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Dear Reader,

This first, and perhaps only, mini-summer edition of *The Ethnograph* is a culmination of two teams over three years. Three of these papers were submitted to be included in the 2021 edition, what should have been the 7th volume, but due to mysterious circumstances, did not make it to publishing. *The Ethnograph* team of 2020/21 made excellent selections, and I would like to thank them for highlighting such stellar works. The two additional papers included came over the summer, perfectly rounding out this quaint edition.

These papers have been sitting in the archives, waiting to see daylight, and here they are for you, our darling and budding anthropologists. All of the proceeding pieces exemplify the meeting of disciplines, and blur the binaries assigned between anthropology, the law, and medicine. Two articles explore the structures of the Canadian judicial system, providing thought provoking critiques that will leave the reader with a much broader understanding of the law (and its associated jargon). Another two consider in turn two globally impactful viruses, offering striking cultural reflections. An additional paper reflects on the past, future, the gender binary, and joins the challenging of century old understandings of all the above.

All of this work was conducted on the unceded lands of the xʷməθkʷəy̓əm (Musqueam), a place of learning and collaboration for time immemorial. The University of British Columbia continues this tradition, however, we also continue the legacy of colonialism as an institution on these lands. I strongly encourage all our readers to reflect on whose lands you are currently on, and the gift it is to be there.

This edition began with the team of 2021, and was completed by myself with the kind support of Dr. Amir Shiva over four months through the summer. I would also like to thank again the team of 2020/2021 for your work on this edition, and to the authors for their patience and diligence in seeing their works published. Lastly, as always, I would like to thank you, the reader, for your interest and care in the journal, and without whom *The Ethnograph* would not exist.

This student-led journal provides an avenue to be heard, and to lift the voices of our peers. Your involvement, be it through submissions, as a reader, or as a part of the editorial team, helps this publication flourish. I look forward to the future editions of this journal, and hope you do too.

High kicks,

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Indigenous Women in a Colonial Legal Framework: An Intersectional Analysis of the British Columbia Human Rights Tribunal

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Abstract

The British Columbia Human Rights Tribunal is a space to heal and assign reparations for discriminatory action. But before the reparations can occur, the harm must be verified. To do this, the onus is on the potential victim of discrimination, the complainant, to prove a correlation between their 'characteristics' and the occurrence of discrimination. The format of the British Columbia Human Rights Tribunal (BC HRT), which operates on specific lines of discrimination and tackles instances of discrimination based on parcelled out categories, does not have a framework that allows for an intersectional analysis. As a result of this framework, the BC HRT cannot look at the whole picture and must instead fit narratives into the framework of colonial law, in which the whole experience is parcelled and judged. Looking at 21 cases brought to the BC HRT by Indigenous women complainants since 2015, I examine how intersecting lines of oppression are managed and approached by the BC HRT. I find that the format of the BC HRT is not conceptualizing discrimination as experienced by people with complex intersectional identities. Instead the HRT is forcing the complainants to parcel their experience into clear lines which serves to destabilize and make illegitimate the argument brought by the complainant.

Introduction

In this essay I will evaluate the way that the BC HRT approaches intersectionality through 21 hearings which occurred over the period of 2015-2020. I will situate this analysis in the broader societal context of colonial court systems as an oppressive system for Indigenous women. I am employing Indigenous Feminist Theory as it intersects with Feminist Legal Theory and Indigenous Legal Theory (Snyder 2014) to analyze the BC HRT and the 21 cases. This theorizing questions the neutrality of colonial law as law, and Indigenous theorizing as gender neutral. This is not applied as a critique of gender roles or equality within Indigenous theorizing or Indigenous legal systems, but a critique based on the unique positionally of Indigenous women in the colonial legal system on which the BC HRT is predicated. This analysis is on womanhood and the gender identity of individuals using she/her pronouns because there were no cases brought by two-spirit, non-binary, or other gender identities (not including men) in the Indigenous cases brought to the BC HRT since 2015. For this reason I limit my analysis to the form of discrimination experienced by Indigenous complainants identifying as women. Using theory which posits Indigeneity as a lens through which discrimination and oppression are examined runs the risk of employing a pan-Indigenous perspective which does not account for variations within Indigenous world

views and Indigenous law (Snyder 2014, 401). I recognize the multiplicity and unboundedness in the term Indigenous.

The British Columbia Human Rights Tribunal is a space to heal and assign reparations for discriminatory action. Discriminatory action occurs when rights protected under the BC Human Rights Code are violated. The BC HRT is a legal entity providing protection for people discriminated against based on certain characteristics, in certain areas. These characteristics are race, colour, ancestry, place of origin, religion, marital status, family status, physical and/or mental disability, sex, sexual orientation or age, and in some cases political belief, criminal conviction, and/or lawful source of income. Before reparations for a violation of the code can occur, the harm must be verified. The onus is on the potential victim of discrimination, the complainant, to prove a correlation between their identity markers and the occurrence of discrimination. When filing a complaint, you fill out a form and tick a box containing the protected characteristic(s) you identify with. Cases can be brought on the basis of any number of characteristics identified by the code (BC HRT 2020, Form 1.1). This filing then has a hearing in which a tribunal member reviews the evidence and determines whether the case will be heard by the tribunal; options to mediate outside of a hearing is offered. This first gatekeeping stage is the farthest many complaints get. At this stage, issues around timelines, jurisdiction, and inability to prove the discrimination which are not speculation or conjecture may dismiss the case.

The concept of intersectionality, as presented by Kimberlé Crenshaw, has at its heart the need to "account for multiple grounds of identity when considering how the social world is constructed" (Crenshaw 1991). The theory is that a unique expression of discrimination occurs at the nexus of multiple forms, and that structures which protect and serve one form of discrimination as well as the other may not adequately approach the needs of those sitting at the intersection of these forms of oppression. Crenshaw's (1997) analysis of three legal cases involving black women plaintiffs argues that these cases were subject to a "single-axis analysis" (1997, 23) which looked at the experiences of black men and white women, and so did not find discrimination on either race or gender in the cases involving black women. Here, Crenshaw argues that the experience of black women cannot be understood by isolating race and gender, but that the compounding factors create an experience that must be examined in its own context. The unique form of oppression which occurs is informed by, but not composite of, race and gender. Race and gender theorizing can both aid in understanding the intersectional experience but do not encompass it This argument goes on to further intersectional theorizing of many forms (Walby et al. 2012). Intersectional analyses' are reckoning with inherently un-categorical, fluid and situationally dependent forces. Sylvia Walby, Jo Armstrong, & Sofia Strid outline how "inequalities mutually shape each other rather than mutually constitute each other at their point of intersection" (2012, 237). This is incomparable with the form of analysis employed by the BC HRT as discrimination on multiple grounds cannot be properly understood when isolated.

As this applies to the BC HRT, the formatting of discrimination complaints on separate and defined characteristics does not allow for an intersectional analysis. For the BC HRT discrimination on the basis of certain characteristics is approached through isolated and separate categories which may have both occurred for the same individual in the same space, but are not co-created and interdependent characteristics resulting in a whole identity. It is

through this nuance that an intersectional analysis of discrimination is missed. The Ontario Human Rights Commission (2001) explores the lack of intersectional or multiple ground analysis occurring in Human Rights Tribunals and the boundaries through precedent and format which perpetuates a lack of intersectionality. It is important to note that "while some tribunal decisions acknowledge that discrimination may be experienced at multiple levels, this appears not to be reflected in awards or remedies" (2001, 23). This means that even if the tribunal recognizes that Indigenous women experience a unique form of discrimination in Canada, that recognition might not empower any realized action. In order for the reparations to occur, they must reflect the harm caused by the unique discrimination occurring at multiple axes, rather than the volume of discrimination occurring at a singular axis.

Situating the BC HRT in its historical context is paramount to this analysis. Cases brought to the BC HRT by Indigenous women are embroiled in the effects of ongoing colonialization. Violence against Indigenous women has gone unacknowledged in courtrooms for far too long (Razack 2016) and this unequal relationship in the BC HRT is apparent in Indigenous women having to prove their discrimination in a system which predominantly disvalues their bodies and experiences. Razack argues that Indigenous women are "pushed, prodded, and violently evicted from settler space" (2016, 300). For Indigenous women to occupy this settler space as complainants carries with it the history of attempted erasure and removal of Indigenous peoples under colonialism. The report done by Carol Muree Martin (Nisga'a – Gitanyow) and Harsha Walia titled "Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside" (2019) contains a wealth of stories, statistics, and research showing how Indigenous women are isolated and oppressed by colonial government systems, including justice systems in British Columbia. While the BC HRT is a system and space predicated on protecting Human Rights and furthering equality for all people, its inherent value system as a representative of colonial law can be read as a violent and dangerous space for Indigenous women considering the excess of oppression in the legal system. An aspect of bringing intersectional analysis into the BC HRT must be self-reflexive, looking at the way the system itself is a form of oppression and how that informs the way Indigenous women operate in that space.

Methods

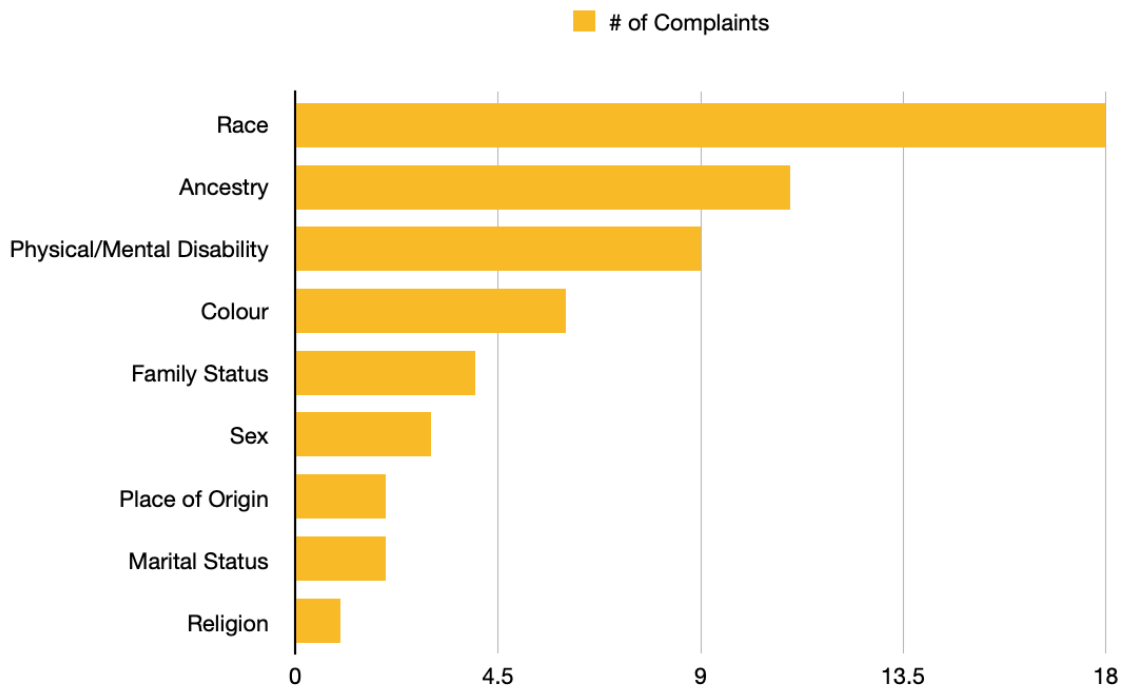
My sample for analysis are cases recorded by CanLII (Law Society of B.C.) since January 2015. Using search words including "Indigenous", "Métis", "Aboriginal", and "race", I collected all the cases from the past five years involving Indigenous complainants and respondents, and compiled all those filed by women. The vast majority of cases involving Indigenous complainants were brought by women. Through filtering out cases brought by male complainants or brought by non-Indigenous complainants, I isolated 21 cases to review, and identified the grounds on which their discrimination complaints were filed.

Table 1: Complainant Characteristics

Case:	Race	Colour	Ancestı	Religioı	Place o	Marital	Family	Physicɜ	Sex	Sexual	gender	age
BB v. B.C. (Min. of Childre	☑											
Thunderchild v. Frans' Flo	☑											
Skarbo v. Gateway Casinc	☑											
A v. Y and X Association,	☑											
Case v. Save on Foods, 2	☑	☑										
BB v. Pub and others, 201	☑	☑										
Grant v. Absolute Spa anc	☑		☑									
Ms. Y v. Clinic and anothe	☑		☑									
Campbell v. Vancouver Pc	☑	☑	☑									
Smith v. Mohan (No. 2), 2(	☑		☑	☑	☑							
Sugarman v. Douglas, 201	☑		☑			☑	☑					
Simpkin v. Stl'atl'imx Triba	☑		☑					☑				
Chubb-Kennedy v. Edgew	☑		☑					☑				
Talbot v. Strata Plan LMS			☑					☑				
Chalifour v. HepCBC Hepɜ	☑							☑				
A v. The Law Society of B	☑						☑	☑				
R.R. v. Vancouver Aborigi	☑	☑	☑				☑	☑	☑			
McCue v. UBC (No. 3), 20	☑	☑	☑		☑	☑	☑		☑			
Kostyra v. Victoria Police I	☑	☑	☑					☑	☑			
Cahoose v. Ulkatcho India								☑				
Dunkley v. UBC and anotl								☑				

The cases filed on the basis of race, colour, ancestry, religion, and place of origin far outweigh any other form of complaint. These 21 cases are all related to discrimination on the basis of Indigenous identity or the expression of the individual's Indigenous identity. The frequency of complaints filed in each category is shown below. When considering Indigenous identity as a form of oppression which encapsulates discrimination on the basis of race, ancestry, colour, place of origin, and religion we see that half of the cases examined are brought on the basis of race basis alone, and only two are completely devoid of some form of discrimination on the basic of Indigeneity. In the case of *Cahoose v. Ulkatcho Indian Band and another,* 2016 BCHRT 114 the respondent was an Indigenous Band and the complaint was dismissed due to lack of jurisdiction. In *Dunkley v. UBC and another,* 2015 BCHRT 100, the complainant identified as Métis and referenced this several times, however, it was only mentioned in passing and was not an aspect of any substantial analysis or a factor in any decision. For example the opening statement begins with "Dr. Jessica Dunkley is Deaf. She is of Aboriginal descent as a Métis. Dr. Dunkley has been Deaf since birth and is the daughter of Deaf parents" (*Dunkley* 2015, para.1), but then the next time anything related to her Indigeneity is mentioned is paragraph 66, when she mentions her experiences as a Métis child in childcare and how this inspired her to become a doctor. Her Indigenous status is mentioned in passing a few more times, but is not articulated as a factor in the decision, or explored further.

Graph 1: Number of Complaints



Mapping the forms these complaints took is shown in the table below, “yes” or “no” indicates the success of the complaint. The use of “yes” and “no” are a visual tool and an overview. The nuances and grounds on which a complaint was dismissed or accepted, and the stage of the proceeding may vary. For example “yes” could mean that the case will get a hearing, or that the case has been heard and won.

Table 2: Success of Complaint

Case:	Race	Colour	Ancest	religion	Place o	Marital	Family	Physica	Sex	Sexual	gender	age	Result:	Level:
BB v. B.C. (Min. of Childre	no												No	Initial Hearing
Thunderchild v. Frans' Flo	Yes												Yes	Initial Hearing
Skarbo v. Gateway Casino	yes												Yes	Initial Hearing
A v. Y and X Association,	yes												Yes	Initial Hearing
Case v. Save on Foods, 2	no	no											No	Initial Hearing
BB v. Pub and others, 201	yes	yes											Yes	Initial Hearing
Grant v. Absolute Spa and	no		no										No	Initial Hearing
Ms. Y v. Clinic and anothe	no		no										No/Yes*	Initial Hearing
Campbell v. Vancouver Pc	yes	yes	yes										Yes	Final Hearing
Smith v. Mohan (No. 2), 2	yes		yes	yes	yes								Yes	Final Hearing
Sugarman v. Douglas, 20	no		no			no	no						No	Initial Hearing
Simpkin v. Stl'atl'imx Triba	yes		yes					yes					Yes	Initial Hearing
Chubb-Kennedy v. Edgew	no		no					no*					No	Final Hearing
Talbot v. Strata Plan LMS			yes					yes/yes					Yes	Initial Hearing
Chalifour v. HepCBC Hep	yes							yes					Yes	Initial Hearing
A v. The Law Society of B	no						no	no					No	Initial Hearing
R.R. v. Vancouver Aborigi	yes	yes	yes				no	yes	no				Yes	Waiting Final He
McCue v. UBC (No. 3), 20	yes	no	no		no	no	no		no				No	Final Hearing
Kostyra v. Victoria Police I	no	no	no					no	no				No	Initial Hearing
Cahoose v. Ulkatcho India								no					No*	Initial Hearing
Dunkley v. UBC and anoth								yes					yes	Final Hearing

The vast majority of cases brought by the human rights tribunal do not end up in a final hearing. In the cases where a hearing was granted, this could be because they were resolved through mediation, or because they were not pursued further. Of the cases which were approved for further hearing but have not been updated, only three are within a timeframe where they could be awaiting a final hearing, the rest can be presumed to have been dealt with outside of the tribunal or through mediation with the tribunal, or not pursued further. In the report "Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights" done by Ardith Walpetko We'dalx Walkem (2020), the general consensus of those interviewed is that the BC HRT is a "waste of time" (2020, 32) and this is due to systemic racism within the BC HRT, burden of proof, and bureaucratic technicalities (2020, 32). If the resource is accessed to begin with, the process itself is not conducive to resolution for Indigenous complainants.

Analysis

Mental/Physical Disability is the third most commonly selected characteristic on which discrimination complaints were filed from this sample pool. Nine of the complainants selected mental/physical disability, of these, two filed on the basis of only mental/physical disability. In three of the cases, mental disability alone is specified, in two, physical disabilities are specified, and the remainder reference both. Three of these cases reference disability in relation to intergenerational trauma connected to residential schools, alcoholism, or some form colonial violence. Four of the claims did not specify the nature of the disability beyond physical or mental. However, in the transcripts of the remaining twelve cases in this analysis, eight of them contained some reference to the complainants trauma, mental, physical, or overall health, with a specific prevalence of references to Post-Traumatic Stress Disorder and Anxiety Disorders. Making mental and/or physical health present in the complainants narrative in 17 of the 21 cases analysed.

Parameters of mental and physical health are socially constructed. I reject the binary between the two as a reductionist classification which does not do justice to nuances and relationships within the body. Carol Muree Martin (Nisga'a – Gitanyow) and Harsha Walia argue that "Indigenous women's health is inseparable from the social and economic context within which Indigenous women are born, develop, live, and age" (2019, 145). The colonial impacts on Indigenous women's health shapes the way Indigenous women are perceived and are able to operate in the health care system. The Western medical system has a demonstrated history of oppression against Indigenous people, involving devaluing their needs. This system may not be a safe space for the complainants to be adequately assessed, or may be forced to schematize trauma and the expression of that trauma into the notion of disability. (Nelson & Wilson 2017). A report done by Sarah Nelson and Kathi Wilson (2017) points to a lack of research done on mental health in Indigenous populations not related to substance use and/or suicide and in populations living off- reserve. With gaps in the literature relating to urban Indigenous women, and with an overemphasis on certain forms of mental health issues, the form of mental disability as a discriminatory category in the BC HRT may lack a cohesive understanding of the intersection of Indigeneity and mental health, and may not adequately approach this form of discrimination. The "cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma

experiences" (Czyzewski 2011, 7) radiates into social structures which perpetuate this trauma. The impacts colonialism has had on Indigenous communities and individuals is integral to conversations and considerations around mental health brought by Indigenous people (Czyzewski 2011). In the BC HRT, when mental health is a direct basis for a discrimination claim, or is brought into the hearing implicitly or explicitly it cannot be considered isolated from this social context and other forms of discrimination which perpetuate, inform, and co-create these mental health issues.

Some cases are strong enough on one ground that they may not warrant the admission of another ground, for example in the case of *Dunkley v. UBC and another,* 2015 BCHRT 100. Dunkley's discrimination on the basis of disability through being visually impaired and not being given adequate support was enough for her to win the dispute and receive reparations, financial and otherwise. Her discrimination on the singular ground was so strong it would not necessitate an intersectional analysis. However, this approach still ignores the complexity of identity and the way people interact holistically (Ontario Human Rights Commission 2001). In this case the discrimination on the grounds of disability was apparent, but would she have been provided better aid or been treated with more efficiency and better accommodated throughout the entire process had her race and/or gender been different? There may not be enough evidence, or any evidence, to prove that her being an Indigenous woman navigating this situation with a disability all resulted in uniquely discriminatory treatment. But this points more to the infrastructure of the BC HRT than the question of whether discrimination on the basis of sex or race even occurred. A framework which necessitated the categorization of discrimination and proof of discrimination on each of these categories creates a certain threshold through which each category of discrimination needs to pass to be legitimized. If the category cannot pass that threshold, it does not make sense in this system to include it. Without removing the singularity of the characteristics on which discrimination occurs an intersectional analysis will not be possible.

This analysis rests not only on the grounds brought to the BC HRT, but on the grounds which may exist as implicit undercurrents in the way the complainant has been conditioned to interact with the world, and vice versa. For example in one case (*Smith v. Mohan* (No. 2), 2020 BCHRT 52) a single mother was renting an apartment and was evicted due to her smudging practice. She brought the complaint due to discrimination on the basis of race, ancestry, place of origin, and religion — all characteristics specific to her Indigeneity, and the expression of that, through her practice. There is no analysis of the power dynamic that may have contributed to their interactions, between a single mother renter, Smith, and Mohan, her male landlord. Since it is not brought to the BC HRT as grounds for discrimination, and since the discrimination inherent to that relationship may be too subtle to name, it has no place in these proceedings.

The BC HRT has power dynamics embedded into it because it is a venue of the Canadian settler-colonial legal system, which historically and presently imposes oppressive colonial law on Indigenous peoples. However, the BC HRT and colonial law at large, posits itself as a neutral space for conflict resolution. This evasion of positionality decontextualizes the way decisions are being made in the BC HRT, and the form colour blind racism (Carbado 2013) may take in these decisions. Dean Space in "Intersectional Resistance and Law Reform" (2013) argues that "The ability to avail oneself of supposedly universal rights in fact

often requires whiteness, wealth, citizenship, the status of being a settler rather than indigenous, and/or conformity to body, health, gender, sexuality, and family norms" (Spade 2013, 1039). These characteristics are essentially the opposite of those protected by the Human Rights Code. The power dynamic coupled with presumed neutrality allows for a space where tribunal members are not required to explore their implicit biases and are not directly analyzing the positions from which decision making occurs.

In the case of *RR v. Vancouver Aboriginal Child and Family Services Society* (No. 3), 2019 BCHRT 269 the complainant was a mother of four who claimed years of discrimination by the Society through their behaviour towards her, their decisions regarding the removal of her children, and their requirements for her actions with the children and conditions for their return. Her claim is on the basis of race, ancestry, colour, and mental disability. Her claim originally involved sex and marital status, but these characteristics were dropped. In the analysis, tribune member Devyn Cousineau showed an awareness of the overrepresentation of Indigenous children and families in the foster care system. In addition, she was sensitive to the way mental health issues and addiction are informed by, or a result of, violent colonialism. However, in the initial hearing Cousineau said her decision was not directly informed by the wider societal context through which Indigenous women are oppressed by foster care and child welfare systems because it was not raised by either party. In this case as well, several instances of discrimination were not admissible as evidence due to their not being raised in time (RR v. Vancouver Aboriginal Child and Family Services Society and another, 2018 BCHRT 32 [Timeliness Decision]).

This example, and others like it, show how the formatting and framework of a human rights tribunal which is not discursive, narrative, and predicated on examining the whole picture and wider societal context cannot adequately address situations of discrimination, especially those involving a myriad of intersecting forms of oppression. R.R. is existing in the world as an Indigenous woman with mental health issues, and as a parent with addiction. Her experience with a system and individuals in this system which has a legacy of discrimination against Indigenous women cannot be isolated and parcelled into singular events of discrimination. For her to prove discrimination by categorizing her experiences as they interact with individual avenues of discrimination, and to translate that experience into evidence for hearing, is to lose the complex relational whole of the discriminatory experience (Weiss 2007).

While Cousineau is clearly sensitive to the complexities of R.R. as a complainant and the societal context on which these complaints are brought, the format of the BC HRT limits her ability to properly examine the whole of the situation. Instead she must whittle down evidence and occurrences which are not admissible and portion out events into forms of discrimination. The report done by Carol Muree Martin (Nisga'a – Gitanyow) and Harsha Walia states that "It is undeniable that the child welfare system is the new residential school system, as children are being removed and their connections to their families, nations, lands, and cultures are being irreversibly destroyed" (2019, 112). This complaint must be examined within this context The respondent(s) are wielding the power of the settler-colonial state when they make decisions regarding an Indigenous woman's child. If these actions follow the patterning of settler-colonial mistreatment of Indigenous women and the destruction of Indigenous families, it must be analyzed in this context. R.R. claims she got no support in

raising her children, they were just separated time and time again, (2019, para.6) and when "Indigenous children are eight times more likely to be removed from their families than other children" (Martin & Walia 2019, 111) the patterning here is important. In the case of R.R., there is ongoing discrimination. Her situation as it stands before the BC HRT is still her lived reality, and as the BC HRT moves along with their validation of her claim, her kids get older and older. The BC HRT acts as a resource for Indigenous women, however, it transforms their intersectional experiences into a procedural and unilateral format (Weiss 2007) and then evaluates their legitimacy through a colonial legal lens.

Culpability

An aspect of the failings of the BC HRT to adequately assess situations through an intersectional lens rests on culpability. The discrimination claim is brought against a named respondent or respondents, the whole of the discrimination falls on them. The respondents are also a part of an inherently oppressive settler colonial system, and sometimes they are immediately recognizable as representatives of that system such as police officers or agents of a child protective service. An intersectional analysis requires us to situate people in their multiple forms of identity and analyze harm through the scope of its societal context. However, assigning blame to one respondent or respondents when analyzing the harm of colonialism and sex discrimination may result in misplaced culpability. In the case of *Kostyra v. Victoria Police Department,* 2015 BCHRT 124, the respondent filed her complaint on the basis of ancestry, race, colour, sex, physical disability, and mental disability. She filed this complaint against the Victoria Police Department after a few short interactions, with little evidence of direct discrimination. Kostyra identifies under multiple protected characteristics in the code. When questioned about her physical disability she states "I am a f.....g Indian" (*Kostyra v. Victoria Police Department* 2015, para.61) and then withdraws discrimination on these grounds. For her, the interactions she has had with the police all incorporate discrimination on her whole person as an Indigenous, disabled woman.

She traces minutiae from the police officer's activity that night to broader forms of police misconduct and racially charged discrimination. For example, she claims that they would not have approached the vehicle if she were a White woman (para.25), also, claiming that their decision to contact her by phone afterwards was due to their discomfort with her holding a position of power as an Indigenous woman security guard (para.65). Kostyra is experiencing discrimination from this event not as a direct response to the actions of the police officers, but as a wider response to the oppression by the settler-colonial government as represented by the police force. Her experiences of the events are predicated on a wider history of living with discrimination. In the BC HRT this worked against her, her conduct in the tribunal detracted from her arguments. The tribunal member analyzing writes that:

> Ms. Kostyra's conduct undermined her very apparent and evident strong feelings and beliefs about the injustice of the events, and the legitimacy of her own life experiences as a First Nations woman. This in turn made it difficult, especially in light of the dispassionate, fact-based testimony of the other witnesses, to give much weight to her evidence. (para.69).

This shows how Kostyra's compounding factors were not able to be translated in the format of the BC HRT without significant frustration for all those involved. As the complainant, Kostyra was entering this space significantly emotionally affected by the events. She had to formulate her existence and experiences with discrimination in a way that was palatable and enticing to the BC HRT. Her conduct was compared to the Victoria Police Department's behaviour which is situationally very different. The report done by Ardith Walpetko We'dalx Walkem (2020) recommends tribunal members be trained on how "trauma may impact Indigenous Peoples' actions or interactions within the BCHRT system" (Walkem 2020, 34). Tribunal members who are not sensitive to the oppressive form of the BC HRT itself and the emotional reactivity complainants may have in that space find cases less credible as shown here in *Kostyra*.

The entirety of Kostyra's oppression can not be appropriately handled by the BC HRT as the tribunal is assigning culpability to the agents of the VPD who had the interaction with her. In large part, her experience with discrimination is a representation of the oppression she endures as an Indigenous disabled women. The blame in this case is more so on the system which has affected Kostyra in this way. Taking the full breadth of her identity and feelings of discrimination and assigning the blame for this on the two police officers she had a brief interaction with may not be fair to them as individuals, or an accurate representation of those specific events. It also is not fair to completely invalidate Kostyra's experience and dismiss her complaint due to insufficient evidence and inappropriate conduct. The police officers are the figureheads, the tangible representations of a whole range of relationships, a whole system of fear and oppression. The BC HRT is not operating as an adequate form of reparation for colonial violence, violence against women, violent policing, violence against people with disabilities structurally in our able-bodied centric society. While these factors all exist in the complainants experience of discrimination, the respondents are not directly to blame for this. Creating an imbalance in the harm and the culpability for the harm.

Conclusion

Can the BC HRT reconcile its rule-oriented and unilateral framework predicated on colonial legal worldview with the inherent intersectional and complex experiences of discrimination brought to it by Indigenous women? In the report "Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights" (Walkem 2020), options for restructuring, advice for tribunal members, and recommendations for structural changes are offered to reconcile the BC HRT with the aims of intersectionality and to make it an accessible, beneficial tool for Indigenous peoples. However, in discussing the police and justice system as a violent space for Indigenous women, especially considering the crisis of missing and murdered Indigenous women, Carol Muree Martin (Nisga'a – Gitanyow) and Harsha Walia argue that "It is unclear whether this relationship can actually be reformed, or whether a more immediate and appropriate solution is Indigenous jurisdiction over Indigenous legal processes in order to end the criminalization and incarceration of Indigenous women and girls" (Martin & Walia 2019, 136). The format of the BC HRT is inherently non-intersectional as it approaches discrimination from isolated characteristics as separate issues to be reckoned with and it assigns culpability to individual respondents rather than situating the blame in its systemic complexity. Adequately approaching an intersectional

analysis in the BC HRT would require a restructuring of the space and framework on which cases are heard.

The BC HRT deals with human rights complaints, however it fails to deal with the whole human. An intersectional analysis of harms done requires examining situations in their wider societal context. In the case of Indigenous women's claims in the BC HRT, the societal context involves colonialism, and a multitude of factors of colonial oppression along with the embodied experience of this must be considered. The BC HRT does not have an infrastructure suited to an intersectional analysis, due to its isolation of individual characteristics upon which discrimination occurs, and due to the misplacing of blame as wholly on the respondent, when, in fact, responsibility is in large part systemic and societal.

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Virus et Cetera: Examining Local Reception and Response to Global HIV/AIDS Discourses in Papua New Guinea

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Abstract

In this paper, I explore the multitude of meaning-making processes and ideologies that are at play in the contested field of HIV prevention and care in Papua New Guinea. First, I will explain how the biomedical frameworks of HIV/AIDS knowledge-making discursively enter the locale and contest the local etiology of health and sickness. I will consider a variety of ethnographies and theoretical works that contemplate the intersectionality and contestation between the biomedical framework and local peoples' context and perception. Through comparative case studies of local practices, I contemplate how current biomedical models of HIV prevention and care succeed and fail in effectively addressing the epidemic in Papua New Guinea. In the end, I validate the biological framework's great potential in HIV/AIDS prevention after modulation in a way that is suitable to the local context.

Introduction

The global HIV/AIDS pandemic attracted great attention in biomedical research, policy making and critical writings. However, efforts in trying to contain the pandemic tended to be dominated by biomedical and epidemiological frameworks (Lepani 2012, 157), and Western negative representations of cultural practices that are contrary to knowledge of Western biomedicine (Eves 2003, 249). There is a general lack of incorporation of local sense-making and practices, which could be informative in making more effective programmes and initiatives.

In this paper, I assess how local societies in Papua New Guinea receive and respond to national HIV/AIDS prevention and care campaigns, examine the roles different institutions play in the reception and delivery of these campaigns, and disentangle the many entwined rationals in sense-making processes in HIV prevention and care amongst local societies.

I start with an overview of the past and present Papua New Guinean healthcare system, and the severity of HIV/AIDS in the nation. Then, I examine how local societies receive biomedicine-informed national campaigns, and contemplate their agency in receiving and incorporating global HIV/AIDS practices into local cultural contexts. Further, I examine how local people respond to the pandemic with Christian-informed knowledge and practices, and discuss the deficiency of current interventional campaigns in addressing the socio-cultural aspect of the illness in local cultural landscapes. I then finish with a contemplation on how a study in Christianity could potentially shed light on the integration of (instead of the intervention of) explanatory frameworks that could contribute to developing more effective prevention and care programmes.

Background: Healthcare In Papua New Guinea

Biomedicine, which refers to the predominant medical theory in Euro-American societies that focuses on human biology and pathophysiology processes (Hahn and Kleinman 1983, 306), has a long history in Papua New Guinea, coming ashore in the 19th century with European colonists. Colonial institutions (namely the German and British authorities) initially set up healthcare facilities for the safeguard of European administrators who were prone to tropical infections such as malaria. Primary care and surveillance systems in rural areas were served by colonial patrols. Later on, missionaries incorporated healthcare facilities, which were exclusive to European colonizers, into Christian charity services and moral education institutions for locals. The significant position of the Churches in healthcare during colonial times established "an indelible link in many places between biomedical and Christian knowledge, technologies and practices" (Street 2019, 301).

Whilst biomedicine has often been the first option of treatment in case of illnesses and injuries for a long time, it exists as one of the many options in Papua New Guinea's multi-layered system of care. For example, Alice Street (2019, 305) and John Barker (2003) describe that when biomedicine failed to cure certain ailments, local people, in turn, perceived the failure as a confirmation of village sickness, which are ailments believed to be rooted in social conflict, failure of reciprocity, or sorcery. Consequently, local people turned to other options such as Christian healing or repairing social relationships. Barker (1990, 139) also notes that European doctors at town hospitals would send those with village sickness back to local healers for further care. Therefore, instead of taking biomedicine as an ultimate framework of illness, superior to any other forms of explanation, local people consider it as a new source of power to which the privileged class have access. Biomedicine is associated with colonial apparatuses, and it exists in parallel with a multitude of other explanatory frameworks.

HIV/AIDS in Papua New Guinea: an Epidemic Brewing

The HIV/AIDS pandemic in Papua New Guinea has become a concerning one: the National AIDS Council (NAC) estimates in 2017 that approximately 47,177 people in PNG were living with HIV, an increase of 13,077 (38%) from the estimate in 2009. The number translates to a prevalence rate of 0.84% nationally. The Highlands and Southern regions have higher prevalence rates than that of the Momase and the Islands regions, which were reported at 1.10%, 0.74%, 0.74% and 0.42%, respectively. (National AIDS Council PNG 2011;2018)

Amidst the absence of a comprehensive national healthcare network, the HIV/AIDS pandemic arrived in Papua New Guinea and attracted local, national, and global attention. In early 2000, international efforts assisted in the establishment of the National AIDS Council (NAC) in response to the growing pandemic. Along with its establishment, several policies and interventions were also drafted in line with the global biomedical HIV discourse. In 2011, the NAC published the National HIV and AIDS Strategy (NHS) 2011-2015 and identified three priority areas of focus in their publication: Prevention; Counselling, Testing, Treatment, Care and Support; and System Strengthening. Specifically, the NAC identified the top ten strategic

interventions designed to address these three areas of focus. These interventions included discouraging multiple sexual partnerships, increased focus on more-at-risk populations, condom promotion, addressing gender violence, preventing parent-to-child transmission, increased availability of testing, greater access to antiretroviral treatment (ART), strengthening the pandemic surveillance system, increased technical assistance to sub-national organizations, and strengthening the overall functionality of the NAC (National AIDS Council PNG 2011).

However, with the inflow and implementation of a plethora of antiretroviral treatments, counseling practices, workshops, and expert support from both national and international organizations, problems started emerging when national efforts reached the sub-national level. The epistemological differences in conceptualizations of causes and cures of illness between the national and the local resulted in significant resistance amongst the local peoples. In addition to socio-structural determinants that are largely ignored by national campaigns, and pre-existing infrastructural deficiencies that would render HIV-specific interventions from higher-up less effective, the discrepancy between global/national HIV/AIDS knowledge and that of the locals' produced an array of entirely unexpected outcomes.

Reception of National Campaign

Whilst national efforts strive to promote HIV prevention and care campaigns at the local level, the outcome of these efforts has had varying degrees of success. The 'ABC' (Abstinence-Be Faithful-Condom) prevention model, which is prominent in global biomedical discourses and promoted as a national strategy, has encountered considerable resistance with local communities.

Richard Eves (2012, 68) identified two main categories of arguments amongst locals that opposed condom use. First, they believed the reliability of condoms is low, and thus it cannot protect one from infection effectively. Charles Wilde (2007, 64) reports that amongst 114 Gogodala people whom he surveyed, 59 of them reported that they have never used a condom, of which 5 reported having never seen one. Whilst many Gogodala people acknowledge that condoms "help stop the transmission of HIV" and over 30% of men surveyed "thought condoms would totally prevent the transmission of HIV/AIDS if used correctly", there is still widespread belief that condoms are not 100% effective (as put into the local language, '*o paepa awapa ela mologa'*, which translates as fifty-fifty) because of fears for breakage and spillage (Wilde 2007, 64).

Second, many societies link condoms to promiscuity, infidelity, and irresponsibility. Therefore, condoms are often considered not as modes of prevention, but as facilitators of HIV transmission. Ethnographic works of Alison Dundon (2007), Richard Eves (2012), Katherine Lepani (2007), and Charles Wilde (2007, 64) all account for the fact that in many regions, the promotion and distribution of condoms is presented as problematic instead of as a solution. Whilst the ABC model of HIV prevention campaign has argued for condoms as the most effective behavioural (as opposed to sociocultural/structural) prevention strategy, it has intrinsically positioned condoms on the bottom of the moral hierarchy of behaviour, in alignment

with discourses of promiscuity and risk (Lepani 2007, 15). For example, in Dundon's (2007, 41) work with the Gogodala people, one of her informants said,

> *"some men, when they get hold of these condoms, they are just looking for women all round the place [and] not their own wives".*

Even in societies such as the Trobriand Islands where sexuality is more liberal and condoms are more embraced, structural obstacles such as condom accessibility and availability also impede the effectiveness of condom campaigns. Lepani (2012) in her work explains that while in theory, free condoms ought to be available throughout PNG, structural obstacles have to a great extent made condoms inaccessible in actuality. For example, there is a common belief held by HIV programme implementers that only condoms distributed through formal channels such as outreach and activities would be properly used. Condoms that are distributed through informal channels, on the other hand, will result in negative outcomes such as promoting promiscuity or be used in other ways such as fish baits. Therefore, whilst condoms are readily available on the local level, they tend not to be distributed and remain unopened because of the unwillingness of the officials or a lack of logistical structures for doing so (Lepani 2012, 171).

Furthermore, the discrepancy in knowledge about contraceptives undermines condom promotions. For example, The Gogodala people adhere to *ela gi* (a responsible, "good" lifestyle on which evangelical Christian principles and practices have an important influence) to prevent illnesses. HIV/AIDS, as a result, is part of the manifestation of the breakdown of *ela gi.* Whilst *ela gi* put great emphasis on sexual responsibilities and marital fidelity, *ela gi* itself, to a great extent, surrounds topics such as family planning and social responsibilities (such as preventing premarital pregnancy) instead of solely on individual sexual behaviours. Gogodala people believe that conception occurs as a result of an accumulation of semen in the mother's womb which requires several occasions of intercourse. Carefully limiting the number of acts with each sexual partner, rather than using a condom, would both effectively prevent transmission as well as pregnancy. This belief, in turn, is translated into the belief that HIV transmission could only happen after more than one act of intercourse (Wilde 2007, 63).

In addition, the reluctance of the Church to engage with condom promotions in Papua New Guinea, where more than 95% of its residents are Christian, is also influential and arguably inimical to condom promotion. The NHASP (National HIV/AIDS Support Project) highlights the resistance to condoms of the Church:

> *"Churches in the districts were strongly opposed to the distribution of condoms to young people, and many respondents, especially in Koroba/Kopiago, were totally against it on the grounds that it goes against church rules and the word of God."* (NHASP 2005a, 51)

As a result, health care workers in both religious (e.g., the Catholic Diocesan Health Services) and more secular health care settings face delicate consideration and moral conflicts in regards to condom distribution. For example, one of Hammar's interviewees reports that he is not allowed to touch condoms nor to suggest condom use; if he were to discuss condoms with "a member of a Catholic congregation or women's group", he might risk the loss of his career (2007, 77).

The ‘B’ component in the ABC model — ‘Be faithful’ — has also had inconsistent outcomes amongst local societies upon reception. It calls for limiting the number of sexual partners and discourages extramarital sex. However, the inflow of ‘authoritative, global discourses’ about HIV, which links sexuality with ‘promiscuity’ and ‘risk’, undermines both positive aspects of sexual relationships as well as pre-existing local knowledge about sexuality.

In some Papua New Guinean communities, sex has social functions pivotal to people’s sociality. For example, in the Trobriand Islands, sexuality is an important means of reciprocity upon which inter-clan relationships rely. Lepani suggests in her work that Trobriand cosmology “values sexuality as a consensual and pleasurable practice that sustains the flows of reciprocity between clans, maintaining the relations of difference that activate social reproduction” (2007, 15). In contrast to the Western model that assumes the unidirectionality of transmission, local cosmology considers sexual activities as a form of exchange that entails the mixing of differences (Lepani 2012, 167). Local peoples have shown interest in addressing issues surrounding the epidemic, however, the deeper motive behind this interest is not only to stop the transmission of the virus but also to negotiate a middle ground between sexuality and health.

In addition, even in Gogodala where ‘faithfulness’ and monogamous relationships are embraced, there still exists a dilemma in the negotiation between individual agency and social relationships. ‘Sex’, in this sense, is not considered solely in its behavioural sense, but also entails other aspects of sociality. For example, the perceived promiscuity and infidelity that condoms entail have resulted in the unwillingness to use condoms. Not using a condom during sex has become a way of showing trust and faithfulness.Wilde’s survey (2007, 64) shows that there is a significant prevalence of extramarital relationships amongst married men despite this. In addition, Wilde also reports that some of his interviewees do not consider extramarital sexual intercourse as ‘real sex’; one man reports that he had extramarital encounters only to ‘relieve pressure’ from his marriage.

Local Response

To gain a more holistic understanding of local societies’ reception of HIV/AIDS not only as a national/global discourse, but as a social phenomenon that entered local societies’ cultural landscape as a whole, I now briefly turn my attention to examining how local societies respond to the pandemic in their everyday life. Specifically, I articulate the degree to which the Christian explanatory framework is at play amongst local communities in making sense of the pandemic.

Christian moralism has a significant influence on how people engage with national campaigns. For example, the Lelet people of the Lelet Plateau of Papua New Guinea, who belong to the Pentecostal denomination of Christianity, consider revelation as the necessary step to prevent and cure illness. The strong moralism of the Pentecostal discourse has put many people in fear of seeking biomedical care for the potential accusation of immorality and promiscuity. Whilst there is heterogeneity between Churches on their views towards condoms, the very existence of Pentecostal preachers who preach ‘those who use condoms will go to Hell’

has to a great extent prevented believers' engagement with national campaigns and caused them to turn to alternative means of prevention and care (Eves 2003, 260).

Christian explanatory frameworks are also influential in how local people make sense of and respond to the HIV epidemic; however, there exists a multitude of views on the role of God that are in disagreement with each other. Amidst the failure of both biomedical as well as local healings, many local people embrace the born-again Christian apocalyptic narrative that considers the pandemic as a warning from God due to moral corruption, and believe the 'Last Day' might be imminent without an immediate moral reform (Eves 2003, 254). As a result, discourses on conversion and the healing power of Christianity have been produced (Hammar 2007, 77).

On the one hand, Eves (2012, 65) reports that many of her interviewees who are born-again Christians subscribed to the view that AIDS is "a curse unleashed by God to punish sinners, especially sexual sinners". Under such contexts, AIDS symbolizes a severe transgression; the only way to receive a cure is through conversion and revelation of previous sins, as people believe that "God can easily cure a severe affliction such as AIDS" (Eves 2003, 259). If a person eventually dies, it is understood that the person's death is equivalent to their unfaithfulness.

On the other hand, some voices argue against the apocalyptic explanatory framework. For example, Frank, a religious leader who also manages an HIV programme from the Southern Highlands Province, argues that individuals have the agency to make choices and be responsible for their consequences. He believes God wishes the best for people and does not punish (Shih et al. 2017, 56).

Eves (2012) argues that the Christian and biomedical bodies of knowledge about HIV/AIDS are incommensurable. Further, "[t]he local understandings and explanations that differ from the master discourse of science are not addressed in HIV prevention messages because these are 'misconceptions' that the messages will readily correct" (Eves 2012, 65). Nevertheless, I contemplate that there might be a common ground where local, Christian and global knowledge could perhaps come together and respond to the HIV/AIDS pandemic more constructively.

For example, national campaigns have indeed disseminated relevant knowledge that is designed to raise AIDS awareness amongst local communities, however, the agency of comprehending this knowledge and making informed choices accordingly lies entirely upon the individual. Instead of solely focusing on the individual aspect of behavioural control, Christian healthcare workers incorporated global HIV knowledge with Christian pedagogy on moralism. As a result, self-control over sexuality has been represented not only as an individual choice, but also symbolizes religious fidelity desired within the community (Shih et al. 2017, 54). Here, Christian-informed moral surveillance has elaborated on the moral dimension of national messages that view the moral person "as a 'unique centre of rationality and free will' who is subject to a set of moral principles that transcend particular social relationships"; instead, it

embeds the individual "within social relationships" and, as a result, one's social behaviour is regulated in accordance with Christian morality (Barker 2007, 5).

Disease *contra* Illness

I now turn my focus back to national campaigns and further examine their deficiencies in addressing the socio-cultural aspect of HIV/AIDS in Papua New Guinean cultural landscapes. Whilst many national campaigns arguably overemphasize the behavioural aspect of prevention that underlines individual agency of choice, and to a great extent disregard structural factors, in actuality, healthcare workers and government policies are aware of the need to respond to these factors. A staff member at the Garden Programme (which aims to modify socioeconomic conditions for urban female sex workers) explains: *"In terms of biblical ways, [sex work is] totally against God's way of understanding. [But] female sex workers for instance, they need food to sustain themselves, they don't have money to look after themselves …"* (Shih et al. 2017, 55).

Despite the recognition of the role in which structural determinants play, many healthcare workers lack the skill and resources to address them (Shih et al. 2017, 57). For example, Holly Wardlow (2012, 411-15) analyzes the process through which the national discourse is translated into local knowledge by a translator in an awareness workshop. The translator Anna, who delivers the knowledge at the workshop, elaborated on the handbook that is provided by the NAC and further reflected on her personal interpretation of the epidemic. Departing from the behavioural ABC model that is the main intent of the handbook, Anna further discussed larger socio-structural factors that she thought to be attributable to the epidemic, such as intertribal violence, men's infidelity, and childcare practices. These socio-structural factors, which are informed by the lived realities and wisdom of the locals, had not at all been addressed in the handbook Anna was provided.

The incommensurability shows that the messages from the national campaign have been largely based on the global biomedical discourses in which biological and behavioural rationalities of care have been firmly based. However, these messages have failed to consider local cultural contexts. Kleinman (1978) discusses the nuanced differences between *disease* and *illness.* Diseases are abnormalities in the physio-structural human body, whereas illnesses are the holistic, lived experiences of changes in social and physical functioning. Biomedicine is competent at treating diseases, whilst patients suffer from illnesses that biomedicine considers to a lesser extent. HIV is arguably the most prevalent illness in the Papua New Guinean (even in the global) epidemiological and cultural landscape. Its inseparability with human sexuality (and thus sociality), both within a single locale as well as in the translocal realm, secures its significant need for consideration at the frontier of different meaning-making processes. Focusing solely on the biomedical aspect of prevention and care is insufficient. Whilst global messages tend to assume that biomedicine is the most accurate and universal way in which natural phenomena such as HIV/AIDS can be explained, biomedicine itself "is based upon particular Western

explanatory models and value-orientations, which in turn provide a very special paradigm for how patients are regarded and treated" (Kleinman 1978, 255).

National campaigns have to a great extent either failed to address or dismissed the legitimacy of local forms of meanings. Confusion and distortion can be produced at the frontier of two explanatory frameworks. For example, Dundon (2009, 176) says that "terms such as 'virus', 'disease', 'condition' and 'transmission' can be as much a source of confusion as they are of education or information". Patti Shih and colleagues (2007) also suggest that current counselling services focus mainly on behavioural changes that rely upon individual choice, whereas social-economic factors that encourage concurrent relationships such as migrant labour and gender inequality are beyond the agency of an individual, and are largely unaddressed.

How, then, can we mingle the two seemingly incommensurable knowledge frameworks to produce more effective prevention programmes? Eves suggests that the "problem with the global AIDS discourse [is] because it is not delivered through a reciprocal process of listening and speaking" (2012, 72); the key to a more integrative approach lies in cultural reciprocity. An examination of how Christianity managed to enter local cultural contexts might shed light on how to 'treat' the '*cultural myopia'* from which current national campaigns suffer. Whilst national HIV campaigns have taken on an interventionist's approach that has positioned themselves in a higher standing in terms of validity and thus delegitimize local knowledge, Christianity, on the other hand, entered the local cultural landscape through emphasis "on doctrines and dogmas in terms of the local reception" (Barker 2014, S179). The individualistic behavioural model of most national campaigns is incommensurable with local explanatory frameworks (Eves 2012), whilst the more collectivist nature of Catholic Churches, in addition to their ideals of reciprocity, resonate better with local cultural contexts and thus experienced a smoother entry into local societies (Barker 2014, S176).

Conclusion

The complex geographical landscape of Papua New Guinea hosts a nation with immense cultural diversity. However, due to geographic isolation and the complexity of culturally contextualized knowledge, national campaigns on HIV/AIDS prevention and care have gained varying, but generally unsatisfactory, degrees of success. National campaigns have adopted mainly the global biomedical forms of knowledge on HIV/AIDS epidemiological processes, whereas local socio-structural contexts have largely been unattended. Such a singular approach has perhaps changed towards a more favourable direction, however, as the new 2018-2022 national STI and HIV strategy expanded upon the 2011-2015 strategy and included the Church and many socio-cultural aspects (i.e. the law, welfare, justice) into its strategic directions (cite) . However, the efficacy of the new strategy is yet to be examined. The incommensurability between different explanatory frameworks of illnesses has not been sufficiently addressed through reciprocal communication. The case of Christianity's entry to Papua New Guinea has provided a vital point of consideration for developing potentially more effective and integrative

programmes on HIV/AIDS prevention and care, in a way that does not *intervene* but *cooperates with* the local people.

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Understanding The Early Middle Ages: From Life Stories to Grave Goods

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Abstract

For the early Middle Ages, there are few primary sources dealing with the lives of everyday people, as the existing ones tend to focus on rich landowners or nobility. In these situations, it has been proposed that all aspects of a person's identity (occupation, ethnicity, biological sex, etc.) can be determined solely from items and belongings buried alongside them. This viewpoint has most recently been upheld by the historian Heinrich Härke, who has used his grave goods analysis as the sole basis for numerous studies. However, grave goods analysis can project modern understandings and biases onto the past instead of accurately representing the nuances of individuals, communities, and their understandings of the world. This paper will explore the disadvantages to relying solely on grave goods analysis and the importance of employing methods in tandem, while being aware of how modern understandings and assumptions can be projected onto archaeological material.

Introduction

For those of us studying the early Middle Ages, understanding the lives of those who lived during this period can be incredibly helpful to broadening our understanding of the Middle Ages as a whole. Unfortunately, most of our primary sources deal with recording major religious and political events, rather than the lives of those affected by them. The few sources that do detail life stories tend to deal with the exploits and adventures of holy figures or the contributions of wealthy, male landowners (Fleming 2009). It is in this context that many historians must turn to archaeology to conduct studies on the individuals who lived and died in the early Middle Ages. As with many things within this field, our understandings and methods have evolved over time. However, there are certain attitudes and assumptions that can hinder the analysis of graves and the individuals within them. Traditionally, it has been assumed that the analysis of grave goods and funerary assemblages can tell us much about a person's life, including their occupation, ethnicity, cultural traditions, and biological sex. Most recently, this narrative has been upheld and defended through the works of Heinrich Härke, who focuses on the use of grave good analysis in an Anglo-Saxon context. However, as will be explored, the notion that a heavy focus on grave goods and burial rites can reveal almost everything about an individual is an oversimplification at best, and a gross error at worst. This essay aims to deconstruct this narrative and, using examples of other studies, outline that it is wiser to use grave good analysis and other methods in tandem to gain a fuller understanding of the lives of those who lived in the early Middle Ages.

Härke's work, "'Warrior Graves'? The Background of the Anglo-Saxon Weapon Burial Rite", presents several points that are reflective of the larger attitude that this essay will be

addressing, which is the continued assumption that items a person was buried with will reveal almost everything about a person's life. For example, Härke asserts that the presence of weaponry means it is likely the person within the grave was once a 'warrior', while the relative quality and quantity of these weapons is reflective of their socio-economic status within society (Härke 1990). While the analysis of grave goods can be beneficial for the initial assessment of what a person's identity or status might have been in life, it is the assumption that grave goods allow us to easily determine a person's ethnic and cultural identities, as well as their biological sex, which can become problematic.

Weapons as Grave Goods

Burial rites were impacted by a number of changes occurring in the early Middle Ages and would ultimately decline in popularity (Härke 1990). However, for such burials that occurred when these rites were popular, Härke assumes that those including weapons can be firmly classified as Germanic men (40), especially if they are found in areas of known Germanic migration such as early medieval Britain. Another component of this narrative is the identification of biological sex. Härke's paper makes the assumption that all burials with weapons were male burials, while other graves found containing weapons could be explained by "[the] secondary us[age] of weapon parts" (36). It is important to note that these secondary usages observed by Härke are mentioned alongside the assertion that most of the male population were not active soldiers during the sixth century; yet, he still makes a distinction between the 'types' of weapons found in male graves and those found in non-male graves (33). Härke also neglects to mention if any alternative methods for determining biological sex were used. Instead, the analysis of biological sex appears to have been done solely through grave goods analysis and associating items with gender roles, even if the role of 'warrior' was not common for men during this period.

This emphasis on grave goods analysis is further stressed in Härke's collaboration with Micheal P. Stumpf and Mark G. Thomas, which hypothesized that the high percentages of Germanic DNA in modern populations of Britain is the result of an apartheid-like system imposed by the Anglo-Saxons during the fifth to sixth centuries (Thomas et al. 2006). Within this study, Härke and his fellow researchers assert that one can positively identify ethnic identity, which in this case is Anglo-Saxon, and social status based on grave good assemblages because of the association between weapons and the Anglo-Saxons mercenaries. The proposed power and wealth imbalance between the Anglo-Saxons and the native Britons is based on the assumption that graves with weapons, alongside other types of grave goods, must belong to wealthy individuals, as the authors believe weapons to be symbolic of Anglo-Saxon power. Considering that the study was looking at genetic input of Germanic peoples on a modern population, an apartheid would seem probable because of what appeared to be a wealth disparity, which could have easily been a manifestation of a wealthy minority imposing restrictions on a native population. But, had the study done testing on the buried individuals instead of relying on grave goods to identify ethnicity, the results may have turned out very differently and the proposition of an apartheid system may not have been made in the first place.

These assumptions made by Härke and his co-authors appear to be oversimplifications in the face of isotopic testing done at the cemeteries of Finglesham (Legget 2021) and West Heslerton (Montgomery et al. 2005), both of which were active during the time of the Anglo-Saxons and were established as likely candidates to contain migrant remains. At Finglesham, the testing done on both dentine and bone revealed that many of those buried in the cemetery spent the majority of their childhoods outside of the area, based on the reconstruction of the carbon levels in their diets (Legget 2021, 14). This is a positive indication that these individuals could be considered ethnically different from the native Britons, as there is reason to believe they migrated from another part of Europe. But in relation to grave goods, there did not appear to be any significant association between funerary assemblages and an individual's isotopic signature (Legget 2021, 19), which signifies that the material culture of the individuals at Finglesham was not determined by their geographical origins.

At West Heslerton, isotopic testing was done on strontium ratios to determine the region in which an individual was born (Montgomery et al. 2005). In this case, special attention was paid to the positioning of burials as it was thought to be reflective of a person's origin. However, the study concluded there was not enough correlation between the burial's positioning and an individual's geographic origin, represented by their strontium levels (133). Much like at Finglesham, the grave goods at West Heslerton did not appear to be particular to a specific isotopic grouping, as graves had different combinations of the four identified categories of goods, one of which included weapons (133-134). This data indicates that, in West Heslerton, geographical origin did not directly impact an individual's status or the grave goods that were buried with them in the way that Härke's works assume. It is important to note that while the study conducted at Finglesham did not have a focus on weapons, the study at West Heslerton revealed that burials containing weapons occurred among both sexes (Montgomery et al. 2005, 136). Unlike Härke's study and the traditional association of weapons with biological males, West Heslerton's cemetery presents a contrary example, where weapons are not reserved for one sex, occupation, or origin. Findings at both of the sites, especially West Heslerton, show that there is little positive evidence for an elite made up of foreign warriors when grave goods analysis and isotopic testing are done in tandem.

While Härke's works were primarily concerned with the Anglo-Saxons, the ideas and theories found within these works are shared by other researchers, and have previously been the cause of errors in research and analysis. In particular, the Viking site of Birka, Sweden attracted special attention when it was revealed that an individual referred to as Bj 581 had been sexed incorrectly. Initially, due to the "complete equipment of a professional warrior" found alongside Bj 581, it was assumed that the individual was male (Hedenstierna-Jonson et al. 2017, 855). Considering that there were no objects traditionally associated with women, this assumption was reinforced and it is likely this conclusion would have been the same if the skeleton had not survived (Price et al. 2019). However, when genomic testing was performed to determine if the sequencing of sex chromosomes matched the assumed male identity, the results determined that Bj 581 was biologically female (Hedenstierna-Jonson et al. 2017).

In this scenario, the conclusion reached from the analysis of grave goods was directly impacted by the bias of those performing it. The assumption that weapons within a burial denote a male identity was so ingrained in the research that Bj 581's biological sex was "taken for granted" (Hedenstierna-Jonson et al. 2017, 857) by everyone involved, until an alternative method was employed. Weapons do not necessarily mean that a person was biologically male, or that their community's understandings of 'bearing arms' and 'warrior-ness' are the same as our own, as these concepts and their implications are unique to each culture (Price et al. 2019). Assuming that the understanding of these concepts, and the identities associated with them, are the same across all cultures is an oversimplification and can lead to misrepresentations of material culture, as seen with Bj 581.

Tracht or Cultural Connections?

As illustrated previously, archaeology concerned with the early Middle Ages has had an emphasis on determining ethnicity using grave goods analysis, since it is assumed that the material culture of an ethnic or cultural group remains uniform and can be easily identified (Hakenbeck 2011). This train of thought is reminiscent of a concept known as 'Tracht', a local or regional costume that has supposedly survived unaltered through time and is thought to act as a visual representation of a group's link to their pre-modern ancestry (Hakenbeck 2011). In this context, 'Tracht' has been applied to grave good analysis and used in an attempt to distinguish between Roman and 'barbarian' populations in central Europe. But a long tradition of Roman military presence in the area means that the local costume and material culture was heavily influenced by the Roman soldiers they were in close contact with – even more so once the physical boundaries separating them became weaker. For example, funerary traditions were heavily influenced by the Romans and the popularity of brooches among the Germanic population was likely another result of interactions between the two groups (Hakenbeck 2011, 42). Despite the seeming continuity of material culture that modern scholars are drawn to, these brooches and the costumes associated with them underwent several stylistic changes over the course of the sixth century.

In these 'barbarian' contexts, female grave goods were interpreted in terms of ethnicity and origin, while male grave goods were seen in terms of social status (Hakenbeck 2011) much like in the previous discussions of the Anglo-Saxons in Britain and the community in Birka. In Bavaria, grave goods typically associated with the typology and style of non-local groups have been found in the graves of local women, which could be evidence of their community's connection to other ethnic and cultural groups (Hakenbeck et al. 2010, 235). At the sites of Altenerding and Straubing, a few female skeletons were found with cranial modifications which is an uncommon practice for southern Germany (Hakenbeck 2011, 48) but has traditionally been associated with Hunnic migrations (Hakenbeck et al. 2010, 236). However, there appears to be little difference between the style of burials for these individuals and those without these cranial modifications (Hakenbeck 2011, 48). For the women at Altenerding, most of those with cranial modifications had outlying carbon-13 values compared to the rest of the individuals buried there.

While at Straubing, only one of the individuals with cranial modification had outlying values (Hakenbeck et al. 2010, 247-48).

While some of the women were likely non-local, perhaps connected to the Huns, there were also local women with cranial modifications which, alongside the presence of non-local grave goods, suggests an exchange of cultural traditions between different groups. Despite differences in traditions, and perhaps ethnicity, these non-local women had been accepted by the locals. These women likely adopted the locals' cultural traditions in return, which ultimately resulted in them being "treated as local women" (Hakenbeck 2011, 49) by the community upon death. Overall, the data suggests that there is a certain degree of cultural mobility of both people and traditions, likely aided by marriages between people of different backgrounds, where one adopts the material culture of another but still retains aspects of their own background (Hakenbeck et al. 2010). For the discussion of grave good analysis, the women of Altenerding and Straubing present an interesting case where the items buried with these individuals are not likely representative of their ethnic identity or traditions, but rather the interactions between different cultural identities.

In another case of cultural connections, beads are an incredibly common form of grave goods in areas associated with the Merovingian dynasty, despite the scarcity of known bead production sites within Merovingian Gaul. These beads, found in cemeteries that were active during the fifth to sixth centuries, have been linked to production activities on the Indian subcontinent, and their popularity suggests trading activity between the two regions (Pion et al. 2020). The popularity of the beads across the regions of Merovingian Gaul and beyond, despite their Indo-Pacific origins, points to a relatively simple explanation for certain types of grave goods: some items are buried with individuals because they are common items, and not because of culturally significant reasons. The beads have, presumably, never been used as a basis to investigate whether or not the individuals buried with them originated from the Indian subcontinent. Instead, they have been presented as evidence for trade between the two regions (Pion et al 2020). Trade and transcontinental connections are entirely valid explanations for non-local items to be grave goods, as these objects could have easily been popular and considered valuable enough to be buried alongside an individual. The Merovingian popularity of the beads and their connection to the Indo-Pacific means that it is plausible to explain instances of non-local or foreign grave goods through cross-cultural connections, instead of assuming they are a reflection of the individual's ethnicity or cultural identity.

Archaeology to Biography

While this essay has been primarily concerned with how the interpretation of grave goods can be misleading if done in isolation, it is also important to recognize how the analyses can lend us important insight into the lives and communities of those living in the early Middle Ages. Robin Fleming's work, "Writing Biography at the Edge of History" (2009), primarily deals with detailing the life of the young woman from early medieval Britain, referred to as Eighteen, using both osteological profiling and grave good analysis. From the osteological profile, it was determined that Eighteen was quite tall in life and relatively healthy throughout her childhood,

with no evidence of broken bones (608). This profile was also crucial in determining that Eighteen had developed leprosy and that the disease was likely affecting her mobility and appearance (609). The analysis done on her grave goods adds much to our understanding of Eighteen's life. For example, she was buried with more impressive grave goods compared to the men buried in the same cemetery (609) and there were no signs, material or otherwise, that indicated Eighteen had lived as an outcast within her community (608).

These understandings of Eighteen's life and her relationship with her community are direct results of interpreting her osteological profile alongside information suggested by her grave goods. Understanding skeletal remains is crucial to the understanding of a person's life and their social interactions, as the body contains information about "cultural practices, diseases endured, meals eaten, and childhood homes" (Fleming 2009, 614) that cannot be gleaned from grave goods alone. Fleming's work on Eighteen, and her use of osteological profiling alongside grave good analysis, reveals the importance of employing multiple methods while investigating what life was like during the early Middle Ages.

Conclusion

There is a bigger picture of an individual's life that can be missed if grave good analysis is the only focus of a study. While buried items may be helpful for identifying ethnicity and occupation, they are by no means the only way to understand how an individual fits into their community. The interpretation of burials, including both grave goods and skeletal remains, needs to be done with care and an open mind as, often, the buried an individual does not have much say in how their community buries them or what is buried alongside them (Price et al. 2019). It is the duty of those performing these analyses to be open to all possibilities and methods, as well as aware of how their own biases and assumptions may be coloring their work. Misinterpretations of material culture can happen and their occurrences are not necessarily reflective of the ability of those performing the research. It is telling, however, when researchers refuse to acknowledge anything except for grave goods, potentially skewing data detrimental to our overall understanding. Once again, it must be stressed that while grave goods are valuable learning tools, we cannot overlook the importance of osteological profiles, isotopic testing, genomics, and knowledge of trade or transcontinental connections. Many of these individuals and communities from the early Middle Ages do not leave much beyond their graves and cemeteries for modern scholars to learn from, so it is important that when we are looking at these graves, we are doing it in a way that focuses on everything they have to offer and ensures that we represent them as accurately as we can manage.

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Reconstituting Space: The Transformation of Non-Places through the Covid-19 Pandemic

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Abstract

Using the theoretic framework of *supermodernity* as it applies to late-stage capitalist spaces of transience and consumerism, I examine the way the COVID-19 pandemic has shifted our physical and mental experience of shared space. Marc Augé's (1995) text explores the concept of liminal, substance-less, isolating shared spaces in which identity and community are absent. Looking at the way our mentalities shift while reckoning with a global pandemic, I find the spaces Augé constructs are now areas of fear, apprehension, and have/embody a focus on physical monitoring. "Non-places" take the shape of supermarkets, shopping malls, airports, buses, railways, and similar locations which you move through as a nobody. The fear of transmission has permeated our day-to-day, re-constituting these places. The lines in the grocery store guiding your movements and the sanitized card readers all reaffirm your location in the pandemic world. In this paper I explore the functions of this transition with reflection on how it shifts our sense of self and anxieties operating in the world, how the self is constructed in relation to the other, and how COVID-19 shifts this worldview. Recognizing this film of anxiety over previously devoid spaces deepens a recognition of COVID-19 as impacting our way of moving in the world at a fundamental level and questions its impact on future ways of moving through these spaces.

Introduction

Marc Augé's seminal text "Non-places: Introduction to an Anthropology of Supermodernity" (1995) explores the burgeoning world of supermodernity and the "non-places" it creates, such as shopping centers and public transport. These non-places and the way we interact within them are marked by absence, shallowness, and solitude (Augé 1995). In the Covid-19 pandemic, these non-places are becoming loci of fear and apprehension, where the self and the other are carefully monitored, and each person is constituted in reference to each other, or more accurately, in reference to the space between them. In this essay I will examine how the Covid-19 pandemic has shifted Marc Augé's "non-places" (1995), specifically through the analysis of changes in the temporal, spatial, and identity excesses of supermodernity. The Covid-19 pandemic is transforming the way non-places function in our lives, reshaping how we feel in them, and crafting new individual and social identities. Spaces of "solitude, and similitude" (Augé 1995, 103) are recast as spaces of apprehension, risk, and hyper self-awareness.

Augé's supermodernity is our current state of excess (1995, 29), the co-creation of late-stage capitalism and globalization in an accelerated world. Augé argues this acceleration is

marked by time, space, and identity (ego). In the era of supermodernity, things move faster due to the constant deluge of noteworthy events; history and the present are woven together. Space is felt as an excess as the world shrinks due to increased accessibility. The ego or identity is in excess in that "the individual wants to be a world in himself" (1995, p. 37). Individualism reigns over collectivism and globalization perpetuates this individualism through the ideals of a market economy (Dascălu 2020).

Supermodernity has led to the construction of non-places. Augé posits non-places in opposition to 'anthropological places,' which are localities in which tradition, socialization, ritual, and depth of human interaction occurs (Augé 1995). A non-place is a place in which absence and solitude reign, a place where the individual is constituted by the activity, as a consumer or commuter. Non-places take the shape of supermarkets, shopping malls, airports, buses, railways, and similar locations which you move through as nobody. They can be contrasted with your local corner-store where you are recognized by the owner, the beach where you go with friends, your church, and other spaces where one is observed. In these localities you are known; you are functioning, socializing, and recognizable. In non-places, the whole obliterates the self within them. Non-places are subjective — what is to you a workplace could be, to me, a non-place. The shopping mall one socializes or works in is the area another passes through, disengaged and isolated in the masses. Supermodernity facilitates an increase of non-places which counteract 'places for living;' places made to be relational and embedded with meaning: "Where individual itineraries can intersect and mingle, where a few words are exchanged and solitudes momentarily forgotten" (Augé 1995, 66-67). Non-places emerge where communication is limited and impersonal — one enters primarily to accomplish a task.

Supermodernity is recognized by Augé as informed by an excess of time, space and identity; these parameters are the foundation on which non-places are built.. In looking at public transportation, airports and large grocery stores, we see how these non-places built on the excess of time, space, and identity have been fundamentally transformed by the pandemic. Time shifts and space is contested, people no longer travel across the world, and instead are extremely limited in their accessible space. Notions of self and others are reconstituted, as people find their place in new moral imperatives and isolation (Prosser et al. 2020). Through spatial reconstructions, temporal experiences, and the redefinition of selfhood, the Covid-19 pandemic has turned our experience of supermodernity on its head.

Space

Non-places, according to Marc Augé, are sites to be passed through, where you don't leave a mark and which don't leave a mark on you. Of non-places Augé writes, "a person entering the space of non-place is relieved of his usual determinants. He becomes no more than what he does or experiences" (1995, 103). Since Covid-19, this is no longer true; the determinants now paramount to our lives are heightened in non-places. contested space of the pandemic, where transmission could occur.

There is a new form of acceptable social behaviour in these areas which is carefully monitored by the collective, not just the authority (James 2020, 189). This collective, unspoken monitoring of each other for rule following, keeping distant, mask wearing, sanitizing etc. creates an environment in which the individual is hyper-aware of the way they operate in that space (Prosser et al. 2020). Where prior to the behavioural shifts brought about by Covid-19, non-places were moved through absentmindedly, now anonymity and negligibility is replaced with hyper self-consciousness in relation to others.

Marc Augé talks of itineraries being paramount to the non-place experience, the functionality of thousands of converging itineraries shaping the noise and chaos which leads to isolation and identity-less operations in the non-place. Airports are emblematic of non-places as they are the intersection of many of these itineraries. Planes fly in and out, taxis pick up and drop off, people race from gate to gate, and people pause, wait in lines, wait in lounges, wait to be picked up. All this bustle of activity means that for the most part, airports are not destinations, but a means to an end. The traveller is faceless, nameless, and full of potential. Covid-19 has completely transformed the way these spaces are conceived of. The traveller is no longer cosmopolitan and seamlessly moving through a frenetic space. "Air passenger traffic declined 98% in April as the pandemic hit" (Abou-Ragheb 2020). What were once choreographed dances of all these moving parts have become shells of what they once were (Hull 2020). Due to airports and air-travel being at the pinnacle of virus movement around the globe (Tirachini & Cats 2020) they are an exceptionally poignant space of fear in the pandemic world.

Before Covid-19, certain localities functioned as the interim; the bus was the line between 'point A' and 'point B', the grocery store was the errand on the way home, where you hurried through the nothing space to accomplish the straightforward task — purchase, travel, wait. Now these spaces are the event in a day of isolation. Working from home, it might be your only outing, at risk and perceived as entering a danger zone. The pandemic has highlighted non-places as high-risk areas (Honey-Rosés et al. 2020), places frequented by many, where the unknown is much greater than the known. Grocery stores have been in the media and present in our minds since the early days when stockpiling and hoarding were a concern (D'Innocenzio 2020). Grocery stores were once a non-place where identity was mitigated by the activity of consumerism. Now they are a common site of anti-mask protest and aggression (Judd 2020). In the Covid-19 era, grocery stores are more than anything a space of fear, intensity, and politics.

Time

Covid-19 has disrupted supermodernity's marked excess of time, and confirmed it in different ways. For example, the phenomenon of waiting in the pandemic is markedly different. Non-places were both rushed and suspended. The airport and grocery stores saw marked moments of hustle emblematic of late stage capitalistic movement patterns, combined with moments of incontestable standing in spaced out lines, where the only activity available was suspended waiting. These experiences have been transformed in Covid-19. Movements must be more careful; time is slowed in that the activity of grocery shopping or moving through public

transportation requires more patience and care. Only certain numbers are allowed inside the store or on the bus and distance must be maintained at stations and in line-ups. No longer is the individual on autopilot, cruising the same tired aisles on the way home from work. Now this may be the singular outing, stocking for a week's worth of food. In addition, the act of quarantine itself is waiting: "millions of people around the world wait under various forms of quarantine" (Andits 2020) but this waiting occurs with no known end point. With the tension of risk and the slowing down of hurried activities, we are suspended in non-places in unordinary ways. Waiting in fear or waiting in hope, the way we move through this temporal experience is profoundly altered from previous experiences.

Augé's description of time in supermodernity is also confirmed by the Covid-19 pandemic world. Our collective awareness of marked events, events which change our perception of the world, is overwhelmed by the reaches of globalization and global awareness (Augé 1996, 29). Augé's description of time in supermodernity as "imminent history, [and] of history snapping at our heels" (Augé 1995, 30) is almost portentous of the Covid-19 experience of time, as we are all aware of living through history. The overwhelming rush of historical events as they are happening makes time feel accelerated and history a thing of our lived experience. We are experiencing the slow crawl of activities informed by and acted out through pandemic guidelines paired with the hyper-acceleration of sensational time.

Identity

Supermodernity is also facilitating an identity crisis. Augé writes that never before "have the reference points for collective identification been so unstable" (1995, 37). The shape of the world as crafted through globalization and economic networks has increasingly marred the sense of in-group and out-group. The foreign and elsewhere is intimately connected to our lived reality through access and exposure (Cuberos-Gallardo 2020).

Much like its impact on space and time, the Covid-19 pandemic has restructured globalization and how we interact with the broader world, fundamentally influencing our perception of identity. Now the near and immediate poses the most threat and the distant, through internet connection and media, poses the least threat (Cuberos-Gallardo 2020). While at first, blame was cast on a foreign other, now the other is all-encompassing. Arpan Roy in "Fear of others: thinking bio politics" (2020) explains how the virus's fundamentally egalitarian nature creates a fear of the 'other' that is not the 'other' in the foreign, "ethnic or cultural other" (Augé 2020, 18), but the 'other' as any body not yours. Augé claims that there is no absolute individual, we are constituted in terms of collective identity and the isolation of one has embedded the whole within them, as we are inseparable from our socialization and culture. We have wrapped up in ourselves our relationships, resemblances, and identity markers..

While this conception of identity is true as a foundation of social relations, the Covid-19 pandemic response of isolation and distance disrupts this. The 'other' becomes the threat, and the virus makes a threat out of everyone. To some degree the "bubble" is the self, and the 'other' is the whole of the world whose movements and interactions you are not carefully aware of.

Distancing has created this strange demarcation. Dejosein De Klerk in his examination of the way quarantine is reshaping our interactions says that, "We — our family unit — are the safe ones. But those who were extensions of our safe unit — our parents, siblings, friends — are the dangerous others to whom we are dangerous too" (2020, 225). All of a sudden "bubbles" are being created and negotiated, which carefully demarcate the in and out group. Identity as social relations is defined in terms of the few tapped to join up, as roommates, families, maybe co-workers, or a friend or two.

Conclusion

In the past year we have reconstructed society in many ways. In some areas we are lagging and in others we've adapted with speed and grace. The ways we experience space, time, our identities, and those of others since the beginning of the pandemic may be permanently distorted through this reshaping (Honey-Rosés et al. 2020). The way fear and apprehension in non-places creates a new identification in these contested areas superimposes another layer of uncertainty in an uncertain world. Setha Low and Alan Smart (2020) ask whether this new paradigm in public spaces could reinforce separation and hierarchies with a racial or class bias (2020, 3). While reckoning with the social and material consequences of Covid-19 and tangible loss, of routine, of loved ones, of plans and goals, of safety and security, we are also reckoning with an unseen and unrecognizable shift in the way we inhabit shared space. Non-places are representative of our supermodernity, with all its excesses, but they are comfortable in that they are known. The time on the bus from home to work is a time where you could pause the self and its inherent responsibilities and submerge yourself in the faceless crowd. In the grocery store or shopping mall your task was defined and manageable; in the airport you moved through that space in anonymity and with the safety of direction. Now our experiences of these non-places are warped and reconstituted. Reckoning with the renegotiating of shared space, ripe with danger and potential contagion, we move through non-places with the tension of the pandemic in the air.

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(Mis)interpreting the Commerce Clause: A Critical Look At Corpus Linguistics As A Solution to the Question of Originalism.

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Abstract

In recent years the use of corpus linguistics as a remedy to the problem of linguistic drift and United States legal language interpretation has proliferated, especially in the field of constitutional originalism of United States constitutional language. This paper investigates the Commerce Clause of the United States constitution as a case study for looking at the effects of legal language misinterpretation, through the Corpus of Founding Era American English (COFEA). This paper will then take a critical look at a modern case of legal language in order to question critical assumptions made by linguists about the employment of corpora for originalist analysis. This paper argues for the necessity of scepticism around the idea that 'original intention' behind written law can somehow be revealed by the syntax-oriented public-usage frequency analysis achieved through corpus analysis. Using corpus analysis to reveal intention assumes not only that legal language likely conforms to original public meanings of words, but more critically that these laws were intended to conform to one such interpretation. Rather, this paper will demonstrate that legal language is consistently written in a way which lends itself to multiple interpretations, and perhaps done so purposefully. By employing corpus linguistics to tackle the problem of original legal meaning, this paper argues, linguists could be ignoring this as a significant *feature* of legal language culture.

Introduction:

An integral part of modern state identity is the legal body which serves to regulate not simply the principles by which a state operates internally and internationally, but also the language of such interactions. Language, for legal systems, is the basis for not only the definition of such principles, but operates as an inbuilt notetaker and arbitrator; both documenting and assuring consistency in legality over time and space. This paper addresses one challenge in legal language culture, which is the interpretation and application of legal language – specifically of language which is in use hundreds of years after its writing. This paper critically addresses recent attempts using corpus linguistics to grapple the problems of original meaning in legal language interpretation in the United States Constitution, under a body of theoretical work termed 'originalism'. Furthermore, this essay serves to address how both the problem of interpretation, and the originalist solutions which have been employed in its remedy, speak to a deeper and more insidious set of problems in legal language culture.

Linguistic Drift and the Need for Originalism | *Introducing the Commerce Clause***:**

The history of law in Western tradition has seen numerous shifts in language and culture (May 2019). One challenge with the continued use of historic legal documents such as the United States Constitution is that the original legal language remains the *only* standard for use in any legal setting since their writing. This becomes a problem due to the linguistic drift – the theory that language shifts in meaning and usage over time (Lee and Phillips 2018) – which has occurred in American English since the 1780's. This drift means that the interpretation of constitutional legal language is not, by any means, straightforward, and its misinterpretation not without real world consequences.

Linguistic drift refers to a body of literature and assumptions regarding the interdependent change of language and culture over time. Inevitably, it seems, the hermeneutic resources of a society are embedded in their language, and thereby the change of the usage and meaning of language over time and space makes writing from distant historical or cultural settings challenging and complex (Lee and Phillips 2018). One prominent case to highlight the effect of such linguistic drift on legal practice is the case of the 'Commerce Clause' which has not changed in wording since the ratification of the United States Constitution in 1788, but is frequently used in contemporary judicial rulings, including as justification for seemingly unrelated policy. The Commerce Clause itself consists of only 16 words *"[That congress shall have the power] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"*[1]. The history of the use of this clause, I argue, makes a cogent case for the importance of understanding some of the real world effects of linguistic drift on the cultural (mis)understanding and (mis)use of legal language.

During the Civil Rights movement of the 1960's, politicians fighting for desegregation faced a challenge with the 14th amendment. While the amendment should have provided all the necessary legal support for desegregation, it seemed overly focused with the actions of 'states' and could thereby not be used to force desegregation in smaller businesses such as restaurants – "*No <u>state</u> shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any <u>state</u> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*"[2]– Instead, the government passed the 1964 civil rights act on the basis of the Commerce Clause. In a subsequent case, Katzenbach v. McClung, a small business, Ollie's Barbeque, argued they should not be regulated as they did not constitute commerce *among the states* (WYNC 2018). In 1964, however, the United States Supreme Court ruled against Ollie's Barbeque, arguing for an interpretation of *commerce* under which a restaurant sourcing ingredients from out-of-state constituted interstate commerce and therefore could be regulated by congress.

Some have poignantly noted the absurdity implied in the need to pass civil rights legislation on the basis of commerce rather than areas of the law already intended for rights.

[1] U.S. Const. Art. 1. Sec. 8. Cl. 3
[2] U.S. Const. Amend. XIV. Sec. 1.

However, putting this aside, many legal scholars also argue that such interpretations of the Commerce Clause were undoubtedly not the intended use of its initial writing, even if they led to progressive outcomes (Lacour 2002). This sort of argument seems intuitive given that the civil rights movement and the question of segregation was not on the minds of the writers of the clause in the same way these questions occupied the minds of Americans during the civil rights movement. This change in cultural context which results from over *two-hundred* years of linguistic drift cannot be ignored. Namely, the socio-linguistic significance of *commerce* as it applies to the case of the Commerce Clause in the United States constitution, raises a significant question of *originalism* (Biancalana 2002).

Originalism in the Context of the United States Constitution:

Originalism in United States Law refers to the methods for the judicial interpretation of the United States constitution in order to ascertain its original meaning and intention (Lee and Phillips 2018). The group of theories which encompass originalism in the constitutional context agree that there is some fixed *communicative content* of the language in the constitution. This communicative content is ratified into the constitution alongside the lexical content of the clauses, which contains the actual relevant legal meaning which must be adhered to in the future use of the legal documents. Due to the prevalence of cases such as the aforementioned Commerce Clause, where legal language from a time both culturally and linguistically out of reach to the modern interpreter is used to make contemporary legal decisions, the question of originalism has understandably proved more and more necessary in the legal consciousness of America. Lee and Phillips argue that originalism, if mastered, is a tool which can not only streamline the application of constitutional clauses in legal settings, but also provide judges with "external and internal restraint" (268). Lee and Phillips split originalism regarding the United States constitution into three ideological camps: public meaning originalism, original intentions originalism, and methods originalism.

Public meaning originalism focuses itself on the garnering of understanding of constitutional-era semantic meaning in public interpretation. The meaning of the United States constitution is embedded in the regularities of use and the semiotic context of late 1700's America, and therefore what we are to strive for in their interpretation is how the 18th century public would have interpreted the writing in terms of their contemporary language conventions. Original intentions originalism, by contrast, searches not for how a work would have been interpreted, but for the intentions of those writing it. To illustrate how these differ, the public meaning originalist would be interested in any contemporaneous media discussion of the constitution, or the general semantic culture around the language used, whereas the original intentions originalist would opt for written record or discussion of the constitution by the people who originally wrote it. Methods originalists, by contrast, hold that the constitution should be treated as a work in a separate 'dialect' and that we can only understand the constitution by "immersing ourselves in the language community of that dialect" (Lee and Phillips 2018, 271). What all of these ideological camps have in common is that they call for the extensive analysis

of primary language data from the historical cultural context of the United States constitution. Therefore the question of originalism becomes an anthropological and linguistic question: How can we accurately bridge the cultural gap of time and tether ourselves to meanings which are hermeneutically inaccessible to us in the modern world? Many have thought corpus linguistics to be the answer to this question.

In a paper entitled *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, Phillips, Lee, and Ortner (2016) argue that given originalism is the predominant method for interpreting the constitution, it therefore becomes imperative that such interpretations are empirically driven so that we can attempt to bridge the historiographic chasm. With this call for empiricism, they envisioned a comprehensive corpora of texts from the period in which the constitution was written, for use in corpus analysis.

Corpus analysis refers to the compilation and systematic analysis of language from specific contexts whereby words and term-phrases could be sequenced out of this data, and organised by context and connotation (May 2019). Ergo a corpus ideally allows us to ascertain the specialised or 'ordinary public meaning' of language in a certain time and space, and then let us approach texts, such as the United States constitution, using a new context-oriented lens. Nonetheless, corpus linguistics is not without limitations. Lawrence M. Solan (2016) wrote in support of Lee and Ortner's call for a corpus, but noted fundamental problems with corpus linguistic analysis: I. A corpus may highlight multiple 'original public meanings', or none at all; II. There lacks a clear, and well supported theory for the selection of one public meaning over another – meaning that originalists, even when trying to be empirical in their methods, "must still exercise judgement to determine how the various occurrences of words or phrases should inform their meaning in the Constitution." (59); and III. For many abstract concepts, common in legal language – citing the example *'abridging the freedom of speech,'*– it is not always apparent whether the concept is meant in reference to particular examples of the concept, or rather if what is being referred to is the concept of freedom of speech itself.

Solan thereby situates the project within a pre-existing and multifaceted set of problems already inherent in other corpus analysis; problems which linguists and lexicographers must contend with constantly, in any work which must make meaning of one language in another (i.e foreign language dictionaries). Solan calls upon Lawrence Lessig (1993), who in *Fidelity in Translation* notes that "Translation is a practice that neutralises the effect of changed language on a text's meaning, where language is just one part of context, and changed language is just one kind of change in context". Simply put, linguistic drift is another contextual change, which requires a translation into our current cultural-linguistic context.

Lessig urges that the originalist, upon enlisting a corpora for constitutional interpretation, must take upon herself the role of a translator. She must view the language of the United States constitution as foreign, and must be even more diligent than the translator in that she must simultaneously fight the apparent lexical similarities, and the urge to affix to them modern judgements and hermeneutical perspectives. Solan (2016), however, argues that this may not be sufficient because even the lexicographer will consider the purpose and audience of their

dictionary, as well as the need for brevity or simply their financial resources. Similarly, in a legal setting, "there will always be lexicographic decisions to be made about how narrowly or broadly to define a term" (7). Meaning, even if taking the translator's perspective could help the originalist achieve neutrality and combat personal reflexivity bias by artificially distancing themselves from the language of the constitution, we have to recognise that even the perspective of the translator is not free from bias. It sacrifices 'accuracy' for 'purpose', and still does not free one from having to ultimately decide upon an 'original public meaning'. White and Phillips (2017) furthermore say that before even considering the interpretation of corpora, the selection of texts from which to produce a corpora is by no means straightforward, especially in such culturally and historically distant settings. Linguists must balance the need for a large sample size, which is fundamental to the validity of sampling methodology, and choosing a representative sample, which becomes problematic when considering the variables in play. A text must not only be from a similar time period, but a similar language usage-culture to the constitution, in order to be considered relevant in the comprehension of the constitution.

Nonetheless, in an effort to bridge the empiricism gap, the project discussed in these papers has since been completed: the Corpus of Founding Era American-English (COFEA), "tailored to cover the linguistic range of the Constitution and the Founding Era, beginning with the rule of King George III in 1760 and ending with the death of George Washington in 1799" (May 2019, 5-6). The first thing that this allowed scholars to do was to actually empirically study constitutional originalism for the first time. However, it also provided new insight into the effectiveness of corpus linguistics as a methodology for ascertaining original public meaning.

Garrett May (2019) used the COFEA to evaluate precisely the Commerce Clause aforementioned in the beginning of this essay. May's analysis of the corpus found four distinct senses of 'commerce', as well as two instances where meanings did not fit any of those four, labelled as *other* or *intermediate*, totalling six senses altogether. After identifying a significant sample of instances where there were duplicates (27 instances) or unclear meanings (20 instances), there emerged one sense, overwhelmingly used in 96 out of the 171 usable instances analysed. The second highest clear sense was far behind with only 16 instances. This most popular sense defines commerce as "the trading, bartering, buying, and selling of goods (and the incidents of transporting those goods within the definition)" (May 2019, 7). This sense does not seem to support the reading of the Commerce Clause utilised in the 1964 supreme court decision regarding Ollie's Barbeque, and calls into question many other interpretations of the clause which have influenced legal decisions in the last 200 years. May notes that given the corpus size of almost 120,000 texts, the appearance of the collocation 'regulate commerce' just 229 times seems wildly disproportionate and could indicate the general invalidity of any conclusions drawn from the analysis. May continues, however, that this is also a generalised argument which is often posed to originalism and to corpus analysis, and which does not really accomplish anything. Evidently, regardless of how much the regulation of commerce was discussed in the 1700's, and whether it bears the same weight as it does in contemporary public politics, these terms which nonetheless occupied a meaning, were used in the constitution. May reminds us

there are numerous things which did not exist at the time of the constitution, and which we still use constitutional law to regulate. Such novel items as the smartphone, modern car, or the globalised transnational corporation, are prime examples. “Regulated commerce was an item of discussion of the founding era…”, writes May, and “minimal though its representation in the corpus may be, it is represented, and our analysis of [it] stands attested.” (2019, 9).

Lee and Phillips (2019) also looked at the Commerce Clause using the COFEA for the same set of senses of commerce/regulating commerce. Interestingly, Lee and Phillips consider that these senses are not mutually exclusive. They describe that a manufacturing sense of commerce, “the production of goods for trade; manufacturing” (300) and a trade sense, “the trading, bartering, buying, and selling of goods (and the incidents of transporting those goods within the definition)” (300), would both fall neatly under a broader, market sense of commerce, “any market-based activity having an economic component (this would include trade, manufacturing, agriculture, labor, and services)” (300). Further, in an analysis of collocates of commerce, one collocate stood out in frequency, *amity*, perceivably the result of trade agreements the United States was making with other nations at the time, called ‘treaties of Amity and Commerce’ (303). This, as well as other notable collocates, also supports an overall trade-oriented understanding of commerce outlined in the leading sense found by both May, and Lee & Phillips’ corpus analyses. The originalist now has a solid case to argue that the 1964 passing of the civil rights act on account of the Commerce Clause, and the legal disputes against segregation with small local businesses such as Ollie’s Barbeque, constitute misuse of the original sense of commerce which existed in the language culture of the founders of the United States constitution. Ollie’s Barbeque partook in the sense of commerce as “the trading, bartering, buying, and selling of goods”, at the level of sourcing ingredients, but not at the level of the ‘goods’ which they created and served at their restaurant. Further, the original intentions originalist might now ask whether or not whom the restaurant served fell under the parts of ‘commerce’ which the clause allows congress to ‘regulate’. This by no means suggests that segregation should not have been made illegal in the United States, or anywhere else for that matter, but rather that it should have been made illegal under the power of human rights legislation as opposed to commerce legislation. Perhaps further corpus analysis of the 14th amendment would find that in 18th century legal discussion, there was less distinction between the power of individual states and that of a central government, and perhaps that we might be able to make the case of originalism to support an interpretation which allows for federal intervention in matters of the 14th amendment.

Regardless of these anecdotal cases, the emergence of this corpus as a tool clearly demonstrates that corpus linguistics serves as a powerful tool in both the interpretation and reformation of legal systems, in the battle against the challenges which arise out of linguistic drift. However, I will take this opportunity for a more general critique of the *modus operandi* of the use and interpretation of language in legal settings —or more precisely of the general assumptions made by linguists and legal scholars in this interpretation. When an originalist searches for original public meaning in the syntax and grammar of a text, they will thereby

assume that the meaning is wholly embedded in the words used. Ideally, this should be the case, especially in a legal context, because those words are all the lawmaker has at her disposal in defining the distinction between the legal and the illegal. However, one need not spend much time looking at legal writing or listening to courtroom law to recognise that the legal language culture is uniquely indeterminate and prevaricating. To exemplify this, I call the reader's attention away from the distant and out of reach language of a 230 year old constitution, and to a contemporary and clear modern case of linguistic research in law.

In a study of juror death penalty decisions in Texas capital punishment cases, Robin Conley (2013) notes that the structure of capital punishment law and the way it is enacted in jury trials is purposefully structured to systematically dehumanise defendants, and distance jurors from ethical decisions. Specifically, the language of the decision to sentence someone to death seems unendurably convoluted. Jurors are asked to answer two questions; 1. "Do you find from the evidence beyond a reasonable doubt that there is a prob-ability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" (505) and 2. "Do you find from the evidence, taking into consideration all of the evidence, in- cluding the circumstances of the offence, the defendant's character and back- ground, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death" (505). In neither question is there explicit mention of the juror's responsibility towards sentencing the defendant to death. The juror is simply answering two questions, and in a different legal or cultural context, the answer to these two same questions might not result in death. Thereby, the juror is not answering the question *should the defendant be killed*, but rather the decision seems to be just a natural consequence of the legal system's interpretation of a certain combination of answers to the two questions. As if in an effort to prove itself even more reductionistic, the question has been divided into two, so that rather than the juror consider all aspects of the question of death in one moment, the juror is asked to separate the matter into distinct sections, and ignore the coherence which comes with viewing the problem as a whole. Thereby, they are also asked to not see the defendant as a whole, but rather to separate them into parts as well, so as to dehumanise them, and remove responsibility from a juror, to make the decision appear less daunting to the individual.

What this points to is a general tendency in the legal use of language — also observed in the aforementioned (mis)use of the Commerce Clause — to say things in ways which lend to multiple interpretations; they are overall inexplicit whilst having the forward appearance of being explicit. This problem cuts to the foundations of originalism, insofar as we assume that finding the 'original public meaning' of the words of a text like the constitution will help discover the meaning of the words as they are used in the legal treatise itself. One simultaneously must assume that the words in the treatise bear the ordinary or statistically likely sense of their language culture. However, it is the overwhelming tendency of law to use complicated language that has the appearance of being explicit due to its inaccessibility, in order to discreetly allow for open ended interpretations to use to their benefit. Just as it is the tendency of judges and lawyers

to use those possible interpretations of the legislation, like the Commerce Clause, to achieve certain legal outcomes, I argue that it is equally the tendency of the writers of these laws — the tendency of the entire linguistic culture of law — to write laws which allow for such multitudinous interpretations.

Conclusion:

Language is both an integral part of the legal identity of a modern nation-state like the United States, and its biggest challenge. Language promises to immortalise laws and ensure the constancy of their application across time and space, yet language equally locks the meaning of a law in a specific context of time and place; language explicitly demarcates the legal and the illegal, and yet language itself creates avenues for the (mis)interpretation and (mis)use of laws. Even in the employment of corpus linguistics to solve the problems of linguistic drift, language seems to be both the saviour and the corruptor of law — both law's biggest problem, and the tool which law uses to fix and reform itself. However, it seems that this dichotomous relationship is so deeply embedded in the very nature of legal culture that it becomes, itself, integral to defining what law is. It becomes insidious to the efforts of legal scholars and lawmakers who fight to ascertain the true meaning of legal language, and yet manipulate language to ensure that one singular clear-cut interpretation cannot be inferred. Corpus linguistics in the field of constitutional originalism must be treated as both a symptom of, and remedy for, the awkward waltz of legal language culture.

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