines the governance of removal into the immigration systems, there are still cases where judges continue to refuse to consider potential deportation in practice. In these instances, courts hold that immigration outcomes are not guaranteed and that to examine

potential removal would be akin to "wagging the tail of the dog" (*R v. Urbe,* 2013 ONSC 6830; see also *R v. Benhsaien,* 2018 ONSC 3672; *R v. Carrera Vega,* 2015 ONSC 4958). What this confirms is that the game of jurisdiction continues; despite precedent that defines the authority to consider immigration outcomes during sentencing, some judges view this examination to be outside of their jurisdiction given their lack of authority to decide on removal. Resistance to sovereign bordering practices fails in these instances. To ensure consideration of migrant circumstances, then, counsel must continuously repeat jurisdictional distinctions between the authority to remove and the authority to sentence.

Conclusion

This chapter has drawn attention to the jurisdictional games enacted within and between the immigration and criminal systems in Canada. It has reviewed the discursive moves undertaken by Conservative Parliamentarians to endorse the jurisdictional authority to decide on deportation as lying with administrative actors. With the implementation of the FRFCA, authority to remove was clearly categorized as within the realm of immigration. While these processes of jurisdiction have been confirmed by courts following the passage of this legislation, judicial actors continue to exercise their authority at sentencing to consider immigration consequences. By walking this jurisdictional tightrope, judges maintain the boundaries that confine authority over removal to the immigration systems while also intervening to prevent practices of deportation via decisions on sentence. The interweaving of processes across these spaces ultimately reveals the limits of the program of removal.

Through this analysis of processes of jurisdiction, this chapter has further demonstrated the complexity of the relationship between the immigration and criminal systems. The assemblages in these legal spaces have been shown to dynamically interweave, with decision

making on sentence being informed by considerations of collateral immigration outcomes. Jurisdictional contests clearly structure the interactions of these heterogenous assemblages, with judges using their authority to sentence to intervene and resist removal. At the same time, authority is clearly divide between these domains, with the jurisdiction to implement the programs of removal being delineated to the immigration system. While these distinctions are potentially subject to change, including as a result of further jurisdictional contests, they demonstrate the nuanced and complex intertwining of these systens in Canada.

Importantly, Conservative Parliamentarians argued during debates of the FRFCA that limits on migrant access to legal rights in the immigration system would not introduce unfairness, since courts would consider migrant personal circumstances before deportation. It is critical to acknowledge here that while courts do review immigration outcomes when individualizing a sanction, the practice of sentencing is confirmed through categorization and precedent to be distinct from the assessments undertaken by administrative actors using their authority to review applications appealing removal orders. Administrative actors consider six specific humanitarian and compassionate grounds when considering appeals of removal orders, as set out in the decision of *Ribic v Canada (Minister of Employment and Immigration)*, [1985] I.A.D.D. No. 636. These factors include an assessment of the offence, possibility of rehabilitation, establishment of the migrant in Canada, level of familial and community support, as well as the conditions in the country of return. Certainly, these circumstances may arise before the courts. It is not established, however, that courts *must* consider these factors in determining a sentence. In fact, the preceding discussion of judicial authority suggests that a review of these factors is well beyond the jurisdiction of the court. To suggest that assessments produced by

immigration actors are consistent with considerations in the court thus appears to be based on a misapprehension of practices of sentencing *and* removal.

Having established that courts hold the authority to consider immigration consequences (but not decide on deportation), the next chapter of this dissertation reviews *how* these decisions on migrant files unfold in practice. This chapter asks, for example, when and how immigration status is raised for judicial consideration, what discourses and knowledge are drawn from the immigration system and deployed by the court, and how spatial and scalar dynamics impact these considerations.

Chapter Five: The Sentencing Process

I'm in this position where I might get deported to a country I have no idea about and have nobody there to guide me… please, Your Honour, I ask you to consider to not take me away from my family and my home.[61]

This chapter turns to consider how discretionary decisions on sentence are rendered for migrants.[62] I unpack sentencing processes by drawing from case law research and interviews. I focused my review of the 188 cases (see list in Appendix B) gathered for this study on understanding: *if* and *when* immigration status was raised in court, *how* status was discussed, and *who* contributed to knowledge of immigration outcomes. I traced several emergent features across these cases, including legal principles and sentencing objectives consistently referenced by the court, as well as racist narratives at play in migrant cases. My subsequent interviews with judges, defence counsel, and immigration practitioners focused on refining insights gained from this case law review. I asked my interviewees about their understanding of immigration outcomes, their perspective on criminal law principles and precedent applicable to migrant cases, and the general process of building a defence and/or determining sentence. I was also keenly aware that my cases were all rendered in Ontario and sought to understand through these interviews how (if at all) judicial decision-making on sentence was shaped by the location of the court. This includes, for example, how locally defined narratives on the prevalence and risk of certain types of crime (i.e., on the pervasiveness of gun crime in Toronto) intermix with federal discourses on the dangerousness of migrant offenders to direct sentencing decisions.

My analysis of decision making on migrant sentence unfolds across the final two chapters. In this first chapter, I examine how knowledge and discourses of migration are

[61] *R v. Thavakularatnam*, Trial Transcripts, p. 49.
[62] There is some additional consideration of processes proceding sentencing, including in submission of pleas. The primary focus, however, is on decision making at sentence.

accessed and deployed by courtroom actors throughout two identified stages of the sentencing process: the sentencing hearing and the sentencing decision. I begin by considering how knowledge of immigration status and outcomes are presented for the court during the sentencing hearing. I provide an assessment of how defense counsel utilizes legal principles in advancing arguments on punishment in migrant cases. I then turn to examine how judicial consideration of the program of removal is impacted by the following elements that generally shape the operation of discretion: 1) the "frames" of the judicial decision maker; and 2) geographically specific discourses. In the final chapter, I consider how narratives of racial difference are applied in migrant cases throughout the sentencing process. The implications of this investigation for conceptualizations of the intersections between immigration and criminal systems in Canada, and for resistance to removal, continues to be considered.

Sentencing Hearings

For the most part, sentencing hearings are relatively informal proceedings (Cole and Roberts, 2020). Unlike the preceding trial, they are unhampered by strict evidentiary requirements (Cole and Roberts, 2020). Crown and defence counsel each make statements on sentence during these hearings, wherein they identify and explain why a proposed sanction should be imposed. These statements articulate, for example, where within the jurisprudential range a recommended sentence lies. Counsel must justify the proposed placement within said range through reference to the circumstances of the offender and the nature of the offence (Lutes, 2020). This includes any distinctive aggravating or mitigating factors in a case. For defence counsel, these statements must focus on humanizing the offender. As per s. 721(3) of the *Criminal Code,* the defence must provide information on the "offenders age, mode of life, character and personality". Crown and defence counsel must each also clearly explain the principles they believe are most applicable to

the matter, as well as any objectives of the sentence that may be fulfilled through the advised punishment (Lutes, 2020). Documentary evidence may be submitted during the sentencing hearing, including victim impact statements, letters of employment and/or character references. Any disputes over facts are adjudicated and assessed on a balance of probabilities (with the exception of information on aggravating factors identified by Crown counsel and information on earlier convictions, which must be proven beyond a reasonable doubt) (Roach, 2022). Altogether, these statements are directed towards supporting the judicial effort to render a proportionate sanction (Roach, 2022).

Knowledge of Status and Outcomes

Collateral immigration consequences have been recognized as potentially impacting the proportionality of a sanction (*R v. Pham*, 2013 SCC 15). The Supreme Court has confirmed that judges must consider these consequences when rendering sanctions to ensure fairness at sentencing. It is thus imperative that migrant status and potential removal are identified during the sentencing hearing. But how and when is this knowledge raised for the court?

Perhaps unsurprisingly, the Supreme Court in *R v. Wong* (2018 SCC 25) determined that it is specifically the responsibility of defence counsel to introduce information on migrant status. This is especially true in circumstances where a migrant seeks to submit a guilty plea. A plea may be deemed uninformed if the defendant was unaware of the potential immigration consequences that would flow from an admission of guilt. As stated by the Supreme Court:

> As a matter of practice, it is also well established in Canada that defence counsel should inquire into a client's immigration status and advise the client of the immigration consequences of a guilty plea, and that counsel should raise the immigration consequences that might result from the client's being convicted or from a particular sentence that might be

> imposed at a sentencing hearing.… The provision of aids … by institutions of the legal profession illustrates an increasing acceptance that awareness of collateral immigration consequences is highly relevant in the criminal context and forms part of an informed guilty plea… (para 73).

Failure to inform a client of potential secondary immigration outcomes has been previously assessed by the court as amounting to ineffective counsel resulting in a miscarriage of justice pursuant to subsection 686(1)(a)(iii) of the *Criminal Code* (*R v. Wong*. See also *R v. Aujla*, 2015 ONCA 325; *R v. Quick*, 2016 ONCA 95; *R v. Shiwprashad*, 2015 ONCA 577. For an alternative approach, see *R v. Hunt*, 2004 ABCA 88; *R v. Raymond*, 2009 QCCA 808; and *R v. Slobodan*, 1993 ABCA 33). The requirement that counsel clarifies the impact of sentence on immigration status is particularly relevant post-passage of the FRFCA and limitations on access to appeal.

It was similarly explained in *Pham* that it is the responsibility of counsel to raise status and immigration outcomes for the consideration of the court. Failure to perform this duty may justify appellate review of a sentencing decision. The Supreme Court specifically held:

> An appellate court has the authority to intervene if the sentencing judge was not aware of the collateral immigration consequences of the sentence for the offender, or if counsel had failed to advise the judge on this issue. In such circumstances, the court's intervention is justified because the sentencing judge decided on the fitness of the sentence without considering a relevant factor: *M. (C.A.)*, at para. 90 (*R v. Pham*, para 24).

It appears settled then that migrant status must be confirmed by defence counsel, who is responsible for both explaining potential outcomes of conviction to their clients and presenting migration information to the court for consideration at sentencing. Yet, my case law review and interviews confirmed that some counsel continue to fail to both inquire on migrant status and

raise removal for review in court. As noted by Jain (2016)[63], deportation is at times still "invisible" in the space of the court (see also Travis, 2002). I uncovered several appellate decisions examining convictions rendered based on uninformed pleas (*R v. Aujla,* 2015 ONCA 325; *R v. Girn,* 2019 ONCA 202; *R v. Pineda,* 2019 ONCA 395; *R v. Sangs*, 2017 ONCA 683)[64], as well as sentences applied by lower court judges who were unaware of collateral immigration consequences (*R v. Change,* 2019 ONCA 924; *R v. Crespo,* 2016 ONCA 454; *R v. Delac,* 2014 ONSC 6619; *R v. Mir,* 2016 ONCA 795; *R v. Nassri,* 2015 ONCA 316; *R v. Onyaditswe,* 2015 ONSC 4995).

I recognize here, of course, the potential limitations of my sample, which may impact the findings. Decisions reported in CanLII may not include cases where counsel has advocated effectively and successfully for their clients, thereby ensuring that the matter is settled outside of court. I also appreciate that there are many criminal lawyers who practice immigration law and/or regularly collaborate with immigration counsel. These lawyers fundamentally understand the potential immigration outcomes that their clients may face and make efforts to promote knowledge of collateral consequences throughout the court process. In fact, I initially identified defence lawyers for interview based on a reading of cases that demonstrated the significant effort of counsel to promote the rights of their migrant clients throughout the criminal process. I wanted to talk to these lawyers who clearly understood the gravity of conviction and sentence for

[63] Through their analysis of the prosecution of migrants in the United States, Jain (2016) confirms that court actors are often unaware of immigration outcomes. See the Introduction to this dissertation for further information.
[64] I acknowledge that several of these decisions were issued pre-Wong. It might be argued, as a result, that the requirement that counsel ensure migrants understand the consequences of a plea was not in fact settled at the time. It is clear from the Supreme Court's decision, however, that this was an established practice *prior to* the hearing of *Wong*. It was required by precedent emerging from appellate courts and guidance was provided to counsel through multiple sources on how immigration outcomes might follow a plea. This was critical given that the outcomes of sentence had been relevant considerations for judicial decision makers since at least *Pham,* but were tied to deportation decisions since as early as the passage of the IRPA in 2002 when the definition of inadmissibility based on length of term of imprisonment was first introduced. *Wong* simply affirmed this precedent.

migrant defendants. Yet, I was also interested in understanding why there was a continued failure to raise migrant status for court consideration, as identified in my case law analysis.

I used my interviews to gain further insight on what knowledge is generally held by defense counsel on collateral immigration consequences. I also asked defence lawyers about their understanding of criminal inadmissibility, when they inquire about the status of their clients, and how any identified immigration concerns then factor into building case materials for sentencing hearings. I similarly used interviews with immigration lawyers to inquire about their perception of defence counsels' understandings of removal and their efforts to intervene in the criminal system. Finally, my interviewees were asked to provide their thoughts on the trends in cases I had gathered that clearly indicated the ongoing lack of knowledge and/or acknowledgement of immigration consequences amongst defence counsel.

Through these interviews, I learned that the failure of counsel to raise the impact of conviction and sentence on removal was connected to the distinctions in operations of the immigration and criminal regimes. My interviewees explained specifically that many actors from the criminal system simply do not hold the necessary knowledge of immigration practices to inquire about client status and/or raise the issue of removal for the court. This was confirmed in interview with immigration counsel where they relayed the following interaction with a defence attorney:

> he kept reiterating to me that they don't know anything. I don't think that's true, I think they know a little bit more than he was giving himself credit for, but they say, like they repeatedly tell me that they just don't know. Now there's more experienced counsel, they say they all like kinda know the six-month rule, they're not really sure, they're like ya there's some six-

> month thing there. Obviously relating to the sentence. But he says that's kind of the extent of it (Interview U, April 2022).

The recognition that counsel's understanding of immigration consequences does not extend beyond a general acknowledgement of removal legislation was reiterated in interview with a Ontario based judge:

> frankly most of the counsel don't know what they are talking about. He might say to me, well he might have immigration consequences, but they can't tell me what they are (Interview R, March 2022).

At the crux of this issue is the very real problem that criminal counsel do not practice immigration law. Immigration programs are administered in a separate system from the criminal domain, governed by a distinct set of legal rules and deploying a unique set of tools. Defence counsels' legal education is limited to a doctrinal introduction to immigration legislation. They thus generally do not have practical knowledge of how immigration legislation is applied in practice and/or of the process of removal post-conviction. This was clarified by another interviewee, who stated:

> I guess one of the big shocking parts … is how many defence lawyers bother to know anything about immigration and that's continued where people work in their microcosms (Interview N, March 2022).

This in turn impacts the ability of defence counsel to advocate for their clients on possible immigration outcomes. As stated by one criminal lawyer:

> when we're making submission about what the consequences are going to be for somebody, we sort of approach it from … looking at it as an inevitability that, your honour, if you give him this sentence, this is going to be the consequence. And we don't know that, I mean when

> we're making those submissions I have no idea what an immigration, what the immigration system is ultimately gonna do to somebody (Interview Y, March 2022).

Again, there are many lawyers working to defend migrant clients who understand and effectively promote the issue of removal for the court. I have worked with this counsel and do not mean to undermine the effort being undertaken by these advocates. I also acknowledge that some lawyers may be negligent and may fail to consider the precarious status of their clients, including in the immigration system. The point of this discussion is to flag how a lack of knowledge of immigration outcomes can shape the sentencing process. It is to demonstrate that, because of the distinction in authority and governance practices between the immigration and criminal systems in Canada, and despite the interweaving of sentencing and removal processes across these spaces, deportation is not always understood by criminal actors and is not a primary consideration in court. Removal may thus never factor into the discretionary sentencing process. Knowledge of these distinctions are again critical given the effect of failure to consider immigration outcomes. Migrants lives may literally depend on these considerations.

Perhaps unsurprisingly, this general lack of knowledge of immigration outcomes extends to judges as well. These former criminal lawyers may have no practical and/or extended legal education on immigration consequences that could assist them in their considerations at sentencing. As stated by one interviewee:

> I mean ... this is the dirty secret, we are not trained in that at all. Right, like I've never done an immigration case in my life. Twenty years as a criminal defence lawyer, I've had cases that had immigration consequences of course, but I've never appeared before the immigration review board, I've never done a deportation hearing in my life, never sat in one, probably

> never even read a decision of one. So what do I know about whether a person is or is not deported, I don't (Interview Q, March 2022).

In a second interview with a judge, I inquired about their understanding of inadmissibility flowing from conviction and sentence. This interviewee confirmed that while they held some knowledge of immigration outcomes, their understanding was generalized and lacked relevant detail *because* these collateral consequences are not consistent considerations at sentencing:

> I don't mean to be cruel, but I don't usually think about these things. Applying my role as a judge. Just as for example, I don't think about whether or not somebody who is not subject to removal from the country is going to get parole. I just, that's not part of my job description, unless it's brought to my attention for some very good reason and, you know, we know from … *Pham* and *Wong* and other cases, that's now in play in Canada. That if I'm told about it, I'm persuaded to exercise, how to exercise my discretion that's one thing. Other than that, I don't really think about it (Interview R, March 2022).

The above response signals a critical consideration for this study's examination of knowledge of collateral consequences. Namely, that judges are not required to understand immigration outcomes in order to convict and sentence in the criminal system. Judicial actors are generalists; they are not expected to be experts in every factor that may be relevant at sentencing (Interview R, March 2022; see also Rothstein et al., 2014; Wood, 1997). We cannot, for example, expect judges to hold detailed knowledge of the innumerable collateral effects of conviction and/or sentence. Judges are also not responsible for inquiring about migrant status (*R v. Pham*, para 24). They rely on counsel to bring pertinent information for their discretionary review. It is thus crucial that defence lawyers confirm the immigration status of their clients and present this information to the court. Collateral consequences may otherwise never be examined by the court.

In interviews, I asked defence counsel to explain when in their process they inquire about the status of their client. Again, the lawyers I interviewed had all demonstrated significant knowledge of collateral immigration consequences in the sentencing decisions reviewed for this project. Criminal defence counsel consistently confirmed that immigration status is one of the initial pieces of information sourced. These actors also relayed that this information is not only used in developing a defence to be presented in court for discretionary assessment but in negotiation with Crown counsel. As one interviewee stated:

> we try and find out the client's immigration status right from the beginning because it can sort of inform what's going to happen forward any and all and, you know, if we're engaged in resolution discussions, if we let the Crown know of this guy's immigration consequences, Crown attorney's generally aren't monsters, they will appreciate that there's going to be collateral consequences and they're willing to play ball and we can get something done behind the scenes in a resolution discussion so that we don't have to leave it to a judge's discretion, then we'll absolutely do that. Like somebody's up on a drunk driving charges and we can negotiate a careless[65] because of immigration consequences that's gonna happen, absolutely we're doing that (Interview Y, March 2022).

The utility of early inquiry for effective counsel was further confirmed by a second interviewee, who similarly advised that immigration information may be passed to Crown counsel for consideration and in developing a plea. This is exhibited in the following exchange:

[65] The interviewee is referring here to negotiation efforts that result in the application of conviction for a reduced charge. Operation of a motor-vehicle while impaired is prohibited under subsection 320.14(1) of the *Criminal Code*. This offence is punishable by way of indictment to term of imprisonment of not more than 10 years under subsection 320.19(1)(a). This offence in turn renders migrants inadmissible pursuant to subsection 36(1)(a) of the IRPA. Comparatively, the offence of careless driving is an offence under the *Highway Traffic Act*, R.S.O. 1990, c.H.8 of Ontario. It carries a possible punishment of a fine of $400 to $2000, or to imprisonment for a term of not more than six months (or both), thereby protecting a migrants admissibility to Canada.

> we might go to the crown as I say and tell them look, he has been in this country for four years he doesn't know anything about Jamaica and he'll get deported if there is a sentence above six months let's do a deal and he'll plead guilty and give him five months and 28 days.
>
> Q: And how is the crown, is the crown receptive to that, do you find?
>
> A: Many times, many times, because the crown is not really involved in the immigration piece (Interview S, March 2022).

Validating that defence do not all hold the necessary knowledge of immigration outcomes to effectively advocate for their clients alone, these actors noted that a critical step in their advocacy process after determination of status is to seek a legal opinion detailing potential collateral effects of conviction and sentence. Guidance is specifically requested from immigration counsel on the program of removal and how court decisions may impact administrative decisions on deportation. It is because of the distinctions in practices and operations between immigration and criminal systems that immigration actors have been forced to intervene in the assemblages of the criminal courts to protect their clients from the program of removal. The necessity of these collaborative efforts was detailed by an interviewee as follows:

> so it becomes a practical issue of working with criminal defence counsel on sentencing and appeals. Because the sentencing consequences are often not or they're poorly advocated or poorly considered at the sentencing level and, you know, the next thing you know the guys, he's looking down the gun barrels of a deportation. Um, which nobody considered and especially with six month sentences it happens a lot more (Interview T, March 2022).

Efforts to access materials from immigration counsel are initiated early in the defence process. My interviewees confirmed that quick access to this knowledge from across the immigration assemblage supports any subsequent advocacy efforts. As stated by a defence lawyer::

> if the client needs advice about what to do because we just straight up don't know what the consequences will be, we will send them out to an immigration lawyer. Or we'll get an immigration lawyer to give us an opinion letter based on certain situation… we will often get… an immigration lawyer just to support an argument that we want to make on resolution, look if this guy gets an absolute discharge as opposed to a fine, that's gonna have meaningful consequences for his immigration status (Interview Y, March 2022).

Interestingly, interviewees confirmed that the knowledge provided by immigration lawyers is not confined to outcomes of conviction and sentence for migrant admissibility. Information gathered may also direct defence counsel on the impact of a variety of criminal court practices for administrative status determinations. For example, immigration lawyers relayed that they advise on the potential negative effects of plea agreements, which are often treated in the immigration system as confirmation of accounts provided in police reports. The profound consequences of this simple action were explained as follows:

> let's just for a moment focus on the police occurrence report and think about the circumstances an accused may find themselves. Heightened emotion, potentially wrongfully alleged to have committed something. So these are individuals at their most vulnerable… which could be moments in time, and those moments in time then follow them for several years through different points in the immigration proceeding without an opportunity to in many cases reasonably qualify those comments, clarify them, establish that they were just

> allegations, never proven in law. So it is one of the most profound failings of the intersection between the two areas of law (Interview X, March 2022)

The potential negative consequences flowing from plea agreements were confirmed again by immigration counsel in a separate interview. This interviewee highlighted further tensions between these systems, namely that different standards of proof guide actors in these two domains which impacts assessments of credibility and the validity of material, including in plea agreements. As this person explained:

> I've looked at a person agreeing to an agreed statement of facts and what type of stuff they shouldn't be agreeing to from an immigration perspective because the standard of proof in immigration is obviously quite low compared to the criminal process so they could be saying things that don't make a difference for them in terms of their criminal convictions but then have massive ramifications on the immigration side. So there's an overlap definitely in terms of contact and what they agree to and what they, what is in the police synopsis etc. (Interview T, April 2022).

The growing need for fulsome opinions from immigration counsel was further confirmed by a defence actor interviewed:

> I've gotten appeals from people like, oh we've got to appeal this sentence because now, all of a sudden, they won't let me sponsor my wife, my father, my child, whatever … (Interview N, March 2022).

Accessing information from immigration lawyers is thus crucial to ensuring that knowledge of *all* potential collateral immigration consequences (and not only deportation) are presented to the court for discretionary consideration (see *R v. Lucas,* 2019 ONCJ 954). Otherwise, everyday

decisions of the court may have significant unintended impacts on a variety of processes in the immigration regime.

Altogether, my interviews demonstrate that knowledge of immigration outcomes is not a foundational component of criminal legal education and practice. It is also not always brought before the court for discretionary review. If potential removal is to be considered during plea negotiations, before conviction and/or sentencing, it is the responsibility of defence counsel to raise this issue. Judges do not hold the necessary knowledge to inquire about status and are not currently expected to proactively request this information. Counsel should access legal information on outcomes from immigration actors, who may advise of additional consequences of criminal practices for migrants beyond those flowing from conviction and sentence.

This discussion certainly confirms the distinctions between the immigration and criminal systems. When asked to describe the relationship between these systems during this discussion of sentencing, one interviewee even stated:

> The systems are almost entirely distinct and separate and they only blur at the edges. You know… we know so little about each other's roles. I mean an immigration officer never sat in my court and watched how a sentencing has gone over and I wouldn't expect them to and I don't know what they're basing their decisions on. So from my perspective, they are siloed (Interview Q, March 2022).

It nevertheless demonstrates the fundamental interweaving and exchange of knowledge by actors from across the assemblages in these spaces. These intersections are a product of shifts in immigration legislation that have compounded the coercive potential of the program of removal. As explained in Chapter 4, the effects of these shifts in immigration law have been recognized by the Supreme Court, which has set precedent confirming that judges must use their authority at

sentencing to consider how these outcomes introduce suffering for the migrant when individualizing a sanction (Berger, 2020). Higher courts have further directed that defence counsel must present information on deportation to the court, which is accessed from immigration practitioners, and that appellate courts must hear cases where immigration outcomes have not been considered. Knowledge of the program of removal when accessed thus interweaves across immigration and criminal legal assemblages to influence court practices.

Shaping Legal Principles and Objectives

Having accessed knowledge of immigration outcomes, defence counsel presents this material to the court via submissions on sentence. References to collateral consequences are interwoven with discussions of key legal principles, sentencing objectives and knowledge of precedent to rationalize requests for penalties that will protect migrants from deportation. This intermixing of knowledge from the immigration and criminal punishment system results in the novel deployment of these legal principles and precedent (Rose & Valverde, 1998). Through these efforts, defence counsel attempts to shape judicial discretion towards the application of sanctions that subvert the program of removal.

A review of the use of legal principles in sentencing submissions is revealing. We know from *Pham* that collateral consequences may have an adverse impact on proportionality by introducing significant suffering for the individual migrant, including by extending the sentence beyond what would normally be imposed on a citizen. These consequences thus impact the parity of a sanction, which requires that similar offenders who commit similar offences receive similar penalties. Defence counsel may reference immigration outcomes in sentencing submission to advocate for the application of a sanction that sits at the lower end of a prescribed range. Critically, though, *Pham* warned that the sentencing process must not be used to

circumvent the will of Parliament to remove. This includes through the imposition of sentences that would protect migrants from removal but that sit outside of the range endorsed by precedent, thereby offending the parity principle and rendering the penalty disproportionate.

These instructions present the parity principle as a static tool to be applied in narrow and specific ways. Sentencing submissions from defence proposing the application of penalties that offend range requirements would thus appear to be futile. Curiously, though, in several decisions examined for this project, the sentencing recommendations made by defence and Crown counsel varied significantly despite being grounded in precedent. This suggests that sentencing ranges are quite flexible in practice.

Consider, for example, *R v. Thavakularatnam,* 2018 ONSC 2380. Thavakularatnam was convicted of possession of a loaded restricted firearm (contrary to section 95(1) of the *Criminal Code*) and unauthorized possession of a firearm (contrary to section 92 of the *Criminal Code*). The defence in this case argued for the imposition of either two six-month consecutive sentences or a twelve-month conditional sentence order for these offences.[66] These suggested sanctions would ensure that Thavakularatnam retained his right of appeal in the administrative immigration system. The defence justified their recommendations through reference to knowledge of the program of inadmissibility, Thavakularatnam's potential deportation, as well as his level of establishment in Canada. The defence specifically highlighted that Thavakularatnam had been in Canada since the age of three, having migrated here with his family from Germany. Although born in that country, defence confirmed that Thavakularatnam did not have access to German citizenship. They further referenced his level of establishment in Canada through discussion of his completion of elementary and high school education, his participation in organized sports,

[66] This is not considered a term of imprisonment in Canada. See *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 SCC 50

and his volunteer work in the community. This knowledge was positioned as mitigating the sentence to be imposed, thereby justifying the sanctions recommended by counsel. Case law demonstrating the application of similar sanctions on similar offenders in similar circumstances was additionally provided to confirm that the imposition of either sentence would not introduce disparity (for similar recommendations and discussion of sentencing principles, see *R v. Oshea*, 2017 ONCJ 736; *R v. Sharm*, 2015 ONSC 5950).

Crown counsel comparatively asked for a five-year term of imprisonment. This recommendation was rationalized through reference to knowledge of the circumstances of the offence and the offender. Crown counsel highlighted that Thavakularatnam had previously registered convictions, although they were applied when he was still a youth, and that he was on bail at the time of the offence. The Crown further argued that several aggravating factors existed in this case, namely that Thavakularatnam had been carrying a gun in a mall, which put the security of the public at risk. It was additionally confirmed that Thavakularatnam had resisted arrest, resulting in a struggle, during which a police officer was permanently injured. Like defence, the Crown was able to present case law to support their position on sentence.

There is clearly a significant difference between a twelve-month conditional sentence and five-years imprisonment. Yet both defence and Crown counsel supplied precedent to support their recommendations. This confirms the flexibility in use of the parity principle (and consequently, proportionality). More fundamentally for this project, this variability is clearly linked to the disparate and interweaving knowledges that were guiding the recommendations of defence versus Crown counsel. While knowledge of immigration outcomes clearly shaped the utilization of the parity principle by defence, who argued for a distinct range of sanctions that

would protect their client from deportation, the Crown gave no consideration to potential removal and was instead focused on the aggravating factors in this case.

My case law analysis further confirmed the effect of knowledge of immigration consequences for counsel's recommendations on criminal penalties. This was most clearly demonstrated in the decision of *R v. Zhou,* 2016 ONSC 3233. Zhou had been convicted of one count of cultivating marijuana and one count of theft of hydro. At sentencing, defense submitted a letter from immigration counsel confirming the potential impact of sentence for both Zhou *and* his family. The letter explained the compounding impact of Zhou's removal on his partner, who was a temporary resident in Canada on a time limited visitor visa. While Zhou was hoping to sponsor his partner, this option would be eliminated by his removal. Without access to permanent residence, Zhou's partner would be required to leave Canada. She would be accompanied by their Canadian daughter. Defence for Zhou thus explained that: " …if he is deported or if he is even subject to a removal order, the results are catastrophic for four[67] people" (*R v. Zhou,* sentencing transcripts, p. 16. For a similar review of impact of removal on multiple family members, see *R v. Adam,* 2017 ONSC 2526).

It was argued by defense that these "unusual circumstances" necessitated a sentencing approach that was perhaps "outside of the box" (*R v. Zhou,* p. 9**)**. Defense was specifically seeking the imposition of a conditional discharge, which would ensure that all immigration consequences would be avoided since this sanction would not result in a conviction. If the judge was unwilling to impose a discharge, defense sought instead a 90-day sentence on time served. Defense argued that Mr. Zhou would even be willing to serve a longer term in *pre-sentence*

[67] Zhou had two children from a previous relationship that were residing with him at the time of the sentencing hearing, rendering the total to four people who would be impacted by the decision beyond the defendant (*Zhou,* Trial Transcripts: 16).

custody if 90-days was deemed insufficient, so long as a discharge was imposed. This "sentence" would avoid registration of a conviction, thereby sparing Zhou from the deportation process but still ensuring that a sufficient term of "imprisonment" was experienced. As stated by the defense, a term of imprisonment served *before* (and in this case without) conviction would have the "same effect on the individual without the catastrophic results that the foreign people would face" (*R v. Zhou*, p. 23).

The Court was concerned that by utilizing pre-sentence custody in place of imprisonment this would undermine the intention of Parliament to remove migrants convicted of criminal offences. Defence stated in reply:

> if you look at all of those circumstances and you can craft a sentence that has equal meaning to an individual in both general deterrent, and specific deterrent aspects, and you can still allow for.... their continued residency in this country, that is something that in my respectful submission is not an end round (*R v. Zhou*, p. 25-26)

Finally, the defence added that the Court could impose a probation order as part of the conditional discharge that included house arrest, thus functioning as a conditional sentence order while again avoiding registration of a conviction.

The Crown comparatively sought a sentence of three years imprisonment. Justification for this sentence was based primarily on the argument that the Public Prosecution Services considered marijuana cultivation a serious offence requiring a significant period of incarceration. When pushed by the court on the potential imposition of pre-sentence custody in place of imprisonment, the Crown conceded that this may be appropriate, given that it would meet the requirements of general and specific deterrence. The Crown further admitted that the

consequence of removal would not only be serious but devastating for the offender, given his establishment in Canada and his familial relationships.

Again, we clearly see how knowledge of immigration outcomes directs the implementation of the parity principle in practice. Considerations of removal of multiple persons prompted defence to argue for a conditional discharge, which was supported by precedent, or in the alternative, a longer term of presentence custody with the discharge registered on the record. Defence counsel's conceptualization of imprisonment is also renegotiated here. Through some creative interpretive work spurred by consideration of immigration outcomes, pre-sentence custody is positioned by defence as an appropriate substitute for a term of incarceration. Comparatively, the Crown was directed by the view of grow operations as serious offences requiring significant terms of imprisonment. This recommendation was critically *not* supported by precedent, again suggesting flexibility in the use of legal principles at sentencing (confirmed in Interview N). Altogether, these diverse recommendations demonstrate how different forms of knowledge operating in the assemblage of the court direct the decision making of court actors.

The approach of the defence in *Zhou* was regarded in interviews as generally being far outside of the realm of plausible recommendations. My interviewees did, however, confirm a willingness to recommend the application of criminal sanctions in new and novel forms. In one interview, a long time defence lawyer explained that, where a migrant has already served their sentence, it is easier to ask for a reduction of the term of incarceration. As this interviewee explained:

> Sometimes if you are seeking relief that might or might not be merited, if the client has actually served the time … I mean I think people in general say well it's moot so why are you even arguing about it, the time is served, well because the immigration consequence is a live

> issue so, um… when we'd argue those, when they'd actually served the time, the specific deterrent of punishment had already been given effect cause they'd served their sentence (Interview N, March 2022).

It was more broadly reiterated throughout my interviews that counsel regularly sought the application of consecutive sentences where these sanctions were otherwise unavailable.[68] Consecutive sentencing allows for the imposition of a longer term of imprisonment while protecting a migrant from deportation, as the immigration system determines inadmissibility based on an assessment of the longest sanction imposed for each charge and not the overall sentence. This was communicated by one immigration lawyer interviewed as follows:

> I get frequently called by criminal defence lawyers… I'll send their people over to me for a consultation and I'll provide an opinion letter to the defence lawyer so they can know what the different you know potential outcomes are. Sometimes I actually do an opinion or an affidavit... We had one that went our way very nicely um, last year, where the guy had been convicted and sentenced to two years less a day on two counts of really low-level trafficking… I gave an opinion by affidavit that if he received a cumulative sentence of one year but it was split up into sentences of six months, that he would not face the automatic deportation and the court of appeal bought it (Interview T, March 2022).

The case law examined further confirmed the willingness of defence to recommend this strategy in court. For example, in *R v. Pavao*, 2018 ONSC 4889, defence asked for the imposition of two consecutive six-month sentences on ten counts of fraud and one count of defrauding the public. While this recommendation was refused, in *R v. Onyaditswe,* 2015 ONSC 4995, the court of appeal did "buy" this defence, splitting time served in pre-sentence custody across four

[68] See section 718 of the *Criminal Code*

convictions for assault, assault with a weapon, and sexual assault (for similar outcomes using consecutive sentencing see *R v. Sohail,* 2018 ONCJ 975; *R v. Zagrodskyi,* 2018 ONCA 34). While the outcomes in *Pavao* and *Onyaditswe* differ, in each case the recommendations for deployment of consecutive sentencing were produced by defence counsel, who justified application of this sanction through reference to potential immigration outcomes.

Interestingly, when asked about this strategy, one interviewee acknowledged that it is not limited to defendants facing removal. Defence counsel will deploy legal principles and sentencing options in unique ways to protect their clients from a variety of consequences. As conveyed by my interviewee:

> it's just gaming the system. And immigration isn't the only place where we do it because there are other situations where for example, somebody may not be eligible for a conditional sentence because of uh, I don't know if you're aware of the system, but there are certain things you can't get a conditional sentence for, house arrest for. So how about instead of a conditional sentence which was unavailable, we keep him on a house arrest bail for the next year and then plead for suspenders[69] at the end of the day. And ya, we just game the system like that. And for immigration too. I mean the really obvious example is where you stack consecutive sentences of 5 months and some days… next to each other. And each one, each sentence is under six months which doesn't trigger the… appeal… and then, you know, the person is kind've in the free and clear (Interview Y, March 2022; also confirmed in Interview N, March 2022).

[69] The interviewee is referring here to suspended sentences. Pursuant to subsection 731(1) of the Criminal Code, judges can suspend the passing of a sentence and impose a probation order on the offender. As long as the offender is not thereafter convicted of an offence while bound by the probation order, they will not be sentenced to the penalty that could have been imposed if the sentence had not been suspended, pursuant to subsection 732.11(5)(d).

What this passage demonstrates is the complexity of interactions between the immigration and criminal punishment systems in Canada. Knowledge of immigration outcomes is interwoven with a multitude of different types of information to direct practices of counsel. And these advocacy strategies that are directed towards the protection of defendants are not unique to migrant cases. Instead, these efforts are regularly used by defence to resist various coercive outcomes of judicial decision making, including by advocating for house arrest over imprisonment. It is ultimately the responsibility of the judge to reconcile the diverse positions presented at sentencing in arriving at a decision on sanction.

Sentencing Decisions

Sentencing decisions are rendered following completion of the sentencing hearing and receipt of submissions from counsel (Cole & Roberts, 2020). It is commonly recognized that judges retain significant discretion in assigning a sentence (Roach, 2022). While they must apply legal principles and consider the multiple objectives listed in the *Criminal Code*, judges retain wide authority to decide on the sanction that will best accomplish the assigned purpose of sentencing.

This analysis considers how judicial discretion operates when sentencing migrants. I rely in this effort on the work of socio-legal scholars who challenge the formal, liberal legal conceptualization of discretion as oppositional to, and constrained by, law (Bell 1992; Davis, 1969; Dicey, 1915; Galligan 1986; Willis 1968). This position is most famously conveyed in the work of Ronald Dworkin (1977) who described discretion as the hole in the doughnut created by law. Socio-legal scholars have shifted focus away from an examination of the binary of law and discretion, and towards an assessment of the *process* of decision making (Pratt, 1999). They recognize that legal rules are one of many forces that influence decision makers (Hawkins, 2003). Rather than focusing on the *roles* of law and discretion (i.e., to ensure fairness vs.

supporting the individualization of a sentence), critical scholarship employs a governance approach by asking *how* discretion is exercised – that is, how decision making unfolds in practice (Emerson & Palley 1992; Hawkins 1992; Hawkins 2003; Pratt, 2005).

As noted in Chapter One, decision makers are not simply governed by programs established by government; instead, governance strategies are adopted by actors who deploy these programs based on their own prior social experiences (Brockling, Krasmann, & Lemke, 2011). These actors further work within organizations that have established sets of relations and processes that impact how governance programs are implemented in practice (Li, 2007). This is why governance is understood to be always incomplete, perpetually defined by failure (Hunt & Wickham, 1993). A socio-legal consideration of discretionary decision making in criminal courts on migrant files thus requires a review of the social and organizational context surrounding the decision maker, as well as their own interpretive processes (Hawkins 2003).

According to Cole and Roberts (2020), judges specifically rely on a variety of sources when using their discretion to decide on sentence. This includes "officially acknowledged" materials (i.e., legal precedent and sentencing submissions), as well as informal "discussions with colleagues or their own intuition about which dispositions are most effective" (Cole & Roberts, 2020, p. 20). Judicial discretion is additionally guided by the experiences of the individual actor and their own perspectives on sentencing (Cole & Roberts, 2020). My examination of case law and the subsequent interviews I conducted confirmed the impact of these various sources on the operation of judicial discretion when sentencing migrants. I now consider how judicial frames and geographical considerations specifically shape the operation of discretion.

Judicial Frames

We know from *Pham* that judges must consider immigration consequences when rendering a proportionate sanction. The question of *how* this discretionary assessment unfolds, though, is fundamentally dependent on *who* is wielding the tool of discretion. The Supreme Court indirectly recognized the impact of distinct decision makers where they stated that sentencing is not an "exact science or an inflexible predetermined procedure" but is instead "primarily a matter for the trial judge's competence and expertise" (*R v. Pavvanto,* 2021 SCC 46).

My case law analysis and interviews confirmed that the use of discretion is shaped by the individual backgrounds and experiences of judicial actors. As explained by one interviewee:

> you have 10 judges sitting at the table over lunch. And somebody says hey give me help on this sentencing problem that I am thinking about. You will get a surprisingly broad range of views that you might not think you would get. You might get views ranging from well he has to be incarcerated, to well this is worth at least a year, to put them in the penitentiary for heaven sakes. Now if you discard the views of the extreme, I am talking about imaginary discussion, if you discard the views at the extreme and then you begin to think about what the discretion is, you will see that generally the views expressed in the middle are a proper expression of how one should use one's discretion. But I might, having said that, I might differ in my approach, and I am allowed to take my personal background (Interview R, March 2022).

Defence counsel similarly confirmed the impact of a judge's experience and personal background on their use of discretion. This was relayed during interviews via the following statement on the impact of background on sentencing for an offender convicted of possession of a firearm:

> The problem with notions of discretion are that we know more or less when we appear in front a judge, who that judge is, we will know which way, you know, the ball is rolling this time around… as soon as I'm in front of Justice (X) who is a former guns and gangs Crown…. Of course, he's gonna hammer him. And of course, he did (Interview Y, March 2022).

The effects of judicial experience and background were finally confirmed in a separate interview through discussion of the role of counsel when advocating for a defendant. This interviewee stated: "… how do you as defence counsel in good conscience put your client before "judge dread" because you ought not to be judge shopping" (Interview N, March 2022). The implication, of course, is that judges take differing approaches to sentencing again depending on their background and experience, with some judicial actors (the "judge dreads" of the criminal court) being more likely to impose harsher punishments.

The effect of personal background on the operation of discretion has been previously recognized by scholars who describe the relationship between individual experience, interpretive processes, and decision making using the concept of "frames" (Emerson & Palley, 1992; Hawkins, 1992; Hawkins, 2003; Manning, 1992). Frames refer to the "knowledge, experience, values and meanings" that guide decision makers in organizations (Manning 1992, p. 260 – 265; see also Hawkins, 2003). This includes judges working within the space of the court. Frames shape the operation of judicial discretion in practice, including in consideration of collateral immigration consequences. Whether and how a judge will weigh, for example, submissions proposing novel and/or unique sanctions to protect migrants from deportation depends on the frame guiding the individual decision maker. As explained by one Ontario based judge:

> certainly, you'll find a broad range of sort of level of activism that judges feel is appropriate and some judges I think will be very loath to step outside of the constraints that are placed upon them by the *Criminal Code*, and other judges are much more interested in exercising and flexing at their discretion (Interview Q, March 2022).

The review of case law around jurisdiction provided in Chapter 4 certainly supports this assessment of the effects of frames on decision making. The material discussed therein focused on unpacking how judges navigate the authority to sentence migrants while respecting the jurisdictional limits that prevent them from deciding on removal. It demonstrated that while many actors followed the guidance in *Pham*, some judges continued to refuse to examine deportation in practice. Judicial discretion is critical to these jurisdictional games. Those actors refusing to consider immigration outcomes relied on distinct forms of knowledge to justify their decisions. To support the fettering of their authority, they referenced for example, the desire of Parliament to confine inadmissibility decisions to the immigration system. While these decisions may have been influenced by factors beyond identity and experience, they do confirm the contention that judges deploy the same information (i.e., drawn from case law, including *Pham*) differently in rendering decisions.

Overall, the acknowledgement of the impact of identity on decision making on migrant files adds further nuance to the assessment of how migration control is enacted between immigration and criminal systems. What this discussion demonstrates is that judges are not simply applying governance programs and tools in practice without thought. With respect to removal, they are not simply abiding by Parliamentary desire to not examine immigration consequences, as expressed by Conservatives during debates of the FRFCA. These judicial actors are also not simply applying precedent, which re-establishes their authority to examine

immigration outcomes using their jurisdiction at sentencing. Instead, judges draw on their discretion to navigate the boundaries of jurisdiction established by the FRFCA and the court in *Pham.* And, fundamentally, how they use this discretion depends on *who* they are. Whether they sentence in a way that protects migrant status, or recognizes the limits of their authority to consider immigration consequences, will vary based on their frames. How the intersections and tensions between the legal assemblages of the immigration and criminal punishment systems are navigated, and whether opportunities for resistance emerge, will depend on the individual decision maker.

Geographical Considerations

If and how judges consider immigration consequences is also shaped by geographical location of the court. Socio-legal scholars utilize the concept of "the field" to understand the effects of environments on decision making (Emerson & Palley, 1992; Hawkins, 2003; Manning, 1992). According to these scholars, frames exist within fields, which are defined as the broader setting and environment surrounding the decision maker (Hawkins, 2003; see also Hawkins, 1992; Manning, 1992). As Hawkins (2003) explains, "decisions are made in a rich and complex environment, which acts as the setting for the play of shifting currents of broad political and economic values and forces" (p. 189).

Time is additionally identified by these scholars as a critical factor shaping the operation of discretion, with past decisions informing future decision makers on how to exercise their discretion. Judicial discretion is specifically informed by past decisions that form precedent. Sentencing discretion is thus positioned by Hawkins (2003) as "residual discretion, since the question of sentence is the culmination of several consequential decisions made earlier in the handling of cases" (p. 188). Fields also change across time; they are not immutable but vary

depending on the political and economic forces at play. These temporal shifts impact the decision-making setting and, in turn, the operation of discretion. For example, criminal courts "react to events and problems as they pop up, or respond to gradual shifts in the surround that become apprehended differently" (Hawkins, 2003, p. 189).

My case law review and interviews confirmed the effects of the field on the operation of judicial discretion, and specifically on the discretionary use of legal tools in the sentencing process. This includes, for example, in the deployment of legal principles like parity. Sentence ranges were again demonstrated to be flexible, not only as a result of the knowledge held by court actors but also based on the provincial location of the court. Organizational knowledge established through precedent differs across provinces, providing distinct frames that shape discretionary decisions on sentence depending on the contextual setting of the court. This was confirmed in interviews with judges, who explained that assessment of range of sanction are place specific. As stated by one interviewee:

> you may find that at the local level there are understood tariffs, or ranges, the extreme of this is that in Prince Edward Island, but I think they only have four provincial judges, they've all decided as a group that if you get in convicted of impaired, even the first impaired, you're going to jail. They've decided that as a group, because they've decided at their local level that is the best way to address drinking and driving (Interview R, March 2022).

Courts in the province of Alberta were specifically noted as being more stringent in their determinations of sentencing ranges, with appellate courts establishing very clear and specific sentence starting points through legal precedent (as compared to other provinces). For example, one defence lawyer stated:

> Of course, in Alberta … we do live in by far the harshest sentencing regime in the country… like we don't even use British Columbia precedents for anything on sentence because they are just laughed out of court… The sentences there, depending on the case, are probably half, or whatever, of what they are here, I mean they're just a fraction of what the penalties are here (Interview N, March 2022).

These efforts of appellate courts in Alberta were tied to the field, namely the political context. As explained by the same interviewee, shifts across time in the surround have specifically impacted Crown discretion, with prosecution now asking for significantly higher sentences:

> The mores of the Crown's office I think vary from place to place and age to age and time to time. And I think that's true of all offences and probably all Crown offices … but the degree of Crown discretion seems to have gone by the wayside in favour of policies that are much more politically influenced than used to be… (Interview N, March 2022)

Given that judicial discretion is constrained by precedent, these political shifts within the field that impact Crown decision making likely influence how sentencing is later decided.

Since judicial discretion is shaped by locally defined ranges, where a migrant is located will impact the availability of sanctions that may protect them from removal. This acknowledgement of variability in sentencing decisions based on location also raises significant equity concerns. Legislation defining migrant inadmissibility and access to appeal is defined by Parliament. This legislation is applied by federal immigration actors governed by the same rules and procedures on inadmissibility across Canada.[70] Comparatively, while the *Criminal Code* is

[70] I acknowledge here that section 95 of the *Constitution Act, 1867*, specifically states that immigration is a concurrent jurisdiction being under the authority of both Parliament and the provinces and territories. Section 10 of the IRPA further clarifies where and when the federal Minister of Citizenship and Immigration must consult with provinces in administering immigration legislation in Canada. However, the IRPA is clear at section 44 that it is officers assigned by the federal Minister of Citizenship and Immigration who prepare reports on inadmissibility.

under the jurisdiction of Parliament, the Canadian provinces and territories hold authority over the administration of this legislation, including in procedures for the investigation of offences and prosecution of charges (Brideau et al., 2019). Knowledge of immigration outcomes thus moves across scale, from the federal systems of immigration to be deployed in the local space of the court. Information on collateral immigration consequences then intermixes with spatially defined knowledge of legal principles. How knowledge of removal drawn from the federal scale is applied in practice by judges in rendering decisions on sentence thus depends on the place where the court is located. Whether a migrant will be sentenced in a way that protects them from removal will vary depending on where they are being tried. This was again acknowledged by my interviewee in our discussion of courts in the province of Alberta:

> so the Federal immigration rules are being applied… disproportionately… in different locales… Can you get six months around here? Pretty easily (Interview N, March 2022).

The issue of equity was also confirmed during a separate interview:

> a drug trafficking cocaine started at three years and if you got drug trafficking cocaine in Vancouver you might get a fine…but you're not going to get pen time. When you have these arbitrary national rules that say six months imprisonment, well check out the imprisonment rate in different provinces and you know what it takes to get it, it's not equality it's a real issue (Interview T, March 2022).

These effects of place on judicial decision making are also scaled, though, being dependent on both provincial *and* local context. Organizational knowledge established at the scale of the province is interwoven with temporally defined and localized discourses on crime

These decisions are then confirmed by the Minister, who refers the report to the ID of the IRB. These decisions may be contested the Federal Court of Canada. Clearly, inadmissibility and removal are under the jurisdiction of federal administrative actors.

and criminality to direct the discretionary use of legal tools at sentencing. This is particularly evident in case law emerging from Toronto where gun crime is promoted as a significant public concern. In the decision on sentence for *R v. Duale* (2014 ONSC 3799), for example, the court noted the defendant's possession of a gun in the Dixon Road neighborhood. The court stated that carrying a gun in this public place threatened the lives of police and residents. Duale was ultimately sentenced to five years imprisonment, with the judge stating that the sentence adequately "reflects the community's abhorrence of the prevalence and use of firearms in our city" (para. 45). More interestingly for the analysis herein, the decision in *R v. Adam* (2017 ONSC 2526) referenced organizational knowledge on sentencing objectives established at the provincial level that specifically addressed local concerns with gun crime in Toronto. The court cited the following passage from the Ontario Court of Appeal decision in *R v. Danvers* ([2005] O.J. 3532)

> our courts have to address the principles of denunciation and deterrence for gun-related crimes in the strongest terms. The possession and use of illegal handguns in the Greater Toronto area is a cause for major concern in the community and must be addressed (para. 78).

We see here the interweaving of place specific knowledge and discourses at the provincial scale, which then directs the application of discretion in the local space of the court. Again, the location of the court rendering the sentencing decision for a migrant will impact any consideration of immigration outcomes.

Local fields affecting judicial discretion traced in case law were not limited to gun crime in the Toronto area. In *R v. Garcia* (2019 ONSC 5095), the defendant was convicted of arson causing damage. Given that this offence was committed in Toronto, a very densely crowded city, the court noted that the actions of the defendant in setting the fire were particularly

"irresponsible and anti-social" (*R v. Garcia*, para 39). Nor do these localized forms of knowledge only appear in decisions emerging from Toronto courts. Judicial actors interviewed for this study confirmed, for example, the concern with drunk driving in the environment of York region. This was reiterated in one interview as follows:

> How many times have I said in York region when I sentence somebody to impaired driving that we are the impaired driving capital of the world, Canada and that it's clearly a scourge in York region and I'm supposed to take it seriously (Interview Q, March 2022).

Critically, when sentencing migrants, knowledge and discourses of spatialized concerns drawn from across provincial and local scales are at times deployed alongside narratives of the safety of the national "public." These discourses are additionally temporalized, being focused on *future* risk. As explained by Valverde (2009),

> The criminal law and other instruments for punishing wrongs try to ascertain past events and provide a symbolic return to the time before the injury was committed thrugh punishment ('justice has been done'). Risk management, by contrast, whether in environment law or in other mechanisms, is oriented to the future, to prevention (p. 155).

This interweaving of knowledge from the federal scale was established in *R v. Critton,* CRIM-P-6030-02, where the court determined that the discretionary consideration of collateral consequences required an examination of the risk of the defendant to the *Canadian* public. The directions in *Critton* were not reiterated in *Pham*. Still, my case law analysis demonstrated that some courts continue to rely on narratives of Canadian public safety to justify applications of sentences that *do not* protect from deportation. For example, in *R v. Jonat,* 2019 ONSC 1633, the court held that, because the defendant would be deported from Canada, their future risk to the Canadian public was not a relevant consideration, thereby negating the need to promote

rehabilitation through sentencing (see also: *R v. G.W.*, 2017 ONSC 3149). This practice was also confirmed in interviews, with one judicial actor stating:

> But there is no doubt that I have seen cases in which the crown position and, ultimately a court accepts it is, this would have been a longer sentence but for the fact that you are being deported. And you are not Canada's problem anymore. And that's quite common, right where, I'm not gonna say quite common but where a sentence should've been longer, at the very least the sentence should've had probationary terms attached, but the thought process is why would I keep somebody who is not eligible in Canada on a two or three probation when really the best thing, I mean we're not looking at rehabilitation, we are looking at public safety, as soon as they get out of jail, they get on a plane and they leave, then at least the Canadian public is safe (Interview Q, March 2022).

These examples demonstrate that knowledge of public safety directs judicial assessment and application of sentencing objectives. Where future risk is no longer a concern given a migrant's likely removal, consideration of rehabilitation is rendered moot. This in turn affects sentencing, with migrants being denied access to certain sanctions that are tied to rehabilitation.

Finally, my interviews and case law revealed that judges also consider the safety and security of the *international* public. For example, one interviewee described a sentencing decision considering the impact of deportation on citizens of a receiving nation:

> I mean I've seen it come up in the context of a dangerous offender hearing where the guy was gonna get deported. He was in fact deported, he snuck back into Canada, committed some crimes and he was found to be a dangerous offender, sentenced to an indeterminate period but that still makes him liable for deportation after like seven years or something. And the judge was actually considering the impact or the safety of people in like Guyana or wherever he was

> gonna be deported to in coming to the decision. That ya, I could give him a year and have him deported and also put at risk all those other people (Interview Y, March 2022).

It is important to recognize here that these considerations of "risk" are distinct from those previously identified in the work of criminologists. We have learned, for example, from Garland (2001) and Feeley and Simon (1992) of the promotion of preventative strategies for population management in penal policies that rely heavily on actuarial predictions of risk (see also Ericson & Haggerty, 1997; Ericson & Doyle, 2003; Hannah-Moffat, 2005; Simon, 1998). Risk discourses, knowledges and techniques deployed in support of these policies are concerned to *manage populations* rather than to "change" offenders through rehabilitative methods (Hannah-Moffat, 2005). Hannah-Moffat (2005) explains that within the category of risk applied to criminals, certain offenders are considered more or "exceptionally" risky, including the mentally ill, and thus subjected to differential management practices (p. 30).

Still, while risk remains a central and recognizable feature of penal and legal regimes, Hannah-Moffat (2005) is clear that these risk discourses, knowledges, and techniques intertwine with other rehabilitative and restorative strategies, resulting in "mixed models of governance" (see also O'Malley, 2009). Risk rationalities are understood here to be heterogeneous, fluid and dynamic, resulting in a variety of groupings of subjects based on their risk *and* their intervenable needs (Hannah-Moffat, 2005; Valverde, Levi & Moore, 2003).

I would extend these insights to include a recognition of the risk discourses applied based on citizenship status within the space of the court. Racist risk discourses focused on the protection of Canadian citizens are specifically promoted at sentencing in cases involving migrants. These discourses originate in the immigration system, where they are used to justify the application of sovereign power to migrants via the program of removal. As Chapters 2 and 3

have demonstrated, racialized migrants are positioned as distinct from and threats to Canadian citizens. These discourses are then drawn from across the immigration assemblage and deployed in the localized space of the courts, with judicial actors considering the risk of migrants to the *Canadian* public based on likelihood of removal. Migrants are again positioned as distinct from citizens, which then justifies novel considerations of risk beyond those identified by criminological scholars. These risk discourses specifically ask if and when migrants will be deported. Where migrants are assessed as removable, judges then justify the application of sentences *not* focused on rehabilitation by arguing that the defendant will be deported and is thus not a future risk to Canadians. These discourses of risk then are only applicable to individuals who are foreign and deportable. This was most clearly explained by one interviewee, where they stated the following in relation to judicial consideration of rehabilitation in migrant cases:

> They are not giving any kind of relief. You are not a candidate for relief. But I think in the back of their minds, without ever putting it on the record, and so, we are relieved that you go… for people who are deportable, the sad life business and the rehabilitation business doesn't seem to carry much of an argument, and nothing is put on the record, but I think that's part of it. You know, you won't be part of our society, so you won't be our problem at that point (Interview N, March 2022).

Overall, this examination suggests that although migrants facing removal can certainly refer to *Pham,* and require that collateral consequences be considered in practice, *how* this discretionary assessment unfolds will depend on the place of the court. The success of efforts to resist the program of removal may thus vary based on where a migrant is prosecuted and sentenced. This examination further confirms that, while the processes of removal and sentencing certainly interweave across the immigration and criminal assemblages, distinctions

and tensions remain between these systems. As judges walk their tightrope of authority, they draw on knowledges and discourses (including of risk) from across the legal assemblage of immigration. Yet characterizing these systems as merging would miss the multitude of elements, such as localized discourses and knowledges from the field, that dynamically interweave to shape the operation of discretion in the process of sentencing.

Conclusion

This chapter has considered how decision making unfolds on migrant files in Ontario-based criminal courts. It began with an examination of if and when migrant status is raised for judicial consideration. Through a review of case law and interview data, I demonstrated that although criminal counsel bears the onus of raising status, many defence lawyers fail to address immigration outcomes during the sentencing hearing. Where status is discussed, counsel relies on knowledge of immigration outcomes (including but not limited to removal) obtained from immigration actors to support their contentions on the collateral effects of sentencing. Knowledge of immigration outcomes was then demonstrated to impact sentencing submission. Defence counsel deploys legal tools, including principles and objectives of sentencing, in new and novel ways to protect migrants by advocating for sanctions that undermine the program of removal. Whether a judicial actor accepts these submissions was demonstrated to depend on both their frame and the field in which the court is set.

Altogether, this material further supports the contention that the immigration and criminal systems in Canada are complexly interweaving. It is because they remain distinct that immigration actors must intervene in the space of the court to ensure that migrant status is considered. Knowledge of immigration outcomes is then interwoven within the process of sentencing, mingling with a variety of elements that shape sentencing submissions and decisions,

including defence strategies, judicial interpretive process, and localized knowledge. Identification of these space of tension reveal opportunities for resistance, as well as factors that may place migrants at further risk of removal (because of, for example, the lack of knowledge of immigration outcomes in the criminal system).

I recognize that my case law was again drawn exclusively from Ontario courts. This introduces a limitation to the analysis. While I draw generalized conclusions on the nature of the relationship between the immigration and criminal punishment systems in Canada, these arguments are based on data emerging from one province. I have attempted to address these limits by interviewing counsel from across Canada. Future work must examine decision making on migrant files across all provinces and territories in Canada.

Chapter Six: Effects of Sentencing

A key component of the proposal for the research conducted in support of this dissertation was to understand the *effects* of criminal court decision making on practices of removal. I sought to trace those practices in the criminal courts that contribute to the production of various forms of inclusion and exclusion[71] in the immigration system. Having worked in the field of immigration with migrants facing removal, I had specific expectations for the likely outcomes of the processes of decision making under review. My clients facing removal for criminality were all racialized men with mental health concerns. I thus expected that men of colour with mental health issues would be disproportionately represented in decisions on sentence that position migrants as inadmissible and removable without the right of appeal. Yet, this was not the outcome that was evident from the case law reviewed. There was mention of mental health issues in the cases I collected, but discussion of these concerns were varied, including in how they intersected with immigration outcomes.[72] This gap in the research will be further considered in the Conclusion to this study.

What was revealed in the research was the clear reliance at sentencing on racist discourses of difference that also structure the program of removal in the immigration system. The outcomes of cases for migrant admissibility where these discourses were employed varied. I contend though that the practical effect of the reproduction of these racist logics is to sustain the

[71] Depending on the offence for which they have been convicted, and the type and duration of the punishment imposed, migrants may be: a) transitionally included – where the status of a permanent resident or foreign national is protected within the administrative immigration system, but they are not full members of society both in being non-citizens and subjected to criminal justice systems; b) liminally excluded – where a permanent resident faces the loss of their status due to their conviction and sentence, but retains the right to appeal an administrative removal order issued against them;[71] or c) excluded – where the conviction and sentence result in the loss of status, and the permanent resident or foreign national is deported from Canada.

[72] Interviewees gave a variety of reasons for these outcomes. A common response, however, was simply that arguing issues of mental health takes significant work that most counsel in criminal courts do not have the time and/or desire to put into a case file (Interviews Q and Y, March 2022).

racialized conceptions of citizenship that also structure Canadian immigration law and policy. Building on the work of border criminologists, I argue that the criminal punishment system works alongside the immigration system to produce racialized people as outside of membership and deportable. Practices of sentencing and removal in both systems thus contribute to the racial programs of governance that functions to maintain the homogeneity of the Canadian settler state.

This Chapter traces when and how racist discourses are employed by court actors during the process of sentencing migrants in the criminal system. It begins with a review of case law where courts *deny* the existence of systemic racism[73] in the Canadian context. It specifically examines how arguments of systemic racism are redirected and subsequently negated through the promotion of liberal legal rationalities. I position these decisions as facilitating exclusion through the denial of difference. I then explore how discourses of race and racial logics of cultural difference are promoted by a variety of court actors, including in cases where consideration of systemic racism is refused. Intersecting with the program of removal, these practices function to produce multiple forms of inclusion and exclusion. While not always resulting in exclusion (i.e., through application of sanctions that progress the program of removal), racialized migrants are relegated through sentencing to positions of legal liminality,[74] being defined as undesirable and criminal (Coutin, 2005; Moffette, 2018). Altogether, these practices contribute to racial

[73] There are multitude of formulations of "race", which are also evolving across space and time (Murdocca, 2013). Within the present study, and following Murdocca (2013), I rely on the analytic of biopower to examine how "ideas about racial difference constitute and produce particular subjects in law" (p. 17). For further information, please see chapter 2 of this dissertation.

[74] Truong, Gasper, and Handmaker (2014) offer the following concise explanation of the socio-legal concept of legal liminality: "From a socio-legal perspective, work on liminal legality in respect of migrants with an uncertain legal status is more ethnographically informed and provides a more grounded, albeit sombre picture. Centred on segmented integration, this body of work focuses on migrants whose social lives are situated in a zone of legal ambiguity and their ways of struggling for residency under tighter immigration policies based on an anti-immigration stance" (p. 10). I stretch this definition here to also apply to racialized people in Canada, who are excluded from full citizenship via processes of racialization that mark them as different and outside of membership.

governance that sustains the colonial power undergirding the program of removal by confirming that citizenship is exclusive to white populations.

"Individual" experiences of racism

The principle of individualization was demonstrated in Chapter 4 to be a critical component of precedent establishing judicial authority to consider immigration consequences at sentencing. The principle of individualization was demonstrated as supporting the considerations of migrant circumstances, and potentially protecting migrants from removal through sentencing. Yet, it is also through reference to individualization that practices of exclusion of racialized migrants are advanced. In the case law I reviewed, there were a few decisions where the defence requested that the court examine the structural conditions that shaped their client's interaction with the criminal system. Denial of these requests were justified by judges through reference to the principle of individualization, with judicial actors stating that sentencing must be directed by a consideration of the circumstances of the individual offender before the court. Review of systemic racism was positioned by these actors as beyond the scope of this process.

We see this, for example, in the sentencing hearing and decision in *R v. Brissett and Francis*, 2018 ONSC 4957 (see also *R v. Kabanga-Muanza*, 2019 ONSC 1161). This case involved two defendants who had been convicted of one count of living off the avails of juvenile prostitution, and one count of exercising control, direction or influence over the movements of the victim to aid, abet or compel her to engage in or carry-on prostitution. Brissett and Francis were both permanent residents of Canada, having separately immigrated from Jamaica in 2008. In presenting their defence, counsel for Brissett asked that the court consider the racism experienced by Black Canadians. Referencing the decision of *R v. Jackson*, 2018 ONSC 2527, the defence stated that the court may

> take judicial notice of the historic disadvantages that African Canadians have faced because of the history of colonialism, slavery and just any sort of trauma associated to issues of race and identity … (*R v. Brissett and Francis,* Sentencing Transcript, pgs. 40-41).

Later in the sentencing hearing, the defence substantiated their request through elaboration of the experiences of Black people in Canada (referencing again the decision in *Jackson*, which was rendered in Nova Scotia), stating:

> the broader identity disadvantages, i.e., of being an African Nova Scotian, of experiencing the trauma, that historical trauma of slavery, colonialism, and navigating, you know, the broader Canadian system as an African Nova Scotian, a Nova Scotian male. I'd submit that some of those issues are relevant and applicable to Mr. Brissett as well because, again, we're talking about the larger piece. It's a bit of a macro and a micro in terms of how it actually affects his day to day and his interactions with society. I mean, of course, in taking that into consideration, His Honour also talks about the continued, or rather the disproportionate incarceration of African Canadians and how those numbers continue to go up, and some of the impacts, or the, rather, as he terms it, the systemic discrimination that they experience while in custody. So, I think certainly those are, I'd submit respectfully that those are factors that Your Honour, that I urge Your Honour to consider in correcting a sentence that Your Honour sees fit and appropriate (*R v. Brissett and Francis*, Sentencing Transcript, p. 45).

The court challenged the need to consider the issue of systemic racism. When presented with these arguments at the sentencing hearing, Justice Lemay highlighted for the defence that the *Criminal Code* does not require consideration of the historical experiences of Black people. The

court also cited the decision in *Jackson,* where Justice Nakatsuru[75] specifically found that it is *not*

> mandatory for trial judges to apply systemic or background factors in sentencing African Canadians in the sense that failure to do so would amount to an error in principle unless explicitly waived by the offender. It all depends upon the issues raised by the parties and how the case is presented (*R v. Brissett and Francis,* Sentencing Transcript, p. 42-43).

The question of judicial authority to consider systemic racism was raised again by Justice Lemay following completion of sentencing submissions from all parties. Here, the court referenced the decision in *R v. Hamilton,* [2004] OJ No 3252 (QL), noting that the appellate court had found that it was not "appropriate" (*R v. Hamilton*, p. 71) to consider "historical, systemic, and/or contemporary social problems" when sentencing "specific" offenders (Murdocca, 2013, p. 160). Justice Lemay asked that all parties present additional submissions on the request to consider systemic racism generally, from a "macro" view, having regard to the decision of the appellate court in *Hamilton.* After a short recess, defence for Brissett stated that the court in *Jackson* was alive to the appellate court's refusal to consider the defendants personal circumstances, but that Justice Nakatsuru still found that there was "room for sentencing considerations that are specific or tailored to African Canadians" (*R v. Brissett and Francis,* Sentencing Transcript, p. 76). Defence for Francis simply echoed their colleague, asking that the position of counsel for Brissett be adopted, without providing further elaboration. For their part, the Crown dismissed the need to consider the general and historical experiences of Black people with racism in Canada, replying simply: "Your Honour has already highlighted sort of the distinction between a

[75] For a separate consideration of decisions rendered by Justice Nakatsuru that consider issues of race, please see Murdocca, 2018.

specific link between the societal context and the offender…" (*R v. Brissett and Francis,* Sentencing Transcript, p. 73).

The principle of individualization is critical to processes of racial governance at play in *Brissett and Francis*. The court relies on the ostensible requirement under liberal law that sentencing be focused on the circumstances of the individual offender to deny a "macro" assessment of the subjugation and criminalization of Black people in Canada. Any request to examine the structural conditions that facilitate exclusion based on race is held to offend this narrow focus. This legal interpretation is consistent with liberalism, which normalizes and naturalizes racial exclusion (Goldberg, 1993). Within a liberal legal rationality, "universal principles" (including legal principles) are conceptualized as "applicable to all human beings or rational agents in virtue of their humanity or rationality" (Goldberg, 1993, p. 5). Liberalism here does away with claims of historical, political, social, and/or cultural difference, holding instead that people are united by their identities as humans. By denying processes that produce difference, liberalism assumes equality. As Goldberg (1993) explains:

> liberalism takes itself to be committed to equality… From the liberal point of view, particular differences between individuals have no bearing on their moral value, and by extension should make no difference concerning the political or legal status of individuals (p. 5).

Race, and the production of difference through racialization, thus becomes irrelevant under liberalism. Race is not a factor at sentencing in a liberal legal system, which instead promotes universal principles of equality and is otherwise unconcerned with the broader social context. The only way that race can be considered is where it is tied specifically to the circumstances of the individual. The court in *Brissett and Francis* adopts a liberal legal rationality, which guides

the use of the principle of individualization, to justify the dismissal of the requests of the defence to consider systemic racism.

Yet, despite the dismissal of arguments of racial oppression, we know that in the Canadian colonial context ideas of race have been critical to processes supporting the violent dispossession and subjugation of Indigenous and racialized populations. It was through processes of racialization that Indigenous people were changed into subjects without humanity, "to be held in contempt, or to be saved from their fates by more civilized beings" (Razack, 1998, p. 3; see also Fanon, 1967; Murdocca, 2014). These biopolitical ideas of difference in turn sustained the white colonists' sovereign claims to the land, with settlers emerging through these "representational practices" as the rational saviours of Indigenous people and the rightful citizens of Canada (Murdocca, 2013). Similar racial logics were again deployed by colonizers to govern other racialized groups via immigration law and practice, as demonstrated in Chapter 2. Jiwani (2002) provides further insight analyzing how the *criminal* system in Canada has similarly been inflected by biopolitical references to racial difference that function to maintain the exclusion of racialized groups through criminalization, thereby sustaining the settler colonial regime. Jiwani (2001) writes that:

> Beginning with the colonization of Canada and the processes of settlement, particular groups have been identified as "others," and the process of "othering" has involved their racialization and criminalization (p. 68).

Jiwani (2001) acknowledges in her work that the criminal system functions in tandem with other systems in Canada (including the immigration system) to facilitate the exclusion of racialized groups through criminalization:

> the criminal justice system works in concert with other institutions in society to perpetuate the racialization and criminalization of specific groups. Studies also show that the criminal justice system is saturated with "common-sense" and taken-for-granted notions of race and racism (p. 68; see also Backhouse, 1999).

Yet, according to Jiwani (2002), and confirming Goldberg (1993), claims of racism within the criminal system are futile:

> from the perspective of the "white eye" (Hall, 1990), which views and defines the world according to its own terms, concepts of race and racism are often denied legitimacy, trivialized, contained (through redefinition and categorization), or erased in the dominant discourses of the system (p. 68).

It is trite to say that processes of othering informed by racial narratives of criminality continue to operate within and through the criminal and immigration systems in Canada to regulate and exclude racialized groups (see, for example, Chan & Chunn, 2014). The point here is that despite the proliferation of racist practices, under liberalism there is a general dismissal of the need to acknowledge these processes and the differences they produce. Razack (1991) is clear on this point, stating that "the concept of an independent, decontextualized individual" under liberalism "functions to suppress our acknowledgement of the profound differences between groups" (p. 401). Goldberg (1993) thus holds that while under liberalism "race is irrelevant," "all is race" (p. 6). The employment of a liberal legal rationality by the court in *Brissett and Francis* ultimately allowed for the erasure of the need to examine whether the criminal system has been structured through references to race, requiring instead a purportedly contextualized assessment of how experiences of racism had directly impacted the defendants as individuals.

The court's refusal to consider systemic racism was reiterated and expanded in the final decision on sentence. Justice Lemay first held that any consideration of systemic racism must be contained to the trial process, as follows:

> Second, in *Jackson*, the sentencing judge relies on the recognition of systemic racism in a number of decisions relating to issues such as strip searches, racial profiling, arbitrary detentions and jury selection (see paragraph 87). The concerns with both bias in jury selection and potential bias in jury membership, in particular, are well known to trial judges.
>
> However, all of these different areas where systemic racism has been identified, and found to be relevant, deal with an accused person's interaction with the justice system and how that justice system treats the accused. Recognizing and ameliorating systemic racism in those types of cases is vital for two reasons. First, it ensures that the law moves towards treating all Canadians equally. Second, it ensures that accused persons are not wrongfully convicted based on pernicious racial stereotypes (paras. 63-64).

There are several interesting logical moves made by the court in these paragraphs. Justice Lemay appears to acknowledge that the criminal system is implicated in the production of racial difference. Yet, the judge argues that these practices are not relevant to the sentencing process. They are instead part of the methodology of deciding on conviction. Here, systemic racism is assumed to impact only assessments of guilt, with the court being directed to consider how racial processes may result in the wrongful criminalization of racialized persons in Canada. Once conviction is applied, however, any consideration of systemic racism is apparently beyond the scope of judicial review. The sentencing process is relieved of any involvement in practices of racialization that the court has acknowledged are underway within other sectors of the criminal system. The assumption is that these practices *precede* the decision to charge and prosecute,

which is why they must be reviewed in relation to culpability. The sentencing court does not engage in these processes producing differences based on race. Practices of sentencing may then be guided by the liberal rationality of a common humanity, since processes of conviction and sentencing do not perpetuate the subjugation and criminalization of racialized groups. Consideration of structural conditions that produce racial difference emerge again as irrelevant to the sentencing process.

Justice Lemay is not alone in this perspective that limits the impact of racism to earlier processes of the criminal system. One judge interviewed for this project echoed this sentiment, stating:

> Remember, judges don't control who comes into their courtrooms… I can't say no, no, no, I've tried enough Black people this week, I can't try anymore, go away. I can't do that. And so, a lot of those decisions are made long before they get to me. Particularly in youth court, given where I sit in (redacted), I try hugely disproportionate numbers of Black male teenagers (Interview R, March 2021).

Critically, this interviewee is not suggesting that they should not examine systemic racism in practice. What this quote suggests, though, is the common adoption of the perspective that racist processes in the criminal system are contained to decision making that occurs before conviction and sentencing. The court is assumed to be relieved from involvement in systemic racism.

In the final decision on sentence, Lemay reiterated that systemic racism is only a relevant consideration at sentencing if the defence can explain how structural conditions directly shaped the commission of the offence and/or the defendants "own personal circumstances" (*R v. Brissett and Francis,* para. 65). The court determined that the defence for Brissett and Francis had failed to make the necessary "connection between the history of discrimination suffered by African-

Canadians and the circumstances of the Offenders or the Offence" (*R v. Brissett and Francis,* para. 61). According to Lemay, to consider systemic racism without this contextualization would potentially cause the court to lose sight of the "individual's personal culpability" (*R v. Brissett and Francis,* para. 69). As the decision states, "the judge must ensure that those societal ills, even if they are relevant, do not overwhelm the other factors" (*R v. Brissett and Francis,* para. 69).

Ultimately, the decision in *Brissett and Francis* operates to deny the examination of systemic racism within the sentencing process. While claims of difference produced through the criminalization of race are acknowledged, consideration of practices of difference are delimited to the trial process. Sentencing judges are relieved from review of systemic racism by Justice Lemay through the promotion of liberal legal principles that assume equality in the court. Race again is irrelevant. Any request for review of structural conditions must be connected to the "causal chain" of offending through individualization (Murdocca, 2013, p. 143; see also Lawrence & Williams, 2006). Structural conditions in Canada emerge as irrelevant given the focus on individualization in the sentencing process. Following the lead of Justice Doherty in *Hamilton,* the court in *Brissett and Francis* "contested the application of sentencing methodology that would see historical and contemporary concerns related to systemic racism and the systematic criminalization of black peoples being codified in law" (Murdocca, 2013, p. 161-162).

Paradoxically, in rendering this decision, the court relied on racial narratives of difference to justify the refusal to consider systemic racism, demonstrating again that while "race is irrelevant," "all is race" (Goldberg, 1993, p. 6). In the decision on sentence, Justice Lemay writes

that the defence had conflated the analysis of Indigenous circumstances under s. 718(2)(e)[76] with the distinct type of assessment that should be applied to "African-Canadian offenders (or others who have experienced discrimination)" (para. 66). The court relied on *Hamilton* in rendering this determination. According to Murdocca (2013), in that earlier judgement, the appellate court,

> distinguished Black people from Aboriginal people by organizing possible and competing claims to both historical disadvantage and systemic discrimination such that Aboriginal people are deemed deserving of the application of section 718(2)(e), while Black Canadians are understood as being outside of its possible application (p. 162).

These same racist logics are at play in *Brissett and Francis* through repetition of the reasoning in *Hamilton.* The adopted liberal legal rationality intersects with these racial ideas to guide the application of the principle of individualization, supporting the denial of examination of structural conditions. This denial is further sustained through contentions of racial difference distinguishing between Indigenous and Black people in Canada.

Further, in their decision Justice Lemay determined that the only evidence of systemic racism that was placed before the court concerned Francis' "difficulties in integrating into Canada" (*R v. Brissett and Francis*, para. 63). The court found, however, that "these difficulties were as a result of Mr. Francis's adjusting to learning English. There is no mention that these difficulties were related to any systemic racial or gender bias" (*R v. Brissett and Francis*, para. 63). Again, Justice Lemay here reproduces racial logics to refute a review of systemic racism. While Francis may have experienced challenges in integrating into Canada due to language barriers, according to the court his experiences of exclusion were not related to structural

[76] This section of the *Criminal Code* requires that sentencing judges consider all available sanctions other than imprisonment when imposing a sentence, with a particular attention to situation of Indigenous people. This legislation was then considererd in *R v. Gladue*, [1999] 1 SCR 688, with the Supreme Court issuing a framework on how to sentence Indigenous persons based on the instructions under s. 718(2)(e).

processes that subjugate Black people. This resort to “common sense” reasoning supports the perpetuation of racism in the criminal system (Heller, 1995). As explained by Heller (1995), decisions on cases involving individuals with limited English language skills are marked by anti-immigrant sentiments that position defendants as undeserving of justice and outside of citizenship. Yet they are accepted given their simplicity and appeal to epistemologically established links between race, crime, and foreignness, in particular in the Canadian context. Jiwani (2001) writes in reference to racist comments on language differences that

> The overt nature of the racism in these comments also attests to notions that "Canadians" do not break the law, but racialized "immigrant" groups do. Racialized groups are "othered" in the process and cast as undeserving of cherished "Canadian" values such as magnanimity and tolerance (p. 69).

In the decision of *Brissett and Francis*, the court invokes these “common-sense” or “simple logics” related to language, which operate to produce Francis as a racialized, criminalized and foreign subject. Francis’ experiences of exclusion are understood by Justice Lemay as being unconnected to processes of racialization and instead are rationalized as the result of differences in language ability. Exclusion becomes understandable in this context; the barriers to integration experienced by the defendant are not the result of systemic processes of racialization, but simply due to the offenders’ own limitations. Francis becomes understandable as a person who has broken the law not because of his experience of “othering” but because of his own inherent criminality. As a result, he does not deserve access to considerations that are beyond the scope of the sentencing process, including of systemic racism. Intersected by these racist narratives, liberal legal rationality prevails.

To summarize, the court in *Brissett and Francis* refuses to review the structural conditions in Canada that the defence argued functioned to criminalize persons on the basis of race, stating that any consideration of systemic difference is irrelevant to the sentencing process. Sentencing judges are absolved of responsibility in perpetuating processes of racial governance. While structural conditions may have impacted decisions that criminalized racialized defendants, bringing them into court, these practices do not inflect the sentencing process. As a result, the court must treat all defendants as equal. Race is rendered irrelevant through these logical moves. And yet, in rendering its sentencing decision, the court relies on racial narratives that function to produce the defendants as racialized, immigrant, criminal "others," even while denying their experiences of racialization and criminalization. The narrative work in this decision ultimately operates to maintain the exclusion of Francis and Brissett and upholds the structures of whiteness that support the eviction of Black people from inclusion, namely through the concomitant promotion of liberal legal assumptions of sameness and repetition of racial narratives that produce difference.

We may return here to the recognition that the tool of individualization is comparably used to facilitate inclusion for migrants in court. How can we reconcile this acknowledgement of benefits emerging from the promotion of principles of individualization in migration cases with the denial of consideration of racial difference through reference to this legal tool? And what impact do these seemingly competing interpretations have for racialized migrants?

I would contend that these distinct approaches to sentencing result from the operation of distinct citizenship practices in the court. We see from the preceding analysis the distinct forms of knowledge that direct the application of sentences with disparate outcomes related to inclusion. Information on migration outcomes may be deployed by the court in the process of

sentencing, directing the use of the legal tool of individualization, and contributing to the production of migrant inclusion (via protection of the migrant from inadmissibility), liminal inclusion (via protection of the right of appeal), and exclusion (Coutin, 2005; Moffette, 2018). When we specifically consider the experience of racialized persons, however, we see that the court relies on a liberal legal rationality to deny individualization while concomitantly deploying racial narratives that criminalize and subjugate the defendants. Together, these processes of "othering" facilitate the exclusion of racialized people from membership in the Canadian colonial state via the application of sentences that render these individuals inadmissible and removable. The criminal punishment and immigration systems are thus concomitantly contributing to racist forms of governance via processes of exclusion. Together, these systems function to maintain the white, colonial nation.

I would further suggest here that judicial acknowledgement of the distinct impact of sentencing for migrants might be understood as representing the courts' "tolerant" approach to difference. As Goldberg (1993) states, under liberalism rather than simply dismissing claims of difference, "Liberals may admit the other's difference, may be moved to *tolerate* it" (p. 7). Yet, Goldberg (1993) is also clear that tolerance does not equate to inclusion. Instead, "tolerance… presupposes that its object is morally repugnant, that it really needs to be reformed, that is, altered" (p. 7). Citizenship practices that guide consideration of removal are thus not incongruent with liberal legal rationalities. Instead, migrant inclusion may be facilitated even under liberalism if and where migrant difference is considered "tolerable." Migrants' whose differences are endurable may be allowed to remain in the state as permanent or temporary residents despite their differences, rather than being deported. They will continue to be assessed for desirability, reformed, and ultimately may be allowed to move closer to inclusion (Coutin, 2005; Moffette,

2018). Again, the remainder of the chapter will consider if and how tolerance of migrant difference is shaped by the concomitant deployment of racial narratives that produce exclusion.

Finally, it is necessary to acknowledge here that tolerance of migrant difference within citizenship practices does not function to unsettle the colonial regime in Canada. Instead, the tolerance of migrant status in court upholds sovereign authority. It is ultimately the sovereign who decides whether the migrant can move towards inclusion/exclusion through the immigration process. The state can observe the migrant, determining if their difference has been successfully overcome before inclusion. Critically, the migrant continues to be understood as different from the population of white settlers. Comparatively, court acknowledgement of difference produced by systemic racism would require reflection on the processes of racial governance that uphold the settler regime. Any consideration of how racialized persons are subjugated within the Canadian nation would necessitate acceptance that these structural conditions imposed by settlers continue to be at play in institutions across Canada, including within the court and immigration system. To avoid this process of reflection, the court denies systemic racism. The sovereign state does not have to reflect on their involvement in the creation and maintenance of difference, instead upholding the liberal legal assumption of sameness (Goldberg, 1993).

Excluding Racialized Migrants

My examination of decision making on court files involving migrants revealed the complex interweaving of processes of racialization with considerations of the program of removal at sentencing. The adoption of racist narratives by a variety of actors during migrant sentencing specifically contributed to the racialization of migrants and their movement towards exclusion. Discourses of race and narratives of cultural difference were uncovered through my case law analysis as directing sentencing processes. Racial logics were shaped by ideas of gender, with

gender-based narratives informing the production of racialized migrants and their assessment for inclusion.

Discourses of race

During both sentencing hearings and within sentencing decisions, men of colour were regularly described by court actors as dangerous recidivists with a propensity for violence. This is consistent with conceptualizations of racialized men adopted in the *immigration* system to support exclusion. We see the perpetuation of these racial narratives, for example, in *R v. Thavakularatnam,* 2018 ONSC 2380. Thavakularatnam was born in Germany to his Sri Lankan parents. He migrated to Canada at the age of three, receiving permanent residence. As explained in Chapter Four, he was convicted in 2018 of possession of a loaded restricted firearm and possession of a firearm knowing that he was not the holder of a license or registration certificate. During Thavakularatnam's sentencing hearing, the Crown described the defendant as a dangerous person who brought a firearm into a public place and then assaulted an officer. To substantiate these claims of the defendant's risk, the Crown presented evidence that Thavakularatnam was not a first-time offender. This information was then used by the Crown to justify the request for a sentence beyond the upper end of the established range (namely, five years imprisonment instead of the three years set out in precedent).

In submissions to the court, the Crown stated that "the accused is no stranger" to the criminal system "and he's engaged in acts of violence" (*R v. Thavakularatnam,* Sentencing Transcript, p. 13). Critically, though, Thavakularatnam had only a youth record at the time of sentencing. He had been arrested as an adult but never convicted of an offence. He was thus technically[77] a first time offender before the court. To demonstrate that he was a recidivist,

[77] Under s. 36 of the Canadian *Youth Criminal Justice Act,* S.C. 2002, c.1, the court may determine that a youth offender is guilty of an offence. This is not, however, a conviction.

however, the Crown reinterpreted information available on Thavakularatnam's past interactions with the criminal system. The Crown argued, for example, that the defendant was not a first-time offender given his *arrests* as an adult.

While the court ultimately dismissed this argument, the Crown later repeated the narrative of Thavakularatnam's propensity to violence. During a personal statement given to the court, Thavakularatnam expressed his deep remorse for his offences, noting in particular the pain experienced by his parents as a result of his arrests:

> Your Honour, I've made the biggest mistake of my life. I have a loving and caring mother and father who will do anything for me and I made their lives a tragedy [*sic*] ever since I came to jail (*R v. Thavakularatnam,* p. 46).

In follow up submissions, the Crown noted their concern that Thavakularatnam was using his statement to deceive the court. After reiterating that the defendant was a repeat offender, now referencing his *youth* record, the Crown then stated that Thavakularatnam's parents were specifically misled into believing that their son was a "good person" (*R v. Thavakularatnam,* p. 51). According to the Crown, where Thavakularatnam's parents positioned their son as a "good man" whom they would assist in getting "his life back," this should be interpreted as statements made by naïve persons that ignored the defendant's history of violent behaviour. The Crown thus asked that any supporting statements made by the defendant and his parents be recognized as attempts to mislead the court.

These statements by the Crown in their submissions on sentence rely on racial logics that produce racialized men as dangerous repeat offenders. Despite being repeatedly told by the court of the inaccuracies of the information presented, the Crown reiterates the erroneous position that Thavakularatnam is a recidivist to further support their contention that he be sentenced to a

longer period of incarceration than what is prescribed in precedent. The criminalization and racialization of Thavakularatnam through these statements thus function to support the subjugation of the defendant. The logic is simple; this is a dangerous threat that needs to be removed, legal principles be damned. Following Walcott (2014), Thavakularatnam is recognized in these statements as "out-of-place" and thus excludable:

> One of the central conceits to removal of Black people from Humanness is that Black people are constantly understood to be out-of-place. This out-of-place-ness especially of poor Black people, is one which has profound life and death consequences; it becomes highlighted in the extreme by the carceral state of the USA… but also by practices like the enormously disproportionate stop and frisk and 'carding' measures used against young Black men across the North Atlantic zones… as well as the state practice of deportation (p. 97).

These same biopolitical discourses have been systematically employed in the immigration system to produce migrants as dangerous threats to the public. Citizenship practices in both systems again rely on similar racial ideas of threat and danger in promoting processes of exclusion adopted against racialized men. The positioning of racialized men as "out-of-place" across these systems further functions to maintain the settler regime in Canada. The resulting removal of racialized people from humanness has been recognized as a critical tool in the production of "social orders of domination for colonized people in a colonized world" (Murdocca, 2014). Use of these narratives across the immigration and criminal punishment systems reaffirms colonial claims of white domination through the subjectification and expulsion of the racialized "other."

The Crown in *Brissett and Francis* similarly argued for the imposition of a sentence outside of the established range for the offence committed. Here, the Crown referenced

mandatory minimum sentences that had been introduced by Parliament for the offence committed but that had not come into effect at the time the offenders were charged. To rationalize requests to impose these new minimum sentences, the Crown relied on racist narratives that described the offenders as wilfully "preying" on the vulnerable, young, female victim. The Crown stated that the defendants viewed the victim as "an object to make money" who they used to "pay off … the women who have their children" (*R v. Brissett and Francis,* Sentencing Transcripts, p. 22). While no physical violence was employed during the course of the offence, the Crown still argued that the defendants were "angry" young men, describing Francis as a "hot head" and referencing an incident where Brissett yelled at the victim (*R v. Brissett and Francis,* p. 26-27; see also *R v. Campbell,* 2016 ONSC 5169; *R v. Honnigan,* 2017 ONSC 7460; *R v. Kabanga-Muanza,* 2014 ONSC 3474). These narratives function to reinforce the otherwise unsubstantiated claims that these young, Black men were violent predators who should be incarcerated for significant periods of time.

Like the statements of the Crown in Thavakularatnam, the discursive moves made in *Brissett and Francis* operate to subjectify the defendants, specifically by denying their humanness (Fanon, 1967; see also Murdocca, 2014). Brissett and Francis are described using language normally applied in reference to animal behavior. While the defendants were first time offenders, the Crown relies on well-worn racial narratives that confirm their inherent dangerousness and violent nature. The Crown conveys through this discourse the assumption that the defendants intentionally committed the offences, intentionally took advantage of a vulnerable young women, and showed no remorse for their behaviours. Brissett and Francis are produced as racialized criminals through these narrative moves.

The employment of racial ideas in conceptualizing intent is similarly apparent where the Crown describes *why* the defendants were engaged in the offence, namely, to support the "women who have their children" (*R v. Brissett and Francis*, Sentencing Transcripts, p. 22). The Crown stated that the two young men "… just don't really particularly want to go to school, work, get their own money for their own babies… (*R v. Brissett and Francis*, p. 32-33). The logic is again simple: these are oversexualized and lazy young men who resort to violent offending to support their families. Like Gayle before them, Brissett and Francis are produced through these racial narratives as degenerates and subhuman. They are recognized as "out-of-place" in the Canadian settler society and so must be removed through a long period of incarceration.

Ideas of gender function alongside discourses of race to produce Brissett and Francis as racialized criminals. Women are characterized by the Crown as the victims of these men, with Black women and Black children bearing the brunt of the emotional, economic and physical consequences of their offending. Essentialist ideas of gendered difference separate Black women and Black men here, with the former being positioned as the powerless victims of the latter. These processes of race and gender may be understood as "interlocking." According to Razack (1998), "interlocking systems need one another, and in tracing the complex ways in which they help to secure one another, we learn how women are produced into positions that exist symbiotically but hierarchically" (p. 13). Black women and men are structured through sentencing processes that rely on both narratives of race and gender to negotiate the positions of each group within the nation. The employment of racial narratives ensures the positioning of these groups as "out-of-place," with gender mediating their respective levels of exclusion. While

Black women are seen as the victims of undesirable men, thus potentially supporting their inclusion, Black men are conceptualized as threats who must be deported.

We can specifically trace these exclusionary effects of interlocking systems of oppression in Canada through an analysis of cases involving racialized migrant women. In *R v. Auckbaraulle*, 2019 ONSC 2498, for example, the defendant was identified as a 53-year-old East African woman. Auckbaraulle had been convicted of fraud over $5000. The sentencing judge held that these offences were committed during a period of time when she was being physically abused by her husband, whom she had wed through an arranged marriage. Auckbaraulle, denied these allegations, stating instead that her home life was happy. Refusing the statement of the defendant, the judge held that the abuse they believed had occurred was a mitigating factor in this case. Having regard for the additional immigration consequences, including via recognition of the defendant's long-term residence in Canada, Auckbaraulle ultimately received a conditional sentence order for a period of two years less a day.

Auckbaraulle is produced through this sentencing decision as a racialized immigrant women that must be saved from her oppression by the court. References to nation and ideas of gender render Auckbaraulle legally comprehensible as a victim (Murdocca, 2013). This includes references to Auckbaraulle's alleged experiences of gendered based violence in an arranged marriage, which appears at sentencing as a cultural importation into the settler state from the African continent, being specifically identified and named in the decision.[78] As explained by Razack (1998), "in the Canadian context, Indian and continental African women are more easily perceived as exotic victims of exceptionally patriarchal cultures" (p. 107).

[78] The court describes Auckbaraulle's marriage as "arranged." The implication is that she is not simply in a marital relationship, that "arranged marriages" are distinct in character from other forms of marriage.

In revealing the victimization of this racialized women, the court further transforms into a tolerant and compassionate space. Although Auckbaraulle is criminalized, she is also protected from removal through sentencing, with the court imposing a sanction that is not considered to be a term of imprisonment (namely, a conditional sentence order. See *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50). Citizenship practices interweave across the space of the court, unfolding alongside the interlocking processes of race that criminalize Auckbaraulle, and the narratives of nation and gender that concomitantly position her as a victim.

Similar citizenship practices were present in the decisions in *R v. Clermont,* 2016 ONSC 4655 and *R v. Atta,* 2016 ONCJ 34. The courts determined that the female defendants in these cases had been manipulated into the criminality for which they were convicted. In *Clermont*, the court contended that the three vulnerable female defendants from Haiti had been preyed upon by a man, identified as Jean Longchamp. The court held that it was Longchamp who was the primary instigator of the offence, although the women were also convicted of fraud over $5000 (*R v. Clermont,* 2016 ONSC 4655, para. 15). Like Auckbaraulle, the defendants all received a conditional sentence order for a period of five months and twenty-nine days. According to the court, this sentence would "ensure that they are not going to be forced to be separated from their families in Canada, but that they will nevertheless be deprived of their liberty in a significant and meaningful way" (para. 35). Comparatively, in *Atta,* the defendant was determined to have been influenced by her male partner to defraud her employer. She was convicted of three charges of fraud over $5000 and unauthorized use of a credit card. Having regard to her youth and the purported influence of her boyfriend, as well as the collateral immigration consequences Atta faced, the court imposed a sentence of five and half month's incarceration. Conceptualizations of

the defendants in each case as racialized female victims of racialized men again intersect with considerations of the program of removal to support the ongoing liminal inclusion of these defendants in the nation. The defendants in *Atta, Clermont* and *Auckbaraulle* are recognized as being "out-of-place" but not so repugnant that they cannot be reformed (Goldberg, 1993). Tolerance of migrant difference thus appears to be shaped by the concomitant deployment of ideas of race *and* gender with knowledge of the program of removal. The immigration and criminal punishment system again function together to maintain racial exclusion, even where migrants are liminally included.

In both *Auckbaraulle* and *Clermont,* the court described the experiences of each defendant as a mother. Auckbaraulle was recognized as having two Canadian children, whom she had been ostracized from following the charges against her. The stress of separation was held to be too much for Auckbaraulle, who eventually suffered both a stroke and a heart attack before her sentencing. The judge acknowledged the significance of her relationship with her children, stating that to apply a penalty that would result in Auckbaraulle's removal would be devastating to both the defendant and her Canadian kids. Again, the court emerges here as a humanitarian space willing to acknowledge the suffering of the defendant through consideration of her role as a mother. Ideas of gender render Auckbaraulle's differences tolerable.

Similarly, in *Clermont*, the court stated that the defendants' impetus for the offence was to provide for their children, with the defendants otherwise facing dire financial constraints. Again, the court recognized the disproportionate impact of a sentence that would result in deportation on both the defendants and their children in determining the penalty to be applied (for similar decisions, see *R v. Ormonde,* 2018 ONSC 1295; *R v. Pinas,* 2015 ONCA 136; *R v. Schulz,* 2018 ONSC 5449). When we compare this decision to the narratives presented by the Crown in

Brissett and Francis, we see the clear interlocking effect of gender on court decision making. In both cases, the offence was understood to be rooted in the defendants' desire to provide for their children. Yet, in Brissett and Francis, the Crown reimagined the defendants' actions as being indicative of their degeneracy through reference to their unwillingness to work. Processes of racialization interlock with conceptions of race and masculinity in these statements to dehumanize these two young Black men.[79] In *Clermont,* gender is given a distinct meaning, with the female defendants offending being positioned as understandable given their role as mothers. While these women are racialized and criminalized, their production as mothers and victims of men ultimately supports the application of sentences that allow for their liminal inclusion in the nation. Brissett and Francis comparatively were sentenced to three and four years' incarceration, respectively, and face almost certain deportation. Citizenship practices interweave in each case with conceptions of gender and race to differentially produce racialized migrants as deportable and/or able to be reformed.

A similar analysis of the interlocking operation of gendered and racial narratives, which intersect with citizenship practices, can be applied to the decision of *R v. Kanagarajah*, 2013 ONCJ 16. This case involved the following four defendants who were found to have formed a criminal organization: Ramanan Kenegarajah, Rajitha Kanagarajah, K.N., and A.N. Each defendant was convicted of multiple counts of fraud. The court applied a conditional sentence order of one year and six months on the female defendants in this case, ensuring their ongoing liminal inclusion in the nation. Comparatively, the male defendants were sentenced to six years

[79] The concept of dehumanization emerges from the work of Fanon (1967). Fanon explains that colonizers position colonial subjects as sub-human through discourses of backwardness and irrationality. The colonized are ripped of their humanity through these discourses (Fanon, 1967, p. 42). Colonizers are then justified in using violence against colonial subjects who, being sub-human, will not respond to other tactics of engagement. Following Fanon, scholars examining race have been urged to consider how subjects continue to be produced and reproduced as sub-human, including through consideration of how contemporary rejections from humanity draw from colonial histories of depersonalization (Bhabha, 2000; Murdocca, 2013; Razack, 1998).

imprisonment (for Kenegarajah) and five and a half years' incarceration (for K.N.), rendering them deportable. In justifying these differences in sentence, the court noted that while the female defendants participated in the criminal organization, "the enterprise was instigated, directed, and operated" by the men in this case (para. 65). Further, the court found that a conditional sentence order was specifically available to A.N. because she had experienced the removal of her children by Children's Aid Society (CAS) following her arrest. While the other defendants were also separated from their kids, the court found that this experience with CAS was particularly traumatic for A.N. In comparison, and in relation to the male defendants, the court held them responsible for the experiences of their wives, stating specifically that:

> they find themselves in jail, their possessions forfeited, and they will leave prison penniless. K.N.'s wife and two young children now live on welfare in a small basement apartment. This is the legacy of their greed (*R v. Kanagarajah,* para. 75).

Critically, logics of motherhood are not consistently applied across cases reviewed. Instead, these discourses were intersected and reshaped by the nationality of the defendant. Narratives demonizing women for having multiple male partners, thereby insinuating failure as a parent, were specifically and repeatedly applied to Black women from Jamaica. This is most clear in *R v. Brown,* 2015 ONSC 6430. Brown immigrated to Canada in 1997. Like Auckbaraulle and the defendants in *Clermont,* Brown was identified as having been directed in her offending by a man, namely Revington Bailey. Together, Bailey and Brown committed several robberies. The court, however, did not view Brown's responsibility as diminished despite the acknowledged influence of Bailey. Instead, the court condemned Brown for her involvement with Bailey given her role as a mother to her four children, each of whom the court states "has a different father" (para. 12). The court admonished Brown for her choice in partners, stating:

> She was interviewed by the probation officer putting together a pre-sentence report [PSR]. She says that she has been physically abused by partners in the past. She admits to having made poor choices in men. *I pause to note that this appears to be an understatement of significant proportion. One need look no further than her involvement with the gun-toting-robbing Revington Bailey, and her choice of intimate partners who provide no financial support for their children, to get a sense of the clear need for Ms. Brown to learn to exercise better judgment when it comes to men. If not for herself, she must do this for her children* (*R v. Brown*, para. 14, emphasis added)**.**

In stark opposition to Auckbaraulle, the court refutes the experiences of victimization articulated by Brown. Brown was instead positioned as a poor parent who had made willfully bad choices in male partners, which in turn had a negative impact on her children. The court acts as a protector of these kids, urging that Brown "learn to exercise better judgement" in terms of who she chooses as a partner. Repeating these reproaches, the court later writes:

> What is most obvious is her self-acknowledged poor choices in men. I have no doubt that Ms. Brown did not look to go out and act as a getaway driver in the two bus stop robberies she has now accumulated a criminal record for. But she did it. Ms. Brown, a single mother of four, needs to think about the implications of her conduct, not only for herself, but for her four vulnerable and impressionable young children. She owes it to them to immediately start making better choices (*R v. Brown*, para. 60).

Brown's culpability is directly correlated to her position as a woman and a mother. Because Brown is described as having poor judgement in whom she dates, and because she chose to enter into a relationship with Bailey, she is positioned by the court as responsible for the

criminalization she now faces. Brown is additionally culpable for the impact of her choices on her four, vulnerable children. Discourses of race that criminalize Brown are intersected here by conceptions of gender and nation, operating altogether to position the defendant as a racialized criminal and a bad parent. These racist ideas are again historically established and accepted in the space of the court (see the discussion of the migration of Carribean domestic workers in Chapter 2). Interweaving with citizenship practices, Brown's racialization and criminalization justified for the court that 18 months incarceration was the appropriate sanction in this case, thereby rendering the defendant deportable.

The operation of interlocking systems of oppression can be similarly traced in *R v. Moore,* 2017 ONSC 5626. Moore was convicted of being an accessory after the fact to an armed robbery. She was acknowledged to have acted in support of her son, who was convicted of the robbery. Like in *Brown*, this recognition of the influence of a Black man (even a child of the defendant) was not treated as diminishing Moore's responsibility for the offence. Although less explicit than in *Brown*, Moore was also positioned as a poor parent. The narratives of her failure as a mother are compounded in this case, though, through additional discussion of the trajectories of her children's lives. The court wrote:

> She has four children, all boys, the three eldest having the same father and the youngest a different father. Her eldest son was murdered in 2008. Two of her sons are in custody, which includes Mark Moore who is serving a life sentence in the federal penitentiary. Her youngest son age 25 continues to reside with her (*R v. Moore,* para. 15).

The court ultimately acknowledged the significant length of time Moore had spent in Canada, having immigrated here in 1973. To apply a sentence that would result in deportation was thus held to be significantly disproportionate. The court thus demonstrated restraint,

applying a sentence of one day in jail and probation for eighteen months. She was additionally required to provide a bodily fluid sample for DNA analysis. This case specifically demonstrates that considerations of removal are not simply directed by processes of race and ideas of gender. Instead, these practices interweave to produce migrants as racialized, gendered, and either excludable or includable in the nation.

Altogether, this discussion demonstrates how discourses of race are deployed by a variety of court actors in sentencing migrants. Racial logics function to produce Black and brown men as inherently violent and criminal. Racialized men are in turn recognizable through these processes as "out-of-place" in the settler nation, being known as degenerate and subhuman. Critically, though, these processes of racialization are further directed by narratives of gender and nation. The court adopts a conceptualization of gender positioning Black women as victims of Black men. However, whether recognition of victimization impacts assessments of culpability appears to depend on the defendants' actions as a mother and conceptions of the nation from which these individuals are held to originate. While those racialized women whose decisions as parents were lauded by the court were offered protection from removal, defendants characterized as bad mothers were moved closer to exclusion. These processes ultimately contribute to the effort to maintain white settler dominance, relying on and reproducing gendered racist logics to ensure that the migrant is outside of the nation state even where liminally included. By demonstrating tolerance for these racial and gendered people, the court is further recognized as a humanitarian space, thereby validating the perception of equality applied to this space under liberalism.

Narratives of Cultural Differences

The second racial logic identified in my case law research as intersecting with citizenship practices to effect migrant exclusion were narratives of cultural difference. Within several

decisions reviewed, the court relied in its decision making on ideas of culture to justify sentences that produced migrants as both racialized and excludable. These references to culture are critical to sustaining the colonial project in Canada (Said, 2003). As Murdocca (2013) explains:

> racial logics of cultural difference suggests that cultural difference, as an analytic category, should not simply be understood as social construction (that is, the social construction of race as cultural difference). Indeed, appeals to, and designations of, cultural difference codify and depend on the political and moral rationalities that underpin historical trajectories of colonialism and racism (p. 20).

We see a reliance on cultural narratives in *R v. Gadam*, 2016 ONSC 4664. Gadam is a citizen of India who migrated to Canada in March 2003. The court was sentencing Gadam following his conviction for the sexual assault of A.D., who was also noted to be a citizen of India. In describing the circumstances of the offence, the court stated that Gadam had "exploited the defendant," whom he was assisting with employment, "in order to force himself on her" (*R v. Gadam,* para. 34). The court specifically tied the impact of the assault on the defendant to the alleged culture of India, stating:

> It was in that context that some force was used by the defendant to overcome A.'s attempts to resist his sexual advances…Threats of harm, to A. and her family, were uttered by the defendant throughout the relationship. They were repeated, frequently, each one adding to the adverse effect of the preceding ones. *All of them had, and* continue *to have, an adverse effect on A. because of the culture in India, where she was raised, that women who complain of sexual abuse will be rejected by the community. The defendant knew of this culture and used it as a means of increasing the effect of the threats he otherwise uttered* (*R v. Gadam*, para. 35, emphasis added).

Gadam is produced through this colonialist cultural knowledge as a racialized criminal subject. His culpability is recognizable through references to these cultural discourses, with the court leveraging ideas of culture to confirm that the defendant had willfully and intentionally exploited the victim. Gadam emerges as a violent degenerate, a racialized subhuman in the nation.

Finding that Gadam had caused significant harm to the victim by abusing his position of power and undermining A's sexual autonomy and integrity, the court determined that a sentence of four years' incarceration was proportionate. While the court considered the potential immigration outcomes in this case, as well as the impact of the defendants deportation on his wife and child, it determined that a sentence of less than six months was "completely outside of the range for crimes like this one" (*R v. Gadam*, para. 40). The interweaving operation of racial logics of cultural difference and considerations of the program of removal thus function to produce Gadam as deportable.

Deployment of these narratives of culture notably support the exaltation of the West, with "the presumed inferiority of the east" being "informed and fortified" via "claims of western superiority and supremacy" (Mawani, 2021, p. 47). Colonizers, through promotion of these racial forms of cultural difference in the court, come to know themselves as distinct from and better than the racialized "other." The "performative force" of these narratives is thus to support "differentiation through a series of absences and presences in order to establish a hierarchical order of things that it differentiates" (Isin, 2012, p. 565). Isin writes that "it is in this sense of being able to instigate dividing practices that political orientalism functions as a strategy of government of colonial territories and colonized peoples (and of government of those who govern them)" (Isin, 2012, p. 565). The West clearly emerges from these narratives of culture as distinct from, and better than, the East.

Similar processes of racialization can be traced in *R v. Saad*, 2019 ONCJ 527. There the court focused on the relationship between the defendant's cultural identity and his offending behaviour. Saad was convicted of committing serious sexual offences against three young men. During sentencing, the court heard that he was a practicing Muslim. Saad arrived in Canada in 2002 and claimed refugee status. This claim was never heard. He refiled in 2007. His claim was then refused. He was thus without status in Canada and facing removal to Lebanon, where he claimed he would face persecution as a gay Palestinian man. Alongside this knowledge of the impact of the program of removal, the court was provided with information of Saad's risk to reoffend via a clinical psychiatric assessment. The report relayed that Saad represented "at least a moderate risk to reoffend if untreated." Further, the report held that it was unlikely that Saad would access care as a result of his cultural identity. The court summarizes:

> Dr. Gojer fairly acknowledged that Mr. Saad's insight into his problems and the need for treatment is a concern. However, he explained that at least part of the explanation for Mr. *Saad's lack of interest in seeking treatment was the secrecy and shame that surrounded his sexuality. It is not accepted in his culture, religion or family*. That secrecy, inner conflict and lack of acceptance can impede treatment (*R v. Saad,* para. 73).

The court did note, however, that Saad had expressed a willingness to seek treatment. As such, the court found that he had overcome the "barrier" presented by "his cultural and religious beliefs" (*R v. Saad*, para. 114). This was considered a mitigating factor. Finally, while the court considered the collateral immigration consequences faced by the defendant, it was held that the risk of deportation was unknown. And yet the court determined that, given the clear clinical evidence presented, it was obvious that immigration authorities would be concerned with the risk Saad presented. A sentence of seven years' incarceration was imposed. Through references to

notions of risk that relied on narratives of cultural difference, Saad is once again produced as a racialized "other" in Canada. These processes of racial governance intersect with consideration of immigration consequences to render Saad deportable.

The racial logics at work in this case further confirm the superiority of the Canadian state, with its implied cultural tolerance of sexuality. Colonial knowledge repeated in this decision classify Muslim "culture" as intolerant and homophobic. Canada is exalted through these narratives, appearing as distinct from the prejudicial Muslim "other". And yet, Puar (2017) is clear that Western toleration of homosexuality is dependent on a distinct form of racialization. Puar writes that "national recognition and inclusion…is contingent upon the segregation and disqualification of racial and sexual others from the national imaginary" (p. 1). Puar (2017) explains that this "homonormative nationalism" or "homonationalism" is specifically dependent on the differentiation between White citizens and immigrant communities, stating: "heteronormative multiculturalism and gay and lesbian liberation are frames that are indebted to the understanding of immigrant families and communities of color as more homophobic than white mainstream American families" (p. 29). Repetition of logics of culture and sexuality are thus permeated with ideas of racial difference. These narratives ultimately reinforce the colonizers self image as different from, and better than, other nations.

Conclusion

This final chapter has demonstrated the complex and multiple ways in which processes of racialization interlock with ideas of gender and nation in the legal space of the court. Racial narratives of difference were critical to producing male migrants as dangerous and violent criminals in Canada. This dehumanization sustains the colonial regime in Canada, which depends on the positioning of racialized persons as distinct from, as "other" than, white citizens.

While liberal legal rationalities of equality are used to deny examination of processes of racialization, this chapter has confirmed the clear and detrimental operation of multiple racial logics at sentencing. These practices were revealed to intersect with considerations of removal in the space of the court, with racialized male migrants being rendered more culpable and thus deportable.

This work confirms previous examinations from border criminologists that recognize the effect of removal on racialized male migrants (Aliverti, 2013; Eagley, 2013; Jain, 2016). It also adds further nuance to the general analysis of the relationship between immigration and criminal systems presented in this dissertation. While I continue to hold that these domains remain distinct, it is clear from the review provided herein that both systems are oriented by similar racial logics, with similar effects for racialized people without citizenship status. Together, these systems function together to sustain the Canadian colonial project. White citizens emerge from interweaving processes of sentencing and removal as the rightful citizens of Canada, confirming the settler regime.

Conclusion

Abdoul Abdi arrived in Canada as a child refugee in the late 20th century. He and his sister Fatouma joined their aunts in the province of Nova Scotia. By 2001, they had been removed from the care of their family by child welfare services (Grant, 2020; Williams, 2018). Abdi and Fatouma were thereafter placed in the care of the Department of Community Services. By age 9, Abdi was a permanent ward of the state (Abawajy, undated). He spent his young life moving between 31 separate homes in the foster care system. He experienced physical and emotional abuse in many of these placements. Abdi and Fatouma's aunts' attempted to regain custody of both children. They were never successful (Abawajy, undated; Grant, 2020; Williams, 2018). Critically, an application for citizenship was never submitted on Abdi's behalf (Abawajy, undated; Williams, 2018). This was the responsibility of the Nova Scotia Department of Community Services, given that the organization was Abdi's "acting parent" (Williams, 2018). While Abdi had access to citizenship, he remained a permanent resident and was thus vulnerable to removal.

Abdi eventually came into conflict with the law as a teenager. At the age of twenty he plead guilty to aggravated assault and other charges (Abawajy, undated). He was sentenced to 4.5 years imprisonment for these offences (Abawajy, undated; Williams, 2018). He was then subject to removal proceedings based on his convictions and sentence. Abdi was deemed to be criminally inadmissible and ordered deported to either Somalia or Saudi Arabia. He faced significant risk in both countries – risks the Canadian government acknowledged when they granted him refugee status (Abawajy, undated). He had no right to appeal his removal, given the length of his sentence to imprisonment.

Despite being set to be deported at the end of his prison term, a Federal Court judge set aside the CBSA decision to deport Abdi. Then Public Safety minister Ralph Goodale thereafter stated that Abdi's case would no longer be pursued (Williams, 2018). Abdi was fortunate; his case engendered public sympathy, which resulted in pressure on the CBSA to stop removal. Many migrants, including some with whom I have worked professionally, are less fortunate. This dissertation has been driven by a recognition of the life and death circumstances that migrants face when subject to removal. People who have lived in Canada for years, who like Abdi have family and community here, who have been educated and worked in this country, are being deported to places where they may have never lived, have no support system, and may even face a risk to their lives.

This project has also been motivated by the understanding that sentencing has a critical impact on this deportation process. Depending on their sentence, migrants may be removed without ever having the opportunity to contest their deportation, to have their personal circumstances heard by an independent decision maker. A sentence can also protect a migrant from the program of removal, however, allowing the person to remain admissible to Canada. Criminal court and immigration processes are thus intimately connected, with significant effect for the enactment of the program of removal. To understand how the program of removal is enacted requires an examination of processes in *both* the immigration and criminal systems that contribute to deportation. The empirical research presented in this study contributes to achieving this objective.

Findings and Scholarly Contributions

This project traced how migrants with criminal convictions are governed across the immigration and criminal punishment systems in Canada. The analysis revealed the processes that span these

two domains and contribute to the program of removal for criminality. Spaces for resistance to deportation were identified via these analyses. The following two critical sets of findings emerge from this examination, and are explored in further detail below: 1) The analysis of processes in this dissertation reveals the complexity of the relationship between the immigration and criminal punishment system. While it demonstrates the interweaving of knowledge, actors and technologies across the assemblages of these domains in support of the development and enactment of removal, it also confirms the ongoing distinctions between these legal spaces; and 2) The work shows how racist ideas of difference guide processes of removal and sentencing that intersect across the domains of immigration and criminal punishment. It argues that racialized migrants emerge from these processes as outside of the homogenous, White citizenry, thereby maintaining the settler state.

These findings in turn contribute to advancing scholarship in the subfield of border criminologies, as detailed below. First, the examination of processes of removal builds from and adds to the border criminological literature employing Foucault's analytics of government. Second, the revelation of how forms of racial governance are perpetuated via these processes offers a novel contribution to the literature, which generally fails to address how racist logics inform immigration practices. Finally, this project provides the only available empirical assessment of criminal court decision making on migrant files in the Canadian context.

Processes of Removal

This dissertation has provided a critical analysis of how the program of removal unfolds across the assemblages of immigration and criminal punishment system. It has traced the key knowledges, discourses and actors drawn from across these domains that have contributed to processes of removal. It confirmed the potential coercive effects of this interweaving, including

for migrants of colour whose expulsion from the nation is facilitated through the positioning of racialized people as outside of membership. This study additionally exposed the productive effects of these intersecting assemblages, including for resistance to the program of removal. This includes where judges render decisions that prevent removal, thereby thwarting deportation. I argued throughout that processes across the assemblages of immigration and criminal punishment systems were thus both intersecting and, at times, in tension. The analysis offers a new contribution to border criminological literature that employs Foucault's analytics of government.

After establishing the historical rationalizations for immigration law on deportation in Chapter 2, the dissertation provides a thorough analysis of the debates of the FRFCA in Chapter 3. It unpacks the justifications for this legislation promoted by parliamentarians in practice. Within the process of debating this legislation in Parliament, Conservative politicians were demonstrated to have relied on knowledge of the offences of racialized persons drawn from the criminal system. I also confirmed that references to knowledge of judicial decision making were promoted within debates of the FRFCA. Contestations to this legislation were traced throughout this examination. I identified and unpacked the knowledges of citizenship, criminality, and sentencing promoted during debates of the FRFCA by opposing parliamentarians.

Chapter 4 of this dissertation then revealed how judicial actors navigate the jurisdictional lines of authority established post-passage of the FRFCA. It demonstrated that although precedent confirmed the jurisdictional lines affirmed by the FRFCA, courts had additionally been instructed to use their authority at sentencing to consider immigration consequences. It argued that judges walk a tightrope of authority when sentencing migrants; they acknowledge that administrative actors hold the authority to remove and they also continue to intervene in

bordering practices that interweave across these domains through the assessment of removal as a "personal circumstance" that is relevant to applying an individualized and proportionate sentence. It was in these spaces of tension in enactment of the programs of removal and sentence that opportunities for resistance were revealed. Courts were confirmed as willing to apply sentences that would protect migrants from deportation based on a consideration of removal, as long as the final sentence imposed remained proportionate.

Finally, Chapter 5 revealed the processes of sentencing that impact the implementation of the program of removal. It demonstrated that migrant status and potential deportation are raised for judicial consideration by defence counsel who access this information from immigration actors. This knowledge directs the novel deployment of legal principles and objectives of sentence by counsel, including the principle of parity. It was noted however, that defence counsel is not always aware of the program of removal and/or the potential impact of sentence on deportation. The distinctions in practical knowledge that exist between the immigration and criminal punishment system were positioned as potentially contributing to processes of deportation, with courts failing to review removal at sentencing where the information is not raised for consideration by counsel. The chapter further confirmed that whether these arguments on collateral consequences are accepted often depends on *who* is rendering the decision on sentence and *where* the court is located. Judicial discretion was shown to be guided by temporal frames and geographical fields, which differentially impact sentencing decisions. Recognition of the myriad of factors that contribute to processes of sentencing adds further nuance to our understanding how migration control is enacted and what opportunities for resistance exist in the space of the court to the program of removal.

Reflections on Race and Racial Governance

This investigation reveals the multiple ways in which racist ideas of foreignness, desirability, and criminality have informed the development of immigration legislation on removal in Canada. The project addresses a key gap in the border criminological literature through these analysis. This scholarship has otherwise offered minimal examination of how racial governance is perpetuated via immigration practices.

The analysis in Chapter 2 traces in detail how ideas of race have structured immigration law and practice since the inception of the Canadian nation. The chapter exposes in particular the longstanding practice of promoting racist discourses of difference to justify the exclusion and expulsion of racialized migrants from Canada. While immigration legislation was wiped of racist language in the early 1960s, the ongoing repetition of historical discourses positioning racialized migrants as foreign threats was confirmed. It was revealed for example that parliamentarians promoting Bill C-44 in 1994 relied on language that carried epistemological associations between foreignness, criminality and desirability. I thus contend that the immigration system has been directed towards racial governance, including through the program of removal, even following the "liberal" era of immigration law.

Chapter 3 then confirms the reproduction of these racist ideas in debates of the FRFCA. It was revealed that discourses of foreignness promoted in these debates relied on long-standing discursive distinctions between rightful residents of Canadian territory, namely White settlers, and racialized interlopers in the nation. This again demonstrates that ideas of race continue to structure the program of removal in Canada. Racialized governance is facilitated through the immigration system.

Chapter 6 extended this analysis further. The analysis of sentencing decisions produced in this chapter reveals how criminal courts contribute to the exclusion of racialized migrants. It demonstrates that judges rely on discourses of race in rendering decisions on sanctions, including racist logics deployed in the immigration system. The impact of these racist discourses is denied, however, through the promotion of liberal legal language that suggests equality. It was argued that the effect of these decisions was to support the effort to govern racialized migrants alongside the immigration system. While the immigration and criminal punishment system may exist in tension, they interweave to support the exclusion and expulsion of threatening, racialized outsiders from the nation state. White people emerge through these processes as the rightful citizens of the nation, thereby sustaining colonial claims to the Canadian territory.

Decision Making in Criminal Courts

Finally, this dissertation provides the first and only empirically based examination of decision making in Canadian criminal courts on migrant files. Chapters 4 to 6 of this dissertation again explained how judges have the authority to consider migrant status at sentencing, how this information is then presented for judicial review, factors directing judicial consideration of collateral immigration consequences, and the differential outcomes of these sentencing processes for migrants of colour. A significant gap in the border criminological literature is addressed through these examinations.

This work builds from and contributes to scholarship on the prosecution and sentencing of migrants produced *outside* of Canada. For example, the analysis in Chapter 5 replicates the findings of Jain (2016) by demonstrating that the immigration consequences of conviction and sentence remain "invisible punishments", with many court actors being unaware of the status of a defendant and the collateral effects of criminal court processes. The analysis in Chapters 4 and

5 also confirm the work of Eagly (2013) by demonstrating that actors in the criminal system who are knowledgeable of the program of removal resist immigration enforcement. It was revealed that the criminal system may thus be reactive to processes in the immigration system, with productive effects. Finally, and again consistent with the work of Eagly (2013), the analysis of court decision making demonstrated the impact of locale on sentencing outcomes, with differences in discretionary approaches to the consideration of collateral consequences impacted by the social and geographical context of the court.

The work in this dissertation also extends the literature on court decision making that has been produced by border criminologists. It specifically offers a more detailed examination of the myriad of factors that shape the operation of court discretion. The material presented in Chapter 5 demonstrates, for example, reveals the impact of fields and frames on discretionary decisions. It contends that judges are guided in the use of their discretion by their backgrounds and personal experiences. This novel examination of discretion offers further insight into migration control. The enactment of the program of removal is shaped by these distinct factors that have nothing to do with deportation or sentencing but that inform the operation of judicial discretion. It is only by shifting down to the examine in fine detail the processes of removal and sentence that these elements shaping discretion may be revealed.

Directions for Future Research

Two specific areas for future research emerge from this study. First, there is a need for research on court decision making on migrant files outside of Ontario. The study highlights the impact of regional context on decision making in Chapter 5. It demonstrates how fields shape judicial considerations at sentencing. It relays, for example, that offence specific concerns differ based on environment and social context. Where a migrant is convicted of an offence that has been

identified as a local concern, the likelihood of application of a sentence that protects the migrant from removal diminishes. The focus of courts in Toronto on addressing gun crime, which is positioned as an issue of public concern, was used to substantiate this discussion.

Chapter 5 additionally reviews how provincial location impacts sentencing decisions on migrant files. It highlighted that precedent varies by province, which in turn effects the application of legal principles such as parity. Sentencing ranges shift based on the precedent set by appellate courts in the province. These ranges then effect whether a proposed sentence that protects a migrant from removal (or at least their right of appeal) will be available or if application of this sanction would result in disparity in sentencing. Interviewees confirmed that sentencing ranges in the provinces of Alberta and British Columbia differ significantly, for example. Disparity would thus result if a sentencing judge in the province of Alberta applied a sentence within the range set in British Columbia. I argue that knowledge of immigration outcomes moves across scale, from the federal systems of immigration down to the local environment of the court, where it intermixes with provincial knowledges.

Critically, while environmental differences across provinces were confirmed via interviews, this study does not examine decision making outside of Ontario. There are thus limitations to the generalizability of these findings. Future research must examine how decisions on migrant files shift based on provincial context. Scholars must consider how the provincial (and local) environment impacts the application of legal principles in the sentencing of migrants. This work may further substantiate how information from the federal scale on removal is deployed, interweaving with knowledge from the provincial and local context to shape outcomes on migrant files.

Second, additional research is needed on the impact of mental health on migrant criminalization and sentencing. As explained in Chapter 6 of this dissertation, I expected that specifically racialized male migrants with mental health diagnoses would be overrepresented in decisions resulting in either liminal exclusion and/or removal. This expectation emerged from my professional experience working with migrants facing removal for criminality. My clients were all racialized men, living below the poverty line, who had been diagnosed with some form of serious and/or chronic mental illness, and who had been in Canada since a young age and had access to citizenship status but could not afford to pay the fees for filing a citizenship application. In focusing on migrant mental health, I was interested in whether actors within the criminal courts were aware of the importance of recognition and treatment of mental health issues for the preservation of immigration status on appeal. In appealing a finding of inadmissibility within the immigration system, migrants may submit evidence that: 1) contests the decision to issue a removal order based on law or fact (or both); 2) highlights a breach of procedural fairness; or 3) substantiates the existence of six specific humanitarian and compassionate grounds that the IAD recognizes in assessing an appeal, which were set out in the case of *Ribic v. Canada (Minister of Employment & Immigration,* [1985] I.A.D.D. No. 636).[80] Mental health concerns relate directly to two of these *Ribic* factors, namely the possibility of rehabilitation and hardship in the country of origin. Presenting evidence that the appellant suffers from some form of mental health issue for which they are receiving treatment (i.e. counselling) serves to demonstrate the possibility of rehabilitation within the immigration system. Evidence of a lack of support for mental health issues in the country of origin may also be used to confirm hardship should the appellant be returned. I was concerned to understand if criminal punishment

[80] Affirmed by *Chieu v Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 84

actors were aware of the importance of recognition and treatment of mental health issues for immigration appeals and, if so, how this knowledge would impact practices within the criminal courts.

Throughout the cases reviewed, mental health concerns were discussed. For example, many migrants were described as suffering from addiction issues.[81] These issues were regularly described as mitigating factors that would reduce a sanction. Consideration of mental health challenges additionally directed application of sentencing objectives, namely rehabilitation, with judges seeking to impose a sentence that would support the individual in addressing any identified concerns. There was, however, no consistency in how these issues intersected with the program of removal. Judges did not consider, for example, whether the migrant would be able to access programming in their country of return for any mental health and/or addiction issues. It was actually not clear that information on IAD decision making was ever even relayed to sentencing judges.

Consideration of mental health also did not necessarily result in a reduction in the sentences applied. This can be demonstrated through a comparison of two cases. In the first, *R v. Ticzon* (2016 ONSC 7299), the defendant was convicted of possession of meth for the purposes of trafficking and possession of a knife for a dangerous purpose. The court at sentencing recognized that Ticzon was an addict, that his addiction was the primary driver of his criminal behaviour, and that without intervention he would continue to represent a risk to the safety of the Canadian public (*R v. Ticzon*, para. 30). The defence asked for a sentence of 4.5 months, in

[81] *R v. Aziz*, 2017 ONSC 5384; *R v. Boyce*, 2016 ONSC 1118; *R v. Brown*, 2015 ONCJ 591; *R v. Dusanjh*, 2016 ONSC 4317; *R v. Ferdinand*, 2018 ONSC 7476; *R v. Flores*, 2017 ONCJ 141; *R v. Foumani*, 2018 ONCJ 700; *R v. Ignacio*, 2019 ONSC 2832; *R v. McKenzie*, 2015 ONSC 5671; *R v. Morris*, 2015 ONCJ 591; *R v. Mugabo*, 2019 ONSC 6526; *R v. Rashid*, 2018 ONCJ 723; *R v. Rudder*, 2018 ONCJ 348; *R v. Saad*, 2019 ONCJ 527; *R v. Seerattan*, 2019 ONSC 4340; *R v. Ticzon*, 2016 ONSC 7299; *R v. Wheatley*, 2017 ONCJ 175.

recognition of the defendant's potential removal. The sentencing judge determined that the sentence proposed was not fit for the offence committed, however. Further, the court held that, despite being advised that the Philippines (Ticzon's country of origin) is not a "good place politically for criminals" Ticzon was the "author of his own misfortune" if returned (*R v. Ticzon,* para 32). Ticzon was ultimately sentenced to 4 years imprisonment. The court wrote that this sentence would be short enough to leave the defendant with a "bad taste" but long enough to allow him access to rehabilitation programming necessary to address his addictions, thereby ensuring public protection (even if removed) (*R v. Ticzon,* para. 30).

The court here is primarily concerned to address Ticzon's rehabilitation needs. He is imagined as a threat to the nation because of his addiction. The focus of the judge is thus to ensure that the objective of rehabilitation is achieved through sentencing. This in turn requires the application of a lengthy sentence, to again support access to necessary rehabilitative programming. A sentence that would protect Ticzon from removal was unavailable given the offence committed and the defendant's rehabilitative needs. Even further, despite the impact of sentence on immigration outcomes, Ticzon is understood as culpable for any consequences he may face. The judge is thus absolved from any consideration of removal, while also being driven by the objective of protecting the public through rehabilitation of the defendant. The judge is not concerned with the outcome of sentence for Ticzon; the focus is on the *Canadians* to whom the defendant poses a threat.

A diffrent approach was taken in the case of *R v. Morris*, 2015 ONCJ 591. The appellant was convicted of two counts of assault and threatening death. He had a previous criminal record for similar offending behaviour. The court explained that the defendant's actions were tied to his abuse of alcohol. Rehabilitation was thus a primary objective in this case, with the judge stating

that the defendant needed to receive both anger management counselling and treatment for alcohol abuse (*R v. Morris*, para. 27). Completion of this programming would in turn ensure the safety of the public. The court was advised of the potential immigration consequences Morris faced. Having regard to parity and the range of sentences available, Morris was ultimately sentenced to six months incarceration, to be followed by a three year probationary term with conditions to address the identified rehabilitative needs (*R v. Morris*, para. 34-36).

Like Ticzon, Morris' mental health concerns are directly tied by the court to the purported risk posed by the defendant to the public. It was held in both cases that these concerns must be addressed through sentencing, with each court promoting the primary objective of rehabilitation. And yet in *Ticzon*, the offender is sentenced to 4.5 years imprisonment, in part to ensure his completion of rehabilitation, while in *Morris* the defendant is sentenced to 6 months incarceration and probation, which would address his rehabilitative needs. Although mental health concerns direct sentencing in each case, the way that these issues interweave with considerations of removal clearly varies.

There may, of course, be a multitude of reasons why these decisions diverge. For example, it might be that the range of sentences available for the offences committed was the primary driver of distinction in these cases. The locale of the court may have also impacted the outcome, as well as the frame of each judicial decision maker. The analysis drawn here is thus not meant to support broad conclusions on the sentencing of migrants with mental health challenges. Instead, I hope it confirms the need for future academic scholarship examining how considerations of mental health and immigration consequences intersect in practice to direct

sentencing. I also continue to hold that this research is necessary given the disproportionate number of migrants with mental health challenges facing deportation for criminality.[82]

Closing Thoughts

This dissertation has traced the evolution of the contemporary program of removal. I have confirmed the ongoing importance of historically significant racist logics of foreignness, desirability and criminality for shifts in law targeting migrants with criminal convictions for deportation. I have also revealed how the program of removal structures processes in the criminal punishment system. The work herein has demonstrated how court actors navigate the consideration of collateral immigration consequences in practice, and the multitude of elements that shape the operation of discretion at sentencing. Finally, I detail the implications of processes of removal and sentencing for racial forms of governance, confirming that both the immigration and criminal systems contribute to the maintaince of the White, settler state in Canada.

This dissertation was again motivated by a recognition of the life and death circumstances migrants may face when subjected to the program of removal. I specifically wanted to understand how these migrants are governed across the immigration and criminal punishment systems. I hoped that this analysis would further reveal opportunities to challenge deportation in practice. What the research confirmed is the *limits* of criminal law and legal processes for responding to coercive practices of deportation. It was revealed that some migrants have access to opportunities to resist removal in the space of the court through the consideration of collateral immigration consequences. More importantly, though, what this project shows is the myriad of factors that shape whether a sentence that protects a migrant from deportation is

[82] This position is based on my professional experiences. It was also confirmed in interviews with immigration counsel that migrants facing removal often present with mental health concerns (Interviews X, Z, and V, March 2021).

actually accessible. This includes the legal definition of range of sentences, but also the location of the court and the background of the judge. Despite the fact that judges can consider immigration outcomes when devising a sanction, protection from removal via criminal court processes is thus not guaranteed.

Even worse, what this project confirms is that the criminal punishment system operates alongside the immigration system to *support* the removal of racialized migrants from the nation. Racialized people are being failed by law and legal practices enacted within and between these domains in very pernicious and systemic ways. Ultimately, what the work herein suggests is that preventing removal, and specifically the deportation of migrants of colour, cannot be achieved without fundamental shifts in legislation and legal processes in both the immigration and criminal punishment systems.

Practices of removal are ongoing. Migrants who have lived in Canada for effectively their entire lives are being deported from the only home they know, to nations where they are strangers. Migrants of colour are specifically at risk of being subjected to these processes of removal. These practices have devastating consequences for those subjected to deportation, their families, and their communities. The fight against this program of removal must continue.

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R v. Arganda, 2011 MBCA 54

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R v. Auckbaraulle, 2019 ONSC 2498

R v. Aujla, 2015 ONCA 325

R v. Aziz, 2017 ONSC 5384

R v. Barkza, (2011) ABCA 273

R v. Belemly, 2010 ABCA 98

R v. Benhsaien, 2018 ONSC 3672

R v. Boyce, 2016 ONSC 1118

R. v. Braithwaite, [1996] O.J. No. 1650

R v. Bratsensis, (1974) 31 C.R.N.S. 71

R v. Brissett and Francis, 2018 ONSC 4957

R v. Brown, 2015 ONCJ 591

R v. Brown, 2015 ONSC 2976

R v. Campbell, 2016 ONSC 5169

R v. Carrera Vega, 2015 ONSC 4958

R v. Chang, 2019 ONCA 924

R v. Clermont, 2016 ONSC 4655

R v. Crespo, 2016 ONCA 454

R v. Critton, [2002] O.T.C. 451

R v. Danvers, [2005] O.J. 3532

R v. Delac, 2014 ONSC 6619

R v. Duale, 2014 ONSC 3799

R v. Dusanjh, 2016 ONSC 4317

R v. Ferdinand, 2018 ONSC 7476

R v. Flores, 2017 ONCJ 141

R v. Foumani, 2018 ONCJ 700

R v. Fung, 1973 ALTASCAD 33

R v. G.W., 2017 ONSC 3149

R v. Gadam, 2016 ONSC 4664

R v. Garcia, 2019 ONSC 5095

R v. Girn, 2019 ONCA 202

R v. Gladue, [1999] 1 SCR 688

R v. Hamilton, [2003] OJ No 532 (QL)

R. v. Hamilton, [2004] O.J. No. 3252

R v. Hassan, 2017 ONCA 1008

R v. Honnigan, 2017 ONSC 7460

R v. Hunt, 2004 ABCA 88

R v. Ignacio, 2019 ONSC 2832

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R v. Jackson, 2018 ONSC 2527

R v. Johnson and Tremayne, 1970 4 C.C.C. 64

R v. Jonat, 2019 ONSC 1633

R v. Kabanga-Muanza, 2014 ONSC 3474

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R v. Kanagarajah, 2013 ONCJ 16

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R v. Kerr, 1982 ABCA 360

R v. L.M., [2008] S.C.J. No. 31

R. v. Lasala, [1999] O.J. No. 1322

R v. Layugan, 2016 ONSC 2077

R v. Leung, 2004 ABCA 55

R v. Lucas, 2019 ONCJ 954

R v. M (C.A.), [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269

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R v. McKenzie, 2015 ONSC 5671

R. v. Melo, (1975) 26 C.C.C. (2d) 510

R v. Mir, 2016 ONCA 795

R v. Moore, 2017 ONSC 5626

R v. Morris, 2015 ONCJ 591

R v. Morgan, 2008 NWTCA 12

R v. Mugabo, 2019 ONSC 6526

R v. Munga, 2017 ONCJ 803

R v Nassri, 2015 ONCA 316

R v. Onyaditswe, 2015 ONSC 4995

R v. Ormonde, 2018 ONSC 1295

R v. Oshea, 2017 ONCJ 736

R v. Pavao, 2018 ONSC 4889

R v. Pavvanto, 2021 SCC 46

R v. Pham, 2012 ABCA 203

R v. Pham, 2013 SCC 15

R v. Pinas, 2015 ONCA 136

R v. Pineda, 2019 ONCA 935

R v. Quick, 2016 ONCA 95

R v. Rashid, 2018 ONCJ 723

R v. Raymond, 2009 QCCA 808

R v. Rudder, 2018 ONCJ 348

R v. Saad, 2019 ONCJ 527

R v. Saffari, 2019 ONCJ 861

R. v. Sandercock (1985), 22 C.C.C. (3d) 79, 48 C.R. (3d) 154

R v. Sangs, 2017 ONCA 683

R v. Schulz, 2018 ONSC 5449

R v. Seerattan, 2019 ONSC 4340

R v. Sharm, 2015 ONSC 5950

R v. Shiwprashad, 2015 ONCA 577

R v. Slobodan, 1993 ABCA 33

R v. Smith, 105 O.A.C. 141

R v. Sohail, 2018 ONCJ 975

R. v. Sullivan 9 C.C.C. (2d) 70

R v. Suter, 2018 SCC 34

R v. Thavakularatnam, 2018 ONSC 2380

R v. Ticzon, 2016 ONSC 7299

R v. Urbe, 2013 ONSC 6830

R v. Wheatley, 2017 ONCJ 175

R v. Wong, 2018 SCC 25

R v. Zagrodskyi, 2018 ONCA 34

R v. Zhou, 2016 ONSC 3233

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Tran v. Canada (Minister of Public Safety and Emergency Preparedness), 2017 SCC 50

Interviews

Interview N, March 2022

Interview P, March 2022

Interview Q, March 2022

Interview R, March 2022

Interview S, March 2022

Interview T, March 2022

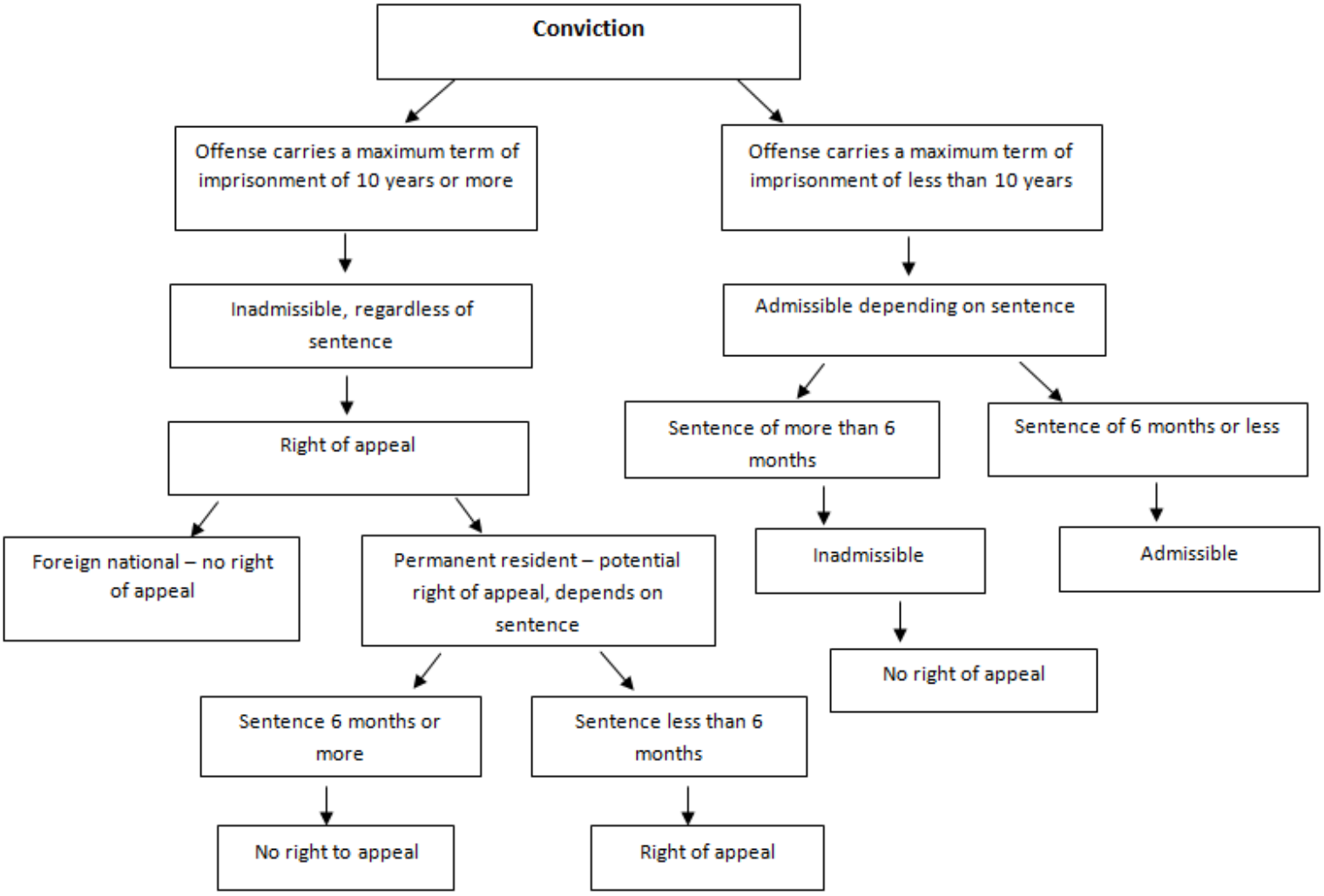
Interview U, April 2022

Interview V, March 2022

Interview X, March 2022

Interview Y, March 2022

Appendix A


Conviction
Offense carries a maximum term of imprisonment of 10 years or more
Offense carries a maximum term of imprisonment of less than 10 years
Inadmissible, regardless of sentence
Admissible depending on sentence
Right of appeal
Sentence of more than 6 months
Sentence of 6 months or less
Foreign national – no right of appeal
Permanent resident – potential right of appeal, depends on sentence
Inadmissible
Admissible
No right of appeal
Sentence 6 months or more
Sentence less than 6 months
No right to appeal
Right of appeal

Appendix B

Complete list of cases reviewed in support of this dissertation:

1. *A.G. of Canada v. Brent* [1956] SCR 318
2. *Ex Parte Fong Goey Jow alias Fong Shue alias Fong Goey Sow* [1948] 1 DLR 817, 90 C.C.C. 289
3. *Ex parte Narine Singh*, [1954] OR 784, 109 C.C.C. 359
4. *Jungo Lee v. The King*, [1927] 1 D.L.R. 721 , 46 Can. C.C. 329; 47 Can. C.C. 255
5. *King v. Brooks* [1960] CarswellMan 21, 31 WWR (ns) 673, 24 DLR (2d) 567
6. *Moore v. Minister of Manpower and Immigration* [1968] SCR 839
7. *R v. Adam*, 2017 ONSC 2526
8. *R v. Ajise*, 2018 ONCA 494
9. *R v. Al-Masajidi*, 2018 ONCA 305
10. *R v. Aleksev*, 2015 ONSC 2747
11. *R v. Ali*, 2016 ONSC 2600
12. *R v. Alamazoff*, 31 CCC 335 – 30 Man R 143 – [1919] 3 WWR 281 – 47 DLR 533
13. *R v. Antonecchia* (1959) 31 CR 320
14. *R v. Ariri*, 2010 ONCA 363
15. *R v. Arganda*, 2011 MBCA 54
16. *R v. Argueta*, 2017 ONSC 230
17. *R v. Arias*, 1987 ABCA 14
18. *R v. Atta*, 2016 ONCJ 34
19. *R v. Auckbaraulle*, 2019 ONSC 2498
20. *R v. Aujla*, 2015 ONCA 325
21. *R v. Aziz*, 2017 ONSC 5384
22. *R v. Bal and Sindhu*, 2014 ONSC 3063
23. *Re Banich* (1954), 109 C.C.C. 324, 12 WWR (ns) 508
24. *R v. Barkza*, (2011) ABCA 273
25. *R v. Belemly*, 2010 ABCA 98
26. *R v. Benhsaien*, 2018 ONSC 3672
27. *R. v. Bentley* [1996] O.J. No. 5030 (Gen. Div.)
28. *R v. Berhe*, 2016 ONSC 8139
29. *R. v. Bernard*, [1999] A.J. No. 812 (Q.B.)
30. *R v. Boyce*, 2016 ONSC 1118
31. *R. v. Braithwaite*, [1996] O.J. No. 1650
32. *R v. Branco*, 2019 ONSC 3591
33. *R v. Bratsensis* (1974) 8 NSR (2d) 298
34. *R v. Brissett and Francis*, 2018 ONSC 4957
35. *Re Brooks* [1945] 1 DLR 726, 83 C.C.C. 149
36. *R v. Brown*, 2015 ONCJ 591

37. *R v. Brown*, 2015 ONSC 2976
38. *R v. Brown*, 2015 ONSC 6430
39. *R v. Buchanan* [1991] O.J. No. 3101
40. *R v. Campbell*, 2016 ONSC 5169
41. *R v. Campbell*, 2017 ONCJ 736
42. *R v. Carrera Vega*, 2015 ONSC 4958
43. *R v. Cesar*, 2013 ONSC 4190
44. *R v. Chang*, 2018 ONSC 5952
45. *R v. Chang*, 2019 ONCA 924
46. *R v. Chen*, 2017 ONCJ 612
47. *R v. Chiu* (1984) 31 Man R (2d) 15
48. *R v. Clase*, 2017 ONSC 2484
49. *R v. Clermont*, 2016 ONSC 4655
50. *R v. Crespo*, 2016 ONCA 454
51. *R v. Critton*, [2002] O.T.C. 451
52. *R v. D.L.*, 2018 ONSC 3409
53. *R v. Danvers*, [2005] O.J. 3532
54. *R v. Dawkins*, 2019 ONSC 2070
55. *R v. Delac*, 2014 ONSC 6619
56. *R. v. Dhandwar*, [1996] O.J. No. 1807, 2 O.T.C. 293 (Gen. Div.)
57. *R v. Diaz*, 2017 ONSC 1883
58. *R v. Duale*, 2014 ONSC 3799
59. *R v. Duncan*, 2018 ONCA 574
60. *R v. Dusanjh*, 2016 ONSC 4317
61. *R v. E.G.*, 2017 ONSC 1000
62. *R v. Etienne* (1989) 49 C.C.C. (3d) 572
63. *R v. Ferdinand*, 2018 ONSC 7476
64. *R v. Flores*, 2017 ONCJ 141
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66. *R v. Foumani*, 2018 ONCJ 700
67. *R v. Freckleton*, 2016 ONCA 130
68. *R v Fung*, 1973 AltaSCAD 33, 11 CCC (2d) 19
69. *R v. G.W.*, 2017 ONSC 3149
70. *R v. Gadam*, 2016 ONSC 4664
71. *R v. Garcia*, 2019 ONSC 5095
72. *R v. Gaurino*, 2017 ONSC 4174
73. *R v. Giraldo-Vargas*, 2016 ONSC 8117
74. *R v. Girn*, 2019 ONCA 202
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76. *R v. Hamilton*, [2003] OJ No 532 (QL)

77. *R. v. Hamilton*, [2004] O.J. No. 3252
78. *R v. Hanan*, 2020 ONSC 1209
79. *Re Hanna* (1957) 118 C.C.C. 351, 8 DLR (2d) 566
80. *R v. Harry K Thaw,* (No.2) (1913) 22 C.C.C. 3 (Que. S.C.)
81. *R v. Hassan*, 2017 ONCA 1008
82. *R v. Honnigan*, 2017 ONSC 7406
83. *R v. Hunt,* 2004 ABCA 88
84. *R v. Ignacio*, 2019 ONSC 2832
85. *R v. Iqbal*, 2018 ONSC 7593
86. *R v. Irons*, 2016 ONSC 1490
87. *R v. Ismail*, 2017 ONCA 597
88. *R v. Jackson*, 2018 ONSC 2527
89. *R v. Jeu Jang How*, [1919] 3 WWR 1115
90. *R v. Johnson and Tremayne*, 1970 4 C.C.C. 64
91. *R v. Johnson*, 2013 ONSC 4217
92. *R v. Jonat*, 2019 ONSC 1633
93. *R v. Kabanga-Muanza*, 2014 ONSC 3474
94. *R v. Kabanga-Muanza*, 2019 ONSC 1161
95. *Re Kalicharan and Minister of Manpower and Immigration* [1976] 2 FC 123
96. *R v. Kanagarajah*, 2013 ONCJ 16
97. *R. v. Kanthasamy,* 2005 BCCA 135
98. *R v. Kerr*, 1982 ABCA 360
99. *R v. Kumar*, 1993 B.C.J. No. 2300
100. *R v. Kyere*, 2017 ONSC 4829
101. *R v. L.M.*, [2008] S.C.J. No. 31
102. *R. v. L.S.U*., [1999] B.C.J. No. 2618 (S.C.)
103. *R v. La Force*, 2017 ONSC 6991
104. *R. v. Lasala*, [1999] O.J. No. 1322
105. *R v. Layugan*, 2016 ONSC 2077
106. *R v. Leslie*, 2018 ONSC 41
107. *R v. Leung*, 2004 ABCA 55
108. *Re Lew and Minister of Manpower and Immigration* [1974] 2 FC 700
109. *R v. Lin and Shi*, 2019 ONSC 5926
110. *R v. Lucas*, 2019 ONCJ 953
111. *R v. Lucas*, 2019 ONCJ 954
112. *R. v. Luckstein*, [1995] B.C.J. No. 2206, 65 B.C.A.C. 154, 106 W.A.C. 154 (C.A.)
113. *R v. M (C.A.),* [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269
114. *Re Mah Shin Shong, Sing Yim Hong* [1923] 4 DLR 844
115. *R. v. Manzano-Zuniga*, [1997] B.C.J. No. 1930 (C.A.)
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117. *R v. McKenzie*, 2015 ONSC 5671
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119. *R v. Mendoza* 1993 ABCA 89
120. *R v. Min Shon*, 2019 ONSC 3916
121. *R v. Mir*, 2016 ONCA 795
122. *R v. Moore*, 2017 ONSC 5626
123. *R v. Morris*, 2015 ONCJ 591
124. *R v. Morgan*, 2008 NWTCA 12
125. *R v. Mugabo*, 2019 ONSC 6526
126. *R v. Munga*, 2017 ONCJ 803
127. *R v. Munshi Singh* (1914), 20 BCR 243, 29 WLR 45, 6 WWR 1347
128. *R v. N.A.*, 2017 ONCJ 665
129. *R v. N.J.*, 2017 ONCA 740
130. *R v. Nassri*, 2015 ONCA 316
131. *R v. Oliveros-Callejas*, 2016 ONSC 142
132. *R v. Onyaditswe*, 2015 ONSC 4995
133. *R v. Ormonde*, 208 ONSC 1295
134. *R v. Oshea*, 2017 ONCJ 736
135. *R v. Pavao*, 2018 ONSC 4889
136. *R v. Pavvanto*, 2021 SCC 46
137. *R v. Pham*, 2012 ABCA 203
138. *R v. Pham*, 2013 SCC 15
139. *R v. Pinas*, 2015 ONCA 136
140. *R v. Pineda*, 2019 ONCA 935
141. *R v. Quick*, 2016 ONCA 95
142. *R v. Quong Wong* [1930] 2 DLR 422, 53 C.C.C. 60
143. *R v. R.C.*, 2016 ONCJ 605
144. *R. v. R.F.* [1994] B.C.J. No. 2501, 51 B.C.A.C. 164, 84 W.A.C. 164 (C.A.)
145. *R v. Ralph*, 2014 ONSC 2800
146. *R v. Rashid*, 2018 ONCJ 723
147. *R v. Ratmanski*, 2016 ONCH 752
148. *R. v. Rawson*, [1997] B.C.J. No. 761, 88 B.C.A.C. 203, 114 W.A.C. 203 (C.A.)
149. *R v. Raymond*, 2009 QCCA 808
150. *R v. Rudder*, 2018 ONCJ 348
151. *R v. Saad*, 2019 ONCJ 527
152. *R v. Saffari*, 2019 ONCJ 861
153. *R v. Sanchez* [1973] OJ No 1903, 11 C.C.C. (2d) 53
154. *R v. Sangs*, 2017 ONCA 683
155. *R v. Schulz*, 2018 ONSC 5449
156. *R v. Seerattan*, 2019 ONSC 4340

157. *R v. Sharm*, 2015 ONSC 5950
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159. *R v. Shokohi-Manesh* (1991) 8 BCAC 263, 69 C.C.C. (3d) 286
160. *R v. Singh*, 2016 ONSC 3596
161. *R v. Singh*, 2018 ONSC 4598
162. *R v. Slobodan*, 1993 ABCA 33
163. *R v. Sohail*, 2018 ONCJ 975
164. *Re Spalding* [1955] 5 DLR 374, 112 C.C.C. 96
165. *R v. Stankovic*, 2015 ONSC 6246
166. *R v. Suarishvili*, 2017 ONSC 6459
167. *R. v. Sullivan* 9 C.C.C. (2d) 70
168. *R. v. Tan*, [1996] B.C.J. No. 767, 75 B.C.A.C. 181, 123 W.A.C. 181 (C.A.)
169. *R v. Thavakularatnam*, 2018 ONSC 2380
170. *R v. Ticzon*, 2016 ONSC 7299
171. *R v. Urbe*, 2013 ONSC 6830
172. *R v. V.K.C.* [1976] O.J. No. 1032
173. *R v. Vu*, 2018 ONCA 436
174. *R. v. W.*, 2017 ONSC 3149
175. *R v. Wheatley*, 2017 ONCJ 175
176. *R v. Wisniewski*, 2002 MBCA 93
177. *Re Wong Shee* (1922), 31 B.C.R . 145, 37 C.C.C . 371
178. *R v. Wong*, 2018 SCC 25
179. *R v. Wickham*, 2015 ONSC 1544
180. *R v. Xie*, 2015 ONCJ 80
181. *R v. Yeung*, 1976 ALTASCAD 98
182. *R v. Zagrodskyi*, 2018 ONCA 34
183. *R v. Zhou*, 2016 ONSC 3233
184. Reference as to the effect of the Exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings, 1933 S.C.R. 269
185. *Rex v. Lee* (1924) 41 C.C.C. 317
186. *Rex v. Sue Sun Poy* [1932] 4 DLR 721
187. *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 SCC 50
188. *Violi v. Superintendant of Immigration* [1965] SCR 232

Codes used to analyse case law

Status
Identity – Gender
Identity – Race
Identity – Health/addiction/Mental Health

Collateral Consequences/immigration issues
Guilty plea
Criminal Law Principles
Sentence below 6 months imprisonment
Sentence 6 months or more imprisonment

Appendix C

Interview Questions – Judges

1. What is your understanding of what it means to be "criminally inadmissible"?
    a. Do you know when a permanent resident is inadmissible for criminality? Foreign nationals?
    b. When will migrant status be raised for your consideration?
2. What range of factors do you consider in building a sentence?
    a. How would migrant status factor into your decision making? For example, would you lower a sentence to ensure that a migrant avoided deportation?
    b. Do you consider how long they have resided in Canada in assessing the impact of deportation?
3. In your role as an actor of the criminal justice system, how do you understand what is meant by "discretion"?
    a. What is the source of your discretion? What guides your use of discretion?
    b. How do you understand the way discretion works at the intersection of criminal justice and immigration systems?
        i. For example, how do legal limitations on access to discretion in the administrative immigration field (i.e. in allowing appeals of removal orders) effect both access to and use of discretion in the criminal justice system?
4. In your role as an actor of the criminal justice system, how do you understand what is meant by "jurisdiction"?
    a. How do you understand the way jurisdiction works at the intersection of criminal justice and immigration systems?
        i. For example, how is jurisdiction discussed in the criminal justice system as a limit on decision making, in turn impacting access to appeal in the immigration system?
        ii. There is some question on the appropriate venue for consideration of deportation. Do you think that the criminal courts would be an appropriate space for this assessment?
    b. When sentencing, do you consider factors relevant to administrative immigration determinations of inadmissibility and removal?
        i. For example, would you consider the conditions in the migrant's country of origin? Their level of establishment in Canada? Their support system in this country?
    c. How do you understand the relationship between Canada's immigration and criminal justice systems? Is it overlapping, is it complete, is it alive and changing? Explain.
5. As a judge, how do you understand proportionality?
    a. When and how does the consideration of proportionality factor into your decision making on sentence?
    b. How do range of sentences connect to proportionality?
    c. How do you understand parity? Individualization?

        i. How are concepts of parity and individualization deployed in practice? Are they used differently by different actors in the system?
6. How do you understand "punishment"?
    a. How (if at all) would you distinguish administrative immigration measures such as deportation from punishment? If punishment and collateral consequences are distinct, when and how do you consider administrative immigration measures in devising a sentence that is proportionate?
7. What do you consider to be a serious offence?
    a. Do you think that the 6 months threshold captures "serious" offences?
8. How does the consideration of a defendants gender and/or race factor into your decision making?
    a. What about their mental health status? Do you distinguish between mental health and addiction?
    b. Are you aware of the importance of identification and treatment of mental health and addiction issues for immigration appeals? If so, how does this guide your decision making?

Interview Questions – Defense Lawyers

1. What is your understanding or how would you conceptualize the relationship between immigration and criminal justice legislation in Canada?
2. What is your understanding of what it means to be "criminally inadmissible"?
    a. What are your thoughts on the definition of serious criminality as being demonstrated by a sentence of 6 months, versus the previous two years? Do you think based on your experience that the migrants being captured by this legislation are "serious criminals"?
    b. Do you ever collaborate with other lawyers and/or activists who represent migrants? If so, what is the nature and purpose of these interactions?
3. What range of factors do you consider when building arguments in defense of your client?
    a. How does immigration status factor into these considerations?
    b. When, if at all, will you raise the issue of inadmissibility? In discussion of the charge? The sentence?
    c. How do you perceive the response of Crown attorneys to considerations of immigration status? What about Judges?
4. In your role as an actor of the criminal justice system, how do you understand what is meant by "discretion"?
    a. What is the source of your discretion? What guides your use of discretion?
        i. Parliamentary intent?
    b. How do you understand the way discretion works at the intersection of criminal justice and immigration systems? For example, how do legal limitations on access to discretion in the administrative immigration field (i.e. in allowing appeals of removal orders) effect both access to and use of discretion in the criminal justice system?
5. In your role as an actor of the criminal justice system, how do you understand what is meant by "jurisdiction"?

    a. How do you understand the way jurisdiction works at the intersection of criminal justice and immigration systems?
        i. For example, how is jurisdiction discussed in the criminal justice system as a limit on decision making, in turn impacting access to appeal in the immigration system?
        ii. There is some question on the appropriate venue for consideration of deportation. Do you think that the criminal courts would be an appropriate space for this assessment?
    b. When sentencing, do you consider factors relevant to administrative immigration determinations of inadmissibility and removal?
        i. For example, would you consider the conditions in the migrant's country of origin? Their level of establishment in Canada? Their support system in this country?
6. As a defense attorney, how do you understand the meaning of proportionality?
    a. When and how does the consideration of proportionality factor into your decision making?
    b. How do you understand parity? Individualization?
        i. How are concepts of parity and individualization used in practice? Are they deployed differently by different actors in the system?
    c. How do collateral consequences factor into considerations of proportionality, parity and individualization?
        i. How does a migrants potential deportation impact, if at all, consideration of the application of sentencing rationales (denunciation, deterrence and rehabilitation)
7. Based on your experience working within the criminal justice system, how do you understand "punishment"?
    a. How does your understanding of proportionality and punishment impact decision making on sentencing recommendations?
        i. How (if at all) would you distinguish administrative immigration measures such as deportation from punishment?
    b. If penalties and collateral consequences are distinct, when and how do you consider administrative immigration measures in devising a recommendation for a sentence that is proportionate?
        i. Do you ever suggest what would maybe be considered more "punitive" options in the criminal courts in order to protect a client from deportation, i.e. a recommendation that the individual be held in presentence custody longer in place of a term of imprisonment.
        ii. Does length of time spent in Canada impact an assessment of how "punitive" deportation will be at sentencing?
8. What do you consider to be a serious offence?
    a. Do you think that the 6 months threshold captures "serious" offences?
9. How do you understand who forms "the public" in the requirement of courts to protect the public?
10. In your role as a defense attorney, how does a client's mental health impact your decision making? What about addiction?

a. What about for permanent residents and/or foreign nationals? For example, do you raise the impact of conditions in a country of origin on the mental health of the defendant during prosecution and/or at sentencing? How?

b. Are you aware of the importance of identification and treatment of mental health and addiction issues for immigration appeals? If so, how does this guide your decision making?

Interview Questions – Immigration Lawyers

1. How often do you work on criminal inadmissibility cases?
    a. Are you asked to intervene on behalf of migrants in the criminal courts?
    b. How do you intervene in these matters? Do you provide a legal opinion on potential inadmissibility? Will you work directly with a defense attorney to build arguments in favor of the accused?
2. How do you understand the relationship between Canada's immigration and criminal justice systems? Is it overlapping, is it complete, is it alive and changing? Explain.
    a. Are the systems responsive to each other? Do they exist in tension?
3. What is your conception of the understanding of migrant inadmissibility amongst criminal court actors (defense attorneys, judges, prosecutors)?
    a. What is your conception of the understanding of sentencing decisions amongst immigration actors?
    b. Do you think immigration officers understand criminal court procedures and decision making?
4. How do you understand what is meant by "discretion"?
    a. How do legal limitations on access to discretion in the administrative immigration field (i.e. in allowing appeals of removal orders) effect access to and use of discretion in the criminal justice system?
    b. How does decision making in the criminal courts shape your use of discretion as an immigration lawyer?
        i. Are you ever limited in the arguments you can present depending on the arguments presented in criminal court and the decision at sentencing?
    c. How does criminal court decision making impact administrative determinations on when to issue a removal order?
    d. How much discretion is available to administrative officers deciding on deportation?
        i. Are there any consistent factors considered by these officers? If so, what?
        ii. How does public safety factor into these considerations? What about traditional sentencing rationales, like denunciation, deterrence and rehabilitation?
            1. How are risk vs. needs assessed?
5. How do you understand what is meant by "jurisdiction"?
    a. How do you understand the way jurisdiction works at the intersection of criminal justice and immigration systems?
        i. For example, how is jurisdiction discussed in the criminal justice system as a limit on decision making, in turn impacting access to appeal in the immigration system?

    b. How is jurisdiction discussed in immigration cases involving criminal inadmissibility, including in relation to consideration of criminal court decisions?
        i. There is some question on the appropriate venue for consideration of deportation. Do you think that the criminal courts would be an appropriate space for this assessment?
            1. What about the institution of a time limit on deportation, instead of a penalty limit?
6. How do you understand punishment?
    a. There is a lot of discussion in legislative debates, and even in the criminal courts, on the punitive nature of collateral immigration consequences. In these debates, deportation is often distinguished from penalties imposed in the criminal justice system. How do you understand the difference between deportation and cjs penalties?
    b. Since the passage of the FRFCA, do you notice any distinction in the offences for which are being referred for deportation?
7. Are there any consistent demographic factors amongst the population of migrants referred for criminal inadmissibility?
    a. If so, what?
    b. Have these changed since the passage of the FRFCA? Who are the "foreign criminals" being caught by this legislation?
        i. How, if at all, do you highlight demographic factors in the administrative system?
8. In your role as an immigration lawyer, how does a client's gender and/or race impact your decision making?
    a. What about mental health and addiction?
    b. When collaborating with members of the criminal court, do you raise the importance of identification and treatment of mental health and addiction issues for immigration appeals? If so, how does this guide decision making in the criminal courts, in your opinion?