

The Paradox of Visibility: Anti-Blackness, Pathologization, and The Limitations of Canadian Criminal Law

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ABSTRACT

This dissertation offers a quadripartite analysis of the endemic nature of anti-Black racism within Canadian criminal law, contributing to the growing body of Canadian critical race theory (CRT) literature and advancing the field of race-conscious doctrinal work on Canadian criminal law. Each chapter engages the system along different axes: (a) the temporal, procedural axis – moving from policing to the trial process to criminal sentencing; (b) the micro to the macro axis, with chapters that range from an individual case study to an analysis of a small constellation of recent court decisions, to a more theoretical analysis of foundational theories of criminal punishment and desert; (c) an axis that considers concrete and practice-related concerns, to more theoretical, with chapters ranging from practice-oriented doctrinal and policy interventions to sustained analyses of theoretical frameworks and scholarly methodology. The chapters will demonstrate how CRT analyses can explain some of the deep pathologies within the criminal legal system, demonstrate its inadequacy, and expose the paradoxicality of tackling anti-Black racism in the system by making Blackness more or less visible.

While each chapter will engage different issues, they will be directed toward the overarching question of how to navigate what I have termed as the “paradox of visibility”: that is, to some extent, a focus on Blackness is disadvantageous, though a refusal to focus on Blackness can support the white supremacist myth of colour blindness and racial neutrality in the criminal legal system. Concretely, the paradox demonstrates that at the same time and in the same context, both advantages and disadvantages are associated with focusing on Blackness and with efforts to achieve race neutrality. Further, my analysis of the paradox of visibility recognizes that for Black people, 'denying difference' is not an option: Black people are read as Black and subjected to so much explicit and implicit bias that claims about 'colour-blindness' are often disingenuous or naïve. So, in many respects, and as expressed by the theory of racial realism, there is no ‘outrunning’ one’s Blackness as racism is woven into the fabric of our institutions and frames the terms of reference for societal racial ordering.

DEDICATION

Nineteen years ago, I walked into an unassuming building on the Carleton University campus in Ottawa, Ontario, resolute in my desire to attend University. A few weeks earlier, I had completed a high school equivalence program at a local College but was told by the program's academic advisor and a University administrator that the pathway to tertiary-level education was, at that moment, out of reach for me. I refused to accept that answer, searched for a path, and ended up on the Carleton University campus on a beautiful Friday afternoon in June 2005. The campus seemed abandoned. I found someone who directed me to the academic recruitment building. I ran in that direction, hoping to catch someone before the office closed for the day, but I was too late – the office was closed. Before I left, I saw a woman appear from her office. She was white and short in stature. I asked her about the process for applying to Carleton University, and she told me that the office was closed for the day and that I should return on Monday. My heart sunk in my chest. I felt defeated. As I turned to walk off in despair, she said: “But I can give you five minutes.” Those words changed my life. Over those five minutes, she provided me with a path to University studies. I ran home and applied for the program that she had recommended. I was granted admission, and the rest, as the saying goes, is history. I don't remember her name, and I honestly don't remember if she existed. But I do know that she saved me. So, I dedicate this dissertation to Ms. Unknown— thanks for giving me five minutes.

I also dedicate this dissertation to my children, who are my reason for being. And to my mother, who told me long ago to dream big because only big dreams have magic.

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INTRODUCTION

I. ROAD MAP

This dissertation offers a quadripartite analysis of the endemic nature of anti-Black racism within the Canadian criminal legal system. It is structured as a portfolio of three (3) peer-reviewed journal articles and one (1) peer-reviewed book chapter, which collectively contribute to the growing body of Canadian critical race theory (CRT) literature.¹ It also advances the field of race-conscious doctrinal work on Canadian criminal law, highlighting the urgent need for such research.² The chapters engage the system along different axes: (a) the temporal, procedural axis – moving from police surveillance and contact to the trial process to criminal sentencing; (b) the micro to the macro axis, with projects that range from an individual case study to an analysis of a small constellation of recent court decisions, to a more theoretical analysis of foundational theories of criminal punishment and desert; (c) an axis that considers concrete and practice-related concerns, to more theoretical, with chapters ranging from practice-oriented doctrinal and policy interventions to sustained analyses of theoretical frameworks and scholarly methodology. The chapters will advance the goal of demonstrating how CRT analyses can productively explain some of the deep pathologies within the criminal legal system, demonstrate its inadequacy, and expose the paradoxicality of tackling anti-Black racism in the system by making Blackness more or less visible/explicit.

¹ See Vincent Wong, “Ethno-Racial Legal Clinics and the Praxis of Critical Race Theory in Canada” (2020) 16 JL & Equal 63; Amar Khoday, “Black Voices Matter Too: Counter-Narrating *Smithers v The Queen*” (2021) 58:3 Osgoode Hall LJ 567; Joshua Sealy-Harrington, “The Charter of Whites: Systemic Racism and Critical Race Equality in Canada” in Kate Puddister & Emmett Macfarlane, eds, *Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change* Law and Society (Vancouver: University of British Columbia Press, 2022) 234.

² See for e.g. Khoday, *supra* note 1.

Because white supremacy is entrenched within the criminal legal system, racial justice interventions, like Impact of Race and Culture Assessments (IRCAs), may be of limited use and may, in some instances, reinforce deeply entrenched pathologies, even as they work to undermine irresponsible claims of “racial neutrality.” While each chapter will engage different issues, they will be directed toward the overarching question of how to navigate what I have termed as the “paradox of visibility”: that is, to some extent, a focus on Blackness is disadvantageous, but at the same time, a refusal to focus on Blackness can support the white supremacist myth of colour blindness and racial neutrality in the criminal legal system. Concretely, the paradox demonstrates that at the same time and in the same context, both advantages and disadvantages are associated with focusing on Blackness and with efforts to achieve race neutrality. Further, my analysis of the paradox of visibility recognizes that for Black people, ‘denying difference’ is not an option: Black people are read as Black and subjected to so much explicit and implicit bias that claims about ‘colour-blindness’ are often disingenuous or naïve. So, in many respects, and as expressed by the theory of racial realism, there is no ‘outrunning’ one’s Blackness as racism is woven into the fabric of our institutions and frames the terms of reference for racial ordering in society. To accept this principle, however, requires getting *real* about race. First, racial realism is concerned with accurately describing the system and focusing on the perspectives of those whom it harms the most but serves the least.³ Second, it provides “a legal and social mechanism on which blacks can rely to have their voice and outrage heard.”⁴ This is done by exploring effective action from the perspective of those Derrick Bell referred to as at the ‘bottom.’⁵ In this way, while Black people cannot deny or avoid being read as Black within our white supremacist society, they can contribute to critical dialogues about what that status or identity means.

³ “The standards of judgment must be rooted in the whys and wherefores of life as it is lived, the world as it is, not our wished-for fantasy of the world as it should be” See Saul Alinsky, *Rules for Radicals: A Pragmatic Primer for Realistic Radicals* (New York: Knopf Doubleday Publishing Group, 1989) at 41.

⁴ Derrick Bell, “Racial Realism” (1992) 24:2 Conn L Rev 363 at 364.

⁵ Derrick Bell, *Faces at the bottom of the well: the permanence of racism* (New York: Basic Books, 1992).

Overall, each chapter explores what, if anything, legal scholars, judges, lawyers, activists, and people in Canada examining the relationship between Blackness and criminal law stand to learn by accepting or acknowledging the persistence of anti-Blackness in the criminal legal system. In that vein, this dissertation interrogates some of the racial justice strategies that have recently been implemented in the Canadian criminal legal system, premised on amplifying Black voices. Moreover, it examines the potentialities of the recent racial turn in the criminal law jurisprudence, as evidenced in cases like *R v Le* and *R v Anderson*, while critiquing the courts' failure to treat anti-Black racism as a structural issue within the criminal legal system.⁶ Admittedly, several important Supreme Court of Canada (“Court”) and appellate-level decisions explicitly acknowledged the existence of structural anti-Black racism, but many lower courts pay little attention to these principles, especially in sentencing proceedings.⁷ Indeed, their approaches are unprincipled and haphazard, which results in “colour-blind” or complicit race jurisprudence.⁸ While courts have acknowledged the endemic nature of anti-Black racism in Canadian society, many jurists and scholars remain reluctant to accept the inherent limitation of doctrinal analysis in understanding and remedying structural racism in the administration of criminal law.

The chapters demonstrate how the phenomenon that legal scholars, most notably Professor David Tanovich, have identified as the elision or erasure of race in the criminal jurisprudence around anti-Blackness and policing is not only a blunt omission of race-based discourses but also a consequence of the judicial navigation and legitimation of the inherent ambiguities and paradoxicalities that are baked into the criminal legal system.⁹ Thus, for example, while involvement in crime and/or having a criminal record - which, for many Black people, is an artefact of systemic anti-Blackness - can be used to formally undermine a Black witness’s credibility, the

⁶ *R v Le*, 2019 SCC 34 [*Le*]; *R v Anderson*, 2021 NSCA 62 [*Anderson*].

⁷ *R v Wournell*, 2023 NSCA 53 [*Wournell*].

⁸ *R v Biya*, 2018 ONSC 6887 [*Biya 2018*]; conviction quashed at: *R v Biya*, 2021 ONCA 171 [*Biya 2021*].

⁹ David M Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40:2 Supreme Court Law Review 655; David M Tanovich, “The Further Erasure of Race in Charter Cases” (2006) 38 Crim Reports - Articles 84; David M Tanovich, “E-Racing Racial Profiling Forum: Stop in the Name of the Law: What Law - Racial Profiling and Police Practice in Canada” (2004) 41:4 Alta L Rev 905.

same credibility analysis may not be attentive to the more complex, nuanced racial dynamics that might serve to bolster their credibility. The evidence rules that operate in this way are both elastic and facially race-neutral, but they tend to operate against Black people in practice.

But, when we assess *how* and *why* the system has evolved to this point and acknowledge structural anti-Blackness, we face a conundrum: do we attempt reform from clear-eyed, informed incrementalism? Are there latent strategic possibilities within the system to advance radical transformative changes?¹⁰ Or do we regard incrementalism as, at best, doomed to fail, in that the system is designed to produce particular deleterious outcomes for Black people and, at worst, a fig leaf that helps perpetuate racial inequalities? To assess such possibilities, the chapters investigate whether an enlightened and reimagined form of incrementalism is a realistic path to achieving racial justice for Black people who interface with the Canadian criminal legal system. These “big” questions permeate the dissertation and become increasingly refined in each chapter.

The dissertation comprises four chapters. The first examines the status and potential of CRT methodology in the Canadian context, using the criminal legal system as a case study. The second looks at the *Theriault* case, in which a white police officer was prosecuted for maiming a young Black man, as a touchstone for thinking about the potential and limitations of working *within* the system to advance racial justice. The third and fourth chapters focus on emerging sentencing caselaw that has tried to simultaneously work within the system’s norms while obviating the system’s complicity in racial subordination. Specifically, they look at attempts to bring race consciousness to sentencing, exposing different facets of the issue through quantitative doctrinal analysis and qualitative data integrating stakeholder perspectives.

¹⁰ Danardo S Jones, “Lifting the Judicial Embargo on Race-Based Charter Litigation: A Comment of *R v Le*” (2019) 67 Crim LQ 14.

II. METHODOLOGY

The chapters use slightly different but complementary research methods, including:

- Critical Race Methodology
- Narrative and Storytelling
- Quantitative analysis
- Doctrinal Research
- Law and Philosophy
- Law and Humanities
- Qualitative empirical research
- Black legal geographies.

Chapter Title	Methodological Approach
“Anchoring Lifeline Criminal Jurisprudence: Making the Leap from Theory to Critical Race-Inspired Jurisprudence”	Critical Race Methodology, Narrative and Storytelling
“Paradoxical Race Visibility in Canadian Sentencing Law”	Quantitative analysis, doctrinal research, Law and Philosophy, Law and Humanities
“Probing the Data: Perspectives on Race Visibility in Canadian Sentencing Proceedings”	Qualitative empirical research, doctrinal research, Narrative and storytelling
“Managing Expectations: Racial Realism and Criminal Trials”	Doctrinal research, Social Science data and Black Legal geographies

CRT legal scholarship goes beyond doctrinal analysis and utilizes social science methods, ranging from law and geography to social psychology and economics. As chapter one outlines, CRT counters and challenges the more doctrinal-focused method of conducting race and criminal law research by centring the voices and stories of those at the margin of society and legal scholarship.

This dissertation also deploys counter-hegemonic methodologies and epistemologies to challenge the scholarly and jurisprudential orthodoxy that saturates criminal justice scholarship.¹¹

Admittedly, as a trained criminal lawyer, I am inclined to turn to court decisions as a starting point for my research. Thus, I have reviewed most of the published criminal trial and sentencing cases that have dealt with Blackness significantly. In these cases, particularly in the sentencing context, I have found that the judicially constructed “narrative of Blackness”(i.e. in the ways in which Blackness is coded and represented in criminal sentencing jurisprudence), as mercy-seeking, is often inconsistent with how Black people tell their own stories.¹² In that regard, the chapters aim to counter and subvert the 'record' by centring Black voices in the discursive spaces that (re)produce and reinforce notions of criminality, risk, and blameworthiness. Indeed, undermining so-called official accounts of Blackness, as criminal law discourses represent it, requires a qualitative accounting by Blacks of the criminal justice system. The chapters augment the audibility of the voice-of-colour in Canadian criminal justice scholarship on race.¹³ This approach directly challenges the victor-oriented, white supremacist discourse that dominates so much of criminal law scholarship.¹⁴

Indeed, the freedom of being and knowing are not privileges afforded to Black people in scholarly and juridical spaces. Through the vehicle of white supremacy, Black experiences are “woven ...out

¹¹ Tayyab Mahmud, “Foreword: What’s Next? Counter-stories and Theorizing Resistance” (2018) 6:3 Seattle J Soc Justice 6; See generally Steven Jordan, “Who Stole my Methodology? Co-opting PAR” (2003) 1:2 Globalisation Societies & Education 185.

¹² See CABL, “Race and Criminal Injustice: New report from CABL, Ryerson’s Faculty of Law and the University of Toronto confirms significant racial differences in perceptions and experiences with the Ontario criminal justice system”, (10 February 2021), online: <<https://cabl.ca/race-and-criminal-injustice-new-report-from-cabl-ryersons-faculty-of-law-and-the-university-of-toronto-confirms-significant-racial-differences-in-perceptions-and-experiences-with-the-ontario/>>.

¹³ Richard Delgado, Jean Stefancic & Angela Harris, *Critical Race Theory (Third Edition): An Introduction*, 3rd edition ed (New York: NYU Press, 2017) at 9; See also Alex M Jr Johnson, “Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship” (1993) 79:4 Iowa L Rev 803.

¹⁴ See HLT Quan & Tiffany Willoughby-Herard, “Black ontology, radical scholarship and freedom” (2013) 11:2 African Identities 109; See generally Howard Zinn, *A people’s history of the United States* (New York: Harper Perennial, 2010).

of a thousand details, anecdotes, stories” that are foreign to Black ways of knowing.¹⁵ I am cognizant, however, that it may be impossible to entirely abandon the discursive practices and ways of knowing that have been developed by colonial white supremacist society. As a Black academic, I may risk scholarly opprobrium: Ensnared in a descriptive world where the dominant epistemic is foreign to Black experiences, deviations from this ‘received wisdom’ may be seen as polemical and fringe. Indeed, my citation profile must mirror the received wisdom from those who purportedly have access to universal truths on Blackness and criminal justice to pass scholarly muster.¹⁶ However, “in human history there is always something beyond the reach of dominating systems, no matter how deeply they saturate society, and this is what makes change possible.”¹⁷ This dissertation decenters white voices on Black experiences. It tells the stories of the primary targets of the criminal justice system.¹⁸ I seek to understand how anti-Black racism shapes criminal law discourses and provides an accurate predictor of criminal trial and sentencing outcomes: white is always right when race is on trial!¹⁹ However, are there latent possibilities to shape, create, or amplify power in historically powerless discourses? How can we create an oppositional, counter-hegemonic jurisprudence that challenges prevailing narratives around criminal justice and race? Indeed, what is in a story?

i. Positionalities/Subjectivities

The question of positionality, reflexivity and bias/objectivity is one of the central debates in the literature on qualitative methodology.²⁰ We ask: ‘Whose side are we on?’²¹ and start by examining

¹⁵ Frantz Fanon, *Black Skin, White Masks* (London: Pluto Press, 1952) at 111. Frantz Fanon, *Black Skin, White Masks* (London: Pluto Press, 1986) at 111.

¹⁶ See generally Katherine McKittrick, *Dear Science and Other Stories - Errantries* (Durham: Duke University Press, 2021).

¹⁷ Edward W Said, *The world, the text, and the critic* (Cambridge, Mass: Harvard University Press, 1983) at 246–47.

¹⁸ See generally Mahmud, *supra* note 11; Howard S Becker, *Whose Side Are We On?* (Routledge, 1970).

¹⁹ See generally Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: U of Toronto P, 2010); See also Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point, NS: Fernwood Publishing, 2017).

²⁰ See generally Katherine Bischooping & Amber Gazso, *Analyzing Talk in the Social Sciences* (London: SAGE Publications Ltd, 2016).

²¹ See Becker, *supra* note 18.

our own experience and understanding to best frame our research focus and questions of interest. For example, studying the impacts of racial injustice in the criminal justice system requires acknowledging my social location and the experiences that animate and ground me. I do not believe that an exhaustive exposition of my positionalities, identities, and social location is warranted, except insofar as they construct my research agenda. As I explore and elaborate in chapter one, my work is shaped by my dual positionality as a practicing lawyer and academic and as a Black man who has experienced many of the forms of deprivation and oppression that are typically associated with pathological narratives of Blackness. In *The Equity Myth: Racialization and Indigeneity at Canadian Universities*, the authors discuss the challenges racialized and indigenous scholars face in the Academy.²² In their study, the authors found that racialized scholars are not given the same opportunities as their white counterparts to engage/participate in this knowledge-generation economy.²³ Critical race scholarship provides a platform for racialized scholars to disrupt this enterprise. However, if not properly constrained, acknowledged or accounted for, the researcher's positionalities, identities, and social location may lead to data reinforcing the researcher's presuppositions about the topic under investigation.

Self-reflexivity and acknowledging one's social location and positionalities can facilitate the production of what some scholars describe as "transformative knowledge."²⁴ Such a methodological approach liberates the researcher from the shackles of positivism and objectivity.²⁵ Indeed, feminist and CRT methodologies encourage this type of emancipatory epistemic.²⁶ As a Black researcher seeking to understand the relationship between Black communities and the criminal justice system, adhering to a strictly doctrinal approach would undermine Black

²² See Frances Henry, *The equity myth: racialization and indigeneity at Canadian universities* (Vancouver: UBC Press, 2017).

²³ *Ibid.*

²⁴ Joan M Anderson, "Toward a post-colonial feminist methodology in nursing research: Exploring the convergence of post-colonial and black feminist scholarship" (2002) 9:3 Nurse Researcher 7 at 12.

²⁵ Margaret Hunter, "Rethinking epistemology, methodology, and racism: or, is White sociology really dead?" (2002) 5:2 Race & Society 119 at 123.

²⁶ See Marjorie L DeVault, "Talking Back to Sociology: Distinctive Contributions of Feminist Methodology" (1996) 22 Annual Rev Soc 29; Kimberle Crenshaw, "Introduction" in Kimberle Crenshaw & et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New York Press, 1995).

epistemological and ontological values and approaches. Strict adherence to doctrinal methods perpetuates whiteness by requiring a system premised on white supremacy to legitimize Black peoples' experiences. Admittedly, employing imaginative and radical methodologies is risky business.²⁷ I fear that my work will not be accepted if I fail to capitulate to archaic, white supremacist notions of scholarly empiricism.²⁸ So deeply ran these fears that I decided to read widely on research methods and methodologies, which I later learned was a Sisyphean effort to acquire accepted research acumens.

For this reason, I decided to employ CRT to counter and challenge the more doctrinal-focused methodology. I am cognizant of the ethical and epistemological implications of conducting qualitative empirical research where the researcher is also a member of the community under investigation. However, mainstream Canadian legal scholarship elides Black epistemologies and ontologies. Therefore, the dissertation purposely centers on Black perspectives on race and criminal justice. Moreover, these voices will provide counter-narratives that may challenge mainstream accounts of race and crime.²⁹

I have been thinking about and experiencing the relationship between race and criminal law for most of my life. However, over the past few years, I have gained the language to express experiences that are often pushed to the sidelines of official discussions about criminal law. While mainstream criminal law scholarship and jurisprudence recognize how criminal law perpetuates anti-Black racism, I have observed that this recognition has not translated into any meaningful racial justice reforms. In other words, simply acknowledging anti-Blackness in the criminal legal system has not done much to improve this deeply ingrained problem. However, it is possible that this bare recognition may be the limit of what the criminal legal system can or is willing to

²⁷ Margaret H Vickers, "Researchers as Storytellers: Writing on the Edge—And Without a Safety Net" (2002) 8:5 Qualitative Inquiry 608.

²⁸ See generally Tukufu Zuberi & Eduardo Bonilla-Silva, *White Logic, White Methods: Racism and Methodology* (Maryland: Rowman & Littlefield Publishers, 2008).

²⁹ See generally Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative Legal Storytelling" (1989) 87:8 Mich L Rev 2411.

do. Does the system have a limit to which it is unable or otherwise unwilling to traverse in the pursuit of racial justice? What is that limit? These are not simply rhetorical queries or philosophical musings but real and pressing issues of immediate import to many people. Or does our lack of imagination stem from the view that the project of racial justice is nebulous and, at times, ill-defined by those who advocate for this brand of justice?

ii. CRT as Methodology

CRT has gained mainstream acceptance in the US and Canadian Legal Academy. However, there is a need for more CRT scholarship in the Canadian Legal Academy, where the scholarly tradition is still relatively nascent. There is also a very significant problem of institutionalized anti-Black racism that requires serious critique and analysis.³⁰ From a methodological perspective, CRT legal scholarship goes beyond doctrinal analysis and utilizes social science methods, ranging from law and geography, social psychology, economics, etc.³¹ CRT counters and challenges the more doctrinal-focused method of conducting race and criminal law research. Gomez argues, “CRT provides us with methodological guideposts that challenge mainstream assumptions about research and interpretation.”³² I import insights from American authors who have produced radical structural critiques of the racial bias inherent in the American criminal justice system.³³ The radical structural critique suggests that “criminal law is racist because it is an instrument of white

³⁰ See Carol A Aylward, *Canadian critical race theory racism and the law* (Halifax: Ferwood, 1999); Shanthi Elizabeth Sente & Sujith Xavier, “Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada” (2013) 31:2 Windsor YB Access Just 1.

³¹ See Osagie K Obasogie, “Symposium Issue: Critical Race Theory and Empirical Methods: Foreword” (2013) 3:2 UC Irvine L Rev 183; Michelle Christian, Louise Seamster & Victor Ray, “Critical Race Theory and Empirical Sociology” (2021) 65:8 Am Behavioral Scientist 1019; Devon W Carbado & Daria Roithmayr, “Critical Race Theory Meets Social Science” (2014) 10:1 Annual Rev L & Soc Science 149; Laura E Gomez, “Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field” (2010) 6 Annu Rev L Soc Sci 487.

³² See Gomez, *supra* note 31.

³³ Paul Butler, *Let's get free: a hip-hop theory of justice* (The New Press, 2009); Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (The New Press, 2010). I acknowledge that these sources are American, and, insofar as they are grounded in a particular national history, they are not entirely transferrable to the Canadian context – however, the basic insight they express is also compelling in the Canadian context.

supremacy."³⁴ The central claims of these American critiques are broadly applicable in the Canadian context, albeit developed in light of American history's particularities.³⁵ I have noticed the creation of an intellectual boundary between the experiences of Black people in the United States and Canada.³⁶ The arguments are framed more or less in this form: Canada is touted as a beacon of multiculturalism and tolerance but has a severe ongoing anti-Black problem like its neighbour to the South. While I do not intend to collect qualitative data from Black peoples on both sides of the border, one can glean from published studies from both countries the similarities in Black peoples' articulation of Black pain. However, do race scholars who cross this ontological border risk scholarly opprobrium for conflating the unique experiences of Black people in both contexts? While there are differences, Black pain, from a global perspective, has a common denominator: white supremacy.³⁷ Black oppression, notwithstanding the oppressors' differing methods of dehumanization, subjugation, cruelty, and pain, nor his geographical location, economic paradigm or monarchial or State allegiance, is rooted in a fundamental social pathology: anti-Black hate. The effects of slavery and ongoing anti-Black hate on the Black psyche do not respect this ahistorical, artificial ontological boundary.³⁸ Black pain is without ontological borders

³⁴ Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System" (1995) 105 Yale LJ 677 at 693.

³⁵ See e.g. Richard Delgado, "Liberal McCarthyism and the Origins of Critical Race Theory Critical Race Theory Speaker Series - CRT 20: Honoring Our Past, Charting Our Future" (2009) 94:5 Iowa L Rev 1505.

³⁶ Rahul Kalvapalle, "'This is a Canadian problem, too': U of T's Maydianne Andrade on finding the will to address anti-Black racism", online: *University of Toronto News* <<https://www.utoronto.ca/news/canadian-problem-too-u-t-s-maydianne-andrade-finding-will-address-anti-black-racism>>; Brooklyn Neustaeter, "No difference between racism in Canada and the U.S., activists say", *CTV News* (3 June 2020), online: <<https://www.ctvnews.ca/canada/no-difference-between-racism-in-canada-and-the-u-s-activists-say-1.4967681?cache=zviomxnayn%3FclipId%3D89926%3Fot%3DAjaxLayout>>; Morganne Campbell, "'From taking a knee to taking a stand': Why anti-Black racism in Canada can't be ignored", *Global News* (10 June 2020), online: <<https://globalnews.ca/news/7044040/anti-black-racism-canada-americans/>>; "How the spectacle of U.S. racism allows Canada to overlook its own", *CBC Radio - The Sunday Magazine* (5 June 2020), online: <<https://www.cbc.ca/radio/sunday/the-sunday-edition-for-june-7-2020-1.5594627/how-the-spectacle-of-u-s-racism-allows-canada-to-overlook-its-own-1.5597168>>.

³⁷ Cedric J Robinson, *Black marxism: the making of the Black radical tradition*, 2nd ed (Chapel Hill: U of North Carolina P, 2020); Ann Cvetkovich, *Depression: A public feeling* (Durham: Duke University Press, 2012) Art II, chapter 2.

³⁸ See Calvin L Warren, *Ontological terror: Blackness, nihilism, and emancipation* (Durham: Duke University Press, 2018).

- it traverses both time and space.³⁹ Few Canadian scholars, however, have assessed whether our system is vulnerable to analogous critiques. This dissertation fills this lacuna.

III. THEORETICAL ORIENTATION

i. CRT

CRT's primary intervention in critical scholarship was placing race at the core of legal analysis. It shifted race and its intersecting realities (e.g. gender, class) from the periphery of legal scholarship and made it the focus of sustained legal analysis about racial inequality. CRT was designed to analyze how the law and power/politics converge to produce predictable racial outcomes.⁴⁰ CRT adopts several starting premises to frame analyses of the link between race, law, and power—e.g. race is a social construct, a critique of liberalism, racism is a structural and permanent/ordinary feature of society, the importance of the voice of colour and intersectionality can help explain how multiple axes of oppression or identity operate. As Crenshaw explains, CRT scholars “share an ethical commitment to human liberation – even if we reject conventional notions of what such a conception means, and though we often disagree, even among ourselves, over its specific direction.”⁴¹

ii. Racial Realism

Closely linked to the ordinariness thesis is the theory of racial realism, which found its intellectual genesis in the American context, primarily through the work of Derrick Bell, the forefather of CRT. According to Bell,

Even those herculean efforts we hail as successful will produce no more than temporary “peaks of progress,” short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on to adopt

³⁹ Robinson, *supra* note 37.

⁴⁰ Crenshaw, *supra* note 26 at xiii.

⁴¹ *Ibid.*

policies based on what I call: "Racial Realism." This mind-set or philosophy requires us to acknowledge the permanence of our subordinate status. That acknowledgement enables us to avoid despair and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.⁴²

Indeed, while there are both similarities and differences between the plights of Black people in Canada and America that warrant our careful attention, ample evidence suggests racial realism is a sensible posture in Canada - i.e., that the subordinated status is intractable in Canada, too. Our distinct historical and current racial climate provides substantial methodological, ontological, and epistemological support for examining the core claims of racial realism within the Canadian context.

iii. Paradox of Visibility

With a clearer understanding of the complexities of anti-Black racism and Blackness, I analyze current sentencing theories and investigate how they fail to address paradoxical racial visibility – a concept I developed and my core theoretical contribution in this dissertation. To understand the paradox, we must first appreciate that racial identities are processual - produced in the dynamism of social and material space structured by and through the racial order. However, the discursive power to ‘speak’ race into existence is exclusively white. “For the people of African descent, blackness is antithetical to the identity whites have assigned them and is a way of being human under regimes of white supremacy.”⁴³ This process is referred to as racialization: a process by which dominant/white society constructs Blackness. Because of racialization, Black people are put in the untenable position of having narratives or associations projected onto them that are harmful and inaccurate and that they would not select for themselves. To some extent, these narratives are

⁴² Bell, *supra* note 4 at 373–374; See Bell, *supra* note 5; Bell’s thesis is not without its critics, see for e.g., Willie Abrams, “A Reply to Derrick Bell’s Racial Realism” (1992) 24:2 Conn L Rev 517; But enjoys wide support, see for e.g. Jess M Otto, “Derrick Bell’s Paradigm of Racial Realism: An Overlooked and Underappreciated Theorist” (2017) 20:2 Radical Philosophy Review 243–264; Tracy E Higgins, “Derrick Bell’s Radical Realism” (1992) 61:3 Fordham L Rev 683; Linda S Greene, “Civil Rights at the Millennium - A Response to Bell’s Call for Racial Realism” (1992) 24:2 Conn L Rev 499.

⁴³ Roderic R Land, “Toward the Study of Blackness: The Development of a Field of Inquiry” (2005) 131 Counterpoints 54 at 56.

self-fulfilling: if Black people are ‘criminals’ then they will be surveilled more, and are therefore more likely than their white counterparts to be detected and convicted when they do commit crimes; if Black people are not reliable employees and are more likely to be unemployed, then they are less likely to be hired and retained by employers; etc.⁴⁴ As authors like Franz Fanon have observed, attempts to evade these narratives by denying or ‘masking’ one’s Blackness are entirely futile since the white gaze centres Blackness.⁴⁵ Yet, more subtle, contemporary forms of racial oppression operate by denying that Blackness is being noticed; terms like ‘colour-blindness’ deny the operations of racialization without interrupting it.⁴⁶

The foregoing leads to the paradox: (1) attempts to mask or minimize Blackness in spaces where it operates to one’s systemic disadvantage are at best futile, and at worst can help prop up disingenuous claims about race-neutrality; but (2) attempts to reframe narratives about Blackness in ways that are positive or materially helpful can easily backfire, since they are received by people who are already submerged in existing, pathological narratives. So, concretely, a person who tries to advance a counter-narrative about how anti-Blackness harms a middle-class person from a stable nuclear family is told their race is irrelevant, and a person who tries to claim they deserve leniency or assistance because they have been harmed by a racist society is forced to underscore the very qualities that are central to racist imaginings of Blackness.

⁴⁴ William Lewis, “Louis Althusser” in Edward N Zalta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy*, fall 2022 ed (Stanford: Metaphysics Research Lab, Stanford University, 2022). It may be argued that Black people perform the very roles that reify the stereotypes that constitute their oppression. So, in a perverse sense, Black people are made to repetitively (re)create their oppression. Thus, while Black Canadians may be unwilling participants, these incessant performatives ‘lock-in’ specific discourses about Blackness, space, identity and belonging. In that way, racial subordination is not a deliberately performed role; instead, it is the consequence of ‘locked-in’ identity discourses that animate the racial order. In other words, Blacks do not voluntarily perform inferiority, but by existing in a “wholly racialized world,” they are pre-assigned these roles. I am not suggesting that Black people are unaware of this inferiority – quite the opposite. They are viscerally aware of it but do not currently possess the discursive power to alter their status. I am not suggesting that Blacks are willing participants in their oppression - that is untrue. For centuries Black people have resisted racial injustice and oppression. However, through an interpellated process of repetition, inferiority has become naturalized and psychically entrenched.

⁴⁵ Fanon, *supra* note 15 at 117.

⁴⁶ See Sherene Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998).

The paradox of visibility has two prongs. The first prong reveals how a focus on Blackness can attract pernicious stereotypes and harsh criminal justice responses; it highlights the difficulty of promoting more positive narratives of Blackness, suggesting that it may be safer to minimize attention to Blackness altogether. Whereas the second prong highlights the contradictions, tensions, and absurdities of efforts aimed at obscuring or invisibilizing Blackness. It captures the impossibility of minimizing attention to Blackness, suggesting that promoting more positive (counter-)narratives of Blackness may be more pragmatic. It may be impossible to resolve this paradox, especially in the sentencing arena where the express goal is to make moral judgments about the individual standing before the court⁴⁷ – a task that, in the case of Black offenders, necessarily involves either an acknowledgement of their Blackness, or an effort to disregard their Blackness, within the moral reasoning process.⁴⁸

The paradox of visibility helps us understand how litigation strategy involving race talk can have ethical and strategic dimensions. For example, do you proceed to make a race-based argument knowing that your client is concerned that it may result in unintended consequences despite the legal accuracy or even the benefit of that argument? Do you persist in the face of your client's anxieties? Do you dismiss their concerns as paranoia? Do the rules of professional conduct provide you with an answer to this quandary? Do you prioritize the wider community's interests if your case has broad appeal and may progressively transform the law, or do you consider yourself bound by your client's fears and individual concerns? Or, as Derrick Bell puts it, "What master do you serve?"⁴⁹ Unfortunately, ethical rules do not provide much guidance on the costs and benefits of race talk in criminal litigation.

⁴⁷ *R v Ipeelee*, 2012 SCC 13 at para 75 [*Ipeelee*]; See also Eric Silver, Jeffery T Ulmer & Jason R Silver, "Do moral intuitions influence judges' sentencing decisions? A multilevel study of criminal court sentencing in Pennsylvania" (2023) 115 Social Science Research 102927.

⁴⁸ Henry S Richardson, "Moral Reasoning" (2003) The Stanford Encyclopedia of Philosophy, online: <<https://plato.stanford.edu/archives/fall2018/entries/reasoning-moral/>>.

⁴⁹ Derrick A Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation" (1976) 85:4 Yale LJ 470 at 472.

IV. CONNECTING THE CHAPTERS

This section revisits the chapter descriptions identified above to show how each chapter advances the theoretical and methodological interventions described therein.

Chapter Title	Word Count	Status
Introduction and Conclusion	12,664	Unpublished
“Anchoring Lifeline Criminal Jurisprudence: Making the Leap from Theory to Critical Race-Inspired Jurisprudence” (2023) 46:1 Dalhousie Law Journal.	12,229	Published
“Paradoxical Race Visibility in Canadian Sentencing Law” (2024) Canadian Bar Review (forthcoming).	15,072	In Press
“Probing the Data: Perspectives on Race Visibility in Canadian Sentencing Proceedings” (2024) Windsor Yearbook of Access to Justice (forthcoming).	14,678	In Press
“Managing Expectations: Racial Realism and Criminal Trials” in Lorne Foster & Les Jacobs, eds, <i>The Black Book</i> (Toronto: University of Toronto Press, Forthcoming).	9,029	Accepted for publication
Total word count	63,672	

- i. “Anchoring Lifeline Criminal Jurisprudence: Making the Leap from Theory to Critical Race-Inspired Jurisprudence” (2023) 46:1 Dal LJ 83 (Published)

A growing number of legal scholars employ CRT to analyze race, racism, and law in the Canadian context.⁵⁰ But what is CRT? And more importantly, is it needed in Canada? These are not rhetorical questions but rather an urgent call for clarity. This chapter takes as a starting point the claim that anti-Black racism permeates Canadian society and finds expression in our institutions, most

⁵⁰ Aylward, *supra* note 30 at See; Faisal Bhabha, “‘Islands of empowerment’: Anti-discrimination law and the question of racial emancipation” (2013) 31:2 The Windsor yearbook of access to justice 6; Adrian A Smith, “Racialized in justice: The legal and extra-legal struggles of migrant agricultural workers in Canada” (2013) 31:2 The Windsor yearbook of access to justice 15; Senthe & Zavier, *supra* note 30. For more recent Canadian CRT scholarship see Adelle Blackett, “Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively, at McGill” (2017) 62:4 McGill LJ 1251; Wong, *supra* note 1; Joshua Sealy-Harrington, “The Alchemy of Equality Rights” (2021) 30:2 Constitutional Forum 53.

notably the criminal legal system. Indeed, anti-Black racism in the criminal legal system and its impact on Black lives are not credibly in dispute. This chapter aims to move from describing a well-known phenomenon—the existence of anti-Black racism in the criminal legal system—to identifying imaginative approaches to confront and subvert it. The chapter also addresses the staying power or permanence of racism. In that vein, this chapter explores a critical question: how can we make the leap from CRT to CRT-inspired, lifeline criminal jurisprudence? It uses the criminal justice system as a case study for systemic anti-Black racism and explains that these dynamics are already well-known and well-documented in the Canadian context.⁵¹ Indeed, if CRT suggests we need a radical rupture, but case law and legislation are still produced by the entrenched powers that structure a white supremacist system, is such a radical rupture possible if we engage with the system?⁵²

This chapter bears witness to a modest acknowledgement and tacit adoption by Canadian courts of one of the central tenets of CRT, i.e. the embeddedness of anti-Black racism. For example, in *R v Le*, the Supreme Court of Canada grounded its detention analysis in a keen recognition of how racialized individuals may experience police interactions.⁵³ By accepting and validating the numerous reliable sources of social science evidence that confirm their experiences, particularly concerning the police, the *Le* Court made it clear that the reasonable person must be presumed to understand the unique characteristics of a marginalized and racialized individual.⁵⁴ In *R v Morris*, the Court of Appeal for Ontario (ONCA) acknowledged the existence and persistence of systemic anti-Black racism in the criminal justice system, particularly how that recognition should be

⁵¹ *R v Morris*, 2021 ONCA 680 [*Morris ONCA 2021*]; *A Disparate Impact: Second Interim Report on the Inquiry Into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2020) [*Disparate Impact*]; *Race and Criminal Injustice: - An examination of public perceptions of and experiences with the Ontario criminal justice system*, by Akwasi Owusu-Bempah (Toronto: CABL, 2021).

⁵² Butler, *supra* note 33.

⁵³ *Le*, *supra* note 6 at para 74.

⁵⁴ *Ibid* at paras 73 & 75; Amar Khoday, “Ending the Erasure?: Writing Race into the Story of Psychological Detentions – Examining *R. v. Le*” (2021) 100:1 Supreme Court LR: Osgoode’s Annual Constitutional Cases Conference, online: <<https://digitalcommons.osgoode.yorku.ca/sclr/vol100/iss1/7>>.

considered by a judge tasked with sentencing a Black offender.⁵⁵ The Nova Scotia Court of Appeal (NSCA) went even further than the ONCA in *R v Anderson* by holding that it may be a reversible error if a sentencing judge fails to inquire into or ignores “[a Black] offender’s background and circumstances in relation to the systemic factors of racism and marginalization.”⁵⁶ These gains, while modest, are not insignificant. However, to build on them, the chapter argues that we must first address and clarify two fundamental questions: what CRT is and why CRT is needed to analyze, confront, and subvert Canadian criminal law. Without clarity, this chapter argues that decisions like *Morris*, *Le*, and *Anderson* may not deliver on their promises.

While the ONCA and the Court have expressly acknowledged the existence and insidious impact of anti-Black racism in our criminal justice system, they remain reluctant to centre race in criminal jurisprudence.⁵⁷ As a result, these decisions fail to provide clear standards or processes to confront and eradicate anti-Black racism in the criminal justice system. Indeed, there is no coherent theory, much less an overarching commitment to addressing anti-Black racism as a structural problem. Professor David Tanovich, for example, has written extensively about the judicial reticence to adopt appropriate critical race standards in the criminal jurisprudence on policing.⁵⁸ Professor Tanovich’s earlier critical race scholarship examines the judicial erasure of race. Given the recent racial turn in criminal jurisprudence, have these critiques lost their appeal?⁵⁹ Indeed, this chapter argues that CRT has not had a more significant impact on criminal law jurisprudence because Canadian criminal courts tacitly endorse the exceptionalism myth and often race to assert white

⁵⁵ *Morris* ONCA 2021, *supra* note 51 at para 1.

⁵⁶ *Anderson*, *supra* note 6 at para 118.

⁵⁷ *R v Desjourdy*, 2013 ONCJ 170 [*Desjourdy*]; *R v Theriault*, 2020 ONSC 3317, [Theriault 3317]; Affirmed at *R v Theriault*, 2021 ONCA 517, [Theriault 517]; Leave to appeal denied by SCC at: *Michael Theriault v Her Majesty the Queen*, 2021 CanLii 129762 (SCC).

⁵⁸ Tanovich, *supra* note 9.

⁵⁹ David Tanovich, “Ignoring the Golden Principle of Charter Interpretation?” (2008) 42:1 The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference, online: <<https://digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/14>>; Tanovich, *supra* note 9.

“innocence.”⁶⁰ However, this critique should not breed inaction and despair but instead, read as a call to action.⁶¹ This chapter explores how CRT scholars and lawyers can diligently build on these recent jurisprudential gains by clearly articulating how and why CRT provides an appropriate and powerful lens for examining and confronting anti-Blackness in the criminal legal system.

- ii. “Managing Expectations: Racial Realism and Criminal Trials” in Lorne Foster and Les Jacobs, *The Black Book: Public Sector Investigations in Disaggregated Race Data*, (University of Toronto Press, Forthcoming) (Accepted for Publication)

Drawing on CRT, particularly Derrick Bell's racial realism thesis⁶², this chapter analyzes how the recent Ontario criminal case *R v Theriault*⁶³ stands as a paradigmatic outcome from a criminal legal system grounded in and framed by anti-Black racist ideologies. It exposes how *Theriault* is, in many ways, an unusual criminal case from a critical race perspective, in that we had a conviction entered against a white police officer, Michael Theriault, who beat and maimed a Black man, Dafonte Miller, and yet, more fundamentally, this is a prototypical case – one that represents the failures of the system to deliver justice for Black people. The chapter is attentive to the fact that the *Theriault* case is primarily a story of incrementalism, modest expectations, and staying inside the lines. It is also a cautionary tale about returning to the source of the problem to solve the very problem it caused. Critically, *Theriault* highlights that racial subordination is not only baked into the criminal legal system but also constrains judicial imagination and boldness to work with pre-existing legal rules to bring about a racially just outcome. This chapter asks what this suggests about what Black people can gain by accepting racism as a structural feature of the criminal legal

⁶⁰ Tanovich, *supra* note 9; Danardo Jones & Elizabeth Sheehy, “R v Desjourdy: A Narrative of White Innocence and Racialized Danger” (2021) 99:3 Can Bar Rev 611; *Desjourdy*, *supra* note 57; *R v Montsion*, 2020 ONCJ 464 [*Montsion*].

⁶¹ Danardo S Jones, “Morris: A Modest Step Forward and a Call to Action” (2022) 75:7 Crim Reports 29.

⁶² See generally, Bell, *supra* note 4 at 373–374; Bell, *supra* note 5; Bell's thesis is not without its critics, see for e.g., Abrams, *supra* note 42; but enjoys wide support, see for e.g. Otto, “Derrick Bell's Paradigm of Racial Realism”, *supra* note 42; Higgins, *supra* note 42; Greene, *supra* note 42.

⁶³ *R v Theriault* 3317, *supra* note 57.

system and not merely a 'bug'.⁶⁴ Finally, the chapter argues that the *Theriault* verdict suggests that Black people may need to calibrate their expectations about achieving justice from the criminal legal system, even during times of purported racial progress.⁶⁵ Underscoring this fact does not promote nihilism—quite the opposite. Instead, the chapter aims to inspire radical hope—a hope grounded in racial realism.⁶⁶

Under the current racial order, some will see Dafonte as receiving a relatively "just" outcome: two white men, one of whom was a police officer, were investigated, charged, and prosecuted (and one receiving a guilty verdict) for viciously beating a Black man. Additionally, the trial judge did acknowledge, albeit uncritically, the evident racialized dynamics present in the case and that Dafonte did receive a modicum of belief. That said, while the trial judge, Di Luca J., found beyond a reasonable doubt that Dafonte was assaulted by Michael, but was left in reasonable doubt whether Michael was guilty of aggravated assault.

The criminal trial process is a dynamic and complex web of legal rules and procedures. It is further complicated when race, particularly Blackness, is either a conspicuous aspect of the process or "the elephant in the room." The current situation is dire for Blacks who interface with the criminal trial process as accused people or victims of crime. Stereotyped as "dangerous," "violent," and "criminal," Blacks are disproportionately likely to attract scrutiny and harsh treatment from criminal justice actors, resulting in their overrepresentation among criminally accused persons and offenders. Indeed, the criminal justice system continues to shape race-based narratives, and in so doing, provided the ontological foundations for the denial of Black innocence and humanity.

⁶⁴ See generally Butler, *supra* note 52; Delgado, Stefancic & Harris, *supra* note 13; Maynard, *supra* note 19. There is judicial, and legislative acknowledgment that anti-Black racism is a feature of Canadian society and infects many of its institutions, including the criminal justice system. See for e.g., *R v Parks*, 1993 1993 CanLII 3383 (ONCA) [*Parks*].

⁶⁵ Bell, *supra* note 6 at 3.

⁶⁶ See Richard Delgado, "Derrick Bell's Racial Realism: A Comment on White Optimism and Black Despair" (1992) 24:2 Conn L Rev 527; John A Powell, "Racial Realism or Racial Despair Commentary on Racial Realism" (1992) 24:2 Conn L Rev 533; Bell, *supra* note 5; Jacqueline Scott, "Racial Nihilism as Racial Courage: The Potential for Healthier Racial Identities" (2014) 35:1/2 Graduate Faculty Philosophy Journal 297; Calvin L Warren, "Black Nihilism and the Politics of Hope" (2015) 15:1 CR: New Centennial Rev 215.

However, the overrepresentation of Black people among criminally accused persons is one way race is also put on trial, but it is not the whole story. In theory, even if Black people are victims of crimes, the accused's prosecution is still a mechanism whereby racial hierarchies are performed and reinforced, for example, through the nature and quality of the trials themselves and the public/media attention received.⁶⁷ Thus, anti-Black racism not only informs but is an accurate predictor of how Black Canadians will interface with the criminal justice system. When race is on trial, the outcome is predictable: white is right.⁶⁸ Though anti-Black racism is judicially recognized, judges are reluctant to accept how deeply entrenched it is within the criminal justice system. Thus, this Chapter contends that it may be difficult to effectively confront racism through the development of legal and evidentiary tools – tools designed to mitigate, rather than eliminate, racial injustice in the criminal justice system.⁶⁹

- iii. “Paradoxical Race Visibility in Canadian Sentencing Law” (2024) 102:2 Canadian Bar Review (Forthcoming)

This chapter moves from the criminal trial to consider the sentencing phase of the criminal process and examines two recent appellate decisions, *R v Anderson* and *R v Morris*. These cases addressed how sentencing judges should weigh a Black offender's race and experience of anti-Black racism within a proportionality-based sentencing structure.⁷⁰ Using insights from CRT, this chapter

⁶⁷ We have recently seen the prosecution of Police officers for the beating and blinding of Dafonte Miller, for the killings of Sammy Yatim and Abdi Abdirahman and the sexual assault of Stacy Bonds: *R v Forcillo*, 2016 ONCA 606; Dakshana Bascaramurty, “Judge hears final arguments in case of Dafonte Miller's alleged beating”, *The Globe and Mail* (29 January 2020), online: <<https://www.theglobeandmail.com/canada/article-judge-hears-final-arguments-in-case-of-dafonte-millers-alleged/>>; *Desjourdy*, *supra* note 57; *Montsion*, *supra* note 60.

⁶⁸ See generally Walker, *supra* note 19; Maynard, *supra* note 19.

⁶⁹ Recent judicial decisions, like *R v Le*, 2019 SCC 34 [*Le*] (Racism informs the timing of detention for s.9 analysis); *R v Dudhi*, 2019 ONCA 665 [*Dudhi*] (Racial profiling at any stage of the investigation, taints the entire interaction); *R v Jackson*, 2018 ONSC 2527 [*Jackson*] (Judge considered race as a mitigating factor in sentencing a Black offender) may signal optimism. But there is a risk that these decisions may not deliver on their promises.

⁷⁰ *Anderson*, *supra* note 6; *Morris ONCA 2021*, *supra* note 51; Maria C Dugas, “Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders” (2020) 43:1 Dal LJ 103 at

illustrates how Canada's proportionality-driven criminal sentencing structure (re)produces, invigorates, and sustains pernicious race-based discourses through the concept of proportionality. The chapter argues that the demands of proportionality, with its fixation on calibrating individual blame, can drive sentencing submissions that distort and pathologize Black lives in a perverse attempt at sentence mitigation. Part of what makes pathologizing stories in the criminal sentencing context so destructive is that they can serve to reinforce the very same racist narratives that increase the vulnerability of Black people within the criminal legal system. By undertaking a focused doctrinal analysis of contemporary caselaw governing whether and how a Black offender's race should be accounted for within the proportionality analysis, this chapter touches on more profound debates about the principle of proportionality and the justifiability of punishment.

This chapter argues that the principle of proportionality, as conceptualized in Canadian sentencing law, may be incompatible with racial justice—at least in a racist society like ours, where anti-Black racism is a longstanding structural feature. The problem is that efforts to account for the effects of anti-Black racism within the framework of individual blameworthiness work to reinforce pathologized narratives of Black lives and communities. Thus, introducing race at the sentencing phase is a challenging and perhaps even a paradoxical manoeuvre—but one that may also be logical insofar as we operate within the cruel illogic of white supremacy.

In *Anderson*, Derrick J.A., writing for a unanimous Nova Scotia Court of Appeal (“NSCA”), held that sentencing judges “should carefully consider the systemic and background factors detailed in an IRCA [Impact of Race and Culture Assessment]. It may amount to an error of law for a sentencing judge to ignore or fail to inquire into these factors.”⁷¹ IRCAs are designed to highlight

121; The ONCA had earlier taken up the same issues in *R v Hamilton*, 2004 CanLII 5549 [*Hamilton*]; *R v Borde*, 2003 CanLII 4187 (ON CA) [*Borde*]; See Gay Abbate, “Appeal court hands down harsher terms for drug mules”, *The Globe and Mail* (4 August 2004), online: <<https://www.theglobeandmail.com/news/national/appeal-court-hands-down-harsher-terms-for-drug-mules/article18269366/>>; Richard Devlin & Matthew Sherrard, “The Big Chill?: Contextual Judgment after *R v Hamilton*” (2005) 28:2 Dal LJ 409; David M Tanovich, “Race, Sentencing and the ‘War on Drugs’” (2004) 22:6 Crim Reports 45; Dale E Ives, “Inequality, Crime and Sentencing: *Borde*, *Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law” (2004) 30 Queen’s LJ 114.

⁷¹ *Anderson*, *supra* note 56 at para 118.

specific cultural, social, and political mitigating factors related to race and racism at play in a Black offender's life that ought to be considered in sentencing.⁷² Justice Derrick held that sentencing judges need not be satisfied that the offender has established a causal connection to the crime before experiences of Blackness and anti-Black racism can properly be considered as a mitigating factor.⁷³ In *Morris*, the Court of Appeal for Ontario ("ONCA"), in a unanimous decision, held that: "[t]here must [...] be some [causal] connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue."⁷⁴ The ONCA further held that absent this connection any raced-based mitigation "becomes a discount based on the offender's colour."⁷⁵

Both decisions, *Anderson*, and *Morris*, acknowledged the presence of anti-Black racism and its possible relevance to sentencing but adopted different positions on translating the harms of anti-

⁷² *R v "X"*, 2014 NSPC 95 at para 198 [X]; Julia Sudbury, "Celling black bodies: black women in the global prison industrial complex" (2002) 70:1 Fem Rev 57–74 at 64; William Calathes, "Racial capitalism and punishment philosophy and practices: what really stands in the way of prison abolition" (2017) 20:4 Contemporary Justice Rev 442; Bruce Wright, *Black Robes, White Justice: Why Our Legal System Doesn't Work for Blacks* (New York: Kensington Publishing, 2002) Arguably proportionality – as implemented in contemporary Canadian society through the Criminal Code's sentencing provisions – may be incompatible with the anti-racist goals that IRCAs are meant to realize.

⁷³ *Anderson*, *supra* note 56. Anderson was greeted with enthusiasm and publicly praised by lawyers as a progressive step toward a fairer sentencing system for Black offenders; See Canadian Association of Black Lawyers, "CABL applauds the decision in *R v Anderson*, 2021 NSCA 62 for recognizing that IRCAs can be a valuable resource for sentencing", (19 August 2021), online: <<https://cabl.ca/wp-content/uploads/2021/08/CABL-statement-r-v-anderson.pdf>>; Terry Davidson, "Court examines race and culture assessments in sentencing African Nova Scotians", *The Lawyer's Daily* (23 August 2021), online: <<https://www.thelawyersdaily.ca/articles/29210/court-examines-race-and-culture-assessments-in-sentencing-african-nova-scotians>>; Elizabeth Raymer, "N.S. decision on use of Impact of Race and Culture Assessment expected to have national impact" *Canadian Lawyer* (27 August 2021), online: <<https://www.canadianlawyermag.com/practice-areas/criminal/ns-decision-on-use-of-impact-of-race-and-culture-assessment-expected-to-have-national-impact/359318>>.

⁷⁴ *Morris ONCA 2021*, *supra* note 51 at para 97.

⁷⁵ *Ibid* at para 97. Morris attracted reactions ranging from tepid and cautious optimism to disappointment. See Lisa Kerr, "Opinion: Ontario's top court says anti-Black racism should be considered in the legal system. That's a start", *The Globe and Mail* (11 October 2021), online: <<https://www.theglobeandmail.com/opinion/article-ontarios-top-court-says-anti-black-racism-should-be-considered-in-the/>>; Sean Fine, "Ontario appeal court tells judges not to over-emphasize the effects of racism when sentencing Black offenders", *The Globe and Mail* (8 October 2021), online: <<https://www.theglobeandmail.com/canada/article-ontario-appeal-court-tells-judges-not-to-over-emphasize-the-effects-of/>>; Ammar, "BLAC responds to Ontario Court of Appeal decision in *R. v. Morris*", (8 October 2021), online: *Black Legal Action Centre* <<https://www.blacklegalactioncentre.ca/blac-responds-to-court-of-appeal-for-ontarios-decision-in-r-v-morris/>>.

Black racism into concrete sentencing outcomes. Crucially, in adjudicating this issue, both decisions took for granted that the sentencing process must be structured through a proportionality assessment.⁷⁶ Indeed, jurisprudential inquiries in Canada (but not necessarily all those adopted or supported by scholars) take as their starting point the fundamental premise that proportionality should govern legal punishment – a central premise within the criminal justice system that finds expression in statute,⁷⁷ case law⁷⁸, and jurisprudential theory dating back to Hammurabi.⁷⁹

This chapter examines race visibility’s contradictory and pernicious nature through existing sentencing theories. Beginning with a discussion of Canadian sentencing law’s fundamental objectives and principles, it focuses on how Canadian sentencing jurisprudence conceptualizes the proportionality principle and incorporates the retributive theory of punishment. Subsequently, the chapter turns to the genealogy of IRCAs, what they contain, and the critical cases that consider their utility in Canadian sentencing jurisprudence. Lastly, this work analyzes the inherent tensions of race amplification and the paradoxicality of race discourse in sentencing proceedings.

I reviewed 92 recently reported sentencing decisions from across Canada and overwhelmingly from Ontario and Nova Scotia – the two jurisdictions where IRCAs are most frequently used and have been the subject of appellate analysis. These decisions were from the period of November 2014 – the year when the first reported use of an IRCA occurred in *X*, to August 2023. The dataset of 92 cases was analyzed on two registers. First, I identified the criminal offences for which the offenders were being sentenced in order to determine which types of offences have been attracting racism-conscious sentencing. As explained in the chapter, these reports are disproportionality used in cases involving serious criminal activity that is stereotypically associated with Black people,

⁷⁶ *Morris ONCA 2021*, *supra* note 51 at para 61; *Anderson*, *supra* note 6 at para 142.

⁷⁷ *Criminal Code*, RSC 1985, c C-46, 718.1.

⁷⁸ *R v Nur*, 2015 SCC 15 [*Nur*] at paras 43-44; *Ipeelee*, *supra* note 47 at para 37; *R v Lacasse*, 2015 SCC 64 at para 12 [*Lacasse*]; *R v Friesen*, 2020 SCC 9 at paras 30-33; *R v M (CA)*, 1996 CanLII 230 at para 80 [*M (CA)*]; *Re BC Motor Vehicle Act*, 1985 CanLII 81 at para 129 [*MVA*].

⁷⁹ See Andrew von Hirsch, “Proportionality in the Philosophy of Punishment” (1992) 16 *Crime & Justice* 55; Andrew von Hirsch, “Proportionate sentences: A Desert Perspective” in Andrew von Hirsch & A Ashworth, eds, *Principled Sentencing: Readings on Theory and Policy* (Oxford: Hart Publishing, 1998).

such as gun violence and drug trafficking. Second, I identified common social markers (such as fatherlessness or early exposure to violence) that are cited by sentencing judges in these decisions and thereby associated, in our jurisprudence, with Blackness. As explained below, these social markers tend to track pernicious stereotypes about dysfunction in Black families and communities.

The decisions all considered how issues of race and culture can or should be introduced into the sentencing arena through either judicial notice or race-conscious pre-sentence reports. This systematic case analysis unearths concerning trends whereby racism-conscious sentencing practices and strategies may inadvertently reinforce some of the anti-Black stereotypes they are intended to confront. With these trends in mind, this chapter queries whether and how courts can achieve racial justice for Black offenders within a proportionality-driven sentencing regime. The conclusion is: if we accept that our proportionality-based sentencing regime is premised on an understanding of morality and social responsibility that assumes fundamental notions about basic equality that are inconsistent with Black peoples' experiences in Canada, then we must confront the possibility that the notion of fit and proportionate sentences for Black people cannot be achieved without a wholesale dismantling and restructuring of the current institution of punishment.⁸⁰

iv. "Probing the Data: Perspectives on Race Visibility in Canadian Sentencing Proceedings"
(2024) Windsor Yearbook of Access to Justice (Forthcoming)

This chapter analyzes qualitative interview data generated from Black criminalized individuals and defence lawyers about the utility of heightened race visibility in sentencing proceedings. Group 1 consisted of nine criminalized Black Ontarians – six men and three women, who had either served custodial or non-custodial criminal sentences – while Group 2 consisted of nine criminal defence lawyers (four white women, one white man, one Black man, two Black women, and one Arab woman). The interviewees were asked similar open-ended questions to explore the

⁸⁰ See *Annual Report 2016–2017*, by Ivan Zinger (Canada, Office of the Correctional Investigator, 2017).

interplay between race and anti-Black racism and what weight, if any, they thought should be accorded to these factors when sentencing Black offenders.⁸¹ The data revealed a schism between these groups, which reveals the paradox of racial visibility. The Black criminalized participants emphasized that increased race visibility may have a deleterious impact on sentencing. Black offenders focus on the risks of centring their race in a system where their Blackness manifestly works against them, despite the fact that obscuring their race is an illusory option. The defence lawyers strongly supported increased racial visibility to combat what they saw as judicial and prosecutorial intransigence to grapple with race in sentencing proceedings involving Black offenders. They lauded the ameliorative potential of race visibility, which has the effect of obscuring the real concern shared by criminalized Black individuals about the ways in which they believe their Blackness betrays them. In that regard, the chapter explores some ethical concerns arising from this schism. It also argues that race-based strategies at sentencing are not a no-cost or low-cost proposition. Indeed, from the Black criminalized research participants' point of view, the cost is to their dignity and liberty interests. These perspectives are critical for sentencing judges tasked with sentencing Black offenders and for lawyers in developing and deploying legal strategies to assist their Black clients.

The data suggest that race visibility can deleteriously affect blame assessments in that it can activate or reinforce entrenched racial stereotypes and hierarchies. Specifically, the data highlight not only the imperative but also the inherent risk of expressly confronting race and anti-Black racism at the sentencing phase. Crucially, the data reveal a striking difference between the attitudes of defence lawyers and Black criminalized individuals: (1) defence lawyers tend to prioritize reduced sentences and believe IRCAs or race-conscious sentencing strategies may achieve that goal; (2) criminalized Black individuals worry that their Blackness will lead to higher sentences;

⁸¹ The data were also used in my LLM thesis: Danardo S Jones, "Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing" (2020) 39 Osgoode LLM Theses, online: <<https://digitalcommons.osgoode.yorku.ca/llm/39>> [Unpublished]; See Timothy John Rapley, "The art(fulness) of open-ended interviewing: some considerations on analysing interviews" (2001) 1:3 Qualitative Research 303; Susanne Bahn & Pamela Weatherill, "Qualitative social research: a risky business when it comes to collecting 'sensitive' data" (2013) 13:1 Qualitative Research 19.

and (3) criminalized Black individuals believe that seeking a reduced sentence based on social factors may harm dignity. In short, the defence lawyers regard race-conscious sentencing as another weapon in their arsenal as they aim to secure a lower sentence for their clients. By contrast, the clients themselves have more subtle and equivocal views. The chapter explores the epistemological and theoretical insights that can be drawn from the data while considering how these insights problematize current sentencing theories concerning proportionality and blame.

CHAPTER ONE: ANCHORING LIFELINE CRIMINAL JURISPRUDENCE: MAKING THE LEAP FROM THEORY TO CRITICAL RACE-INSPIRED JURISPRUDENCE⁸²

I. INTRODUCTION

A growing number of legal scholars employ critical race theory (CRT) to analyze race, racism, and law in the Canadian context.⁸³ Some Canadian law schools have also begun to offer CRT courses.⁸⁴ But, what is CRT? And more importantly, is it needed in Canada? These are not rhetorical questions but rather an urgent call for clarity. Given the growing public discourse and

⁸² Previously published in: Danardo S Jones, “Anchoring Lifeline Criminal Jurisprudence: Making the Leap from Theory to Critical Race-Inspired Jurisprudence” (2023) 46:1 Dal LJ 1.

⁸³ CRT has a long history in Canadian legal scholarship. See e.g. Aylward, *supra* note 30; Bhabha, ““Islands””, *supra* note 50; Smith, “Racialized”, *supra* note 50; Sente & Xavier, *supra* note 30; Blackett, *supra* note 50; Wong, *supra* note 1; Sealy-Harrington, *supra* note 50.

⁸⁴ See e.g. Nancy Simms, *Critical Race Theory (LAW412H1S)* (University of Toronto Faculty of Law); Sonia Lawrence, *Law & Social Change: Critical Race Theory (2750X.03)* (online: Osgoode Hall Law School <osgoode.yorku.ca>); See also Doug Beazley, “Using critical race theory to form lawyers”, (3 August 2021), online: *CBA National* <<https://perma.cc/X2BY-WP5Y>>.

hysteria around CRT in the United States of America (US),⁸⁵ Canadian legal scholars must aim to clarify and demarcate CRT's explanatory and transformative dimensions and the theory's power when deployed to effectively address systemic anti-Black racism in Canadian legal institutions, most notably the criminal justice system.⁸⁶ We risk similar hysteria⁸⁷ and, worse, a firmer embracing of the Canadian exceptionalism myth⁸⁸ if CRT is construed as the uncritical importation of a US-based theory of race relations.

CRT had its intellectual genesis in the US legal academy in the 1970s as a critique of liberal discourses of race and inequality.⁸⁹ Since then, CRT has gained widespread cross-border and cross-disciplinary appeal and has been deployed to examine structural racism in education, child welfare, criminal justice, immigration, and other disciplines.⁹⁰ While developed and deployed explicitly in the US context, CRT provides Canadian legal scholars, activists, law students, and practitioners with much-needed theoretical insight into Canada's home-grown variety of anti-Black racism.⁹¹ Moreover, Canada's distinct historical and current racial landscape provides substantial methodological, ontological, and epistemological support for applying CRT's core claims within the Canadian context.⁹²

This article takes as a starting point the claim that anti-Black racism permeates Canadian society and finds expression in our institutions. It will use the criminal justice system as a case study for

⁸⁵ See Spencer Bokor-Lindell, "Why Is the Country Panicking About Critical Race Theory?", *The New York Times* (13 July 2021), online: <<https://perma.cc/HP5S-YXTH>>; Kimberle Crenshaw, "The panic over critical race theory is an attempt to whitewash U.S. history", *The Washington Post* (2 July 2021), online: <<https://perma.cc/2BMX-GJPG>>.

⁸⁶ Several recent court decisions have implicitly adopted and relied on core CRT insights in their analyses of race and criminal law. See e.g. *Le*, *supra* note 6; *Anderson*, *supra* note 6.

⁸⁷ There is some suggestion that this hysteria is already here. See e.g. Julia Hughes, "Critical Race Theory in Legal Education" *Slaw* (15 June 2021), online: <<https://perma.cc/3ND9-QARG>>.

⁸⁸ See Laura J Kwak, "Problematizing Canadian exceptionalism: A study of right-populism, white nationalism and Conservative political parties" (2020) 10:6 *Oñati Socio-Leg Series* 1166.

⁸⁹ Delgado, Stefancic & Harris, *supra* note 13 at 4; Crenshaw, *supra* note 26; Richard Delgado & Jean Stefancic, *Critical Race Theory: The Cutting Edge*. (Philadelphia: Temple University Press, 2013) at 38.

⁹⁰ Delgado, Stefancic & Harris, *supra* note 13 at xiv.

⁹¹ *Ibid.*

⁹² See generally Maynard, *supra* note 19.

systemic anti- Black racism and explain that these dynamics are already well-known and well-documented in the Canadian context.⁹³ Indeed, anti-Black racism in Canada and its impact on Black lives are not credibly in dispute. Thus, what should concern legal scholars is the staying power or permanence of racism.⁹⁴ In other words, should Canadian legal scholars “*get real*” about the intractability of race? Or can anti-Black racism be effectively confronted by developing legal and evidentiary tools designed to fix, rather than dismantle, the current system? Put another way, this article aims to move from describing a well-known phenomenon—the existence of anti-Black racism in the criminal justice system—to identifying radical approaches to confront and subvert it. In that vein, this article will explore a critical question: how can we make the leap from CRT to CRT-inspired, lifeline criminal jurisprudence?⁹⁵

But what does CRT-inspired or lifeline criminal jurisprudence, even look like? More importantly, if CRT suggests we need a radical rupture, but case law and legislation are still produced by the entrenched powers that structure a white supremacist system, is such a radical rupture possible if we engage with the system?⁹⁶ Indeed, if CRT was developed in the US, by the recognition of the fact that the ‘civil rights revolution’ did relatively little to change the material conditions of African Americans,⁹⁷ then can a CRT-informed assessment of Canadian criminal law jurisprudence⁹⁸

⁹³ See *Morris ONCA 2021*, *supra* note 51 at para 1; note 51; Owusu-Bempah, *supra* note 51.

⁹⁴ See Derrick A Bell, “The Permanence of Racism” (1993) 22:4 SW L Rev 1103.

⁹⁵ Lifeline jurisprudence seeks to work within and accepts the criminal system’s inherently racist constraints but nonetheless works to develop creative, resistive strategies and tools aimed at mitigating some of the damaging impacts on those people currently before the criminal system. Thus, lifeline jurisprudence aims at harm reduction as opposed to radical structural changes like abolition. It also recognizes that the two approaches are neither mutually exclusive nor antagonistic.

⁹⁶ See Butler, *supra* note 52.

⁹⁷ Delgado, Stefancic & Harris, *supra* note 13 at 40; Bell, *supra* note 49.

⁹⁸ For discussions on CRT-informed jurisprudence, see generally: Sealy-Harrington, *supra* note 50; Tanovich, *supra* note 59; Tanovich, *supra* note 9.

suggest a way of litigating and deciding criminal cases that will have more than a glancing impact on systemic anti-Black racism, or is the project of focusing on rights and legality itself the problem?⁹⁹

In recent years, we have witnessed a modest acknowledgement and tacit adoption by Canadian courts of one of the central tenets of CRT, i.e. the embeddedness of anti-Black racism. For example, in *R v Le*, the Supreme Court of Canada grounded its detention analysis in a keen recognition of how racialized individuals may experience police interactions.¹⁰⁰ By accepting and validating the numerous reliable sources of social science evidence that confirm their experiences, particularly concerning the police, the *Le* Court made it clear that the reasonable person must be presumed to understand the unique characteristics of a marginalized and racialized individual.¹⁰¹ In *R v Morris*, the Court of Appeal for Ontario (ONCA) acknowledged the existence and persistence of systemic anti-Black racism in the criminal justice system, particularly how that recognition should be considered by a judge tasked with sentencing a Black offender.¹⁰² The Nova Scotia Court of Appeal went even further than the ONCA in *R v Anderson* by holding that it may be a reversible error if a sentencing judge fails to inquire into or ignores “[a Black] offender’s background and circumstances in relation to the systemic factors of racism and marginalization.”¹⁰³ These gains, while modest, are not insignificant.¹⁰⁴ However, to build on them, we must first address and clarify two fundamental questions: what is CRT, and why is CRT needed to analyze, confront, and subvert Canadian criminal law? Without clarity, decisions like

⁹⁹ Some commentators argue that community or cause lawyers should not adhere to blind fidelity to the law, but rather “community lawyers should consider the ‘morality and practicalities’ of a client’s or community’s situation.” See Anthony V Alfieri, “Fidelity to Community: A Defense of Community Lawyering Book Review Colloquy” (2011) 90:3 Tex L Rev 635. However, critical race scholar Patricia Williams argues that “[w]hile rights may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks.”; Patricia J Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights Minority Critiques of the Critical Legal Studies Movement” (1987) 22:2 Harv Civ Rights-Civ Liberties L Rev 401 at 101.

¹⁰⁰ *Le*, *supra* note 6 at para 94.

¹⁰¹ *Ibid* at paras 73 & 75; Khoday, *supra* note 54 at 101.

¹⁰² *Morris ONCA 2021*, *supra* note 51 at para 1.

¹⁰³ *Anderson*, *supra* note 6 at para 118.

¹⁰⁴ See Jones, *supra* note 61.

Morris, Le, and Anderson may not deliver on their promises.¹⁰⁵ Indeed, clarification is necessary lest we risk the erosion of these decisions to the point of obsolescence.¹⁰⁶

While the ONCA and the Supreme Court of Canada have expressly acknowledged the existence and insidious impact of anti-Black racism in our criminal justice system, they remain reluctant to centre race in criminal jurisprudence.¹⁰⁷ As a result, these decisions fail to provide clear standards or processes to confront and eradicate anti-Black racism in the criminal justice system.¹⁰⁸ Indeed, there is no coherent theory, much less an overarching commitment to addressing anti-Black racism as a *structural problem*. Professor David Tanovich, for example, has written extensively about the judicial reticence to adopt appropriate critical race standards in the criminal jurisprudence on policing.¹⁰⁹ Tanovich's earlier critical race scholarship examines the judicial erasure of race, but given the recent racial turn in the criminal jurisprudence, have these critiques lost their appeal?¹¹⁰ Or are we simply witnessing what Reva Siegel refers to as "preservation-through-transformation"—that is, "efforts to reform a status regime do bring about change—but not always the kind of change advocates seek."¹¹¹ Indeed, like Tanovich, I would argue that CRT has not had a more significant impact on criminal law jurisprudence because Canadian criminal courts tacitly endorse the exceptionalism myth and often race to assert white "innocence."¹¹² However, this critique should not breed inaction and despair, but instead read as a call to action.¹¹³ In what follows, I explore how CRT scholars and lawyers can diligently build on these recent

¹⁰⁵ See Jones, *supra* note 10.

¹⁰⁶ *Ibid.*

¹⁰⁷ See *Desjourdy*, *supra* note 57; *R v Theriault*, *supra* note 57; affirmed by *R v Theriault*, *supra* note 57.

¹⁰⁸ The decisions acknowledge the problem but fail, or perhaps are incapable, to go any further. As Barnes J, asserted "[w]e have not yet reached the promised land. However, Canadian jurisprudence continues to evolve in its efforts to identify and acknowledge instances of systemic racism and to develop well-informed jurisprudence aimed at ensuring an effective, equal, fair and just application of the law for all": *R v Odle*, 2020 ONSC 3991 at para 59.

¹⁰⁹ See Tanovich, *supra* note 9.

¹¹⁰ See Tanovich, *supra* note 59; Tanovich, *supra* note 9.

¹¹¹ Reva B Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105 Yale LJ 2117 at 2119.

¹¹² See generally Tanovich, *supra* note 9; Jones & Sheehy, *supra* note 60; *Desjourdy*, *supra* note 57; *Montsion*, *supra* note 60; *R v Theriault*, *supra* note 57.

¹¹³ See generally Jones, *supra* note 61.

jurisprudential gains by clearly articulating how and why CRT provides an appropriate and powerful lens for examining and confronting anti-Blackness in the criminal justice system.

The first section of the article will advance through personal narratives and critical race scholarship how CRT analyses can productively explain the criminal justice system's pathologies, demonstrate its inadequacy, and, ultimately, the paradoxicality of tackling anti-Black racism in the system by making Blackness more or less visible. The second section provides a brief overview of the central tenets of CRT. It also addresses what CRT is and, more importantly, is not. In that sense, section two serves as a restatement of CRT's central theoretical insights. The third section will explore anti-Blackness in Canada, particularly its expression in the criminal justice system, and explore why the deployment of CRT is powerful and distinctive in the Canadian context to highlight the criminal justice system's pathologies, paradoxes, and tensions. Finally, in the fourth section, the article discusses the potentialities of CRT insights on developing "lifeline jurisprudence."

II. THREE BLACK MEN WALK INTO A COURTROOM: A STORY OF ACCEPTANCE AND RESISTANCE

CRT has gained mainstream acceptance in the US legal academy. However, there is a need for more CRT scholarship in the Canadian legal academy,¹¹⁴ particularly on criminal justice, where the scholarly tradition is still relatively nascent, and there is a very significant problem of institutionalized anti-Black racism that requires serious critique and analysis. From a methodological perspective, CRT goes beyond doctrinal analysis and utilizes social science methods, ranging from law and geography to social psychology and economics.¹¹⁵ CRT counters and challenges the more doctrinally focused method of conducting race and criminal law research. As Gomez argues, "CRT provides us with methodological guideposts that challenge mainstream assumptions about research

¹¹⁴ See generally *supra* note 83

¹¹⁵ Obasogie, *supra* note 31; Christian, Seamster & Ray, *supra* note 31; Carbado & Roithmayr, *supra* note 31; Gomez, *supra* note 31.

and interpretation.”¹¹⁶ Indeed, it facilitates the development of a radical structural critique of the criminal system. The radical structural critique suggests that “criminal law is racist because...it is an instrument of white supremacy.”¹¹⁷ However, few Canadian legal scholars have assessed whether our system is vulnerable to analogous critiques.¹¹⁸ Canadian legal scholars must aim to fill this lacuna.

Legal scholars with a critical race lens may face resistance when developing a uniquely Canadian liberation/radical scholarship. Indeed, they may confront ethical and practical conundrums and critiques when they break free from traditional conceptions of lawyering and scholarship.¹¹⁹ For example, as a Black scholar and lawyer studying the impacts of racial injustice in the criminal justice system, I worry about acknowledging my social location and the experiences that animate and ground me. While I do not believe that an exhaustive exposition of my positionalities is warranted, except insofar as they construct my research agenda, I must, however, account for them and be transparent about the biases that inevitably flow from them and how they inform the central themes and questions that I explore. In that vein, I agree with critical race scholars that it is vital for “[B]lack and [B]rown writers to recount their own experiences with racism and the legal system and to apply their own unique perspectives to assess law’s master narratives.”¹²⁰ However, race scholars often face unfounded criticism, alleging that their work lacks scholarly empiricism.¹²¹ This phenomenon is a larger methodological concern that warrants investigation before advancing any critical analysis of race and criminal justice in Canada.

¹¹⁶ Christian, Seamster & Ray, *supra* note 31 at 1023.

¹¹⁷ Butler, *supra* note 34 at 693.

¹¹⁸ Tanovich is perhaps the most notable criminal law scholar to challenge the anti-Black interpretation of the criminal law and the negative impacts such interpretations continue to have on Black lives. See Tanovich, *supra* note 59; Tanovich, *supra* note 9; Tanovich, *supra* note 9; See also Sonia N Lawrence & Toni Williams, “Swallowed up: Drug Couriers at the Borders of Canadian Sentencing” (2006) 56:4 UTLJ 285.

¹¹⁹ See Daniel A Farber & Suzanna Sherry, “Telling Stories out of School: An Essay on Legal Narratives” (1993) 45:4 Stan L Rev 807; Alfieri, *supra* note 99; Mario L Barnes, “Empirical methods and critical race theory: A discourse on possibilities for a hybrid methodology” (2016) 3 Wis L Rev 443.

¹²⁰ Delgado, Stefancic & Harris, *supra* note 13 at 11.

¹²¹ Farber & Sherry, *supra* note 119; Barnes, *supra* note 119.

Again, I acknowledge that I must account for my positionality. I face difficulty, however, determining “what part of me do I leave out?”¹²²

I am a Black male tenure-track law professor and criminal justice scholar who practiced criminal defence law for several years. However, I also embody the more stereotypical Black experiences: fatherlessness, youthful criminality, high school underachievement, poverty, teenage parenthood, and first-generation migration. As a Black man, lawyer, and criminal law scholar, I aim to express how I feel researching Canadian criminal justice as far as words can convey. I will be blunt: I feel enraged—not engaged. As Fanon explained, “[t]he Negro is a toy in the white man’s hands; so, in order to shatter the hellish cycle, he explodes.”¹²³ There is no intellectual stimulation—just a tightness in the chest, coupled with uneasiness in my gut caused by my deployment of oppressive epistemologies to analyze Black experiences. While I am viscerally aware of my intellectual unfreedom—my epistemic chains, I nonetheless persist. I fear getting it wrong—not for scholarship’s sake—but because I know that Black dignity is at stake. Nothing that my research unearths surprises me—I am only surprised by the disbelieving faces when I report my findings or have the audacity to speak my truth—a truth that is not hidden but purposely made opaque and only made visible in its most tragic light.

As a racialized scholar, I walk this epistemic tightrope: attempting to confront systemic racism by utilizing well-worn discursive approaches while remaining faithful to radical traditions. So how do I walk this epistemic tightrope: balancing scholarly rigour while remaining faithful to the truth—my truth? This epistemological straitjacket may result in some Black scholars muting or eliding their perspectives on race, racism, and law. So how do we extricate ourselves from this epistemic state of unfreedom? I only ask that my readers grant me the indulgence to write, read, walk, breathe, speak, and seek my truth.¹²⁴

¹²² Jennifer Lavia & Pat Sikes, “‘What Part of Me Do I Leave Out?’: In Pursuit of Decolonising Practice” (2010) 2:1 Power and Education 85.

¹²³ Fanon, *supra* note 15 at 140.

¹²⁴ See generally Denielle A Elliott & Dara Culhane, *A different kind of ethnography: imaginative practices and creative methodologies* (Toronto: University of Toronto Press, 2017).

III. BETWEEN M, ME, AND THE LAW

Several years ago, a childhood friend, M, asked me to represent him in court. It was alleged that he recklessly drove his car into another motorist and failed to remain at the accident scene. He explained how fearful he was when the police were chasing his vehicle. So, he turned off the main road, came out of his car, ran, and hid between houses to evade detection. However, his parked vehicle was identified, and the next day the police contacted him and asked that he turn himself in to the local police station. He was questioned, arrested, and criminally charged with several driving offences when he arrived. After listening to his version of the incident, I told him that I would be happy to assist him. I asked him for more details and told him what possible options we could pursue. He abruptly said, “*You know what, man, I don’t think I am going to have you represent me.*” Before I could ask him for his reasons, he laughed and said: “*Can you imagine our two black asses going before a white judge—that won’t look good.*” My face grimaced momentarily; then, I managed to fake a smile and joined M in his guffaw. After enjoying a laugh at my expense, M decided to retain a white lawyer.

A few years after my encounter with M, I appeared in a Toronto bail court (on Zoom) as a criminal duty counsel.¹²⁵ That day, the crown prosecutor was a tall, large-built, no-nonsense, bearded Black man. The presiding jurist was a charming, esoteric, older Black man. It took several cases before I realized what was evident to the court staff and my clients: three Black men were running the court. I had never experienced this dynamic in my years of legal practice. Yet, for a brief moment—one that felt staged, unreal, imagined—I experienced belongingness. I imagined myself no longer being perceived as an accused person clothed in lawyer’s garbs—so I laid my burden at the door and got down to the business of practicing law. With my tumultuous and noisy thoughts suppressed, I discovered something: I am a decent lawyer. And with that realization, I managed to beat back, albeit for a short time, the agonizing and disquieting feelings of self-doubt and imposter syndrome that conspire to confine and rob me of my

¹²⁵ Due to the Covid-19 pandemic, most criminal proceedings in Ontario have moved online.

dignity and self-worth. Paradoxically, I found a rejuvenated sense of value in a vista that continues to destroy Black lives.

What I entered was a new frontier that rendered me dazed and confused—disassociated. I would describe the feeling as serene discomfort: knowing that what was occurring was aberrational but still savouring the moment of peace. A peace that I associated with white masculinity over my years of practice. Never could I have imagined serenity in a courtroom—a vista that, even before earning my robes (licence to practice law), provoked crippling anxiety. I see courtrooms as modern auction blocks where shackled Black bodies are paraded before white eyes for dissection, valuation, and destruction. Law continues to destroy Black lives—it strips Black peoples of culture, dignity, or a sense of identity. The misfortunes are intergenerational—the woes perpetual. My life force is rendered inert by law's stifling grip. The law, or so the story goes, has brought me a long way from slavery and lynching to equality.

But I am a stubborn unbeliever. In its genocidal fervour, the law has brought more death and misfortune to Black lives than any natural disaster. Law has drowned millions of Africans in the middle passage and enslaved millions more on stolen lands. The law saw value in a corporate charter but none in an African. Indeed, Black value is still a hotly debated legal issue. Yet, paradoxically, we seek to restore value to Black lives through a system that continues to erode their value. It seems that self-worth and value are codified in statutes, the common law, and other legal instruments. Thus, Black dignity relies on the passions of judges and legislators—the same philosophers and kings who, in their infinite wisdom, supported the inhumane treatment of Black bodies before, during, and after slavery.¹²⁶

Strangely, in that courtroom, on that day, before that jurist and standing beside that crown, I dared to imagine the law's liberatory possibilities—not simply as a “supple tool of power” for the powerful and ignoble.¹²⁷ Before that day, law and liberation existed as mutually exclusive concepts—never to be

¹²⁶ Barry Cahill, “Slavery and the Judges of Loyalist Nova Scotia” (1994) 43 U NB LJ 73.

¹²⁷ Oliver Wendell Holmes is quoted as saying that his epitaph should be “Here lies a supple tool of power.” See Sanford Levinson & JM Balkin, “The ‘Bad Man,’ The Good and the Self-Reliant” (1998) 78 BU L rev 885.

spoken unless in parody. But in my dream-like reality, I found no levity in law's ideals; I took law's claims seriously. That esoteric, charming jurist and that burly crown prosecutor had shifted my perception of law. They made me a cautious believer. I was frightened but emboldened by the liberatory potential of the dynamic. But like all things deemed too good to be true, reality swooped in and abruptly awoke me to face the fragility and fleetingness of the moment. It ended before it truly began. When the court adjourned, I stayed online, hoping to drift away, for even another minute, back into the dream-like reality before being thrust into the despairing and prevailing dynamic that awaited me in my scholarship and criminal defence practice. So, perhaps in violation of section 136 of the *Courts of Justice Act*, I captured the moment through a screenshot of the three of us to remind myself that it was real, despite its duration and brittleness.¹²⁸ I remind myself daily that it happened—I have the picture to prove it! At that moment, I could not help but wonder if my friend M would have had any trepidations about our “black asses” appearing before that court.

IV. ARE WE SEEKING THE ELUSIVE? THE PARADOX OF VISIBILITY

When I reflect on the above experiences, it appears that both M and I harbour, consciously or unconsciously, a profound mistrust of the criminal justice system but implicit hope that change is possible. For M, that hope resided in a white lawyer's ability to successfully deploy a race-based *Charter* argument.¹²⁹ For me, it was the possibility, perhaps the audacity, to imagine that my rare experience could become the norm.¹³⁰ M was most likely the victim of racial profiling, but that

¹²⁸ *Courts of Justice Act*, RSO 1990, c C.43, s 136 (prohibits electronic recordings of court hearings, subject to exceptions).

¹²⁹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹³⁰ Having the audacity to imagine a court where the judge and both lawyers are Black reveals for us the absurdity of a court where they are all white. See Richard Delgado, “Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law” (1993) 45:4 *Stanford Law Review* 1133 at 1143; See also Derrick Bell, *And we are not saved: the elusive quest for racial justice* (New York: Basic Books, 2008). As Ruha Benjamin asserted: “Toward that end, the late critical race scholar, Harvard professor Derrick A Bell, encouraged a radical assessment of reality through creative methods and racial reversals, insisting that to see things as they really are, you must imagine them for what they might be.” Ruha Benjamin, *The New Jim Code? Race, Carceral Technoscience, and Liberatory Imagination* (UC Berkeley, 2019).

defence, coupled with our mutual Blackness, was more risk than he wanted to undertake. He never told me about the case's outcome, but I will never forget how the experience left me feeling. On the one hand, I understood his apprehension because I would have done or at least thought the same had I been in his position. However, on the other hand, I was convinced that he was wrong. But was he wrong? Or was I simply embarrassed or upset by his decision? Perhaps he merely chose the most effective means to get the best trial outcome. Though I would have made the same arguments as M's white lawyer, for M, it would seem the risk to his liberty did not reside in the argument per se, but rather his lawyer: me!

For M, the amplification of his race—defended by a Black lawyer, coupled with a race-based defence—would preclude him from receiving a favourable outcome. Therefore, he found it strategically advantageous to mute his race in a bid to avoid the ire of a white judge that may have taken exception to both our “*black asses*” making a race-based *Charter* argument. M feared revealing himself in a well-known hostile vista for Black Canadians.¹³¹ He instead, and perhaps naively, sought invisibility by shrouding himself in the aura of his white lawyer's privilege of belonging. M's manoeuvre is reminiscent of Frantz Fanon's existential crisis when he encountered his own Blackness. Fanon asserted: “...I slip into corners, I remain silent, I strive for anonymity, for invisibility. Look, I will accept the lot, as long as no one notices me! ...My Blackness was there, dark and unarguable. And it tormented me, pursued me, disturbed me, angered me.”¹³²

I coined the term “paradox of visibility” to describe this specific identity crisis plaguing many Black Canadians.¹³³¹³⁴ The paradox of visibility concept seeks to understand and (re)conceptualize how introducing race consciousness in the criminal process can act as a double-edged sword. As early as 1987, Professor Martha Minow examined a similar concern in the American context. She

¹³¹ See e.g. Owusu-Bempah, *supra* note 51; See generally, Scot Wortley & Akwasi Owusu-Bempah, “Race, Ethnicity, Crime and Criminal Justice in Canada” in Anita Kalunta-Crumpton, ed, *Race, Ethnicity, Crime and Criminal Justice in the Americas* (London: Palgrave Macmillan UK, 2012) 11.

¹³² Fanon, *supra* note 15 at 116–117.

¹³³ Jones, *supra* note 81.

¹³⁴ *Ibid.*

argued that: “[f]ocusing on differences poses the risk of re-creating them. ...Yet denying those differences undermines the value they may have to those who cherish them as part of their own identity.”¹³⁵ She characterized this as the dilemma of difference. However, the paradox of visibility recognizes that, for Black people, ‘denying difference’ is not even on the table as an option: Black people are read as Black and subjected to so much explicit and implicit bias that claims about “colour-blindness” are often disingenuous or naïve.

Blackness becomes even more prominent under the gaze of whiteness.¹³⁶ Under this gaze, Blackness is transformed—mutated into something alien. In those moments, the Black body reconfigures in both meaning and identity. The identity on display and under scrutiny is that of the pathologized, dehumanized, and undignified Black body, which is not a Black creation, but despite its origins, Black people are viscerally aware of the Blackness engrafted on them. It is now their burden to bear. Ralph Ellison aptly describes the paradoxicality of race visibility in the *Invisible Man* when he writes:

I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me, they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.¹³⁷

Indeed, Black people who strive for visibility—as persons in our society who are seen as individuals and not as ciphers or placeholders onto which we project a standardized set of characteristics—are, in the eyes of whiteness, paradoxically rendered invisible. In *Black Skin, White Masks*, Frantz Fanon explained that when he undertook to construct his own “...historico-racial schema. The elements that I used had been provided for me not by ‘residual sensations and

¹³⁵ Martha Minow, “Foreword: Justice Engendered” (1987) 101:1 Harv L Rev (The Supreme Court 1986 Term) 10 at 12.

¹³⁶ See Razack, *supra* note 46.

¹³⁷ Ralph Ellison, *Invisible Man* (New York: Modern Library, 1992) at 1 of the Prologue.

perceptions primarily of a tactile, vestibular, kinesthetic, and visual character,' but by the other, the white man, who had woven me out of a thousand details, anecdotes, stories.”¹³⁸

This ontological dismemberment and epistemic violence is an ongoing psychic crisis that shapes Black self-perception: Yearning for existence but met with only nonexistence. Fanon puts it best when he asserts, “[t]o state reality is a wearing task. But, when one has taken it into one’s head to try to express existence, one runs the risk of finding only the nonexistent.”¹³⁹

Black people are harmed by the fiction of colour blindness that elides attention to Blackness and the vulnerability to anti-Black racism that comes with an express focus on Blackness. On this account, Black Canadians, it would seem, are caught in a veritable “racial catch-22.” Indeed, there is no “outrunning” one’s Blackness as racism is woven into our institutions’ fabric and frames the terms of reference for racial ordering in society.¹⁴⁰ As Fanon asserted, “I cannot go to a film without seeing myself. I wait for me. In the interval, just before the film starts, I wait for me. The people in the theater are watching me, examining me, waiting for me. A Negro groom is going to appear.”¹⁴¹ The Black “self” that Fanon describes as “unalterable, ...dark, and unarguable” lay in wait to capture perceptions contemplating escape.¹⁴² W.E.B. Du Bois asserted over a century ago that Black people exist in “a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world.”¹⁴³ For Du Bois, Blacks embody “two souls,

¹³⁸ Fanon, *supra* note 15 at 111.

¹³⁹ *Ibid* at 137; See also: “Toni Morrison Reads ‘English and the African Writer’ by Chinua Achebe”, (26 February 2008), online: *PEN America* <perma.cc/B5FB-BKYQ>: “The function, the very serious function of racism is distraction. It keeps you from doing your work. It keeps you explaining, over and over again, your reason for being. Somebody says you have no language and you spend twenty years proving that you do. Somebody says your head isn’t shaped properly so you have scientists working on the fact that it is. Somebody says you have no art, so you dredge that up. Somebody says you have no kingdoms, so you dredge that up. None of this is necessary. There will always be one more thing.”

¹⁴⁰ Delgado, Stefancic & Harris, *supra* note 13 at 7.

¹⁴¹ Fanon, *supra* note 15 at 140.

¹⁴² *Ibid* at 117.

¹⁴³ W E B Du Bois, *The Souls of Black Folk* (Chicago: Dover Publications, 1903) at 2.

two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.”¹⁴⁴

In the criminal justice context, the concern with this duality is that a particular type of Blackness—one that is tragic and pathological—is provided as the lens through which to analyze Black people’s conduct. Dismantling these misleading racial epistemologies is complex and requires getting real about race and the difficulties we face in imagining transformation without utilizing white epistemologies (e.g. rights discourse)—Black people, arguably, remain discursively shackled.¹⁴⁵

Indeed, epistemologies have power. They have the power not only to transform worlds, but to create them. And the worlds that they create can be better or worse. For many people, the worlds they create are predictably and reliably deadly.¹⁴⁶ Patricia Williams argues that:

[t]he black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society’s inverse, beyond the dimension of any consideration at all. Thus, the experience of rights assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding oneself.¹⁴⁷

How can Black Canadians discover themselves through rights rhetoric that has been deployed historically to deny them visibility and only make them visible in the most tragic light? According to Williams, “[t]he vocabulary of rights speaks to an establishment that values the guise of stability and from which social change for the better must come (whether it is given, taken, or smuggled).”¹⁴⁸ I would add that we should intentionally attend to Black ways of being and knowing *on its own terms*.¹⁴⁹ Indeed, we should eschew well-worn discursive practices, ontologies, and

¹⁴⁴ *Ibid.*

¹⁴⁵ See e.g. Kristie Dotson, “Accumulating Epistemic Power: A Problem with Epistemology” (2018) 46:1 *Philosophical topics* 129; See generally, Nora Berenstain et al, “Epistemic oppression, resistance, and resurgence” (2022) 21:2 *Contemporary political theory* 283.

¹⁴⁶ Berenstain et al, *supra* note 145.

¹⁴⁷ Williams, *supra* note 99 at 102.

¹⁴⁸ *Ibid* at 101.

¹⁴⁹ See James Joseph Scheurich & Michelle D Young, “Coloring Epistemologies: Are Our Research Epistemologies Racially Biased?” (1997) 26:4 *Educational Researcher* 4.

epistemologies and focus on seeing Black lives in terms of radical possibilities. We must aim to see Black lives outside of white supremacist descriptive categories. Williams refers to this as a “slippage of perception.”¹⁵⁰ To bring about the slippage, she argues, “...requires listening at a very deep level to the uncensored voices of others.”¹⁵¹ However, it may be impossible to abandon the discursive practices and episteme developed by colonial white supremacist society. That said, arguably, within the realm of Black thought lie resistance, liberation, and dignity-restoring strategies. We must begin to imagine the impossible, the fantastical, the unimaginable, and the non-white. As Fanon aptly stated, “[since] the other hesitate[s] to recognize me, there remain[s] only one solution: to make myself known.”¹⁵²

The allegorical introduction to Patricia Williams’ *The Alchemy of Race and Rights* helps further illuminate the paradox of visibility. Williams tells the story of the priest-gods who grew tired of their “superstanding.” So, they decided to set out in boats to the Deep Blue Sea to wander. When they reached a point far beyond the heavens, they dropped their anchors and experienced godhood once more: “At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far overhead, which they thought were lifelines meant for them.”¹⁵³ Are my and M’s hopes, indeed the hopes of all those seeking visibility and harbouring the audacity to confront and eradicate systemic anti-Black racism in the criminal justice system, real examples of those mortals hopelessly reaching for elusive lifelines? More importantly, can CRT-inspired criminal litigation generate ‘lifeline jurisprudence’ that can reach the people at the bottom or is that concept itself just a paradox?¹⁵⁴

¹⁵⁰ Williams, *supra* note 99 at 101.

¹⁵¹ *Ibid.*

¹⁵² Fanon, *supra* note 15 at 115.

¹⁵³ Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991) at ii.

¹⁵⁴ *Ibid* at 8 (for Williams, theoretical understanding and social transformation need not be oxymoronic).

V. IF YOU DON'T KNOW, NOW YOU KNOW: A PRIMER ON CRT

The above narrative and discussion are inspired by my understanding of CRT, particularly its power to give space and voice to radical and oppositional voices. It aimed to address why CRT is a powerful tool for examining race in the criminal justice system. Before I further explore “why CRT,” I will briefly discuss what CRT is. However, while restating CRT’s central precepts may clarify the theory’s assumptions about race, law, and power, it does not tell us why, and perhaps more importantly, if CRT is a helpful lens for examining systemic anti-Black racism in the criminal justice system.

CRT was developed by American law professors who were critical of the rights revolution during the civil rights era.¹⁵⁵ These mostly racialized scholars, Black and Latinx, challenged the rights orthodoxy that permeated the American legal academy.¹⁵⁶ CRT scholarship shares some similarities with Critical Legal Studies (CLS).¹⁵⁷ CLS scholars challenged notions that promoted law as apolitical, neutral, and value-free.¹⁵⁸ An important CLS insight is the principle of legal indeterminacy: A rejection “that law is a system or is able to resolve every conceivable problem.”¹⁵⁹ However, CLS failed to develop a comprehensive and critical account of how “race and racial power are constructed and represented” in society.¹⁶⁰ Thus, CRT’s primary intervention in critical scholarship was placing race at the core of legal analysis. It shifted race and its intersecting realities (e.g. gender, class) from the periphery of legal scholarship and made it the focus of sustained legal analysis about racial inequality. CRT was designed to analyze how the law and power/politics converge to produce predictable racial outcomes.¹⁶¹ That said, critical race theorists are not merely

¹⁵⁵ Delgado, Stefancic & Harris, *supra* note 13 at 40.

¹⁵⁶ Crenshaw, *supra* note 26 at xiii; See generally, Delgado, Stefancic & Harris, *supra* note 13.

¹⁵⁷ Crenshaw, *supra* note 26 at xiii; For a comprehensive history of CLS, see e.g. Roberto Mangabeira Unger, “The Critical Legal Studies Movement” (1983) 96:3 Harv L Rev 561.

¹⁵⁸ See Alan Hunt, “The Theory of Critical Legal Studies” (1986) 6:1 Oxford J Leg Stud 1.

¹⁵⁹ Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (Oxford University Press, 2014) at 96.

¹⁶⁰ Crenshaw, *supra* note 26 at xiii.

¹⁶¹ *Ibid.*

concerned with studying the “[relationship] between law and racial power but to change it.”¹⁶² In that sense, CRT embodies an activist dimension.¹⁶³

CRT scholars reject notions of neutrality and objectivity in legal scholarship about race and power. Kimberlé Crenshaw posits that there exists “no scholarly perch outside the social dynamics of racial power from which merely to observe and analyze.”¹⁶⁴ Scholarship is inherently political.¹⁶⁵ No scholarly tradition is insulated from this observation. Arguably, we tell stories through our scholarship. There are, however, different methodological and epistemological dimensions to these tales.¹⁶⁶ CRT scholars accept that CRT is not “neutral” but recognize that the same is true of other forms of scholarship.¹⁶⁷ All scholarly work reflects or expresses the author’s paradigm, whether implicitly or explicitly—and to the extent that some scholarship registers as “neutral” it is not because that scholarship is, in fact, more objective or pure, but rather because the scholar who produced it is privileged enough to be in the mainstream.¹⁶⁸

CRT is organized around six core tenets. First is the ordinariness of racism: racism is woven into the fabric of our institutions and frames the terms of reference for racial ordering in society.¹⁶⁹ Second, racial realism, which is related to the intractability of race concept, recognizes that “Black people will never achieve racial equality...[e]ven those herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.”¹⁷⁰

¹⁶² *Ibid.*

¹⁶³ *Ibid.*; See generally, Colette N Cann, *The Activist Academic: Engaged Scholarship for Resistance, Hope and Social Change* (Gorham, ME: Myers Education Press, 2020).

¹⁶⁴ Crenshaw, *supra* note 26 at xiii.

¹⁶⁵ *Ibid.*

¹⁶⁶ See Laurence Parker & Marvin Lynn, “What’s Race Got to Do With It? Critical Race Theory’s Conflicts With and Connections to Qualitative Research Methodology and Epistemology” (2002) 8:1 Qualitative Inquiry 7.

¹⁶⁷ Crenshaw, *supra* note 26 at xiii.

¹⁶⁸ See Henry, *supra* note 22; See also Delgado, *supra* note 29.

¹⁶⁹ Delgado, Stefancic & Harris, *supra* note 13 at 8.

¹⁷⁰ Bell, *supra* note 4 at 373.

The third tenet is the critique of liberalism. According to Delgado and Stefancic, “critical race theory is marked by a deep discontent with liberalism, a system of civil rights litigation and activism characterized by incrementalism, a faith in the legal system, and hope for progress, among other things.”¹⁷¹ Indeed, CRT scholars were concerned that hard-won civil rights gained in the 1960s had stagnated and, in some cases, were being “rolled back.”¹⁷² “New theories and strategies” became necessary to explicate and combat newer forms of structural racism, which were subtler than the earlier, more explicit “variety.”¹⁷³

The fourth is the “social construction thesis,” which understands that “race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient.”¹⁷⁴ Framed this way, race takes on pseudo-scientific legitimacy despite having no basis in biology.¹⁷⁵ According to Crenshaw, although race is a social construct, “race was nonetheless ‘real’ in the sense that there is a material dimension and weight to the experience of being ‘raced’ in American society, a materiality that in significant ways has been produced and sustained by law.”¹⁷⁶

The fifth tenet is intersectionality, which broadens CRT’s theoretical reach by inviting scholars to explore the significance of race at various intersecting points of vulnerabilities.¹⁷⁷ CRT scholars, most notably Kimberlé Crenshaw, adopt an intersectional framework that analyzes how multiple sources of oppression can “intersect” to create an axis of vulnerability that is more than just the

¹⁷¹ Delgado & Stefancic, *supra* note 89 at 7.

¹⁷² *Ibid* at 40.

¹⁷³ *Ibid* at 2.

¹⁷⁴ Delgado, Stefancic & Harris, *supra* note 13 at 9.

¹⁷⁵ See Cheryl I Harris, “Whiteness as Property” (1993) 106:8 Harv LR 1707; See Theodore W Allen, *The invention of the white race. Volume I: Racial oppression & social control* (London: Verso, 2012). Some authors suggest that biological race and social constructivism is not incompatible, see e.g. Robin O Andreasen, “Race: Biological Reality or Social Construct?” (2000) 67: Supplement-Proceedings of the 1998 Biennial Meetings of the Philosophy of Science Association. Part II: Symposia Papers Philosophy Science 653.

¹⁷⁶ Crenshaw, *supra* note 26 at xxvi.

¹⁷⁷ See Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 Stan L Rev 1241; Angela P Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42:3 Stan L Rev 581; Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1 U Chicago Leg F 139.

sum of its parts. Hence, it is not enough for us to sequentially analyze each locus of oppression; rather, the intersection must be apprehended on its own terms.¹⁷⁸

Finally, the voice of colour thesis appreciates “...that because of their different histories and experiences with oppression black, [Indian], Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know. Minority status, in other words, brings with it a presumed competence to speak about race and racism.”¹⁷⁹ This dimension of CRT scholarship has come under criticism by scholars for lacking methodological rigour.¹⁸⁰ Admittedly, the voice-of-colour thesis co-exists in an uneasy tension with anti-essentialism and intersectionality insofar as it ascribes a higher degree of competency to engage in race talk to people of colour. Delgado and Stefancic assert that “[t]he ‘legal storytelling’ movement urges black and brown writers to recount their experiences with racism and the legal system and to apply their own unique perspectives to assess law’s master narratives.”¹⁸¹

VI. ET TU, CANADA: THE BLACK EXPERIENCE IN CANADA

So, what does CRT reveal about the Black experience in Canada? While slavery existed in Canada, “[t]he study of slavery...is not a significant part of the Canadian historical narrative.”¹⁸² This less-examined history is crucial, for as Afua Cooper aptly observed, “slavery was the context in which current race relations were created.”¹⁸³ Indeed, current attitudes and stereotypes about Black Canadians, for example, their alleged propensity for laziness, criminality, and violence, found their

¹⁷⁸ Crenshaw, “Mapping”, *supra* note 177; Harris, *supra* note 177; Crenshaw, “Intersection”, *supra* note 177.

¹⁷⁹ Delgado, Stefancic & Harris, *supra* note 13 at 10; See generally Johnson, *supra* note 13.

¹⁸⁰ See Johnson, *supra* note 13.

¹⁸¹ Delgado, Stefancic & Harris, *supra* note 13 at 10.

¹⁸² Ken Donovan, “Slavery and Freedom in Atlantic Canada’s African Diaspora: Introduction” (2014) 43:1 *Acadiensis* 109 at 110; Robin W Winks, *The Blacks in Canada: A History*, 2nd ed. ed (Montreal ; McGill-Queen’s University Press, 1997) at 142–143.

¹⁸³ Joshua Ostroff, “Colonial Canada Had Slavery For More Than 200 Years. And Yes, It Still Matters Today”, *HuffPost* (17 July 2017), online: <<https://perma.cc/ZW8Z-LLUD>>; See Afua Cooper, “Acts of Resistance: Black Men and Women Engage Slavery in Upper Canada, 1793-1803” (2007) 99:1 *Ontario History* 5; See also Kenneth Morgan, *A Short History of Transatlantic Slavery* (London: I.B. Tauris, 2016).

genesis in the crucible of slavery.¹⁸⁴ Long gone are the days of slavery, but its contemporary legacies are equally as virulent and destructive to the bodies of Black Canadians.¹⁸⁵ Given the strikingly similar conditions Black people face in both the US and Canada, Canadian scholars and activists can gain critical insights from a closer examination of CRT's central precepts. Like the US Black experience, anti-Black racism has not abated in Canada despite adopting legal standards that guarantee substantive equality.¹⁸⁶ Indeed, we continue to witness an alarming proliferation of anti-Black racism in Canada. Racism does not abate but mutates in the face of opposition. Thus, inoculating against one strain of racism is futile, given the near-certainty of a mutated and potentially more resistant strain.

Structural anti-Black racism is expressed through various interrelated methods and institutions.¹⁸⁷ For example, both Michelle Alexander, writing in the US context, and Robyn Maynard writing in the Canadian context, agree that post-slavery, the over-criminalization of Black Canadians became a conspicuous method of controlling Black bodies.¹⁸⁸ There is ample evidence that the criminal justice system is infected with systemic anti-Black racism and continues to have devastating impacts on Black lives.¹⁸⁹ However, while courts have acknowledged this fact,¹⁹⁰ this recognition has not translated into any radical, structural changes to the system.¹⁹¹ Some scholars, notably Professor Tanovich, have criticized both lawyers and judges for failing to challenge and eliminate the

¹⁸⁴ James W St G Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa: Canadian Historical Association, 1985) at 8.

¹⁸⁵ See Maynard, *supra* note 19.

¹⁸⁶ *Charter*, *supra* note 129; See Dominique Clement, *The Evolution of Human Rights in Canada* (Ottawa, Ont: Canadian Human Rights Commission, 2012).

¹⁸⁷ See e.g. Carl E James & Tana Turner, *Towards Race Equity in Education: The Schooling of Black Students in the Greater Toronto Area* (Toronto: York University, 2017); *One Vision One Voice: Changing the Ontario Child Welfare System to better serve African Canadians Practice Framework Part 1: Research Report*, by Ontario Association of Children's Aid Societies (Ontario Association of Children's Aid Societies, 2016).

¹⁸⁸ Alexander, *supra* note 33; Maynard, *supra* note 19.

¹⁸⁹ Wortley & Owusu-Bempah, *supra* note 131; *Halifax, Nova Scotia: Street Checks Report*, by Scot Wortley (Toronto: Nova Scotia Human Rights Commission, 2019).

¹⁹⁰ See *Parks*, *supra* note 64; *R v Williams*, [1998] 1 SCR 1128, 15 CR (5th) 227 [Williams]; *R v Golden*, 2001 SCC 83 [Golden]; *R v Spence*, 2005 SCC 71; *R v Grant*, 2009 SCC 32 [Grant]; *Le*, *supra* note 6; *Morris ONCA 2021*, *supra* note 51; *Borde*, *supra* note 70; *Hamilton*, *supra* note 70; *Anderson*, *supra* note 6.

¹⁹¹ 108. Instead, what we have witnessed are small, incremental steps towards what one can hope is radical, structural change at some point in the future. See generally Jones, *supra* note 10.

embedded presumptions of the criminal justice system by their reluctance to engage in *Charter*-based litigation.¹⁹² Tanovich argues that the *Charter* has had minimal impact on racial injustice in Canada since its inception. Racial justice, he asserts, “has not had a chance to grow because of trial and appellate lawyers’ failure to engage in race talk in the courts and a failure of the judiciary to adopt appropriate critical race standards when invited to do so.”¹⁹³ But as Harry Glasbeek remarked, “[t]he...criminal justice system...start[s] off from the assumption that [it]...is a neutral system. Equality before, according to and under the law, are considered the norm. Law is assumed not to be racist.”¹⁹⁴ Arguably, the criminal justice system manufactures “truths” about Black bodies as bounded by risk, violence, and dangerousness, then harnesses these to justify the harsh and degrading treatment imposed on Black Canadians.¹⁹⁵ Put another way, the criminal justice system not only acts upon stereotypical notions about Black Canadians; it is also instrumental in their creation.

To the extent that Black Canadians are stereotyped as “dangerous,” “violent,” and “criminal,” they are disproportionately likely to attract scrutiny and harsh treatment from criminal justice actors like police, prosecutors, and judges.¹⁹⁶ A predictable result is the overrepresentation of Black Canadians among criminally accused persons and offenders. That overrepresentation, in turn, serves to validate the

¹⁹² See generally Tanovich, *supra* note 9.

¹⁹³ *Ibid* at 656–657.

¹⁹⁴ *A Report on Attorney-General’s Files, Prosecutions and Coroners’ Inquests Arising Out of Police Shootings in Ontario to The Commission on Systemic Racism in Ontario Criminal Justice System*, by H J Glasbeek (Commission on Systemic Racism in Ontario Criminal Justice System, 1993).

¹⁹⁵ See generally Jones & Sheehy, *supra* note 60; For historical analysis, see Walker, *supra* note 19; Camisha Sibblis, “Expulsion Programs as Colonizing Spaces of Exception” (2014) 21:1/2 *Race, Gender & Class* 64; citing: Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008). Professor Sibblis relies on Sherene Razack’s idea that risk is read on the Body and argues that “Dominant ideology about the black body belies how behaviours are interpreted and used to gauge propensity for harmful behaviours and predict future harm, particularly because black bodies are believed to be innately savage and violent.”

¹⁹⁶ David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); Akwasi Owusu-Bempah, “Race and Policing in Historical Context: Dehumanization and the Policing of Black People in the 21st Century” (2017) 21:1 *Theoretical Criminology* 23; Toni Williams, “Sentencing Black Offenders in the Ontario Criminal Justice System” in David P Cole & Julian Roberts, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 2016) 200; Akwasi Owusu-Bempah & Scot Wortley, “Race, Crime, and Criminal Justice in Canada” in Sandra M Bucerius & Michael H Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford University Press, 2014) 281; Julian V Roberts & Anthony N Doob, “Race, Ethnicity, and Criminal Justice in Canada” (1997) 21 *Crime & Justice* 469.

unfavourable stereotypes about Black Canadians that it helps to produce. In essence, the risk coded on Black bodies becomes self-reinforcing through a negative feedback loop: as more Black people are criminally punished, more Black people are regarded as deserving of criminal punishment, and vice versa.

However, despite widespread recognition of the overwhelming evidence of the role that anti-Black racism plays in the criminal justice system, and widespread agreement on the need to redress it, Black Canadians continue to receive unfair treatment at all stages of the criminal justice process.¹⁹⁷ Does accepting the danger and intractability of racism provide opportunities for resistance?¹⁹⁸ But how can acknowledgment of complicity in systemic anti-Black racism and a commitment to its eradication co-exist?¹⁹⁹ This dilemma reveals the inherent paradoxes we confront when addressing anti-Black racism in the criminal justice system.

VII. ANCHORING LIFELINE JURISPRUDENCE?

Having acknowledged the criminal justice system's anti-Blackness, do we persist with 'insider' responses like jurisprudential reform efforts, test cases, and legislative endeavours? Or do we instead imagine what a clean break or a rejection of law might look like and insist on a more ambitious agenda, considering past failures of incremental responses that reproduce systemic problems?²⁰⁰ Phrased another way, can we confront anti-Blackness in the criminal justice system by utilizing existing structures (i.e. jurisprudential and legislative reforms) and remain faithful to radical traditions (i.e. abolitionism, critical race theory) that seek to disrupt or, in some cases, dismantle these very structures?²⁰¹

¹⁹⁷ *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report*, by Office of the Correctional Investigator Canada (Ottawa: Office of the Correctional Investigator, 2013).

¹⁹⁸ Bell, *supra* note 94 at 1106–1108.

¹⁹⁹ *Morris ONCA 2021*, *supra* note 51 at para 1.

²⁰⁰ Bell, *supra* note 5 at 3; Bell, *supra* note 94 at 1106.

²⁰¹ See Alfieri, *supra* note 99.

Is seeking change in a hostile system undesirable or, worse, impossible? CRT scholars argue that racial subordination is entrenched within our legal paradigms and has set the terms of reference for criminal justice discourses of race and crime. This entrenched hostility creates a closed-loop system of oppression—what critical race scholars refer to as structural determinism: systems, as a result of their structures and language, cannot rectify particular kinds of injustices.²⁰² Arguably, we must accept the inherent limitation of doctrinal analysis in understanding and, indeed, remedying structural racism in the administration of criminal justice.²⁰³ In the face of this racial realism, we must, nonetheless, promote a degree of instrumentalism, as a sort of harm-reduction strategy, in light of the fact that real people are caught up in the system at this very moment, and there is an urgent need to reduce the harms experienced by these individuals.²⁰⁴ This harm-reduction stratagem requires forming an uneasy alliance with a hostile system—a type of jurisprudential *détente*. We have witnessed this *détente* in recent appellate and Supreme Court of Canada decisions.²⁰⁵

Admittedly, these jurisprudential shifts may seem modest, but they are not insignificant and have the potential to positively impact the lives of Black Canadians currently before the criminal system. Indeed, as Jack Balkin puts it, “[r]ecourse to law forces the powerful to talk in terms in which the powerless can also participate and can also make claims.”²⁰⁶ Williams pointedly observed that:

“Rights” feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate reconstructing (deconstruction is too awful to think about!) at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no- power. The concept of rights, both positive and negative, is a marker of our citizenship, our participatoriness, our relation to others.²⁰⁷

²⁰² Delgado, Stefancic & Harris, *supra* note 13 at 31; See generally Butler, *supra* note 52.

²⁰³ Tanovich, *supra* note 59 at 658.

²⁰⁴ See e.g. Eve Tuck & K Wayne Yang, “Decolonization is not a metaphor” (2012) 1:1 Decolonization: Indigeneity, Education & Society 21; See generally Wong, *supra* note 1.

²⁰⁵ *Le*, *supra* note 6; *Morris ONCA 2021*, *supra* note 51; *Anderson*, *supra* note 6.

²⁰⁶ Jack M Balkin, “Critical Legal Theory Today” in Francis J Mootz, ed, *On Philosophy in American Law* (Cambridge University Press, 2009) 64 at 67.

²⁰⁷ Williams, *supra* note 99 at 104.

There are inherent risks in using rights talk. But we can both claim and contest the rights that we claim.²⁰⁸ As Balkin argues:

Law may offer an unjust and unwieldy system for apprehending, incarcerating, and destroying human beings. It may also offer important elements of procedural fairness, equality, and human dignity. It does both of these things simultaneously, and it may be difficult to fully separate its harmful and beneficial aspects in practice.²⁰⁹

Accepting law's ambivalence does not necessitate a retreat from a commitment to radical structural change. However, there must be an explicit focus on the practical and ethical questions that arise when one mounts a total, radical critique of interconnected systems while engaged in and committed to harm reduction critical race-inspired litigation.²¹⁰ When we assess *how* and *why* the system has evolved to this point and acknowledge its intrinsic anti-Blackness, we face a conundrum: do we attempt reform from clear-eyed, informed incrementalism? Or do we regard incrementalism as, at best, doomed to fail and, at worst, a fig leaf that helps perpetuate racial inequalities? On the other hand, are there latent strategic possibilities within the system to achieve radical transformative changes? Moreover, should we pursue a radically enlightened and reimagined form of incrementalism as a realistic path forward to achieve racial justice?²¹¹

A critical race lawyer or scholar can pursue incrementalism while remaining committed to radical, structural change.²¹² Indeed, as someone who has worked in strategic litigation and anti-racism advocacy,²¹³¹³⁰ I am familiar with the impulse to focus on “big picture goals”—sometimes at the expense of individuals whose cases are rejected because they have “bad facts” and are not good candidates for advancing litigation strategies that have the potential to bring about sustained legal change that would benefit many. Both approaches are problematic in some ways and laudable in others.

²⁰⁸ Balkin, *supra* note 206 at 65.

²⁰⁹ *Ibid.*

²¹⁰ See generally Tanovich, *supra* note 9.

²¹¹ See Amna A Akbar, “Toward a Radical Imagination of Law” (2018) 93:3 NYUL Rev, online: <<https://www.nyulawreview.org/issues/volume-93-number-3/toward-a-radical-imagination-of-law/>>.

²¹² *Ibid.*; Allegra M McLeod, “Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives” (2012) 8 Harvard Unbound 109.

²¹³ I was the Director of Legal Services at the African Canadian Legal Clinic.

The late critical race scholar, Derrick Bell, discussed this dilemma in the context of school desegregation litigation. He found that civil rights lawyers were attempting to serve two masters—the client on the one hand and the promotion of a progressive agenda on the other.²¹⁴ In the context of litigation work on behalf of Black people who are involved with the criminal justice system, both approaches measure their success in roughly the same way: does the strategy help to diminish mass criminalization and mass incarceration—whether for an individual client or in terms of the statistical averages for Black people in Canada.

These measures are important, but they are also incomplete insofar as they do not pay sufficient regard to how Black people—as individuals and as diverse community members—measure success; and it certainly does not pay sufficient attention to how they calculate costs, including costs to their individual and collective dignity.²¹⁵ Indeed, the creation of lifeline jurisprudence must focus on the cost to Black dignity.²¹⁶ As Anthony Alfieri asserts in his defence of community lawyering:

[f]undamental to that break [from traditional conceptions of lawyering] is the incorporation of difference-based community voices and stories into the lawyering process. From critical theories of race, [we] also might interweave the values of community participation and civic dialogue, especially between majority and minority communities. Only from dialogue will come a moral recognition of common cross-racial interests in economic justice and social solidarity.²¹⁷

Therefore, critical race lawyers must listen to the voices at the bottom of the well²¹⁸ or the Deep Blue Sea.²¹⁹ Arguably, a society's justness is measurable by its treatment of those at the bottom. Indeed, when viewed solely from the dominant class's perspective, the criminal justice crisis may not seem as acute.²²⁰ As James Baldwin asserts: "if one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the

²¹⁴ See Bell, *supra* note 49.

²¹⁵ Alfieri, *supra* note 99 at 655–656.

²¹⁶ *Ibid.*

²¹⁷ *Ibid* at 655.

²¹⁸ See Bell, *supra* note 5.

²¹⁹ Williams, *supra* note 153 at ii.

²²⁰ Alfieri, *supra* note 99 at 655.

middle class. One goes to the unprotected—those, precisely, who need the law’s protection most!—and listens to their testimony.”²²¹ However, how do we locate, shape, create, or amplify power in historically powerless discourses? How can we create an oppositional, counter-hegemonic jurisprudence that challenges prevailing narratives around criminal justice and race? What does effective action look like from the perspective of those at the bottom?

Arguably, “[i]n human history there is always something beyond the reach of dominating systems, no matter how deeply they saturate society, and this is what makes change possible...”²²² Critical race lawyers must decentre white voices on Black experiences and tell the stories of the primary targets of the criminal justice system.²²³ For example, they must seek to understand and highlight how anti-Black racism shapes criminal law discourses and provides an accurate predictor of criminal trial and sentencing outcomes. There is power in Black discourses that can be utilized to shatter white supremacy—not merely to describe or highlight its contours.²²⁴ According to Katherine McKittrick, “[b]lack embodied knowledge radically overturns the normalizing workings of white supremacy by enunciating, demanding, and asserting black agency and humanity.”²²⁵ Indeed, “[a] story [i.e. Black embodied knowledge] can touch what has never been touched; it can bring into relief what never come into the field of vision; and, it can oppose what never has been opposed. A story can be resistive, subversive and transformative, especially when it weaves a counter-narrative to settled understandings, interpretations and worldviews.”²²⁶

VIII. CONCLUSION

This article interrogated whether CRT-inspired litigation can usher in lifeline criminal jurisprudence. It highlighted several tensions and paradoxes inherent in criminal justice discourses on Blackness

²²¹ James Baldwin, *No Name in the Street* (New York: Knopf Doubleday Publishing Group, 2007) at 149.

²²² Said, *supra* note 17 at 246–247.

²²³ See generally Mahmud, *supra* note 11; Becker, *supra* note 18.

²²⁴ Alfieri, *supra* note 99 at 655.

²²⁵ McKittrick, *supra* note 16 at 127.

²²⁶ Mahmud, *supra* note 11 at 617–618.

without necessarily resolving them. It was posited that adopting a CRT lens, which centres Black voices in criminal justice discourses, will promote Black dignity and help pursue ethical harm-reduction strategies to mitigate the devastating consequences of systemic anti-Black racism for those Black Canadians currently interfacing with the system. This approach is not antithetical to radical structural reform; instead, it recognizes the need to adopt a racial realist approach to racial justice initiatives—one that integrates CRT theory and praxis that is alive to ‘on the ground realities’ facing Black Canadians. Like Williams, I have also “...learned that the best way to give voice to those whose voice had been suppressed was to argue that they had no voice.”²²⁷ This argument is not simply about judicial recognition of systemic anti-Black racism; instead, it is about deploying race-talk through the prism of rights in hostile vistas. The aim is not merely to seek acquittals, which is paramount, but to restore dignity and affirm visibility in terms native to Black imaginaries. Indeed, lifeline jurisprudence represents the removal of discursive shackles, recognizing Black lives in radical possibilities outside of white supremacist descriptive frames and transforming or at minimum calming hostile waters into seas of hope.

²²⁷ Williams, *supra* note 153 at 103.

CHAPTER TWO: MANAGING EXPECTATIONS: RACIAL REALISM AND CRIMINAL TRIALS²²⁸

I. INTRODUCTION

On June 15, 2022, the Toronto Police Service (“TPS”) released data demonstrating a concerning trend of excessive use of force by its officers against Black people.²²⁹ In response, activists demanded an end to police brutality, killings, and carding, practices and policies against which Black communities have long advocated and that were recommended for abolishment in many reports dating back years.²³⁰ Despite decades of advocacy and recommendations, more recent data from the Black Canadian National Survey (“BCNS”) shows that the issue of anti-Black police violence remains pressing and widespread.²³¹

²²⁸ Danardo S. Jones, *Managing Expectations: Racial Realism and Criminal Trials* in Lorne Foster and Les Jacobs, *The Black Book: Public Sector Investigations in Disaggregated Race Data* (University of Toronto Press, Forthcoming) (Accepted for Publication).

²²⁹ “Use of force by the TPS report (updated January 2023).pdf”, online: <<https://www.ohrc.on.ca/sites/default/files/Use%20of%20force%20by%20the%20TPS%20report%20%28updated%20January%202023%29.pdf>>.

²³⁰ *Interpellations policières et profilage racial*, by Victor Armony et al (Montreal: Monreal Police, 2023); Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*. (Toronto: Queen’s Printer for Ontario, 1995); Julie Ireton & Valerie Ouellet, “Paid to stay home”, (9 April 2024), online: <<https://www.cbc.ca/newsinteractives/features/suspended-police-officers-cost-ontario-taxpayers-134m-over-past-decade>>; *Report of the Advisor on Race Relations to the Premier of Ontario*, by Stephen Lewis (1992); Lysandra Marshall, *Racial Disparities in Police Stops in Kingston, Ontario: Democratic Racism and Canadian Racial Profiling in Theoretical Perspective* (Thesis, University of Toronto, 2017) [unpublished] Accepted: 2017-06-04T20:00:15Z; *Traffic Stop Race Data Collection Project*, by Ottawa Police Service (Ottawa Police Service, 2016); Jennifer Pagliaro, “‘You have to show me’: Black Toronto voices reject police chief’s apology for ‘systemic’ discrimination”, *Toronto Star* (15 June 2022), online: <<https://www.thestar.com/news/gta/2022/06/15/i-am-sorry-toronto-chief-apologizes-but-wont-investigate-officers-behind-anti-black-discrimination.html>>; Inayat Singh, “Deadly Force”, *CBC News* (23 July 2020), online: <<https://newsinteractives.cbc.ca/fatalpoliceencounters>>; Wortley, *supra* note 189.

²³¹ *Black Canadian National Survey*, by Lorne Foster et al (Toronto: Institute for Social Research, 2023).

The brutal beating of Dafonte Miller is a recent example of this troubling trend.²³² Dafonte was 19 years old when he was chased and viciously beaten by Michael Theriault, an off-duty TPS officer, and his brother, Christian Theriault, who suspected Dafonte of breaking into their parents' vehicle. When Durham Region Police responded to a neighbour's 911 call, they found the brothers restraining a severely injured Dafonte. The police arrested and charged Dafonte at the scene, though the Crown prosecutor ultimately withdrew the charges. It was only after the persistent advocacy of Dafonte's lawyer that the Special Investigation Unit ("SIU") examined the incident, per its standard official policy for police violence. The SIU investigation led to both Michael and Christian being charged with aggravated assault and attempting to obstruct justice. Following a lengthy and highly publicized trial, Justice Di Luca of the Ontario Superior Court ("ONSC") acquitted both brothers of aggravated assault and attempting to obstruct justice. Michael Theriault, however, was convicted of the lesser included offence of assault and sentenced to a 9-month prison sentence and 1-year probation.

Drawing on critical race theory ("CRT"), particularly Derrick Bell's idea of racial realism, this chapter will highlight how, despite being atypical in some respects, i.e. the conviction of a white police officer, *Theriault* is ultimately both typical and disheartening with respect to racial justice when viewed through a more critical lens. In a sense, Michael Theriault's conviction simultaneously represents a victory and a loss for Dafonte and racial justice advocates. Indeed, Black peoples' experience in Canada reveals that *Theriault* is not aberrational but consistent with the system's design.²³³ Notably, both the trial judge and the appeals court acknowledged the pernicious nature of anti-Black police violence and recognized it as a widely known and well-documented phenomenon.²³⁴ But beyond this generic acknowledgment, neither court grappled meaningfully with the connections between that widespread phenomenon and Dafonte's experience. As a result, the decisions culminated in a limited

²³² Carolyn Greene, Marta-Marika Urbanik & Kanika Samuels-Wortley, "'It Stays with You for Life': The Everyday Nature and Impact of Police Violence in Toronto's Inner-City" (2022) 19:17 Intl J Enviro Research & Public Health 10503; Joseph Mensah et al, "Racial Discrimination in the Canadian Criminal Justice System: How Anti-Black Racism by the Toronto Police Harms Us All" (2021) 38:2 Can Soci Work Rev 63; *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018) [Collective Impact]; note 51.

²³³ See Tanovich, *supra* note 9.

²³⁴ *R v Theriault*, 2020 ONSC 6768 at paras 11 & 246; *R v Theriault*, *supra* note 57 at para 212.

and tentative response to a violent, racist, unjustified exercise of state sanctioned violence against a vulnerable young Black man.

This chapter will argue that the *Theriault* verdict suggests that Black people may need to calibrate their expectations about achieving racial justice from the criminal legal system. It will demonstrate via a critical, racial realist analysis of the criminal legal system how *Theriault* is a typical decision from a critical race perspective. The decision highlights the limits of the criminal law in addressing anti-Black racism and police violence. Indeed, transformational race-based criminal law discourses remain challenging, not only because of the risk of being disbelieved when one makes specific—as opposed to generic—claims about how anti-Black racism operates but also because of contradictions that are inherent features of the criminal legal landscape.²³⁵ For example, the judicial recognition of the embeddedness of structural anti-Black racism in the criminal system but judicial failure to consider the impact that may have on trial fairness. The realist approach eschews a simple, hollow acknowledgment of anti-Black racism in the criminal legal system; instead, it analyzes how and why this evil is so difficult to name and address in the context of criminal trials.²³⁶

As this chapter argues, *Theriault* provides an appropriate case study to demonstrate the critical explanatory power of Derrick Bell's theory of racial realism in the contemporary Canadian criminal law context. Section one will briefly outline the facts and procedural history of the *Theriault* decision. Section two will discuss, through allegories and a personal narrative, how Black people confront subordination, exemplified by but certainly not limited to police violence. Section three will delve into the contours of Bell's racial realism theory as a strategy for responding to subordination. Finally, section four will explore the typicality and atypicality of the *Theriault* decision and what the case teaches about reliance on the criminal legal system to address anti-Black racism and police violence.

²³⁵ See Jessica T DeCuir-Gunby, Thandeka K Chapman & Paul A Schutz, *Understanding Critical Race Research Methods and Methodologies: Lessons from the Field* (Oxfordshire: Routledge, 2018); Parker & Lynn, *supra* note 166.

²³⁶ Tanovich, *supra* note 9 at 657.

II. SECTION ONE

i. The Theriault case

According to the Theriault brothers' version of the facts, on December 28, 2016, Michael and Christian were inside their parents' garage smoking cigarettes when they heard someone opening the unlocked door of a vehicle parked in the driveway. Christian activated the electric garage door, and Michael slid under it before it opened fully to find then 19-year-old Dafonte and his friend, Antonio, inside the vehicle. Dafonte and Antonio ran in different directions. The Theriault brothers chased Dafonte about 130 meters down the street and then through a gap between two houses, at which point Michael body-checked Dafonte into a fence. A metal pipe entered the melee between the houses, but there is inconclusive evidence about who first had the pipe or exactly where it came from. The trial judge found that there was a reasonable possibility that Dafonte had the pipe at some point during the initial struggle between the houses before he was disarmed and viciously beaten with kicks and many punches to the face. The trial judge found that Dafonte received a devastating eye injury during the beating between the houses. After the beating between the houses, Dafonte attempted to retreat to the front door of the nearby residence of the Silverthorne family, banging heavily on the door and requesting the homeowner call the police. Michael followed Dafonte to the front door of the residence and struck Dafonte several times in the face and other parts of his body with the metal pipe.

Dafonte advanced a different version of what happened on the night in question. According to Dafonte, he and his two friends were walking down the street when they were approached and questioned by the Theriault brothers about their reasons for being in that neighbourhood. When Dafonte and his friends ran, they were chased by the brothers, who eventually caught up with Dafonte and viciously beat him with a metal pipe and with their hands and feet. A weakened and severely injured Dafonte made his way to the front door of the Silverthorne residence to seek aid, followed by Michael, where he was once again beaten. Michael subsequently held down Dafonte until the Durham Police arrived on the scene. It was uncontested at trial that upon their arrival, officers handed Michael handcuffs to arrest Dafonte, handcuffs that were placed so tightly around Dafonte's wrist that he lost blood circulation.

Ultimately, Dafonte suffered a fractured wrist, nerve damage to his hands from the handcuffs, a ruptured left eye that required removal and the fitting of a prosthetic eye, and soft tissue damage. Police charged Dafonte with two counts of assault with a weapon and theft under \$5000, among other charges; the Crown prosecutor later withdrew those charges. Following a belated SIU investigation, the Theriault brothers were charged with aggravated assault and attempting to obstruct justice by giving a false statement to the police.

As noted above, a three-week ONSC trial before Justice Di Luca resulted in a finding of guilt against Michael Theriault on the lesser and included charge of assault. Both Michael and Christian were acquitted of aggravated assault and attempting to obstruct justice. Ultimately, the trial judge held that the Crown had not proved beyond a reasonable doubt that Michael and Christian were not justified in defending themselves during the part of the attack when Dafonte's catastrophic eye injury may have occurred—hence, they could not be convicted of aggravated assault. However, the beating with the pipe by Michael near the Silverthorne front door was found to be unlawful and formed the basis of the assault conviction.²³⁷ The defence sought to have the case reopened, claiming the charge of assault was not a lesser included offence, but Justice Di Luca decisively rejected this application based on well-settled law.²³⁸

Justice Di Luca subsequently sentenced Michael to nine months in prison and one year of probation, made an ancillary DNA order, and imposed a five-year weapons prohibition.²³⁹ As part of his sentencing decision, Justice Di Luca considered community impact statements from the Black Action Defence Committee and the Canadian Association of Black Lawyers.²⁴⁰ In response to those concerns, Justice Di Luca explained that “[his] role in sentencing Mr. Theriault is [...] not to place solely upon his shoulders the blame for the sorry history of violent interaction between members of the Black community and the police. While I must consider the broader racialized context within which this

²³⁷ *R v Theriault*, *supra* note 57.

²³⁸ *R v Theriault*, 2020 ONSC 5725 at para 20.

²³⁹ *R v Theriault*, 2020 ONSC 5784.

²⁴⁰ *Ibid.*

offence took place, I must be mindful of the need to punish Mr. Theriault only for the crime he committed and not punish him for crimes committed by others’”.²⁴¹ In his sentencing reasons, he also cited the severe breach of trust, the gratuitous violence, and the need to denounce and deter such behaviour. However, Justice Di Luca also recognized the significant mitigating factors in favour of Michael and his solid rehabilitative prospects.²⁴²

Michael appealed his conviction and sentence to the Ontario Court of Appeals, which unanimously rejected the grounds of appeal and upheld the trial judge’s findings of fact and his credibility assessments.²⁴³ The Supreme Court of Canada denied an application for leave to appeal.²⁴⁴ Michael was suspended with pay from the TPS for the duration of the trial and appeals but ultimately resigned before the completion of his disciplinary hearing.²⁴⁵

III. SECTION TWO

i. The Planning Meeting Blues

The *Theriault* decision, like much of Canadian criminal jurisprudence on race presents a narrative that, in many respects, is incongruent with Black people’s experiences of race in Canadian society. Thus, a critical feature of anti-racist research center counter-narratives that aim to expose historical patterns of oppression that, in some quarters, are thought to no longer be a problem.²⁴⁶ Indeed, a cornerstone of CRT methodology is the utilization of counterstories, which are advanced to provide the perspectives of those who are the most affected by white supremacist power structures, such as the criminal legal

²⁴¹ *R v Theriault*, *supra* note 238 at 9.

²⁴² *R v Theriault*, *supra* note 234.

²⁴³ *R v Theriault*, *supra* note 57.

²⁴⁴ *Michael Theriault v Her Majesty the Queen*, 2021 SCC.

²⁴⁵ Jeff Mitchell, “Judge approves new conditions for cop, brother accused in beating of Whitby teen”, *Whitby This Week* (2 August 2017), online: <https://www.toronto.com/news/judge-approves-new-conditions-for-cop-brother-accused-in-beating-of-whitby-teen/article_61f799f8-869e-58e2-adf9-eba5cd685cb5.html>; Jeff Mitchell, “Michael Theriault, cop convicted of assaulting Dafonte Miller, resigns from Toronto police service”, *Whitby This Week* (3 May 2022), online: <https://www.durhamregion.com/news/michael-theriault-cop-convicted-of-assaulting-dafonte-miller-resigns-from-toronto-police-service/article_6d783b8f-6b51-5529-b1a2-11e6004245dd.html>.

²⁴⁶ Parker & Lynn, *supra* note 166 at 10.

system, but are the least protected and heard, thus indicating that the work of racial justice has not been done.²⁴⁷ For example, some actors in the criminal legal system, including judges, defence lawyers, and Crown prosecutors, may believe that by identifying anti-Black racism as an embedded feature of the criminal legal system and occasionally naming it, albeit abstractly, the work has been done and the problem resolved.

Indeed, formal acknowledgment of anti-Blackness as a general feature of our criminal legal system is not new. Over the last three decades, we have observed that every level of Canadian court makes similar observations.²⁴⁸ Many empirical studies have documented this phenomenon, including those commissioned and authored by official actors.²⁴⁹ Yet, for the most part, these bald acknowledgments of structural anti-Black racism have not resulted in radical racial justice reforms needed to eliminate the anti-Blackness that is an embedded feature of the criminal legal system.²⁵⁰ What *Theriault* teaches is that despite the existence of incontrovertible data about anti-Black violence, the criminal legal system remains ill-equipped for or actively resistant to race-based arguments, particularly when police are on trial.²⁵¹ Such resistance or inability to tackle anti-Black violence by police officers contributes to and entrenches the mistrust, fear and anger expressed by Black Canadians toward the criminal legal system.²⁵² This mistrust is a phenomenon long recognized in appellate-level court decisions²⁵³ and

²⁴⁷ Jones, *supra* note 82.

²⁴⁸ Golden, *supra* note 190; Le, *supra* note 6.

²⁴⁹ Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 230; Foster et al, *supra* note 231; Lewis, *supra* note 230; *Paying the price: The human cost of racial profiling* (Toronto: Ontario Human Rights Commission, 2003) [Paying the Price].

²⁵⁰ Debra Parkes & Sonia Lawrence, “R. v. Sharma: Reckoning with Destabilizing Truths in Constitutional Equality Adjudication” (2024) 115 SCLR (2nd).

²⁵¹ Kristin Annable & Vera-Lynn Kubinec, “Criminal consequences for police officers are rare when a civilian dies”, *CBC News* (6 April 2018), online: <<https://www.cbc.ca/news/canada/manitoba/deadly-force-police-criminal-charges-1.4607134>>; Ireton & Ouellet, *supra* note 230.

²⁵² Le, *supra* note 6 at para 93.

²⁵³ *Peart v Peel Regional Police Services*, 2006 CanLii 37566 (ONCA); *Borde*, *supra* note 70; *Golden*, *supra* note 190; *Hamilton*, *supra* note 70; *Le*, *supra* note 6.

supported by empirical data and the stories of those who continue to face this ongoing violence.²⁵⁴ These appellate-level decisions acknowledge the problem but are incapable of going any further.

Stating this reality is by no means a declaration of capitulation; instead, the racial realist approach seeks to highlight Black peoples' subordinate status in the racial order – not simply as a bald acknowledgement of a notorious fact – but as a way to organize and resist white supremacy from a place of realism and not idealism.²⁵⁵ However, confronting the reality of one's subordinate status can sometimes prove crippling. I experienced this paralytic sensation a few years ago when I was a member of a Black advocacy group in Toronto. The group's primary objective was Black empowerment and capacity-building. At our planning meetings, we would pour libations and reflect on our ancestors who fought, lived and died for Black freedom. I often reflected on Marcus Mosiah Garvey, the Jamaican-born pan-Africanist who, in his time, led the largest Black self-empowerment movement – the United Negro Improvement Association. Reflecting on Garvey's struggles, triumphs, and dreams filled me with a sense of power and made me feel hopeful. Following my reflections, the group leader, a seasoned community organizer and a stalwart advocate against anti-Black racism, would calmly say, *àṣẹ*. It always amazed me how such a simple word, often used as an “affirmation, acceptance or agreement after the pronouncement of blessings, prayers and as a seal of oath” could generate so much internal strength.²⁵⁶ I often left our meetings feeling as if I had the power to change the world.

The group leader posed a thought experiment at one of our planning meetings. He asked us to imagine a scenario where former slave-holding states decided to reinstitute Black enslavement. Startled by the thought, it took time before we offered the group leader any reflections on his question. When we spoke, the responses were similar, as if scripted: What benefit do white societies gain by returning to

²⁵⁴ See Scot Wortley, “Justice for all? Race and perceptions of bias in the Ontario criminal justice system – A Toronto survey” (1996) 38:4 Can J Criminology 439; Amy Peirone et al, “The Social Environment of Daily Life and Perceptions of Police and/or Court Discrimination among African, Caribbean, and Black Youth” (2017) 59:3 Can J Criminology & Crim Justice 346; Scot Wortley & Akwasi Owusu-Bempah, “Unequal Before the Law: Immigrant and Racial Minority Perceptions of the Canadian Criminal Justice System” (2009) 10:4 Int Migration & Integration 447.

²⁵⁵ See Bell, *supra* note 4.

²⁵⁶ Samuel O Olupinyo, “Biblical Concept of ‘Amen’ Translated as ‘Ase’ in Okun Language” (2021) 4:1 African J Culture History Religion & Traditions 55 at 57.

such systems of mass exploitation, subjugation, and extermination? Firmly, we all declared that Black people will never allow themselves to be subjected to enslavement again! Then, coldly, the group leader responded: “With what army would they resist?” The thought of our collective powerlessness paralyzed me. I left the planning meeting demoralized but vowed, in what can only be described as a futile declaration, that neither my family nor I would ever be enslaved! I did not need an army! Though the group leader’s thought experiment lingered in the recesses of my subconscious, I decided not to dwell on it. However, it resurfaced after reading Derrick Bell’s *Faces at the Bottom of the Well: The Permanence of Racism* (*Faces*).²⁵⁷

ii. Confronting Subordination

In *Faces*, Bell uses fictionalized narratives and allegories to explore the racial plights confronting African Americans. For example, in the final chapter of *Faces*, Bell invites his readers to imagine a scenario in which extraterrestrial Traders offered the United States advanced technologies and vast wealth in exchange for all African Americans. Following failed legal challenges and some escape attempts, the United States government eventually rounded up every Black American and handed them over to the Space Traders. While it is doubtful that Black people will ever encounter such a scenario, for Bell: “[e]verpresent, always lurking in the shadow of current events, is the real possibility that an unexpected coincidence of events at some point in the future—like those that occurred in the past—will persuade whites to reach a consensus that a major benefit to the nation justifies an ultimate sacrifice of black rights—or lives”.²⁵⁸ The Space Traders story teleported me back to that demoralizing planning meeting. I began pondering whether Black Canadians could face the devastating betrayal imagined in Bell’s story – not being rounded up by extraterrestrial slavers – instead, my fear was of the more terrestrial threat. The fear was paralyzing: how could Black people resist the “sacrifice of black rights—or lives?” We have no armies! Even if the wholesale suspension of Black legal personhood seems unlikely, the looming threat of police violence operates in the same way on an individual level.

²⁵⁷ Bell, *supra* note 5.

²⁵⁸ *Ibid* at 13.

The lived, racial reality, as experienced by many Black people - and even acknowledged by courts in cases like *R v Le* (2019) and *R v Morris* (2021) - is that there is an ever-present danger that an officer of the state, acting in that capacity, may inflict extraordinary, extralegal violence - and that one's formal status as a rights-bearing member of society will not provide a shield, but at best, a limited retroactive remedy. That is precisely what happened to Dafonte Miller.

Dafonte's experience demonstrates that even though Black individuals have formal legal rights, they may not be adequately protected from extralegal state violence. For example, because of the trial judge's careful consideration of established criminal law principles such as the presumption of innocence and the *W.(D.)* principle, the outcome was a hesitant finding of reasonable doubt and a partial acquittal.²⁵⁹

The outcome in *Theriault* aligns with established criminal law principles but does not align with a comprehensive, race-conscious approach. In fact, in terms of exhibiting race-consciousness, the trial judge saw his function as simply acknowledging the racial dynamics but not conducting any further examination into them or utilizing the criminal law to provide a remedy.²⁶⁰ The trial judge was indeed required, by law, to adhere to relevant criminal law principles and to focus on the material issue of whether the Crown proved the elements of the offences beyond a reasonable doubt. As such, the issue is not necessarily that the trial judge attempted to do this; instead, it could be that (1) his credibility assessment was too cautious or "race-neutral," leading to clearly incorrect factual findings that then influenced the verdict on the relevant law; and/or (2) a trial for individual charges may be ineffective in addressing racial justice issues, particularly because trial judges are bound by the constraints articulated by Justice Di Luca. Indeed, even if individual trials are successful, they cannot, in the aggregate, fix the system. The issue here is systemic in nature and related to the limitations of a criminal trial in addressing problems rooted in social context.

²⁵⁹ *R v W(D)*, 1991 SCC 1991 CanLii 93 (SCC), 1 SCR 742.

²⁶⁰ *R v Theriault*, *supra* note 57 at para 11.

Arguably, justice for Dafonte, or at least the justice his supporters and activists demanded, was unavailable in the criminal courts. Despite community outrage and the submissions in the community impact statement requesting a harsher sentence, Justice Di Luca held that his “role in sentencing Mr. Theriault is also not to place solely upon his shoulders the blame for the sorry history of violent interaction between members of the Black community and the police.”²⁶¹ While I must consider the broader racialized context within which this offence took place, I must be mindful of the need to punish Mr. Theriault only for the crime he committed and not punish him for crimes committed by others.”²⁶² Michael was sentenced to 9 months for common assault, and his brother, Christian, was acquitted because the trial judge had reasonable doubt in regard to the aggravated assault charges against the Theriault brothers.

Despite this outcome, Dafonte is quoted as saying: “I could have easily been convicted of one of those charges they put on me that night... But instead I’m here today. So I don’t feel I took a loss. I feel like there is a long way to go and we just took a step forward”.²⁶³ The fact that Dafonte feels he did not take a loss after one of the Theriault brothers was acquitted outright, and the other was sentenced for a lesser included charge because of reasonable doubt – and that he feels this way because he is grateful to have not been convicted for the incident that led to his own maiming – raises serious questions about how many steps forward we can take along this path of legal reform. Moreover, what should be done when we confront the extreme vulnerability that remains despite the apparent racial progress or hard-won legal protections? Do we double down on incremental legal reform? Or do we do something else? Bell’s theory of racial realism offers one possible answer.

²⁶¹ *R v Theriault*, *supra* note 239.

²⁶² *R v Theriault*, *supra* note 234 at para 9.

²⁶³ John Marchesan, “Supporters express anger and disappointment at verdict in Dafonte Miller case”, (27 June 2020), online: *CityNews Toronto* <<https://toronto.citynews.ca/2020/06/26/supporters-lawyer-express-disappointment-and-anger-at-dafonte-miller-verdict/>>.

IV. SECTION THREE

i. Racial Realism and the Contradictions of Subordination

Racial realism found its intellectual genesis, primarily through Bell's work, in the American context, though it is an appropriate and powerful lens for examining racial justice in the contemporary Canadian context.²⁶⁴ According to Bell, racism is an "integral, permanent, and indestructible component of society".²⁶⁵ He explains that "[a]cceptance of the racial realism concept would enable [Black people] to better recognize, understand, and respond to recurring aspects of our subordinate status. It would free them to think and plan within a context of reality rather than idealism- idealism based on principles that unhappily do not conform to social reality".²⁶⁶ For Bell, "racial realism is to race relations what 'legal realism' is to jurisprudential thought".²⁶⁷ He further explained that "the racial realism that we must seek is simply a hard-eyed view of racism as it is and Black peoples' subordinate role in it".²⁶⁸ It is concerned with giving an accurate account of the system by centring the perspectives of those the system harms the most but serves the least while providing "a legal and social mechanism on which blacks can rely to have their voice and outrage heard".²⁶⁹ Indeed, for Bell, such a 'reality check' can create avenues for resistance hitherto unimagined or attempted.²⁷⁰ He explains that "[w]e must acknowledge it [subordination], not as a sign of submission, but as an act of ultimate defiance".²⁷¹

In *Faces*, Bell sought to disrupt settled notions of racial progress and equality in traditional American civil rights discourse.²⁷² Ironically, Bell spent part of his career as a civil rights lawyer, litigating school

²⁶⁴ Athena D Mutua, "The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship" (2006) 84:2 Denv U L Rev 329 at 341.

²⁶⁵ Bell, *supra* note 5 at ix.

²⁶⁶ Derrick Bell, "The Performance of Racism" (1993) 22:4 Sw U L Rev 1103 at 1106.

²⁶⁷ Bell, *supra* note 4 at 364.

²⁶⁸ *Ibid* at 378.

²⁶⁹ Jones, *supra* note 61 at 31; Alinsky, *supra* note 3 at 41; Bell, *supra* note 4 at 364.

²⁷⁰ Bell, *supra* note 4 at 378.

²⁷¹ Bell, *supra* note 5 at 12.

²⁷² Bell, *supra* note 5.

desegregation cases during the civil rights period.²⁷³ According to Bell, “what we designate as racial progress is not a solution to that problem. On the contrary, it is a regeneration of the problem in a particularly perverse form”.²⁷⁴ Bell urges African Americans to give up lofty notions of racial equality. For Bell, “the goal of racial equality is, while comforting to many whites, more illusory than real for blacks”.²⁷⁵ Bell’s racial cynicism is born of a history of oppression, broken promises, and false hope, which has led him and others to reject the possibility of racial progress/equality and to accept Black peoples’ real status in America: subordination.²⁷⁶ The Black experience in America is marked by centuries of institutionalized oppression and violence, which seems stubbornly persistent. As Bell writes, “... the fact of slavery refuses to fade, along with the deeply embedded personal attitudes and public policy assumptions that supported it for so long. Indeed, the racism that made slavery feasible is far from dead in the last decade of twentieth century America; and the civil rights gains, so hard won, are being steadily eroded”.²⁷⁷

Bell further argues that “the interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites”.²⁷⁸ This idea, referred to as interest convergence, holds that “because racism advances the interests of both white elites (materially) and working-class people (psychically), large segments of society have little incentive to eradicate it”.²⁷⁹ Put differently, racial progress is only made incidentally to the extent that it advances white/majoritarian perceived interests. Further, because racism advances the perceived interests of both white elites and working-class people,

²⁷³ Derrick A Bell, “Brown v. Board of Education and the Interest Convergence Dilemma” in Kimberle Crenshaw & et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New York Press, 1995).

²⁷⁴ Bell, *supra* note 5 at 3; Reva Siegel, “Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action Symposium: The Critical Use of History” (1997) 49:5 *Stan L Rev* 1111 at 1113.

²⁷⁵ Bell, *supra* note 266 at 1105.

²⁷⁶ See Derrick Bell, “After We’re Gone: Prudent Speculations on America in a Post-Racial Epoch” (1990) 34:3 *St Louis U LJ* 393; Bell, *supra* note 5; Bell, *supra* note 266 at 1106; Ta-Nehisi Coates, *Between the world and me* (New York: Spiegel & Grau, 2015); George W Dowdall, “White gains from black subordination” (2005) 32:3–4 *Rev Black Political Economy* 65; Dawn G Williams & Roderic R Land, “The Legitimation of Black Subordination: The Impact of Color-Blind Ideology on African American Education” (2006) 75:4 *J Negro Education* 579.

²⁷⁷ Bell, *supra* note 5 at 3.

²⁷⁸ Bell, *supra* note 273 at 22.

²⁷⁹ Bell, *supra* note 273.

it is unreasonable to expect interest convergence to be a complete solution. At most, there will be intermittent times when it may enable limited or temporary progress.²⁸⁰ In other words, both poor and rich white people may feel incentivized to resist any radical or structural change to “white-over-colour ascendancy”.²⁸¹ Black people who agitate for radical structural reform are, therefore, doomed to merely receiving hollow, retrogressive wins that are generally walked back or watered down to the point of obsolescence.²⁸²

Thus, even those notable racial liberation moments are imaginary and mask society’s true state of affairs. According to Kimberlé Crenshaw, another leading figure in the CRT movement, “[r]acial justice was embraced in the American mainstream in terms that excluded radical or fundamental challenges to the status quo institutional practices in American society by treating the exercise of racial power as rare and aberrational rather than as systemic and ingrained”.²⁸³ Despite civil rights victories that putatively remedied the most overt, egregious forms of racism, Bell argues that Black Americans are not saved.²⁸⁴

Critics challenge Bell’s claim that Black Americans have not achieved racial equality or have any hope of doing so.²⁸⁵ One critic argues that “[t]he urgency, therefore, comes from my sense that Professor Bell’s work propagates a damaging and dampening message which must be confronted and rejected if we are to fashion our future creatively”.²⁸⁶ Yet, according to Bell, accepting that racism is an entrenched feature of American society should not breed despair but rather defiance. By releasing the false hope of racial equality, Black people can fight unencumbered by false promises. Moreover, this unburdening may sharpen one’s understanding of the unpleasant, disturbing nature of racism. Here, Bell assumes that those whose eyes are now fully opened to racial realities on the ground will not

²⁸⁰ *Ibid.*

²⁸¹ Delgado, Stefancic & Harris, *supra* note 13 at 8.

²⁸² Bell, *supra* note 273; See Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed (Chicago: U of Chicago P, 2008).

²⁸³ Crenshaw, *supra* note 26 at xiv.

²⁸⁴ Bell, *supra* note 130 at 288.

²⁸⁵ Leroy D Clark, “A Critique of Professor Derrick A. Bell’s Thesis of the Permanence of Racism and His Strategy of Confrontation” (1995) 73:1 Denv U L Rev 23.

²⁸⁶ *Ibid* at 24.

collapse in debilitating fear, surrender, or flee. For Bell, accepting the unrelenting force and severity of racism, while admittedly challenging, is not antithetical to radical resistance.²⁸⁷ Bell asserts that “African-Americans must confront and conquer the otherwise deadening reality of our permanent subordinate status. Only in this way can we survive society’s racial hostility that drags us down. Beyond survival, there is the potential to perceive more clearly both a reason and the means for further struggle”.²⁸⁸

Awareness of racial subordination is proffered as a motivator to resist, and crucially, it frames the construction of one’s resistance. Some evidence in the field of psychology suggests that one can draw positive power from pessimism.²⁸⁹ In other words, it is not that racial realism is itself a motivating force – but rather, that racial realists and racial idealists are both motivated to fight racism (presumably for unstated but quite obvious reasons to do with self-preservation, dignity, etc.) but they approach the task differently. Like Sisyphus, Black people may labour fruitlessly in pursuit of racial equality. Each victory is rolled back like Sisyphus’ rock in an unwinnable battle. However, Albert Camus’ reimagining of Sisyphus’ plight is instructive insofar as it urges one to confront the absurdity of meeting torment with happiness. For Camus, “[t]he struggle itself toward the heights is enough to fill a man’s heart. One must imagine Sisyphus happy”.²⁹⁰

V. SECTION FOUR

i. Getting Real about Theriault

The *Theriault* case evinces the illustrative power of Bell’s theory of racial realism in the contemporary Canadian context. Indeed, the presence of anti-Black racism in Canada and its impact on Black lives are not in dispute. Thus, what should concern race scholars is its staying power. Given Canada’s

²⁸⁷ Bell, *supra* note 130.

²⁸⁸ Bell, *supra* note 266 at 1106.

²⁸⁹ See Julie K Norem, *The Positive Power of Negative Thinking: Using Defensive Pessimism To Harness Anxiety and Perform at Your Peak* (New York: Basic Books, 2001).

²⁹⁰ Ronald Aronson, “Albert Camus” in Edward N Zalta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy*, winter 2022 ed (Metaphysics Research Lab, Stanford University, 2022) at 18.

longstanding, documented anti-Blackness, race scholars and activists may stand to gain critical insights from a closer examination of Bell’s thesis. As Bell explained, “empiricism is a crucial aspect of racial realism”.²⁹¹ As documented in the BCNS and similar reports dating back three decades, the criminal legal system is a site of profound institutional anti-Black racism.²⁹² Stereotyped as “dangerous,” “violent,” and “criminal,” Black Canadians are disproportionately likely to attract scrutiny and harsh treatment from criminal justice actors, resulting in the overrepresentation of Black Canadians among criminally accused persons and offenders.²⁹³ There is a clear genealogy from the most explicit and violent forms of anti-Black racism to current expressions of structural violence against Black people.²⁹⁴ Black people still experience significant disadvantages and structurally inflicted violence, but in terms that have been sanitized and taken out of public view. This subtler form of anti-Black racism is more difficult to combat insofar as it is now an indistinguishable feature of the criminal legal system.²⁹⁵

The criminal trial process is a complex, dynamic web of legal rules and procedures. It is further complicated when race, particularly Blackness, is a conspicuous aspect of the process. Historian Barrington Walker highlighted that from 1858 to 1958, “when Blacks appeared before the criminal courts, ‘race,’ whether tacitly or overtly, procedurally or rhetorically, was on trial”.²⁹⁶ Walker provides archival evidence (newspapers, reported court cases, etc.) demonstrating the racialized rhetoric looming over criminal cases involving Black Canadians. He asserts that during this period, “the criminal law was an integral part of how race was produced, managed, and expressed in the racial liberal order that framed the Black experience in Canada”.²⁹⁷ While Walker’s observations are made in a historical context, his observation about ‘race’ being on trial remains true today — though today, race tends to play a more subtle, yet no less pernicious, role in criminal adjudication. Black people still experience significant disadvantages and structurally inflicted violence, but in terms that have been

²⁹¹ Bell, *supra* note 4 at 365.

²⁹² Foster et al, *supra* note 231; Parks, *supra* note 64 at 54.

²⁹³ Foster et al, *supra* note 231.

²⁹⁴ Maynard, *supra* note 19.

²⁹⁵ Walker, *supra* note 19.

²⁹⁶ *Ibid* at 20.

²⁹⁷ *Ibid*.

sanitized and taken out of public view. This subtler form of anti-Black racism is more difficult to combat insofar as it is now an indistinguishable feature of the criminal legal system.²⁹⁸ The current situation remains dire for Black people who interface with the criminal trial process as accused people or victims of crime. Indeed, the *Theriault* decision is a relevant current example of what Walker found was typical from the mid-nineteenth century to the mid-twentieth century.

Atypical Case

However, *Theriault* is, in some ways, an atypical criminal case from a critical race perspective:

1. First, it resulted in a conviction against a white police officer who beat and maimed a Black man, whereas it is disproportionately Black people who are the target of prosecution (See Tatum, 2012).
2. Second, the prosecutor decided to withdraw the charges against Dafonte.

In all other aspects, the *Theriault* case was a typical outcome of a criminal legal system steeped in anti-Blackness, which cannot consistently and systematically produce justice for Black accused or victims.

Typical Case

When we center Black knowledge on the *Theriault* case, it reveals that the decision is not aberrational but consistent with the system's design.²⁹⁹ Indeed, *Theriault* is paradigmatic in the following aspects:

1. First, the Durham Police's decision to arrest and charge with assault a beaten and bloodied Dafonte and not the Theriault brothers at the outset — a decision that not only demonstrates the broader phenomenon of racial profiling but also how police privilege themselves.

²⁹⁸ Walker, *supra* note 19.

²⁹⁹ Butler, *supra* note 52.

2. Second, the excessive use of force experienced by Dafonte is typical, given statistics about both lethal and non-lethal police violence against Black civilians.³⁰⁰
3. Third, the TPS's decision to protect one of its own by failing to notify the SIU about the beating.³⁰¹ Indeed, only through the advocacy of Dafonte's lawyer did the SIU commence its investigation into the incident – an investigation mandated by policy and standard procedure. This failure speaks to a more significant problem concerning inadequate police oversight of racially motivated police misconduct.³⁰²
4. Fourth, the trial judge's reluctance to engage in race talk despite the case's evident racial dynamics is also paradigmatic of how Blackness is elided and 'invisibilized' in criminal trials.³⁰³
5. Fifth, the fact that two white defendants, one who was a police officer, received more extensive trial and appeal procedures than is afforded to the average defendant, with the benefit of a very cautious analysis that centred on the presumption of innocence. This is not a criticism of a fair and deliberate trial process that centers on the defendant's rights, nor is it atypical for *any* defendant to have this sort of trial that accords with the system's formal commitments. Rather, the observation is that, as per usual, the people who are benefitting from this more idealized trial process are two well-resourced white defendants; most accused persons — including most Black accused who are overrepresented in the system — do not benefit from these Constitutional guarantees.³⁰⁴

³⁰⁰ *Use of force by the Toronto Police Service - Final report*, by Scot Wortley, Ayobami Laniyonu & Erick Laming (Ontario Human Rights Commission, 2023).

³⁰¹ Shelby Percival, "S. 11 Report - Failures of the Toronto Police Service Continue", (23 November 2021), online: *Falconers LLP* <<https://falconers.ca/s-11-report-failures-of-the-toronto-police-service-continue/>>.

³⁰² *Report of the Independent Police Oversight Review*, by Michael H Tulloch (Toronto: Queen's Printer for Ontario, 2017) [Tulloch 2017].

³⁰³ See Benno Herzog, "Invisibilization and Silencing as an Ethical and Sociological Challenge" (2018) 32:1 Soc Epistemology 13; Jones & Sheehy, *supra* note 60; Tanovich, *supra* note 9.

³⁰⁴ Tanovich, *supra* note 9.

ii. What was missed?

Underscoring these facts does not promote nihilism—quite the opposite. Instead, as with the realist approach, it aims to inspire radical hope—a hope grounded in a clear-eyed view of what should be expected and what can and cannot be accomplished.³⁰⁵ Acknowledging structural racism as reality should not promote inertia – rather, clarity about racial injustice is a call to action, not inaction.³⁰⁶ Admittedly, *Theriault* joins a list of recent criminal cases involving police violence against Black people.³⁰⁷ In many of these cases, the court’s decision was unsatisfactory on the one hand but expected on the other.³⁰⁸ Even in what some may consider clear cases of racist police violence, like *Theriault*, trial judges appear reluctant to place race knowledge at the center of their analysis. If centred, such knowledge would reveal that in criminal trials, race tells a story about those capable and worthy of belief and those who are supposedly devoid of credibility.³⁰⁹ Indeed, when race is centred in the trial judge’s credibility assessment, this may lead to claims of bias or judicial overstep, as witnessed in *R v S (R.D)*, where Justice Sparks, the first Black female Judge in Canada, accepted a Black teenager’s testimony that he was placed in a chokehold by a police officer because he asked the officer why he was arresting his cousin – a claim the officer denied. Justice Sparks commented that police officers, in her experience, have been known to overreact in their dealings with racialized people and that young RDS’s testimony had a ring of credibility to it, and she found him to be “a rather honest boy”.³¹⁰ The Crown appealed the decision, claiming that Justice Spark’s comments gave rise to a reasonable

³⁰⁵ Bell, *supra* note 5; Delgado, *supra* note 66; Powell, *supra* note 66; Scott, *supra* note 66; Warren, *supra* note 66.

³⁰⁶ Bell, *supra* note 4; See Robert Knox, “Strategy and Tactics” (2012) 21 Finnish YB Intl L 193; Alinsky, *supra* note 3 at 40.

³⁰⁷ Meghan Grant, “Calgary police fire officer who slammed handcuffed woman on ground”, *CBC News* (23 November 2023), online: <<https://www.cbc.ca/news/canada/calgary/calgary-police-alex-dunn-fired-disciplinary-decision-1.7038212>>; *R v Bonds*, 2010 ONCJ 561; *R v Dunn*, 2023 ABKB; *R v Forcillo*, *supra* note 67; *Montsion*, *supra* note 60; *R v Othen*, 2018 ABPC 38.

³⁰⁸ Chris Herhalt, “TPS officer convicted in beating of Dafonte Miller resigned from service last month”, *CTV News Toronto* (3 May 2022), online: <<https://toronto.ctvnews.ca/tps-officer-convicted-in-beating-of-dafonte-miller-resigned-from-service-last-month-1.5886349>>; Jones & Sheehy, *supra* note 60; Philip Dwight Morgan, “The Dafonte Miller case reveals a troubling trust gap for police”, *Macleans.ca* (2 August 2017), online: <<https://macleans.ca/opinion/the-dafonte-miller-case-reveals-a-troubling-trust-gap-for-police/>>.

³⁰⁹ Brynne Harding, “*R v Theriault*: A Case of Epistemic Injustice” (2020) *ABlawg.ca*.

³¹⁰ *R v S (RD)*, 1997 [1997] 3 SCR 484, SCJ 84 (cited to SCR) at para 73 [RDS].

apprehension of bias. A sharply divided SCC dismissed the Crown's appeal. The majority reasons of Justices L'Heureux-Dubé and McLachlin (as she then was), in which Justice Gonthier joined, held that "[j]udicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality".³¹¹ Moreover, "[j]udicial inquiry into context provides the requisite background for the interpretation and the application of the law".³¹² This "enlargement of mind," as explained by Jennifer Nedelsky and cited by the SCC, "is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible".³¹³

The *Theriault* trial was as much about race as it was about a dispassionate application of the beyond a reasonable doubt standard. Race loomed over this entire case: from the violent beating of Dafonte, his arrest and the Crown's decision to initially prosecute him, the TPS and Durham police's failure to report the incident to the SIU, and the entire prosecution of the Theriault brothers. Indeed, race cannot be dislodged from this decision. Nevertheless, that is what Justice Di Luca tried to do in his reasons. He explained that "[his] task is ... not to conduct a public inquiry into matters involving race and policing".³¹⁴ However, as is the typical approach in similar cases where race is a conspicuous feature of the process, Justice Di Luca acknowledged race in parenthetical terms that relegated it to the margins of his analysis. He wrote, "I am mindful of the need to carefully consider the racialized context within which this case arises. Beyond that, I also acknowledge that this case, and others like it, raise significant issues involving race and policing that should be further examined".³¹⁵

³¹¹ *Ibid* at 42.

³¹² *RDS*, *supra* note 310.

³¹³ Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42:1 McGill Law Journal 91 at 107; *RDS*, *supra* note 310 at 42.

³¹⁴ *R v Theriault*, *supra* note 57 at para 11.

³¹⁵ *Ibid*.

Justice Di Luca did not see this case as an opportunity to “further examine” the issue of race and policing although it was a white, off-duty police officer and his civilian brother who had chased, severely beaten and maimed a young Black man. To compound matters, when police arrived on the scene, they assisted and trusted Michael, who had no insignia or identification that he was a police officer and who was brandishing a metal pipe over a severely beaten Black teenager. One may query what the response would have been had the roles been reversed. Even Justice Di Luca observed the implication and, indeed, the absurdity of this racial reversal.³¹⁶ He stated, “one could well ask how this matter might have unfolded if the first responders arrived at a call late one winter evening and observed a black man dressed in socks with no shoes, claiming to be a police officer, asking for handcuffs while kneeling on top of a significantly injured white man”.³¹⁷ Justice Di Luca decided not to probe this issue and instead explained that his “task is more focused”.³¹⁸ For him, the function of a criminal trial judge is to decide whether the Crown has discharged its burden of proving the charged offences beyond a reasonable doubt—nothing more, nothing less. While this view of his role is certainly a plausible one in the sense that it accords with standard judicial practice, it limits the criminal legal system’s capacity to advance racial justice.

Thus, for Justice Di Luca, regardless of how race logic framed the evidence – two white men chasing a young Black man and severely beating him for “picking the wrong car”³¹⁹ – credibility assessments and other critical features of the trial demand that as a trial judge his function is not to delve into a broader examination of a pervasive and entrenched phenomenon that infects the entire criminal process, from arrest to sentencing. Even if Justice Di Luca is correct that his role is properly limited to adjudicating the specific allegations before him —without regard to broader issues of racial justice in policing — even that narrow role demands sensitive attention to racial dynamics. In other words, we can imagine at least two different ways in which a judge could attend to race here: (1) attend to broader systemic issues *as a way of adjudicating the facts of the case*, e.g. through a more informed credibility

³¹⁶ Jones, *supra* note 82 at 11–12; Benjamin, *supra* note 130.

³¹⁷ *R v Theriault*, *supra* note 57 at para 11.

³¹⁸ *Ibid* at para 12.

³¹⁹ *Ibid* at para 240.

assessment; and (2) attend to broader systemic issues *in order to address those issues*, e.g. by undertaking the role of offering broader commentary on policing or treating the race dynamics as an aggravating sentencing factor using a denunciation theory.

A keen understanding of the racial dynamics that animated the entire encounter between Dafonte and the Theriault brothers could have provided much-needed insight into why Dafonte was so severely beaten and maimed. Indeed, the trial judge could not assess credibility without taking race into account because one cannot understand the facts without the racial context. The crucial context that ought to have framed the judge's credibility assessment was whether a nineteen-year-old Black youth posed such a threat to two adult white men, one trained in police use-of-force tactics, that it warranted a response that permanently damaged him physically and mentally. Indeed, credibility assessments are not an a-racial exercise—they are framed by what the assessor decides to know and what they believe is knowable about race. This racial knowledge is a composite of tropes and stereotypes that, from the assessor's point of view, constructs racialized bodies and their experiences – often, in ways that are misaligned with how the target views themselves, i.e. failing to enlarge the mind.

Dafonte and Michael's stories of the night in question track the divergent ways race is experienced in Canadian society. Dafonte was minding his business when he was accosted, chased, and severely beaten by two white men. Dafonte's version of the facts is the nightmare of most Black parents and the topic of the "Talk" that many of them have with their children when they come of age.³²⁰ The story is one of self-preservation and race performatives. From this perspective, Dafonte's crime was having the audacity to traverse a residential, suburban neighbourhood in the early morning hours and failing to stop when accosted by two white men. The Talk teaches that Dafonte should have acquiesced and not resisted. Instead, he should have been polite and accommodating, an undignified response but one

³²⁰ Ife Alaba, "The 'race talk' can be overwhelming for kids, but it doesn't need to be", *CBC News* (1 April 2024), online: <<https://www.cbc.ca/news/canada/newfoundland-labrador/race-children-talk-1.7144931>>; Leslie A Anderson, Margaret O'Brien Caughy & Margaret T Owen, "'The Talk' and Parenting While Black in America: Centering Race, Resistance, and Refuge" (2022) 48:3–4 *Journal of Black Psychology* 475; Kabrena Robinson, "Why Black parents must have 'the race talk'", *TVO Today* (4 June 2020), online: <<https://www.tvo.org/article/why-black-parents-must-have-the-race-talk>>.

that increases the odds of surviving such encounters. Thus, performing subordination in the face of obvious injustice is a realistic, albeit undignified strategy, when confronted with one's subordinated status.

Michael, however, offers a version of the facts that portrayed Dafonte as a thief who broke into his parents' vehicle and decided to react violently when he and his brother chased him to make a citizen's arrest and hold him until police arrived. Notice there is a clear villain and hero in Michael's recounting of the facts. In this story, the villain ostensibly got what he deserved for "picking the wrong car".³²¹ In fact, the putative "hero" walked away, and it was not until a year later that it was discovered that he may have engaged in wrongful conduct. While expressing some incredulity about Michael and Christian's motivation for chasing Dafonte, Justice Di Luca was left in reasonable doubt.³²² In a way, the trial judge's decision reinstated Michael and Christian as heroes while casting Dafonte as the villain. The finding that the Crown had not disproved the brothers' claim that they were acting in lawful self-defense when they delivered the blows that maimed Dafonte, as well as the finding that the brothers did not obstruct justice by lying to the Durham Police, can be read as a reinstatement of the prevailing statuses: Dafonte as subordinate and Michael and Christian as dominant. One may query whether two adult Black men who maimed a white teenager and stayed until police arrived and lived to be prosecuted would have been acquitted of the more serious offence of aggravated assault and convicted of a lesser included and sentenced to jail for nine months.

Justice Di Luca did not examine this racial reversal, just as he expressly declined to consider how a racial reversal might have played out with respect to the police conduct when they arrived at the scene. In the latter case, he explicitly declined to do so, not because he examined this racial reversal or did not know the answer to his hypothetical, but because he deemed the exercise outside his function as a trial judge. However, what could be even more central to his function than assessing the Theriaults' credibility in a manner that is alive to racial dynamics? The same dynamics, he admitted, would have

³²¹ *R v Theriault*, *supra* note 57 at para 240.

³²² *Ibid.*

produced different results had the roles been reversed: Had it been Dafonte and his friends standing over a bloodied and beaten Michael Theriault with a metal pipe. In posing that racial reversal, one can assume that Justice Di Luca is suggesting that the Durham Police officers who arrived on the scene would have treated Dafonte and his friends as violent perpetrators and Michael as the victim. One would imagine that that would be a reasonable response from first responders.

For Justice Di Luca, these counterfactuals/ racial reversals warrant further examination – but not from him, and not in this case – The very case that inspired the hypothetical. One might say that Justice Di Luca is right about the need for a “broader inquiry.” However, his own counterfactual suggests that he does know, on some level, that one cannot make sense of the evidence or conduct a thoughtful credibility assessment without paying attention to the racial dimension of *this* case. Indeed, the racial reversals target the same essential question: How plausible is it that the Theriault brothers acted in self-defence and were not themselves the aggressors throughout the incident? *That* question goes to the heart of the factual issue that Justice Di Luca had to adjudicate via his credibility assessments. In the end, any attempt to answer that factual question without attending to the racial dynamics is necessarily going to seem disingenuous, distorted and flawed.

Arguably, *Theriault* is a lesson in calibrating expectations about what the criminal legal system can deliver. At its highest, the case is primarily a story of incrementalism, modest expectations, and ‘staying inside the lines.’ Dafonte achieved some measure of justice through the criminal courts, but this outcome was both modest and hard-fought, and it is unlikely to prompt real structural change. Dafonte had to deal with the stress of impending criminal charges against him. The case against the Theriault brothers took years and only happened because of the dogged intervention from Dafonte’s civil litigation lawyer, Julian Falconer, to get the SIU to investigate.³²³ Dafonte had to go through the process of testifying at a trial where his own conduct was scrutinized and where he was publicly

³²³ Front Burner, “Lawyer Julian Falconer on Dafonte Miller’s fight for justice”, *CBC Radio* (29 June 2020), online: <<https://www.cbc.ca/radio/frontburner/lawyer-julian-falconer-on-dafonte-miller-s-fight-for-justice-1.5630851>>; Jon Woodward, “‘Failed him again’: Dafonte Miller, lawyer slam lack of accountability after officer-involved beating”, *CP24* (23 November 2021), online: <<https://www.cp24.com/news/failed-him-again-dafonte-miller-lawyer-slam-lack-of-accountability-after-officer-involved-beating-1.5678843>>.

implicated in criminal activity even though he was there as the victim, not the accused. Michael Theriault spent years on paid leave between the trial and his sentencing - a luxury most accused do not have.³²⁴ Crucially, the case ultimately resulted in a relatively modest custodial sentence for him (as compared to what he might have received had he been convicted of aggravated assault). Michael also proactively resigned before the conclusion of a disciplinary hearing into his misconduct. His brother, Christian, was granted a full acquittal for his part in the incident.

Theriault represents a missed opportunity and perhaps a cautionary tale about criminal litigation as a tool for racial justice. If racism is indeed baked into our criminal justice system, what, if anything, can Black people gain by accepting racism as a structural feature of the criminal justice system and not merely a ‘bug’?³²⁵ This form of racial realism suggests that Black people may need to calibrate their expectations about achieving justice from the criminal justice system, even during times of purported racial progress.³²⁶ Black liberation through criminal justice reform, particularly through constitutional litigation and other progressive agenda-based litigation, has enjoyed moderate success in the sentencing context.³²⁷ Little scholarly attention has been paid, and far less litigation has been focused on Black liberation through criminal trial advocacy. The reasons for this situation are simple: criminal procedure and substantive criminal law masquerade as aracial, ahistorical, and neutral. Indeed, the criminal law’s animating principles often obscure the case’s underlying racial epistemic and ontologies. The resounding silence around racism in criminal law can also be attributed to the embedded presumptions of the justice system. As Harry Glasbeek puts it: “The...criminal justice system... start[s] off from the assumption that [it]is a neutral system. Equality before, according to and under the law, are considered the norm. Law is assumed not to be racist”.³²⁸ The consequence of

³²⁴ Mitchell, *supra* note 245.

³²⁵ See Butler, *supra* note 52; See also Delgado, Stefancic & Harris, *supra* note 13; Maynard, *supra* note 19; Parks, *supra* note 64.

³²⁶ Bell, *supra* note 5 at 3.

³²⁷ Anderson, *supra* note 6; Morris ONCA 2021, *supra* note 51.

³²⁸ Glasbeek, *supra* note 194.

the historical and current concealment of racism by and through law is the under-development of legal and evidentiary tools to confront and condemn it.³²⁹

Theriault also provides a case study for the limitations and difficulties involved in disrupting trial or policing systems. Indeed, nothing changed despite the moment in which the case was heard. *Theriault* was a high-profile prosecution of a white police officer during a moment of racial unrest due to the police killing of George Floyd. Racial justice and Black Lives Matter advocates reasonably expected that Justice Di Luca would have been more attentive to the obvious racial dynamics given the heightened race consciousness and global appeals for racial justice from system actors. That did not occur. The trial judge mentioned the term race four times in his 66-page, 336-paragraph decision.³³⁰ In paragraph 11, he acknowledged the obvious racial dynamics but then decided that it was not his role to conduct a broader inquiry into the phenomenon of race and policing. In paragraph 246, he briefly explained that he “must assess his evidence in a fair context and with a sensitivity to the realities that racialized individuals face in society.” Despite the trial judge’s uncritical acknowledgment of these realities, he failed to draw on the obvious racial/social context that animated the case to provide the necessary analytical insight for his credibility assessments. Even the perceived wins described above were significantly blunted by what was lost.

Some will see Dafonte as receiving a relatively “just” outcome. So, in some sense, Dafonte may have simultaneously won and lost. He succeeded in that the judge acknowledged that the Theriault brothers probably unjustifiably maimed him but lost when the judge was invited to but declined to find guilt beyond a reasonable doubt of aggravated assault. This contradiction is expected in a criminal trial, whether race is an inconspicuous or salient feature. We have recently witnessed similar results in two Ottawa criminal cases - *R v Desjourdy* (2013) involving the police sexual assault and beating of Stacy Bonds and *R v Montsion* (2020), the police killing of Abdi Abdirahman – in both cases, the officers were acquitted outright. Indeed, notwithstanding the outcome, the fact that there was any criminal

³²⁹ Tanovich, *supra* note 9 at 657.

³³⁰ *R v Theriault*, *supra* note 57 at paras 11 & 246.

prosecution is rare and will be considered by some as a victory. The high levels of police misconduct and violence against Black Canadians are often shielded from oversight by criminal courts and public complaint bodies, which furthers distrust and cynicism from Black communities. Only in rare circumstances will police officers be charged under the *Criminal Code* or with internal disciplinary offences. Convictions are rarer still.

VI. CONCLUSION

This chapter highlighted the typicality and atypicality of the *Theriault* decision and how the criminal trial unfairly treats Black victims of police violence. Indeed, from a critical race perspective, *Theriault* is an apt case study of how the criminal legal system reinforces anti-Black racism. The trial judge acknowledged this phenomenon but decided his role was more circumscribed. However, were Black advocates and others reasonable to expect a different approach or outcome? Justice Di Luca is, in fact, correct in that his assigned task is to figure out if the Crown has proved its case. However, (1) he cannot do that task properly without attending to racial context, at the very least in order to inform his credibility assessments; and (2) his unwillingness or inability to attend to racial context in his decision-making process may be due, in part, to the system's inaccurate and problematic self-perception as aracial, neutral, and narrowly focused. So, in other words, the system styles itself as concerned with individual cases and treats social context as (largely) external to those disputes since social context is necessarily about trends disclosed by multiple cases; but, in so doing, it urges a distorted picture of each individual case. These dynamics are protective of the system's inherent racism. Perhaps, at most, Black people can expect the development of what I refer to as lifeline jurisprudence: A criminal jurisprudence which seeks to work within and accept the criminal system's inherently racist constraints but develops creative, resistive strategies and tools aimed at mitigating some of the damaging impacts on people currently before the criminal system. Thus, lifeline jurisprudence aims at harm reduction rather than radical structural changes like abolition. It also recognizes that the two approaches are neither mutually exclusive nor antagonistic.³³¹ The racial uprising of 2020 in the aftermath of George

³³¹ Jones, *supra* note 82.

Floyd's murder sparked a hope that, in hindsight, was perhaps rooted in the type of idealism that Bell critiqued. We have witnessed similar moments of heightened race consciousness throughout history that promised radical changes but failed to deliver anything more than ephemeral or modest gains.

CHAPTER THREE: PARADOXICAL RACE VISIBILITY

IN CRIMINAL SENTENCING LAW³³²

I. INTRODUCTION

Two recent appellate decisions, *R v Anderson* and *R v Morris*, took up the issue of how sentencing judges should weigh a Black offender's race and experience of anti-Black racism within a proportionality-based sentencing structure.³³³ In *Anderson*, Justice Derrick, writing for a unanimous Nova Scotia Court of Appeal ("NSCA"), held that sentencing judges "should carefully consider the systemic and background factors detailed in an IRCA [Impact of Race and Culture Assessment]. It may amount to an error of law for a sentencing judge to ignore or fail to inquire into these factors."³³⁴ IRCAs are designed to highlight specific cultural, social, and political mitigating factors at play in a Black offender's life that ought to be considered in sentencing.³³⁵ Justice Derrick held that sentencing judges need not be satisfied that the offender has established a causal connection to the crime before experiences of Blackness and anti-Black racism can properly be considered as a mitigating factor.³³⁶ In *Morris*, the Court of Appeal for Ontario ("ONCA"), in a unanimous decision, held that: "[t]here must ... be some [causal] connection

³³² Danardo S. Jones, "Paradoxical Race Visibility in Canadian Sentencing Law" (2024) 102:2 Canadian Bar Review (Forthcoming).

³³³ *Anderson*, *supra* note 6; *Morris ONCA 2021*, *supra* note 51; Dugas, *supra* note 70 at 121 [Dugas]; The ONCA had earlier taken up the same issues in *R v Hamilton*. See *Hamilton*, *supra* note 70; *Borde*, *supra* note 70; *Abbate*, *supra* note 70 [Abbate]. Devlin & Sherrard, *supra* note 70 [Devlin & Sherrard]; Tanovich, *supra* note 70 [Tanovich]. Ives, *supra* note 70; Lawrence & Williams, *supra* note 118 [Lawrence & Williams].

³³⁴ *Anderson*, *supra* note 6 at para 118.

³³⁵ *X*, *supra* note 72 at para 198. Sudbury, *supra* note 72 at 64 [Sudbury]. Calathes, *supra* note 72 [Calathes]. See Wright, *supra* note 72 [Wright]. Arguably proportionality—as implemented in contemporary Canadian society through the *Criminal Code*'s sentencing provisions—may be incompatible with the anti-racist goals that IRCAs are meant to realize.

³³⁶ *Anderson*, *supra* note 6. Anderson was greeted with enthusiasm and publicly praised by lawyers as a progressive step toward a fairer sentencing system for Black offenders; See Canadian Association of Black Lawyers, *supra* note 73 [CABL]. Davidson, *supra* note 73 [Davidson]. Raymer, *supra* note 73 [Raymer].

between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue.”³³⁷ The ONCA further held that absent this connection any raced-based mitigation “becomes a discount based on the offender’s colour.”³³⁸

Both decisions, *Anderson* and *Morris*, acknowledged the presence of anti-Black racism and its possible relevance to sentencing but adopted different positions on translating the harms of anti-Black racism into concrete sentencing outcomes. Crucially, in adjudicating this issue, both decisions took for granted that the sentencing process must be structured through a proportionality assessment.³³⁹ Indeed, jurisprudential inquiries in Canada (but not necessarily all those adopted or supported by scholars) take as their starting point the fundamental premise that proportionality should govern legal punishment—a central premise within the criminal justice system that finds expression in statute,³⁴⁰ case law,³⁴¹ and jurisprudential theory dating back to Hammurabi.³⁴² This starting assumption is reasonable and inevitable since courts work within a statutory scheme that expressly mandates proportionality-driven sentencing. However, the analysis below will show that despite philosophical and jurisprudential assumptions about how proportionality ensures equality, the proportionality principle limits how much racial justice could be achieved through sentencing reform of the kind invited in *Anderson*.³⁴³

By undertaking a focused doctrinal analysis of contemporary caselaw on whether and how a Black offender’s race should be accounted for within the proportionality analysis, this article will touch

³³⁷ *Morris ONCA 2021*, *supra* note 51 at para 97.

³³⁸ *Ibid* at para 97. *Morris* attracted reactions ranging from tepid and cautious optimism to disappointment. See Kerr, *supra* note 75 [Kerr]. Fine, *supra* note 75 [Fine]. Ammar, *supra* note 75 [Ammar].

³³⁹ *Morris ONCA 2021*, *supra* note 51 at para 61; *Anderson*, *supra* note 6 at para 142.

³⁴⁰ *Criminal Code*, *supra* note 77.

³⁴¹ *Ipeelee*, *supra* note 47 at para 37; *Lacasse*, *supra* note 78 at para 12; *R v Friesen*, *supra* note 78 at paras 30–33; *M (CA)*, *supra* note 78 at para 80; *MVA*, *supra* note 78 at para 129; *R v Nur*, 2015 SCC 15 at paras 43–44 [Nur].

³⁴² See von Hirsch, “Philosophy”, *supra* note 79 [“Philosophy”]. von Hirsch, *supra* note 79 [“Desert Perspective”].

³⁴³ *Anderson*, *supra* note 6 at para 145.

on more profound debates about the principle of proportionality and the justifiability of punishment.³⁴⁴ This article argues that the principle of proportionality, as conceptualized in Canadian sentencing law, with its fixation on notions of blameworthiness that reinforce pathologized narratives of Black lives and communities, may be incompatible with racial justice³⁴⁵—at least in a racist society like ours, where anti-Black racism is a longstanding structural feature.³⁴⁶

I reviewed 92 recently reported sentencing decisions from across Canada, and overwhelmingly from Ontario and Nova Scotia—the two jurisdictions where IRCAs are most frequently used and have been the subject of appellate analysis. These decisions were from the period of November 2014—the year when the first reported use of an IRCA occurred in *R v “X”*—to August 2023. The dataset of 92 cases was analyzed on two registers. First, I identified the criminal offences for which the offenders were being sentenced in order to determine which types of offences have been attracting racism-conscious sentencing. As explained below, these reports are disproportionately used in cases involving serious criminal activity that is stereotypically associated with Black people, such as gun violence and drug trafficking.³⁴⁷ Second, I identified common social markers (such as fatherlessness or early exposure to violence) that are cited by sentencing judges in these decisions and thereby associated, in our jurisprudence, with Blackness. As explained below, these social markers tend to track pernicious stereotypes about dysfunction in Black families and communities.

³⁴⁴ See Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law*, Oxford Legal Philosophy (Oxford: University Press, 2011) [Tadros].

³⁴⁵ See M Tonry, “Proportionality, parsimony, and interchangeability of punishments” in M Tonry, ed, *Why Punish? How Much? A Reader on Punishment* (New York: Oxford University Press, 2011) 217 [Tonry]. See BA Hudson, “Punishing the poor: Dilemmas of justice and difference” in W Heffernan & J Kleinig, eds, *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford: Oxford University Press, 2000) 189 at 189 [Hudson].

³⁴⁶ St G Walker, *supra* note 184 at 7 [St G Walker].

³⁴⁷ See Akwasi Owusu-Bempah, *Black Males’ Perceptions of and Experiences with the Police in Toronto* University of Toronto, 2014) [unpublished].

The decisions all considered how issues of race and culture can or should be introduced into the sentencing arena through either judicial notice or race-conscious pre-sentence reports. This systematic case analysis unearths concerning trends whereby racism-conscious sentencing practices and strategies may inadvertently reinforce some of the anti-Black stereotypes they are intended to confront. With these trends in mind, this article queries whether and how courts can achieve racial justice for Black offenders within a proportionality-driven sentencing regime. The conclusion is: if we accept that our proportionality-based sentencing regime is premised on an understanding of morality and social responsibility that assumes fundamental notions about basic equality that are inconsistent with Black peoples' experiences in Canada, then we must confront the possibility that the notion of fit and proportionate sentences for Black people cannot be achieved without a wholesale dismantling and restructuring of the current institution of punishment.³⁴⁸

The concept of proportionality can reinforce archaic norms and notions about Black bodies' status, belonging, identity, and worth.³⁴⁹ Moreover, the demands of proportionality, with its fixation on calibrating blame, can distort and pathologize Black lives in a perverse attempt at sentence mitigation, resulting in what I refer to as the paradox of visibility. The theme of paradoxical race visibility aims to comprehend and redefine the impact of incorporating race awareness into the criminal sentencing process, which can have positive and negative consequences. Indeed, introducing race at the sentencing phase is a challenging and perhaps even a paradoxical manoeuvre—but one that may also be logical insofar as we operate within the cruel illogic of white supremacy.

This article, the first of two companion pieces, explores race visibility's contradictory and pernicious nature when examined through existing sentencing theories. The second article,

³⁴⁸ See Zinger, *supra* note 80 [Zinger].

³⁴⁹ Tonry, *supra* note 345 Some scholars have suggested alternatives that might be more compatible with racial justice, assuming the same pervasive conditions of systemic racism, for example, abolitionism and restorative justice.

however, will pivot to consider qualitative data generated from two interview groups querying what various stakeholders think about inviting an explicit consideration of anti-Black racism and an offender's Blackness/race into sentencing.³⁵⁰ Section One of this present article will discuss Canadian sentencing law's fundamental objectives and principles, focusing on how Canadian sentencing jurisprudence conceptualizes the proportionality principle and incorporates the retributive theory of punishment. Following that, Section Two will focus on the genealogy of IRCAs, what they contain and the critical cases that consider their utility in Canadian sentencing jurisprudence. Section Three analyzes the inherent tensions of race amplification and the paradoxicality of race discourse in sentencing proceedings.

II. SECTION ONE

i. The Principle of Proportionality

Before examining the specifics of the race and sentencing jurisprudence reviewed for this article, it is necessary to understand the legislative scheme that structured those decisions and the theories of justice that animate it. The principle of proportionality and the institution of criminal punishment more broadly raise a host of philosophical questions that ultimately cluster around a fundamental problem: i.e., under what conditions, if any, can the liberal State justifiably inflict intentional harm on an individual?³⁵¹ Section 718 of the *Criminal Code* implicitly answers that problem by expressly setting out the purpose and principles of criminal sentencing in Canada.³⁵² These include parity, totality, restraint, and proportionality. Among these basic tenets,

³⁵⁰ Danardo S Jones, "Probing the Data: Perspectives on Race Visibility in Canadian Sentencing Proceedings" (2024) Windsor YB Access Justice [forthcoming] [Jones].

³⁵¹ Marie Manikis, "Recognizing State Blame in Sentencing: A Communicative and Relational Framework" (2022) 81:2 Cambridge LJ 294 at 314 [Manikis]. Antony Duff & Zachary Hoskins, "Legal Punishment" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, spring 2018 ed (Stanford: Metaphysics Research Lab, Stanford University, 2018) [Duff & Hoskins]; Mirko Bagaric, "Proportionality in Sentencing: its Justification, Meaning and Role" (2000) 12:2 Current Issues in Crim Justice 143 at 55 [Bagaric].

³⁵² *Criminal Code*, RSC 1985, c C-46; This section came into force on September 3, 1996. Gerry Ferguson, "Department of Justice - A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code", *Research and Statistics Division, Department of Justice Canada* (5 August 2016), online: <<https://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/index.html>>.

proportionality is elevated as the “fundamental principle” of criminal sentencing.³⁵³ The principle of proportionality requires sentencing courts to ensure sentences are proportionate in that the punishment reflects the offence’s gravity and the offender’s moral blameworthiness.³⁵⁴

As conceptualized and entrenched in Canadian sentencing law, proportionality functions as a restraint mechanism against excessively severe punishments or those considered disproportionately lenient.³⁵⁵ In other words, punishment must be commensurate with blameworthiness: offenders should receive no more or less punishment than they deserve.³⁵⁶ However, sentencing judges must also weigh other complicated and contradictory factors.³⁵⁷ For example, under the section 718 sentencing framework, judges must balance retributive (moral desert) and consequentialist (utility) considerations.³⁵⁸

Proportionality is venerated in Canadian sentencing law and has a constitutional dimension.³⁵⁹ Described as the “*sine qua non* of a just sanction,”³⁶⁰ all other sentencing principles are secondary and must, in their application, promote proportionality.³⁶¹ For a sentence to be considered fair and just, it must be proportionate to the gravity of the offence and the offender’s degree of responsibility/moral blameworthiness.³⁶² Some scholars suggest that proportionality has two dimensions: ordinal and cardinal.³⁶³

³⁵³ *Criminal Code*, *supra* note 77; Marie Manikis, “The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions” (2022) 59:3 Osgoode Hall LJ 587 at 604 [Manikis].

³⁵⁴ *Criminal Code*, *supra* note 77.

³⁵⁵ *M (CA)*, *supra* note 78 at para 80; *Ipeelee*, *supra* note 47 at para 37; von Hirsch, *supra* note 79; *R v Nasogaluak*, 2010 SCC 6 at para 42 [*Nasogaluak*]; *Nur*, *supra* note 341 at paras 43–44.

³⁵⁶ See von Hirsch, *supra* note 79.

³⁵⁷ *Morris ONCA 2021*, *supra* note 51 at para 102.

³⁵⁸ Bagaric, *supra* note 351 at 145.

³⁵⁹ *Nasogaluak*, *supra* note 355; *R v Friesen*, *supra* note 78; *Ipeelee*, *supra* note 47; *R v Bissonnette*, 2022 SCC 23 [*Bissonnette*].

³⁶⁰ *Ipeelee*, *supra* note 47 at para 37.

³⁶¹ *R v Parranto*, 2021 SCC 46 at para 10 [*Parranto*]; *R v LTN*, 2021 SKCA 73 at para 48 [*LTN*].

³⁶² *Criminal Code*, *supra* note 77; *Nasogaluak*, *supra* note 355 at para 41.

³⁶³ Andrew von Hirsch, “Proportionality in the Philosophy of Punishment: From Why Punish to How Much?” (1991) 25:3 & 4 *Isr L Rev* 549 at 572.

Ordinal proportionality suggests that a sentence must reflect the gravity of the offence relative to other offences and the various degrees of seriousness in the range of conduct covered by the offence.³⁶⁴ To a large extent, ordinal proportionality also incorporates retributivism—as it regards different levels of blameworthiness as a legitimate basis (or perhaps the only legitimate basis) for assigning different sentences.³⁶⁵ Cardinal proportionality makes the link between proportionality and blameworthiness more evident by seeking an absolute correspondence between wrongdoing and blameworthiness.³⁶⁶ Cardinal proportionality also assumes it is possible to find some non-arbitrary quantum of punishment for a given crime; i.e., that not only can we rank-order crimes and punishments from least to most severe, but also that we can ensure any individual crime and its punishment are properly matched on their own terms.³⁶⁷

Briefly, retributive theories of punishment broadly hold that wrongdoers morally deserve punishment.³⁶⁸ In other words, sentencing judges must strike an appropriate and fair balance of just deserts.³⁶⁹ From a retributive perspective, proportionality is understood as a theory of justice which ostensibly allocates punishment based on moral desert.³⁷⁰ Moreover, retributivism is retrospective in that it aims to punish offenders for their past conduct (i.e., the offence they were convicted of committing). Some retributivists assert that proportionality is equitable because it seeks to curb arbitrary punishment and ensure parity in sentencing allocation.³⁷¹ Von Hirsch contended that when proportionality is disregarded, offenders are unfairly visited, through the

³⁶⁴ Manikis, *supra* note 351 at 317; See Alec Walen, “Retributive Justice” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, summer 2021 ed (Stanford Encyclopedia of Philosophy Archive <<https://plato.stanford.edu/archives/sum2021/entries/justice-retributive/>>).

³⁶⁵ Walen, *supra* note 364.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ Bagaric, *supra* note 351 at 145.

³⁶⁹ Nasogaluak, *supra* note 355 at para 42.

³⁷⁰ von Hirsch, “Philosophy”, *supra* note 79 at 79.

³⁷¹ *Ibid.*

penalties imposed on them, with more implicit blame (or less) than the actual blameworthiness of their conduct warrants.³⁷²

Retribution is a justification for punishment and shares commonalities and premises with proportionality. Both proportionality and retribution aim to apportion and calibrate blame/moral culpability by ensuring that sentences are proportionate to the gravity of the crime and the offender's level of blameworthiness.³⁷³ A fundamental aim of retributivism and proportionality is aligning and balancing blameworthiness and desert.³⁷⁴ Proportionality does not purport to say why punishment is good, but only the conditions under which it is just.³⁷⁵ Retributivism, however, supplies the theoretical and philosophical justification for punishment: i.e., offenders morally deserve punishment for their wrongful acts, but that punishment must be commensurate with their level of blameworthiness and the gravity of the offence.³⁷⁶

In contrast, consequentialist theories of punishment are forward-looking and attempt to use the offender's punishment to promote forward-looking goals, mainly preventing future criminal behaviour by the offender and the wider public through deterrence and rehabilitation.³⁷⁷ Retributivists contend that offenders should be considered and treated as rational agents, not tools to achieve consequentialist goals.³⁷⁸ They worry that offenders may be unfairly subjected to harsher punishment than they deserve to achieve broader goals like deterrence.³⁷⁹ Nevertheless, consequentialists would hold that because punishment is—normatively speaking—a bad practice,

³⁷² See von Hirsch, "Philosophy", *supra* note 79.

³⁷³ *M (CA)*, *supra* note 78 at para 81; von Hirsch, "Philosophy", *supra* note 79 at 81 Retributive accounts of punishment tend to be premised on specific theories of culpability (or moral blameworthiness), especially the choice-based conceptions of culpability. See R A Duff, "Choice, Character, and Criminal Liability" (1993) 12:4 Law and philosophy 345–383 [Duff]; The Court also adopted this conception of culpability in *R v Ruzic*, 2001 SCC 24 at para 34 [Ruzic].

³⁷⁴ *Nasogaluak*, *supra* note 355 at para 42.

³⁷⁵ Morris J Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28:1 Oxford J Leg Stud 57 at 71.

³⁷⁶ See Walen, *supra* note 364.

³⁷⁷ *Ibid*; Hend Hanafy, "Bentham: Punishment and the Utilitarian Use of Persons as Means" (2021) 19:1 J Bentham Studies 1 at 9.

³⁷⁸ See Walen, *supra* note 364.

³⁷⁹ *Ibid*.

its imposition must carry some benefit to the offender and society.³⁸⁰ For some scholars, punishment can only be justified on consequentialist grounds, given the significant burdens imposed on citizens by the practice. If the consequential benefits do not outweigh the detrimental effects of the practice, then the practice is unjustifiable.³⁸¹ However, using punishment to advance societal goals contradicts the retributive ethic.³⁸²

Section 718 directs judges to combine retributive and consequentialist approaches, even though these two approaches conflict according to philosophical debate. While retribution is not expressly part of the section 718 framework, it is implicit in the notion of proportionality as enshrined in the *Criminal Code* and explicitly expounded by the Supreme Court of Canada (“the Court”).³⁸³ For example, in *Nasogaluak*, Justice Lebel held that “the rights-based, protective angle of proportionality is counter-balanced by its alignment with the ‘just deserts’ philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused.”³⁸⁴ Moreover, in *R v M (CA)*, the Court, in holding that retribution is a legitimate principle of Canadian sentencing law, explained that retribution:

is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be “just and appropriate” under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions.³⁸⁵

³⁸⁰ *Ibid.*

³⁸¹ Antony Duff & Zachary Hoskins, “Legal Punishment” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, spring 2018 ed (Metaphysics Research Lab, Stanford University, 2018).

³⁸² See von Hirsch, *supra* note 79 According to von Hirsch “the institution of criminal punishment is not an appropriate ‘instrument’ to resolve social problems.”

³⁸³ *Criminal Code*, *supra* note 352; *M (CA)*, *supra* note 78 at paras 79–80; *MVA*, *supra* note 78 at para 129.

³⁸⁴ *Nasogaluak*, *supra* note 355 at para 42.

³⁸⁵ *M (CA)*, *supra* note 78 at para 79 [emphasis in original].

The sentencing principles and practices outlined above have animated the Canadian criminal justice system long before being codified in section 718 of the *Criminal Code*. Increasingly, courts and commentators are turning their attention to how social context considerations, including pervasive anti-Black racism, should inform the application of these principles.³⁸⁶ Social context can inform consequentialist theories of punishment since the goals of deterrence and rehabilitation are more likely to be achieved when diverse members of the public perceive the system as legitimate and when efforts to rehabilitate offenders are designed with attentiveness to different individuals' material circumstances and cultural expectations.³⁸⁷

Retributivist theories, for their part, are concerned with appropriately calibrating blameworthiness. Some retributivist scholars accept that social deprivation, for example, the impact of racism on the offender, should be considered if it is appropriate in the blame calculus.³⁸⁸ Many sentencing decisions are likewise attentive to the significance of racism and other social context factors—though these factors are frequently taken up in a limited fashion.³⁸⁹ In an early leading decision on the significance of anti-Black racism in criminal sentencing, *R v Hamilton*, Justice Doherty offered the following observation about the limits of sentencing proceedings as a venue to address social inequalities: “A sentencing proceeding is ... not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or ‘make up’ for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.”³⁹⁰ Since *Hamilton*, advocates have tried to push social context more to the foreground, primarily through the use of IRCAs.

³⁸⁶ See *Anderson*, *supra* note 6; See *Morris ONCA 2021*, *supra* note 51. These decisions consider whether and how an offender's racial identity and associated burdens could mitigate their level of blameworthiness, thereby justifying a lower sentence. See Dugas, *supra* note 70.

³⁸⁷ See Barbara A Hudson, “Mitigation for social deprived Offenders” in Andrew von Hirsch & A Ashworth, eds, *Principled Sentencing: Readings on Theory and Policy*, 2nd ed (Oxford: Hart Publishing, 1998) 205; See Richard Delgado, “Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation” (1985) 3:1 Minnesota JL & Inequality.

³⁸⁸ Duff & Hoskins, *supra* note 381.

³⁸⁹ See *Borde*, *supra* note 70.

³⁹⁰ *Hamilton*, *supra* note 70 at para 2.

III. SECTION TWO

i. IRCAs: Creating Space for Race in a Proportionality-Driven Sentencing Structure

Scholars who study race and sentencing have sought to reduce Black mass incarceration and confront anti-Blackness in the criminal justice system by redressing the known problem of colour-blind sentencing.³⁹¹ They investigate how the fundamental principle of proportionality, enshrined in section 718.1 of the *Criminal Code* and interpreted by the Court, can be applied to promote fairer sentences for Black offenders. The problem of disproportionately harsh punishment for Black offenders is well-documented. For example, recent studies by the Office of the Correctional Investigator (“OCI”) have recorded that Black Canadians are over-represented in the Federal prison population. The OCI found in 2015-2016 and 2016-2017 that while Black Canadians represented only 3% of Canada’s population, they make up 8.6% of all those federally incarcerated.³⁹² One study found that “Black offenders were most likely to be incarcerated in ... Ontario.”³⁹³ In *R v Jackson*, Justice Nakatsuru commented, “stripped to its essentials, African Canadians have been jailed three times more than their general representation in society for quite some time. The problem is not getting better.”³⁹⁴

Studies suggest that when specific criminal behaviour gets assigned to particular bodies in the public imagination, there is a corresponding increase in punishment severity and frequency.³⁹⁵ In other words, when a specific crime—for example, drug possession—becomes associated with a particular racial group, that racial group is more likely to be investigated for and convicted of that offence and is more likely to be sentenced harshly for it. The cycle becomes self-reinforcing, as

³⁹¹ See Canadian Association of Black Lawyers, *supra* note 73; Davidson, *supra* note 73; Raymer, *supra* note 73; Ives, *supra* note 70; Dugas, *supra* note 70.

³⁹² Howard Sapers, “Annual Report of the Office of the Correctional Investigator 2015-2016”, (2016), online: <<https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2015-2016>>; Zinger, *supra* note 80.

³⁹³ *A Profile of Visible Minority Offenders in the Federal Canadian Correctional System*, by Shelley Trevethan & Christopher J Rastin (Research Branch Correctional Service of Canada, 2004) at 12.

³⁹⁴ *Jackson*, *supra* note 69 at para 40.

³⁹⁵ Anne-Marie Singh & Jane B Sprott, “Race Matters: Public Views on Sentencing” (2017) 59:3 Can J Corr 285 at 303; See David A Sklansky, “Cocaine, Race, and Equal Protection Essay” (1995) 47:7 Stan L Rev 1283.

the overrepresentation of a particular group among those punished for a given offence is misinterpreted as evidence that group members are more likely to commit that offence.³⁹⁶

The general phenomenon described above, whereby specific communities are targeted for greater punitive responses, has long impacted Black people. The criminalization of Black people dates back to slavery and has been unrelenting.³⁹⁷ While that more detailed history is beyond the scope of this paper, the key point, for present purposes, is that it has resulted in entrenched stereotypes about Black criminality that help to explain the contemporary data showing the mass incarceration of Black people. Because of the phenomenon's self-reinforcing nature, anti-Black stereotypes also work to "naturalize" excessively harsh sentences by giving the false impression that they reflect greater blameworthiness, i.e., that they are, in fact, proportionate. Concurrently, Black people are not immune from taking on this perverse narrative themselves. Black people can and do internalize these presuppositions. Nonetheless, these stereotypes find their genesis and are reinforced through white supremacist ideologies.³⁹⁸

Indeed, notions about Black criminality, dangerousness, and recalcitrance predate current expressions of anti-Blackness in Canada's criminal justice system. These notions justified Black slavery and post-slavery attitudes about Black lives.³⁹⁹ Frantz Fanon aptly noted that Black lives are "woven" from these and other invidious presuppositions.⁴⁰⁰ These notions construct a distorted and grotesque imagery that stands as an external projection of Blackness that is paradoxically made more prominent when Black people make attempts at eliding it or deploying it as a means of

³⁹⁶ See Canadian Association of Black Lawyers, "Race and Criminal Injustice: New report from CABL, Ryerson's Faculty of Law and the University of Toronto confirms significant racial differences in perceptions and experiences with the Ontario criminal justice system", (10 February 2021), online: <<https://cabl.ca/race-and-criminal-injustice-new-report-from-cabl-ryersons-faculty-of-law-and-the-university-of-toronto-confirms-significant-racial-differences-in-perceptions-and-experiences-with-the-ontario/>>.

³⁹⁷ See Maynard, *supra* note 19.

³⁹⁸ John T Warren, "Doing whiteness: On the performative dimensions of race in the classroom" (2001) 50:2 Communication Education 91 at 103; Henry A Willis et al, "The Associations Between Internalized Racism, Racial Identity, and Psychological Distress" (2021) 9:4 Emerging Adulthood 384 at 384–385.

³⁹⁹ See Maynard, *supra* note 19.

⁴⁰⁰ Fanon, *supra* note 15 at 111.

explaining their material condition. I refer to this phenomenon as the paradox of race visibility, which I discuss in more detail below.

ii. What are IRCAs?

IRCAs were first introduced in Nova Scotia in the case of *X* in 2014, followed by *Jackson* in Ontario in 2018.⁴⁰¹ In Canada, IRCAs have become an increasingly popular method that defence lawyers use to introduce race and anti-Blackness in sentencing. IRCAs highlight specific cultural, social, and political mitigating factors that judges should consider when sentencing Black offenders.⁴⁰² However, unlike “regular” pre-sentence reports, which sentencing judges routinely order, IRCAs are not prepared by state agents like probation officers. Instead, social workers, often in private practice, with specialized knowledge about systemic anti-Black racism prepare IRCAs.

IRCA writers provide sentencing judges with information on the offender’s background, including insights about systemic racism and other structural inequalities and their likely impact on the offender’s decision to commit the offence. In this way, as explained by Justice Derrick (as she then was) in *X*, IRCAs can provide sentencing judges with “a more textured, multi-dimensional framework for understanding [the defendant], his background and his behaviours.”⁴⁰³

IRCAs have been described in *Anderson* as providing “indispensable” insight in a “[comprehensive] and [efficient manner]” into the multi-dimensional ways anti-Black racism

⁴⁰¹ *X*, *supra* note 72 at para 41; *Jackson*, *supra* note 69 at para 42; Before those cases, Defence counsel would simply, raise the issue of the offender’s race and culture to provide the sentencing judge with some context to assist him/her in arriving at a proportionate sentence. See *R v Ferrigan*, 2007 ONSC 16828 [*Ferrigan*]; *R v Duncan et al*, 2012 CanLII 35904 (ON SC) [*Duncan*]; There are recent cases, however, where counsel does not submit a CIAR/IRCA report. See *R v Reid*, 2016 ONSC 8210 [*Reid*]; *R v Desmond*, 2018 NSSC 338 [*Desmond*]; *R v Brissett & Francis*, 2018 ONSC 4957 [*Brissett*]; *R v Williams*, 2018 ONSC 5409 [*Williams*]; *R v Elvira*, 2018 ONSC 7008 [*Elvira*]; *R v Nimaga*, 2018 ONCJ 795 [*Nimaga*].

⁴⁰² These reports have been referred to as Cultural Impact Assessment Reports (“CIAR”), Enhanced Pre-Sentence Reports (“EPR”) and IRCA. In this paper, I will refer to these reports as IRCAs or race-based reports. See *X*, *supra* note 72 at para 34; Duff & Hoskins, *supra* note 381 at 5.

⁴⁰³ *X*, *supra* note 72 at para 98.

brought the offender before the court.⁴⁰⁴ For example, the IRCA adduced in *Morris* highlighted mitigative factors that aimed to contextualize blame and inform sentencing determinations. The ONCA held that,

[t]he moral blameworthiness of Mr. Morris's conduct is mitigated by his mental and physical health issues, as well as his educational and economic disadvantages. All of those factors are influenced by the systemic anti-Black racism Mr. Morris has experienced. The factors can only properly be understood, for the purposes of determining the appropriate sentence, by having regard to that context.⁴⁰⁵

IRCA's are, in essence, pre-sentencing reports that aim to, among other things, highlight an offender's racialized experiences and ensure that cases are appropriately understood in context. In this way, IRCA's are meant to promote more careful attention to structural anti-Black racism in sentencing and facilitate proportionate sentences for Black offenders.

iii. The Jurisprudential Genealogy of IRCA's

The infusion of race consciousness into the sentencing process is not new, having been a feature of Canadian sentencing law since the 1996 *Criminal Code* reforms and the Court's 1999 decision in *R v Gladue*.⁴⁰⁶ Since then, we have seen the Court direct sentencing judges to take a more careful approach when sentencing Indigenous offenders.⁴⁰⁷ Indeed, failure to do so is an error in law and subject to appellate intervention.⁴⁰⁸ Lawyers and activists advocated for a similar approach to sentencing Black offenders, arguing that both communities face similar plights.⁴⁰⁹ Indeed, while not driven by the same legislative, constitutional, and judicial imperatives, IRCA's share similarities with *Gladue* reports.⁴¹⁰

⁴⁰⁴ *Anderson*, *supra* note 6 at para 119; See *X*, *supra* note 72 at para 194; *Morris ONCA 2021*, *supra* note 51 at para 99.

⁴⁰⁵ *Morris ONCA 2021*, *supra* note 51 at para 179.

⁴⁰⁶ *R v Gladue*, 1999 CanLII 679 [*Gladue*].

⁴⁰⁷ *Ibid*; *Ipeelee*, *supra* note 47.

⁴⁰⁸ *Gladue*, *supra* note 406 at para 93; *Ipeelee*, *supra* note 47 at para 87.

⁴⁰⁹ *Borde*, *supra* note 70 at para 27; *Morris ONCA 2021*, *supra* note 51 at para 90.

⁴¹⁰ *Morris ONCA 2021*, *supra* note 51 at para 90; See *Dugas*, *supra* note 70.

Before the implementation of IRCAs, *R v Borde* established that in certain cases, judges may appropriately consider systemic and background factors when determining sentencing, as long as those factors are connected to the offence committed and the values of the offender's community.⁴¹¹ In *Borde*, the ONCA considered the appropriate sentence for a 19-year-old Black man convicted of aggravated assault, gun possession and breaching his release order. The sentencing judge imposed 5-year imprisonment, which the ONCA lowered to 4 years given Borde's youth and because this was his first penitentiary sentence. Notably, however, the ONCA declined to reduce Borde's sentence to account for anti-Black racism. It reasoned that, despite the importance of considering Black offenders' systemic and background factors, these factors would not affect the sentence length, even if they were considered, given the seriousness of the offence.⁴¹²

A year later, the ONCA in *Hamilton* considered the same issue it did in *Borde*, i.e., the role that race and anti-Black racism should play in sentence proceedings.⁴¹³ That case involved the sentencing of Ms. Hamilton, a young Black single mother convicted of cocaine importation. Despite not being provided with any social context information from defence counsel, the sentencing judge considered Ms. Hamilton's race, gender, and the prevalence of anti-Black racism in Canadian society and ultimately sentenced her to a 20-month conditional sentence. The ONCA altered the sentence and imposed 20-month imprisonment. The ONCA concluded that the trial judge erred in sentencing Ms. Hamilton to a conditional sentence and reasoned that, where the offence is sufficiently serious, imprisonment will be the only reasonable response "regardless of the ethnic or cultural background of the offender."⁴¹⁴

Some scholars read *Hamilton* as limiting the reach and use of social context evidence in the sentencing of Black offenders.⁴¹⁵ They argue that in *Hamilton*, Justice Doherty limited the mitigative scope of submissions on the impact of anti-Blackness on the offender when he held that "[t]he fact that an offender is a member of a group that has

⁴¹¹ *Borde*, *supra* note 70 at para 30.

⁴¹² *Ibid* at para 35.

⁴¹³ *Hamilton*, *supra* note 70 at para 141.

⁴¹⁴ *Ibid* at para 100.

⁴¹⁵ Devlin & Sherrard, *supra* note 70 at 433.

historically been subject to systemic racial and gender bias does not in and of itself justify any mitigation of sentence. Lower sentences predicated on nothing more than membership in a disadvantaged group further neither the principles of sentencing, nor the goals of equality.”⁴¹⁶

Ostensibly, Justice Doherty worried that such a move would be perceived as an endorsement of race-based sentencing discounts—which would offend the proportionality principle in that it would allow demographics to act as a shorthand rather than requiring a context-specific analysis.⁴¹⁷

Nevertheless, in the period between *Hamilton* and *Morris*, some sentencing judges displayed less resistance when offenders introduced, whether through IRCAs or by inviting the court to take judicial notice, how anti-Blackness influenced their life choices and, indeed, the commission of the particular crime.⁴¹⁸ In *Morris*, which was decided 17 years after *Hamilton*, the ONCA again considered the role of social context evidence of race and anti-Blackness in sentencing proceedings.⁴¹⁹ Mr. Morris, a young Black man, was convicted of gun possession and sentenced to 12 months’ imprisonment. The Crown appealed the sentence, claiming that it was unfit and that the sentencing judge erred in his consideration and treatment of the defence evidence about the impact of anti-Black racism. *Morris* provided the ONCA with its first opportunity to consider the utility of IRCAs in sentencing proceedings involving Black offenders. The ONCA clarified the evidentiary value of race-based pre-sentence reports and explained how they could help judges contextualize and assess moral blameworthiness and blend the various sentencing objectives. Moreover, the ONCA held that there must be some evidentiary connection “between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue” and not the strict causal connection that *Hamilton* imposed.⁴²⁰

⁴¹⁶ *Hamilton*, *supra* note 70 at para 133.

⁴¹⁷ *Ipeelee*, *supra* note 47 at para 75.

⁴¹⁸ *Hamilton*, *supra* note 70 at paras 135–137; See e.g. *Ipeelee*, *supra* note 47.

⁴¹⁹ The decision was upheld in part on appeal.

⁴²⁰ *Morris ONCA 2021*, *supra* note 51; *Hamilton*, *supra* note 70 at 135–137.

In *Morris*, the ONCA was presented with two expert reports—one general (Report on Crime and the Black Male Experience in Toronto) and one specific to Mr. Morris (Sibblis report on Morris’ Social History). The former provided an in-depth review of the various ways anti-Black racism manifests in the lives of young Black Torontonians men. The latter report focused exclusively on the social history of Mr. Morris as described by Mr. Morris and other close collaterals, including his mother. According to the ONCA, the report on the experience of Black male Torontonians (“the general report”), particularly as it relates to race and criminal justice, “could have been the subject of judicial notice.”⁴²¹ However, the court found that “[t]he [general] report gave the trial judge the benefit of a scholarly, comprehensive, and compelling description of the widespread and pernicious effect of anti-Black racism.”⁴²²

In Nova Scotia, the issue of how anti-Blackness and race should inform sentencing has been commonplace in the lower courts for several years.⁴²³ However, the NSCA first considered this issue in *Anderson*.⁴²⁴ The case involved the sentencing of a young Black man convicted of gun possession. The sentencing judge imposed a conditional sentence with strict conditions. The Crown appealed, not to ask the NSCA to overturn the sentence (the Crown had sought a penitentiary sentence initially), but instead asked the court to guide sentencing judges tasked with sentencing Black Nova Scotians. *Anderson* considered how IRCAs and comparable sources of information about race and anti-Black racism should inform sentencing proceedings involving

⁴²¹ *Morris ONCA 2021*, *supra* note 51 at para 42.

⁴²² *Ibid.*

⁴²³ *X*, *supra* note 72. African Nova Scotians have a unique relationship with the Canadian State which ought to inform how Judges contextualize the background and systemic factors of Black Nova Scotian Offenders. See Adrienne Lucas Sehatzadeh, “A Retrospective on the Strengths of African Nova Scotian Communities: Closing Ranks to Survive” (2008) 38:3 J Black Studies 407; See also Michelle Y Williams, “African Nova Scotian Restorative Justice: A Change Has Gotta Come Restorative Justice” (2013) 36:2 Dal LJ 419; See also Shayla Martin, “A Journey Through Black Nova Scotia”, *The New York Times* (12 September 2022), online: <<https://www.nytimes.com/2022/09/12/travel/a-journey-through-black-nova-scotia.html>>.

⁴²⁴ Observers have hailed *Anderson* as being a superior decision. Faisal Mirza (now Justice Mirza of the Ontario Superior court of Justice), one of the lawyers who acted for Mr. Morris, commented to reporters that “the decision [Morris] is one to build on but said the Nova Scotia decision [Anderson] demonstrated a superior understanding of the historical and current detrimental impact of racism ... I hope in Ontario we will get to the same place one day as well.” See Fine, *supra* note 75; Canadian Association of Black Lawyers, *supra* note 73.

African Nova Scotian offenders. The NSCA held that “[t]he ‘method’ employed for sentencing African Nova Scotian offenders should carefully consider the systemic and background factors detailed in an IRCA. It may amount to an error of law for a sentencing judge to ignore or fail to inquire into these factors.”⁴²⁵

In *Morris* and *Anderson*, both appellate courts held that the information contained in IRCAs, whether standing alone or complemented by judicial notice or other comparable information, is indispensable in sentencing proceedings involving Black offenders.⁴²⁶ In *Morris*, it was held that IRCAs must provide an objective and balanced picture of the offender that judges can use to make sentencing decisions.⁴²⁷ To maintain objectivity, IRCA writers must “carefully consider the information available in the primary source documents collected.”⁴²⁸ Both courts endorsed the expanded use of IRCAs while encouraging judges to take judicial notice of anti-Black racism in Canada and its impacts on Black Canadians.⁴²⁹ Moreover, Crown attorneys will rarely seek to qualify an IRCA writer as an expert witness,⁴³⁰ subject to the following caveat by the ONCA: IRCAs must “be prepared to a high professional and authoritative standard,” “maintain objectivity,” and “cannot purport to speak for the offender or advocate on the offender’s behalf. A social context report must also distinguish between facts and an offender’s perceptions and beliefs as stated to the author.”⁴³¹ In *Anderson*, Justice Derrick held that “[t]o be a credible resource for the courts, IRCAs need to be prepared to a high professional and authoritative standard.”⁴³²

Morris and *Anderson* have created more space for heightened race visibility/consciousness in sentencing proceedings by firmly endorsing IRCAs.⁴³³ Both decisions have also given sentencing Judges greater clarity around what consideration(s) should judges afford to structural anti-Black

⁴²⁵ *Anderson*, *supra* note 6 at para 118.

⁴²⁶ *Morris ONCA 2021*, *supra* note 51 at para 123; *Anderson*, *supra* note 6 at para 111.

⁴²⁷ *Morris ONCA 2021*, *supra* note 51 at paras 144–145.

⁴²⁸ *Ibid* at para 146.

⁴²⁹ *Ibid* at para 123; *Anderson*, *supra* note 6 at para 111.

⁴³⁰ *Anderson*, *supra* note 6 at para 30.

⁴³¹ *Morris ONCA 2021*, *supra* note 51 at para 145.

⁴³² *Anderson*, *supra* note 6 at para 109.

⁴³³ *Morris ONCA 2021*, *supra* note 51 at para 145.

racism in sentencing proceedings.⁴³⁴ The ONCA suggests to those who defend, prosecute and sentence Black offenders that the general report introduced in *Morris* should be read and reread and presumably relied on by courts, even for those Black offenders who do not hail from Toronto or share very little in common with Mr. Morris or young, Black Torontonians men.⁴³⁵ While the social history report in *Morris*, prepared by Professor Sibblis, spoke explicitly about Mr. Morris's life experiences, the report on crime and the Black experience in Toronto was more general, albeit focused on a specific phenomenon—young Black men's interaction with criminal justice in Toronto. The general report encapsulates how anti-Black racism influences life choices and constrains opportunities. Arguably, when read alone, the general report fails to connect how structural anti-Blackness specifically manifested in Mr. Morris's life. By advocating for more precise attention to individual lived experience, I am not advocating for a stronger emphasis on a “causal connection” between anti-Blackness and how the offender came before the court, but rather a more precise understanding of how anti-Blackness affected the life of a particular offender.

Those whom the ONCA suggests read and rely on the general report must strive to understand the complexity and multi-dimensionality of Black lives.⁴³⁶ Indeed, the generic assessments in the general report, if relied on perfunctorily by sentencing judges, threaten to compress Blackness into a monolithic experience that ignores intersectionality, which can become harmful or inapposite in the sentencing context where reliance on stereotypes and broad generalizations have a detrimental impact on Black offenders' liberty, dignity, and self-worth. Indeed, by its very nature, anti-Blackness operates by flattening experience, generalizing, and thereby dehumanizing individuals.⁴³⁷

My specific intervention is that the flattening of Blackness in the general report as an urban, male-centric experience elides the complexities of Black identities and reinforces pernicious tropes that

⁴³⁴ *Ibid* at para 146.

⁴³⁵ *Ibid* at para 43.

⁴³⁶ See generally: Crenshaw, “Mapping”, *supra* note 177; Crenshaw, “Intersection”, *supra* note 177; Harris, *supra* note 177.

⁴³⁷ See generally: Crenshaw, *supra* note 26; Delgado, Stefancic & Harris, *supra* note 13.

may backfire when relied on to provide background information about Black offenders. Precisely, the objection here is not regarding the reliance on a general report in conjunction with an individualized social history, as was done in *Morris*; my concern is that a general report focused on broad social phenomena as they impact one facet of diverse Black communities (e.g., young Black men in Toronto), designed to provide context for a more individualized inquiry, should not, *on its own*, be taken to encapsulate diverse Black experiences. In the companion article, I explain the danger of portraying Blackness as a monolithic experience. When we use an intersectional approach to evaluate race critically, we avoid the pitfall of essentialism. Essentialism assumes all Black individuals share the same experiences of oppression and desire the same liberation. Instead, we should be encouraged to deconstruct identities and challenge harmful stereotypes to explore identity without harmful assumptions.⁴³⁸

It is harmful to, consciously or unconsciously, attempt to match the life experiences of the offender before the court with those experiences highlighted in the general report. While the offender may share common experiences with the generic, amorphous “young Black Torontonians” featured in the general report, they are also unique—a uniqueness that challenges the rote recitation of a static Black criminal justice experience. It is this uniqueness that must drive sentencing assessments. However, the complexity here is that, on the one hand, courts should eschew reliance on the archetypes or stereotypes that result from a perfunctory acceptance of the content in a general report, but, on the other hand, specific life stories must be read in the context of general social trends in order to detect and name systemic racism.

The ONCA held that it was appropriate for the sentencing judge in *Morris* to rely on both reports to determine a fit sentence for Mr. Morris. Despite criticizing the social history report for offering opinions that purportedly went beyond the author’s expertise, the ONCA explained that: “[w]e are confident that with more experience in preparing these reports, and added guidance from the courts, authors of these reports will appreciate the need to present an objective assessment, while

⁴³⁸ See Jones, *supra* note 350.

avoiding appearing to take on the role of advocate for the offender.”⁴³⁹ Moreover, “courts may acquire relevant social context evidence through the proper application of judicial notice or as social context evidence describing the existence, causes and impact of anti-Black racism in Canadian society, and the specific effect of anti-Black racism on the offender.”⁴⁴⁰ However, the ONCA did not make failure to take judicial notice of anti-Blackness a legal error in those cases where IRCAs are not employed.⁴⁴¹ Thus, in Ontario, any failure to consider social context evidence about the impacts of anti-Black racism on the offender will not necessarily warrant appellate intervention.

In contrast, in *Anderson*, the NSCA held that “a sentencing judge cannot preclude comparable information being offered, or fail to consider an offender’s background and circumstances in relation to the systemic factors of racism and marginalization. To do so may amount to an error of law.”⁴⁴² Moreover, sentencing judges should take judicial notice of incontrovertible facts such as “the existence of anti-Black racism.”⁴⁴³ This recognition, however, does not limit the inclusion of this reality in an IRCA. Justice Derrick added that such an inclusion “will contribute to deepening the awareness and understanding of judges, Crown prosecutors, defence counsel, probation officers, correctional officials, parole officers and others who are dealing with the offender.”⁴⁴⁴

While not making it a legal error to fail to consider anti-Black racism, it is evident that the ONCA has endorsed using IRCAs and race-based social context evidence in sentencing proceedings.⁴⁴⁵ The ONCA explained that while IRCAs “are not commonly used in Ontario,” it was hopeful that “their preparation can be adequately funded and they will become a common feature of sentencing in Ontario in appropriate cases.”⁴⁴⁶ Both *Anderson* and *Morris* suggest that judicial notice of

⁴³⁹ *Morris ONCA 2021*, *supra* note 51 at para 147.

⁴⁴⁰ *Ibid* at para 13 [emphasis added].

⁴⁴¹ *Ibid*.

⁴⁴² *Ibid* at para 118.

⁴⁴³ *Ibid* at para 42.

⁴⁴⁴ *Ibid* at para 111.

⁴⁴⁵ *Ibid* at para 147.

⁴⁴⁶ *Ibid*.

historical and contemporary forms of anti-Blackness and the indispensable content in IRCAs must complement each other.⁴⁴⁷ The Court concluded the same in the *Gladue* context.⁴⁴⁸ Acknowledging notorious and indisputable facts, such as the existence of anti-Black racism, provides, as the Court held in *R v Ipeelee*, “the necessary *context* for understanding and evaluating the case-specific information presented by counsel.”⁴⁴⁹ In sentencing Black offenders, an IRCA is a vehicle for presenting this case-specific information.

iv. Post-IRCA Observations

I surveyed 92 reported sentencing decisions between November 2014 and August 2023 where judges expressly considered the impact of anti-Black racism: 50 from Ontario, 34 from Nova Scotia, 3 from British Columbia, 1 from New Brunswick, and 4 from Alberta. These cases were identified and selected using the following keywords: “Black”, “offender”, “race”, and “sentence.” To ensure comprehensiveness, I used the same keywords across three caselaw search engines—CanLII, Westlaw and Quicklaw. However, the case dataset is limited by the fact that it does not include unreported sentencing decisions, nor does it address the particular phenomenon of sentences arising out of plea bargains where the negotiations may have been informed by the parties’ shared expectations of whether and how anti-Black racism might be accounted for were the issue to go to a contested sentencing hearing. Nevertheless, the dataset provides much-needed information about how race and anti-Black racism have been deployed in sentencing analyses. More importantly, it compels us to reflect on the efficacy of a sentencing innovation that has been with us for nearly a decade.

I observed that in 38 of the 50 reviewed Ontario cases, defence counsel did not rely on IRCAs. In fact, only 12 documented cases mentioned the use of an IRCA. In 21 Ontario cases, the court relied

⁴⁴⁷ *Ibid* at para 113; *Anderson*, *supra* note 6 at para 111.

⁴⁴⁸ *Ipeelee*, *supra* note 47 at para 60; See Jonathan Rudin, “Aboriginal over-representation and R. v. Gladue: where we were, where we are and where we might be going” (2008) 40 SCLR 687; Jonathan Rudin, “Aboriginal Peoples and the Criminal Justice System”, online:

<<https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf>>.

⁴⁴⁹ *Ipeelee*, *supra* note 47 at para 60.

on pre-sentence reports. Indeed, in 15 Ontario cases, defence counsel relied exclusively on the judge taking judicial notice of anti-Black racism and its impacts on Black Canadians. In contrast, Nova Scotian defence lawyers relied on IRCAS in 22 cases. Judicial notice was exclusively relied on in only 3 reported Nova Scotian cases. However, the reported decisions do not explain why these offenders declined to rely on IRCAs. Unfortunately, no social science data has been collected on the reasons behind an offender's decision to decline an IRCA or the consistency with which offenders are made aware of the option. Indeed, given their touted mitigative effect on sentencing, the reasons behind the decision not to rely on IRCAs warrant exploration.

Outside of the sentencing context, some of the reasons most cited for declining the use of an expert may include cost, time, and efficiency.⁴⁵⁰ For example, in *R v DD*, a non-sentencing case involving the delayed reporting of childhood sexual abuse, the Court held that there was no need to bring in an expert to testify about the implications of delayed reporting of child sexual abuse [or lack thereof] because a simple jury instruction would suffice.⁴⁵¹ The Court explained that “expert evidence is time-consuming and expensive. Modern litigation has introduced a proliferation of expert opinions of questionable value. The significance of the costs to the parties and the resulting strain upon judicial resources cannot be overstated.”⁴⁵² According to the Court, the expert's opinion in *DD* could be distilled to a bald, generic principle that aligned with existing law and was, therefore, properly the subject of a jury instruction. Here, by contrast, the very essence of an IRCA is that it is not generic or universalizable. Indeed, in the sentencing context, *Anderson* and *Morris* have emphasized the indispensability of the case-specific content in IRCAs—whether standing alone or complemented by judicial notice. Indeed, as we will see, claims that the kind of information offered in IRCAs enhances the sentencing process warrants further exploration.

But there may be other less apparent reasons why offenders decline to use IRCAs. For example, as with expert reports discussed in *DD*, IRCAs are expensive and may take a long time to prepare.

⁴⁵⁰ *R v DD*, 2000 SCC 43 at para 56 [*DD*].

⁴⁵¹ *Ibid* at para 58.

⁴⁵² *Ibid* at para 56.

⁴⁵³ A Black offender with a Legal Aid Ontario (“LAO”) certificate can apply for IRCA funding in Ontario.⁴⁵⁴ However, to be eligible for LAO IRCA funding, a Black offender must be facing two years or more of incarceration or be a young person facing a jail sentence.⁴⁵⁵ The eligibility criteria make it evident that IRCA funding decisions are driven partly by the seriousness of the charge.⁴⁵⁶ What, if any, implications flow from this funding eligibility policy?

One potential implication becomes apparent from the sentencing decisions reviewed for this article. All 92 decisions in my dataset were analyzed to identify the offence(s) for which the Black offenders were sentenced. I found that a higher percentage of these cases involved serious crimes related to drugs and firearms—offences stereotypically linked to Black Canadians.⁴⁵⁷ For example, LAO’s funding policy will predictably lead to more reliance on IRCAs in cases involving serious crimes, and this prediction is not only based on the data but is also consistent with larger Canadian trends. It is unreasonable to presuppose that Blackness is not an essential factor in sentencing cases involving charges that are deemed less serious in terms of the penalty they attract or public perception of their gravity, for example, theft or other offences not stereotypically associated with Black people. There are perhaps cogent reasons for this phenomenon, which implicate legal ethics, litigation strategy, client instructions, funding policies, and access to justice imperatives. Often, these concerns conflict with each other.

⁴⁵³ “Enhanced Pre-Sentence Report (EPSR)”, (2023), online: *Sentencing and Parole Project* <<https://sentencingproject.ca/enhanced-pre-sentence-reports>>; Jason Miller, “Judges slam cost, delays with ‘essential’ anti-Black racism reports”, *Toronto Star* (28 February 2023), online: <<https://www.thestar.com/news/gta/2023/02/28/fundamentally-unfair-judges-slam-cost-and-delays-with-essential-anti-black-racism-reports.html?rf>>.

⁴⁵⁴ If deemed eligible, they can claim these reports as a disbursement.

⁴⁵⁵ LAO, “Impact of Race and Culture Assessments (IRCAs)”, online: *Legal Aid Ontario* <<https://www.legalaid.on.ca/irca/>> [LAO].

⁴⁵⁶ *R v Husbands*, 2019 ONSC 6824 [*Husbands*]; *R v TJT*, 2018 ONSC 5280 [*TJT*] See Figure 1 for a table of IRCA decisions. *Anderson*, *supra* note 6; *Morris ONCA 2021*, *supra* note 51.

⁴⁵⁷ Jones, *supra* note 350; *Overrepresentation of Black People in the Canadian Criminal Justice System*, by Department of Justice Government of Canada (Ottawa: Department of Justice, 2022).

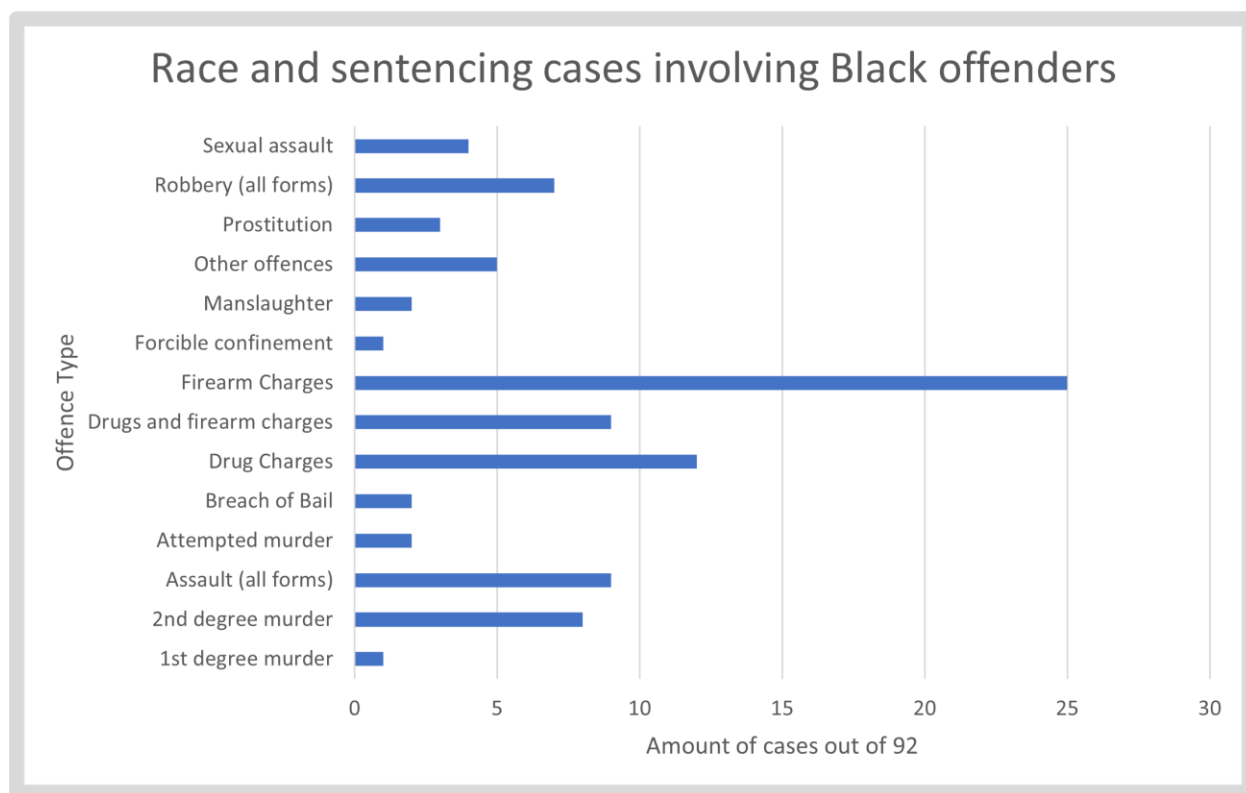


Figure 1: Reported Race and Sentencing Cases involving Black Offenders from 2014–2023 that involved the use of IRCAs or judicial notice of race.⁴⁵⁸

The decision to direct limited funds towards more serious charges carrying greater sentencing jeopardy is a pragmatic one, but it has broader impacts on the geographic and cultural communities from which Black offenders hail. An inadvertent link becomes reinforced when offence severity is used as the barometer to determine funding eligibility for IRCAs. Indeed, such policies further strengthen the trope that links Blackness and serious criminality. It is not IRCAs *per se* that preserve this link, nor is that the objective of IRCAs—quite the opposite. IRCAs are supposed to sever this invidious, deeply entrenched link. So, how do they become implicated in its strengthening? Briefly, any strategy that reinforces the union of Blackness and serious criminality,

⁴⁵⁸ Other offences include: Failing to stop after an accident and render assistance; Dangerous operation causing bodily harm to a police officer; DUI leading to bodily harm; Criminal negligence causing bodily harm; Criminal negligence causing death.

such as drug and firearm-related offences, must be carefully weighed. If IRCAs are almost exclusively used to explain the relationship between Blackness and gun or drug charges, then their cumulative effect on sentencing judges, lawyers and other stakeholders could be the entrenching of pernicious stereotypes that Black people are more likely to carry guns and use or traffic illegal drugs. As noted above, these pernicious stereotypes contribute to harsher sentences for Black people—the exact phenomenon that IRCAs are meant to redress.⁴⁵⁹

Deciding to use an IRCA is profoundly personal and depends on many factors, including case strategy, cost, time, and risk tolerance. That decision should be equally afforded to Black offenders facing lengthy sentences and those who are not. These reports draw attention to the anti-Blackness that does not materialize and de-materialize based on offence gravity. A viable corrective strategy requires policy changes around funding eligibility. Funding decisions should not focus on a “bang for your buck” assessment. In other words, the severity of the offence should not be among the eligibility criteria. Presumably, for many Black people convicted of an offence, just having a criminal record is a problem that will affect their future, even if the crime is relatively minor.

As noted above, race amplification or visibility through the expanded use of IRCAs impacts more than sentencing outcomes. It can concretize or attenuate existing stereotypes that justify the cruelty that all Black people, not just the individual offender, endure from the criminal justice system and society more broadly. The anti-Black stereotypes bred and amplified in our criminal courts impact all Black people, even those who do not come before sentencing court.⁴⁶⁰ Indeed, the race narratives in IRCAs are not exclusive to the offenders. Instead, they are collective narratives whose use and interpretation will reverberate outside the courtroom. Thus, a sentencing decision that consciously or unconsciously reinforces stereotypical links between Blackness and gun and drug crimes affects more Black people than the offender before the court.

⁴⁵⁹ Government of Canada, *supra* note 457.

⁴⁶⁰ Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 230; note 249.

When the offender is a person who claims or is assigned Blackness as an identity, their sentencing cannot be decoupled from their Blackness—and this is so, whether or not an IRCA is involved. Individually and collectively, the sentencing of Black offenders produces and reinforces perverse narratives of Blackness and criminality by making individual Black people the subject of official, public-facing condemnation for their criminal actions. The stigma that is associated with criminal sentencing attaches to the Black offender and to the construct of Blackness itself. That stigma endures long after the offender completes the sentence. That is the nature of Black punishment: It co-opts the individual Black offender’s case and uses it as a proxy to target entire Black communities by encouraging race-based policing and prosecutorial practices that are ultimately relied upon to sentence more Black offenders, creating a vicious and sometimes deadly feedback loop that is evidenced by the mass incarceration of Black people in Canada.⁴⁶¹

The iconography and accompanying narrative of the “dangerous Black person” is central in the decision-making around whom police officers investigate, arrest and charge.⁴⁶² It can also direct Crown prosecutors about what cases to proceed with and ultimately guide Judges in sentencing Black offenders. Moreover, the influx of Black offenders before the criminal courts and in prison reinforces the narrative of the recalcitrant, remorseless, and dangerous Black criminal. Thus, anti-Black racism within the criminal justice system not only targets Black “offenders” but is also instrumental in their creation. In some cases, this narrative travels with the offender from their initial arrest through to the sentencing phase, which can result in disproportionate sentences for Black offenders. There is also cogent evidence to suggest that Blackness is a central consideration in the public’s perception of sentence appropriateness.⁴⁶³

⁴⁶¹ *Black People in Criminal Courts in Canada: An Exploration Using the Relative Rate Index*, by Charbel Saghbini & Lysiane Paquin-Marseille (Research and Statistics Division - Department of Justice Canada, 2023); Butler, *supra* note 52 at 130.

⁴⁶² See Tanovich, *supra* note 196; note 232; *Report of the Independent Street Checks Review*, by Michael H Tulloch (Toronto: Queen’s Printer for Ontario, 2018) [Tulloch 2018]; *Race & Identity Based Data Collection Strategy: Understanding Use of Force & Strip Searches in 2020*, by Toronto Police Service (Toronto: Toronto Police Service, 2020). There are also gendered stereotypes that can also come into play.

⁴⁶³ Canadian Association of Black Lawyers, *supra* note 396.

While the sentencing proceeding is not the sole culprit in maintaining this loop, it contributes to its longevity. Sentencing, in the context of Black punishment, is not a purely individualized process, even if it is proportionality-driven in its form. While the sentence *directly* burdens Black offenders, racial burdens are borne by Black offenders and by their entire communities. At the same time, and more importantly, sentencing proceedings can provide opportunities to disrupt or expose this loop. That is one of the stated objectives of IRCAs. However, if sentencing judges rely on generic descriptions, like those found in *Morris's* general report, and assume that the life experiences of young Black men in Toronto are universalizable to Black offenders, they risk reinforcing the pernicious tropes IRCAs are meant to disrupt.

The anti-Blackness that IRCAs ought to highlight to judges is how the anti-Blackness that beset the offender from birth gets harnessed to punish him. Indeed, IRCAs must explain how anti-Blackness can shape an offender's experiences in different areas of social life and contribute to their decision to commit a particular offence. They also should explain how the offender's reactions to anti-Blackness shape perceptions of behaviours deemed criminal and, ultimately, how those perceptions become the basis for punishment.⁴⁶⁴ As discussed in more detail in the companion article, sentencing is invariably about *Blackness* when a Black offender is involved: Specifically, how Blackness is seen by judges or attempted to be invisibilized by Black offenders. I refer to this as the paradox of race visibility. Black thinkers like Fanon have discussed this phenomenon, which deserves our sustained attention.⁴⁶⁵

IV. SECTION THREE

i. The Paradox of Visibility

Through the concept of the paradox of visibility, I seek to understand and (re)conceptualize how centering race consciousness within the sentencing process can act as a double-edged sword. In

⁴⁶⁴ Butler, *supra* note 34 at 694.

⁴⁶⁵ See Fanon, *supra* note 15.

some contexts, a focus on Blackness operates to disadvantage Black Canadians interfacing with the criminal justice system. In contrast, in other contexts, a refusal to focus on Blackness can support the myth of colour blindness and racial neutrality in the criminal justice system. Unfortunately, this paradox has been overlooked by many well-meaning and careful commentators looking at the emergence and ascendancy of IRCAs in Canadian criminal sentencing. We confront the paradox of visibility in sentencing cases where the infusion of race consciousness can simultaneously promote and erode dignity and access to justice.

Over three decades ago, Professor Martha Minow delved into a related issue within the American context. She pointed out that concentrating on differences could lead to recreating them, but dismissing those differences would diminish their significance to those who hold them dear as part of their identity.⁴⁶⁶ This article aims to, in contrast, focus on the paradox engendered by emphasizing or increasing the visibility of Blackness in criminal sentencing. The paradox of visibility recognizes that, for Black people, “denying difference” is not an option: Indeed, those individuals who are read as Black are subjected to so much explicit and implicit bias that claims about “colour-blindness” are generally disingenuous or naïve.⁴⁶⁷ As Fanon aptly asserted: “I slip into corners, I remain silent, I strive for anonymity, for invisibility. Look, I will accept the lot, as long as no one notices me. My Blackness was there, dark and unarguable. And it tormented me, pursued me, disturbed me, angered me.”⁴⁶⁸

From a criminal sentencing perspective, highlighting an offender’s Blackness seems like a losing strategy because of the racist association of Blackness with dangerousness and recalcitrance, but

⁴⁶⁶ Martha Minow & Donald C Langevoort, “The Supreme Court, 1986 Term” (1987) 101:1 Harv L Rev at 12; As stated by Minow in the Bilingual and Special Education context “[a]re the stigma and unequal treatment encountered by minority groups better remedied by separation or by integration of such groups with others? Either remedy risks reinforcing the stigma associated with assigned difference by either ignoring it or focusing on it. This double-edged risk is the “difference dilemma.” See Martha Minow, “Learning to Live with the Dilemma of Difference: Bilingual and Special Education Children with Special Needs” (1985) 48:2 Law & Contemporary Problems 157.

⁴⁶⁷ Blackness becomes even more prominent under the white gaze. See Razack, *supra* note 46; Carl E James, “Students ‘at Risk’: Stereotypes and the Schooling of Black Boys” (2012) 47:2 Urban Education 464.

⁴⁶⁸ Fanon, *supra* note 15 at 117 [emphasis added].

avoiding mentioning their Blackness also seems like a losing strategy because their Blackness is visible and has been all along. Indeed, given the incessancy of Blackness, it may be futile to avert the judge's gaze. Given the futility of deflecting attention from Blackness, we confront the issue of the desirability of forcing judges to confront the relevance of anti-Black racism and the risk of doing so in a way that exacerbates stereotypes. The risk is that a particular type of Blackness, one that is tragic and pathological, is provided as the lens through which to analyze a Black offender's conduct.⁴⁶⁹ We risk reinforcing this belief when Blackness is routinely offered to explain an offender's behaviour, especially when Blackness is presented as a tragic archetype: fatherlessness, early exposure to violence, abject poverty, high school drop-out, single-mother raised, youthhood criminality. Such an approach sacrifices Black dignity for the chance of sentencing mitigation. Any sentencing strategy that seeks to essentialize Blackness to explain a Black offender's actions is problematic.⁴⁷⁰ It is an affront to dignity and, at best, presents a distorted picture of the individual offender; hence, it cannot generate a truly fit sentence that attends to the complex, unique humanity of the person standing before the court.⁴⁷¹

A thorough review of the decisions in my dataset highlights how Blackness is often articulated as tragic and pathological in sentencing proceedings. In order to quantify the social indicators used by judges in sentencing, I thoroughly reviewed all 92 decisions and coded them accordingly. Social indicators refer to biographical information about an offender's social, cultural, and socio-economic background that may be considered as mitigating factors due to their relevance in understanding why the offender appeared before the court and their potential for rehabilitation. To identify these indicators, I analyzed the available sentencing reasons and excerpts from IRCAs. *Morris* is the only decision in the set of 92 decisions where an IRCA was appended in its entirety. In other decisions, IRCAs were excerpted; in particular, IRCAs are heavily excerpted in *X*, *Anderson*, and *Jackson*. In others, IRCAs are referenced but not excerpted, and as noted above, in

⁴⁶⁹ Eve Tuck, "Suspending Damage: A Letter to Communities" (2009) 79:3 Harv Educational Rev 409 at 413.

⁴⁷⁰ See generally Crenshaw, "Mapping", *supra* note 177; Harris, *supra* note 177; Crenshaw, "Intersection", *supra* note 177.

⁴⁷¹ *Ipeelee*, *supra* note 47 at para 75.

some cases, IRCAs were not received, but the judge did receive submissions from defence counsel about the offender's background. Because I relied mainly or exclusively on the sentencing decisions, I coded the information that the judge highlighted; we do not know what the offenders said about themselves or what else may have been included in the IRCAs. We can assume, however, that the social indicators relied on by the judge were either those stressed by defence counsel or those factors that the judge regarded as relevant to sentencing.

To code the decisions, I started by reading each individually and identifying every discrete social indicator referenced by the judge. I then worked to identify commonalities among those indicators to cluster them into categories that could be analyzed quantitatively. Apart from the offenders' age, I identified 15 discrete social indicators. These indicators frequently arose across the decisions and could encompass all of the discrete indicators I had identified in each decision, with two exceptions: *R v Biya* and *R v Tennant*.⁴⁷² Both cases are outliers. As explained below, in the other 90 cases, the identified social indicators were negative or pathological. Conversely, Mr. Biya, who was convicted of firearm and drug trafficking offences, came from a stable nuclear family; his siblings were academically gifted, and he was enrolled in a four-year advanced diploma program. As for Mr. Tennant, the sentencing judge highlighted that he "grew up in a loving, stable home with the presence of both of his parents."⁴⁷³

After expressly contrasting Mr. Morris' multiple negative social indicators with Biya's positive social indicators, the judge in *Biya* concluded that the *Morris* principles (as identified by Justice Nakatsuru) regarding systemic anti-Black racism and overrepresentation were not applicable.⁴⁷⁴ In *Tennant*, the sentencing judge declined to accede to the defence counsel's submission regarding

⁴⁷² See *R v Tennant*, 2019 ONSC 1764 [*Tennant*]; *Biya* 2018, *supra* note 8 at para 36; The conviction was subsequently quashed on appeal, but there was no appellate consideration of the sentencing *Biya* 2021, *supra* note 8; *R v Peart*, 2022 BCSC 680 at para 38 [*Peart*]. The court took judicial notice of anti-Black racism. However, in that case, Mr. Peart's positive upbringing and prosocial history made him a poor candidate for sentence mitigation because no connection could be made between his race and the systemic anti-Blackness that he claims contributed to the commission of the crime.

⁴⁷³ *Tennant*, *supra* note 472 at para 4.

⁴⁷⁴ *Biya* 2018, *supra* note 8 at para 36.

the principles enunciated by Justice Nakatsuru in *Jackson* about the historical discrimination and racism faced by “Afro-Canadians.”⁴⁷⁵ Both these decisions imply that only negative/pathological factors are applicable. This phenomenon is borne out by the indicators that were relied on as relevant in the other 90 cases.

In the other 90 cases I coded, the social indicators included neutral biographical details such as age and gender. I coded for age categories, noting that many offenders were young, but there was variation. Concerning gender, all but three of the 92 cases involved male offenders. Notably, the general report from *Morris* includes an extensive analysis of Black masculinity. This gendering of IRCAs is significant because it invisibilizes the Black women who come before the criminal justice system and warrants further analysis that is beyond the scope of this article.⁴⁷⁶

Again, except for *Biya and Tennant*, the social indicators apart from neutral demographics would all widely be regarded as pathological. Some of these indicators are related to substance use or exposure. I organized those into five distinct categories: alcohol use among family members, drug use among family members, personal alcohol use, personal drug use, and substance use from a young age. “Alcohol use” refers to heavy use or alcohol addiction. By contrast, while several decisions referred to recreational drug use (mostly marijuana use), only a few identified severe drug addictions as a factor.

The social indicators that clustered around the offender’s relationship with his father were organized into two categories: “Fatherlessness” refers to cases where there was no father in the home at all, including cases where the offender had never met their father or had only met their father briefly. “Challenging relationship with father” refers to situations where the offender described their father as having neglected them, as having never been a strong presence in their lives, or as having been described as “emotionally remote,” as strict, as abusive, or as having

⁴⁷⁵ *Tennant*, *supra* note 472 at paras 43–44.

⁴⁷⁶ For a more developed analysis of this critique, see Jones & Sheehy, *supra* note 60.

subjected the offender to corporal punishment. “Fatherlessness” and “challenging relationship with father” correlate with being raised in a single-mother household.

Some of the offenders were described as having had a challenging relationship with their mother. In these cases, their mothers struggled with mental illness and substance addiction, were physically or verbally abusive, or were generally absent. I also coded for the social indicators of having experienced or having witnessed violence, as well as criminality in the family. For example, some of the offenders were described as having been the victims of gun and knife attacks or having witnessed the same. Many also grew up in high-crime communities.

There were also social indicators related to health, which I further categorized as “mental health issues” encompassing, e.g., PTSD, anxiety, depression, and ADHD diagnoses. I excluded addiction from this category since this was separately coded as drug/alcohol use. I also coded for “physical health issues,” referring to physical/non-mental health challenges. Finally, other social indicators related to socio-economic achievement were captured under “did not finish high school” and “low income.”

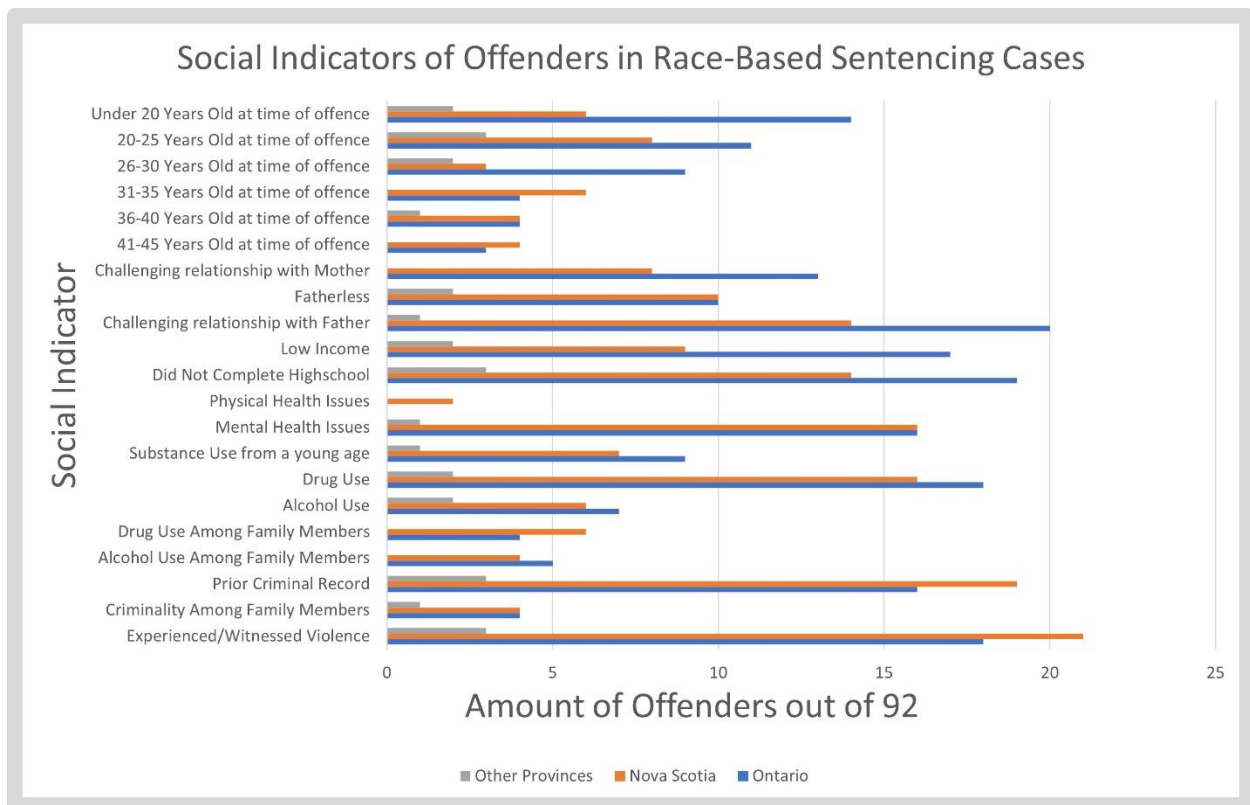


Figure 2: Social Indicators used to describe Black Offenders in the 92 Reported Race and Sentencing Cases involving IRCAs or judicial notice of race from 2014–2023.

In these cases, the offenders’ journeys, as described by the courts, are almost identical. They are the product of a single-mother household, grew up in abject poverty, were exposed to violence at an early age, and their crime of choice usually involves violence, using a firearm, or trafficking controlled substances. At first glance, it appears that those called upon to sentence, prosecute and defend Black offenders are engaged in a veritable race to the bottom—to highlight the most wretched and pathological image of Blackness as a way of provoking an institutional response to anti-Black racism when those tropes are themselves both a cause and a symptom of anti-Black racism.

ii. The Demands of Proportionality

The visibility paradox becomes even more acute when we consider the demands of proportionality and its requirement for blame articulation and allocation. Indeed, strict application of the

proportionality framework can lead to unjust sentences for Black offenders, even though proportionality aims to work against biased sentencing. For instance, the concept of proportionality and blame is rendered hollow when we consider the crimes committed by people with minimal opportunities and options due to structural anti-Black racism and that Black people who do commit crimes are more likely to be blamed than their white counterparts.⁴⁷⁷ There are two dimensions to this claim: (1) Black people who commit crimes do so, in part, because they are structurally disadvantaged and overexposed to criminogenic factors and have fewer opportunities to live “pro-socially”; and (2) the mass incarceration of Black people does not indicate that Black people commit more crimes, so much as the fact that they are over-surveilled, over-prosecuted, and over-punished compared to their white counterparts.⁴⁷⁸ Black Canadians are stereotyped as incorrigible, inherently violent, blameworthy and dangerous due to racist stereotypes that were part of the logic of slavery.⁴⁷⁹ Today, the State detects crime and determines individual criminal sentences in part by determining the extent to which a person is violent, incorrigible, blameworthy and dangerous. Yet, behaviours coded as dangerous and violent are frequent responses to conditions of systemic oppression. In the general report adduced in *Morris*, the authors explained that “evidence suggests that Black youth engage in violence as a means of ‘self-help’ resulting from the belief that the police cannot, or will not, provide them with adequate protection.”⁴⁸⁰ Indeed, a critical examination of our proportionate-based approach to sentencing reveals that we are, as Paul Butler asserts, “punishing people for ‘negative’ reactions to racist, oppressive conditions.”⁴⁸¹

Acknowledging structural inequalities does not excuse criminal conduct; instead, it helps to contextualize and deconstruct blame assessments “by forcing a reckoning with the pernicious stereotypes that are projected onto Black bodies and with the racist structures that produce and

⁴⁷⁷ Government of Canada, *supra* note 457; Butler, *supra* note 34 at 716.

⁴⁷⁸ See Government of Canada, *supra* note 457.

⁴⁷⁹ See W R Riddell, “The Slave in Upper Canada” (1919) 4:4 *J Negro History* 372; Frank Mackey, *Done with Slavery: The Black Fact in Montreal, 1760-1840* (Montreal: McGill-Queen’s Press, 2010).

⁴⁸⁰ See *Morris ONCA 2021*, *supra* note 51.

⁴⁸¹ Butler, *supra* note 34 at 716.

reinforce them.”⁴⁸² Failing to consider this could lead judges, defence lawyers, and Crown prosecutors to unconsciously rely on stereotypes that link certain races to criminal behaviour, perceived danger, and incorrigibility.⁴⁸³ A critical and under-theorized issue is the a-racial and a-contextual assumptions inherent in proportionality/blame assessments.⁴⁸⁴ As Carol Steiker asserts, “retributivism’s chief distortion is its inability to take account of the effects of widespread social and economic inequality on its central determination of desert.”⁴⁸⁵ Indeed, “[w]hat has been thought of as proportionality ... is not a naturally existing relationship, but a product of political and social construction, cultural meaning-making, and institution-building.”⁴⁸⁶

This distortion is apparent in the ONCA’s proportionality assessments in *Hamilton* and *Morris*. For example, in *Morris*, the ONCA, while acknowledging widespread and entrenched anti-Black racism, under-emphasized the impact such recognition should have on blameworthiness and how blame assessments exacerbate sentencing disproportionality.⁴⁸⁷ In *Morris*, the ONCA addressed the question, which has also been taken up in *Borde* and *Hamilton*, of how systemic anti-Black racism should factor into proportionality assessments.⁴⁸⁸ In other words, when sentencing a Black offender, how does a keen understanding and acknowledgement of anti-Black racism help guide judges toward a proportionate sentence? Arguably, anti-Black racism is *prima facie* relevant to proportionality assessments because it:

⁴⁸² Jones, *supra* note 350.

⁴⁸³ Carbado & Roithmayr, *supra* note 31 at 153.

⁴⁸⁴ Nicola Lacey & Hanna Pickard, “The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems” (2015) 78:2 Mod L Rev 216 at 219.

⁴⁸⁵ Carol Steiker, “The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System” in Michael Klarman, David Skeel & Carol Steiker, eds, *The Political Heart of Criminal Procedure: Essays on Themes of William J Stuntz* (New York: Cambridge University Press, 2012) at 224.

⁴⁸⁶ Nicola Lacey & Hanna Pickard, “From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm” (2013) 33:1 Oxford J Leg Stud 1 at 3.

⁴⁸⁷ *Ibid* at 3.

⁴⁸⁸ *Borde*, *supra* note 70; *Hamilton*, *supra* note 70.

1. Constrains social opportunities (e.g., education, employment, housing, *etc.*);⁴⁸⁹
2. Increases the risk of involvement in the criminal justice system;⁴⁹⁰
3. Increases the qualitative harshness of the experiences of sentences—insofar as those sentences are administered by institutions like prisons and parole offices that frequently operate more harshly and violently towards Black people than their white counterparts.⁴⁹¹

The *Morris* Court made two assumptions in grappling with how to account for anti-Blackness in proportionality assessments. The first is more general and entrenched in Canadian sentencing law, whereas the second is more specific to these cases.

Assumption #1: No Blame Attaches to the State

Courts must focus exclusively on the offender and assess their level of blame in part by acknowledging deprivations, harm, and trauma offenders have experienced, but they are not required to expressly name and condemn those who caused the deprivations, harm, and trauma; in other words, without *blaming* those who harmed the offender. Consequently, the State is allowed to be abstracted into a position of semi-innocence.⁴⁹² The ONCA reasoned that, under the proportionality doctrine, no blame should be ascribed to society for its complicity in maintaining systemic anti-Black racism.⁴⁹³ In fact, the ONCA held that “[i]f society’s complicity in institutional racism means denunciation and general deterrence should play a lesser role in sentencing for serious crimes, it will follow that Black offenders who commit those serious crimes, such as gun

⁴⁸⁹ *Study: A labour market snapshot of Black Canadians during the pandemic*, by Statistics Canada (2021); Robyn Maynard, “Canadian Education Is Steeped in Anti-Black Racism”, (29 November 2017), online: *The Walrus* <<https://thewalrus.ca/canadian-education-is-steeped-in-anti-black-racism/>>; *Housing Discrimination & Spatial Segregation in Canada* (Centre for Equality Rights in Accommodation, National Right to Housing Network & Social Rights Advocacy Center, 2021) at 13 & 17 [Housing Discrimination].

⁴⁹⁰ Ontario Human Rights Commission, *supra* note 51; Wortley, *supra* note 189; Owusu-Bempah, *supra* note 51.

⁴⁹¹ *R v Gabriel*, 2017 NSSC 90 at para 82 [*Gabriel*]; See Tom Cardoso, “Bias behind bars: A Globe investigation finds a prison system stacked against Black and Indigenous inmates”, *The Globe and Mail* (24 October 2020), online: <<https://www.theglobeandmail.com/canada/article-investigation-racial-bias-in-canadian-prison-risk-assessments/>>.

⁴⁹² *Morris ONCA 2021*, *supra* note 51 at para 56; Manikis, *supra* note 353.

⁴⁹³ See *Morris ONCA 2021*, *supra* note 51.

crimes, will receive shorter jail sentences than other similarly situated non-Black offenders.”⁴⁹⁴ Thus, the individual offender, and not the State—despite State complicity in maintaining social inequalities that frame life choices—attracts all blame and hence all punishment. However, two distinct problems arise from this reasoning:

1. The ONCA considers itself constrained by and committed to proportionality. Consequently, it fixates on blame and can only try to lower individual blameworthiness (as it relates to personal responsibility) to account for anti-Black racism—rather than envisioning radically different responses that would address the root causes and core effects of anti-Black racism.
2. The ONCA is unwilling to ascribe blame to the State except in the vaguest terms. This unwillingness diminishes Black people’s claims based on their lived experience of racism and makes it difficult to meaningfully calibrate the offender’s blameworthiness since the implication is that only the offender shoulders the lion’s share of the blame for the offence.⁴⁹⁵

This glaring contradiction—i.e., the ONCA acknowledging the State, including the justice system’s, complicity in the maintenance of systemic anti-Black racism and the impacts of anti-Black racism on individual blameworthiness while nevertheless deploying a proportionality analysis that contemplates the allocation of moral blameworthiness to the offender but does not allocate any responsibility to society/State—demonstrates one way in which proportionality cannot co-exist with racial justice.⁴⁹⁶

Furthermore, the ONCA expressly declined the invitation by interveners, the Black Legal Action Centre (BLAC), to apportion some blame to society when fashioning a sentence for a Black offender, holding that no such objective exists under the current sentencing framework.⁴⁹⁷ Thus, IRCAs must omit any reference to blame distribution that considers state complicity to fit within

⁴⁹⁴ *Ibid* at para 84.

⁴⁹⁵ It appears that the *Morris* court was similarly concerned, as Doherty J.A. was in *Hamilton*, that allocating societal blame for the offender’s conduct would promote a “determinist theory of crime.” *Hamilton*, *supra* note 70 at para 140.

⁴⁹⁶ See generally Manikis, *supra* note 351.

⁴⁹⁷ *Morris ONCA 2021*, *supra* note 51 at para 83.

current doctrinal parameters. As a result, IRCA writers and those who endorse their wider deployment have had to learn a lesson in compromise. Whether they struck an improvident bargain to transform what began as a fringe and counter-hegemonic movement into a mainstream procedural exercise remains an open question. However, as I have said elsewhere, *Morris* should be read as a call to action, not the final word on sentencing reform for Black offenders in Ontario.⁴⁹⁸

Assumption #2: Frankly Acknowledging Systemic Racism as a Cure

The ONCA assumes that the sentencing process is redeemable and expiated through what it describes as “a frank acknowledgement” of systemic anti-Black racism.⁴⁹⁹ Indeed, the ONCA seems to suggest that a frank acknowledgment is an ameliorative response, albeit not a complete one, to the problem of anti-Black racism in sentencing proceedings. According to the ONCA, “[a] frank acknowledgement of the existence of, and harm caused by, systemic anti-Black racism, combined with a careful consideration of the kind of evidence adduced in this case, will go some distance toward disassociating the sentencing process from society’s complicity in anti-Black racism.”⁵⁰⁰ However, if the offender expresses such remorse or expiation, it will yield little, if any, forgiveness, mercy, or dissolution of blame.

Anti-Blackness strips Black bodies of the ability to express or sense remorse, embody innocence or be worthy of mercy.⁵⁰¹ Arguably, a bare, generic acknowledgment of responsibility by the offender has almost no expiatory value, but here, the ONCA’s analysis suggests that such an acknowledgment is meaningful and materially significant when performed by/on behalf of the state.⁵⁰² With respect, decoupling the sentencing process from anti-Black racism will require more than “[a] frank acknowledgement.”⁵⁰³ Arguably, recognition without more is, at best, hollow and,

⁴⁹⁸ Jones, *supra* note 61 at 1.

⁴⁹⁹ *Morris ONCA 2021*, *supra* note 51 at para 86.

⁵⁰⁰ *Ibid.*

⁵⁰¹ See Steiker, *supra* note 485; See Jones & Sheehy, *supra* note 60.

⁵⁰² See Sara Ahmed, “The Nonperformativity of Antiracism” (2006) 7:1 *Meridians* 104.

⁵⁰³ *Morris ONCA 2021*, *supra* note 51 at para 86.

at worst, fosters retrogression.⁵⁰⁴ What is required is a fundamental rethinking of our sentencing process from the vantage point of the system's most vulnerable and targeted.

V. CONCLUSION: BREAKING AWAY FROM PROPORTIONALITY?

This article illustrated how Canada's proportionality-driven criminal sentencing paradigm (re)produces, invigorates, and sustains pernicious race-based discourses. It discussed how deploying IRCAs within a proportionality paradigm could inadvertently exacerbate the problem IRCAs seek to confront and dismantle. Admittedly, courts and supporters of IRCAs find themselves constrained by proportionality and its demands. For IRCAs to be "effective," they must be intelligible to the system—that is the compromise. Thus, IRCAs must often recount stereotypical narratives of Black brokenness and social irretrievability. The article highlighted some subtle but devastating problems with current efforts to work within proportionality logic. The implication is that to promote racial justice for Black offenders may require a seismic rupture of proportionality theory and a repudiation of blame calibration and retributivism as the governing logic of punishment. Blame assessments reproduce and reinforce race logic that finds its genesis in Black enslavement. Such assessments routinely pathologize Black bodies and can result in harsher sentences. Strategic attempts to reframe racial narratives while retaining a focus on blame calibration are risky. They also come at a cost to the dignity of Black communities and Black individuals who come before sentencing courts since they invoke negative associations with Blackness.

The *Morris* decision highlights the competing and paradoxical interests at play when sentencing Black offenders. Unfortunately, *Morris* does not resolve this paradox—one that infects the sentencing process and the broader justice system and requires a radical, structural change. That radical change may involve abandoning the proportionality principle, with its retributivist fixation on punishing people for their moral blameworthiness.⁵⁰⁵ The proportionality principle does not

⁵⁰⁴ See Bell, *supra* note 273; See Rosenberg, *supra* note 282; See *Morris ONCA 2021*, *supra* note 51.

⁵⁰⁵ See von Hirsch, "Philosophy", *supra* note 79.

focus our attention on eliminating racist structural conditions by maximizing the potential of Black criminalized persons and their communities. Instead, it focuses on deciding how much blame and punishment to allocate to an individual Black offender—even though their conduct was shaped partly by structural conditions, and the punitive responses driven by the allocation of blame are likely to perpetuate those same conditions while reinforcing pernicious stereotypes about Blackness and criminality.⁵⁰⁶

IRCA's tell the stories of pathology and damage. Unfortunately, whether these stories are told or obscured, it is evident the offender is Black—and in the logic of a structurally racist society, it is therefore always “evident” that the offender is pathological or damaged. That is the paradox of visibility that Black offenders must confront and navigate before sentencing courts—the desire for invisibility coupled with the recognition that this advantage, like so many others, is not one they can access.

CHAPTER FOUR: PROBING THE DATA:

PERSPECTIVES ON RACE VISIBILITY IN CANADIAN

SENTENCING PROCEEDINGS⁵⁰⁷

I. INTRODUCTION

A decade ago, in the Youth Justice Court of Nova Scotia, Judge Anne Derrick (as she then was) convicted “X” for attempting to murder his cousin “Y.” The Crown prosecutor applied to have X sentenced as an adult. In response, the defence counsel urged the court to consider, among other things, X’s race and culture in determining the appropriate punishment. In support of this

⁵⁰⁶ Tuck, *supra* note 469.

⁵⁰⁷ Jones, *supra* note 350.

proposition, the defence counsel filed, among other expert reports, a race-conscious pre-sentence report referred to as a cultural impact assessment report (CIAR). In what has since become a seminal case in criminal sentencing jurisprudence involving Black offenders, Derrick J declined the Crown’s application partly because of the CIAR. She held that the CIAR provided her with “a more textured, multi-dimensional framework for understanding ‘X,’ his background and his behaviours. ... [it] gives me a lens through which to view ‘X’ in determining this application.”⁵⁰⁸

Since *R. v X.*, there has been growing scholarly, jurisprudential, and public interest in new strategies for reducing the mass incarceration of Black people in Canada through criminal sentencing.⁵⁰⁹ Specifically, there has been greater attention to the use of race-conscious pre-sentence reports that detail the effects of anti-Black racism as a mitigating sentencing factor.⁵¹⁰ These reports, now referred to as impact of race and culture assessments (IRCAs) or enhanced pre-sentence reports (EPSRs), have proliferated and been the subject of appellate analyses in both Nova Scotia and Ontario in cases such as *R. v Morris*, *R. v Anderson*, and *R. v Wournell*.⁵¹¹ IRCAs are the doctrinal and practical manifestations of the belief that making Blackness and anti-Black racism visible in sentencing proceedings is essential. Indeed, courts are now promoting the use of these reports and encouraging or requiring sentencing judges to also take judicial notice of anti-Black racism as part of sentencing. Yet, to date, it appears that there has been no attempt to assess how the individuals who are supposed to benefit from these sentencing strategies – Black criminalized persons facing criminal sentencing – understand or regard this approach. So, even as the focus on race-conscious sentencing jurisprudence and scholarship has increased, there has been no accompanying data on how the intended beneficiaries perceive this strategy.

⁵⁰⁸ *X*, *supra* note 72.

⁵⁰⁹ *Anderson*, *supra* note 6; *Wournell*, *supra* note 7; *Morris ONCA 2021*, *supra* note 51; *R v Morris*, 2021 ONCA 680 [*Morris*]; Bintou Diarra, “Discours d’avocats de la défense sur l’utilisation des rapports Impact of Race and Culture Assessments dans les cours criminelles de Toronto” (2023) Master’s Thesis, University of Montreal, online: <<https://papyrus.bib.umontreal.ca/xmlui/handle/1866/32495>> [unpublished].

⁵¹⁰ Dugas, *supra* note 70 at 122.

⁵¹¹ *Morris ONCA 2021*, *supra* note 51; *Anderson*, *supra* note 6; *Wournell*, *supra* note 7.

Thus, my inquiry starts from the observation that there is a research gap. This article fills this gap through original interview data from two interview groups. Group 1 consisted of nine criminalized Black Ontarians – six men and three women, who had either served custodial or non-custodial criminal sentences – while Group 2 consisted of nine criminal defence lawyers (four white women, one white man, one Black man, two Black women, and one Arab woman). The interviewees were asked similar open-ended questions to explore the interplay between race and anti-Black racism and what weight, if any, they thought should be accorded to these factors when sentencing Black offenders.⁵¹² The study's data revealed unexpected but informative perspectives on the explicit mobilization of Blackness in sentencing proceedings. This study holds significant value as existing research on race-conscious sentencing has not explored the perspectives of criminalized Black individuals regarding the incorporation of their race, whether through race-conscious pre-sentence reports or judicial notice, and its potential influence on crafting a proportionate sentence.⁵¹³ Indeed, by engaging with criminal defence lawyers who promote these strategies and the criminalized Black individuals who are their intended beneficiaries, we confront challenges that are not addressed by the sentencing principles that inform these methods.

However, what can we learn from key stakeholders involved in strategic efforts to make anti-Black racism an explicit factor in criminal sentencing? The data suggest that race visibility can deleteriously affect blame assessments in that it can activate or reinforce entrenched racial stereotypes and hierarchies. Specifically, the data highlight not only the imperative, but also the inherent, risk of expressly confronting race and anti-Black racism at the sentencing phase. Crucially, the data reveal a striking difference between the attitudes of defence lawyers and Black criminalized individuals: (1) defence lawyers tend to prioritize reduced sentences and believe IRCAs or race-conscious sentencing strategies may achieve that goal; (2) criminalized Black individuals worry that their Blackness will lead to higher sentences; and (3) criminalized Black

⁵¹² These data were also used in: Jones, *supra* note 81.

⁵¹³ See Dugas, *supra* note 70; See Daniel J Song & Christine Boyle, “When Race Matters in Sentencing: R. v. Ramsay and R. v. Hamilton” (2004) 22:6 Crim Reports 86.

individuals believe that seeking a reduced sentence based on social factors may harm dignity. In short, the defence lawyers regard race-conscious sentencing as another weapon in their arsenal as they aim to secure a lower sentence for their clients. By contrast, the clients themselves have more subtle and equivocal views. They expressed two distinct but related concerns: first, that heightened racial visibility in sentencing proceedings could backfire (a concern that may be well placed or disproved by the data on sentencing outcomes but, nonetheless, is a perception that matters) and, second, that there is a cost to individual and collective dignity that may be unacceptable.

The article is divided as follows. The first section briefly discusses key definitions of race, racialization, and anti-Black racism. The second section examines the methodology by elaborating on the techniques and approaches employed for gathering and analyzing the interview data while offering reflections on the significance of researcher positionality. The third section explores the epistemological and theoretical insights that can be drawn from the data. It also considers how these insights problematize current sentencing theories concerning proportionality and blame.

II. RACE, RACIALIZATION, AND ANTI-BLACK RACISM

The sentencing strategies at issue (judicial notice or IRCAs) seek to promote particular accounts of Blackness and anti-Black racism. However, the criminalized Black people who are the intended beneficiaries of these strategies understand them, in part, through the lens of their experiences with anti-Black racism, race, and racialization. To understand these sentencing strategies and to appreciate the diverse reactions to them, we, thus, need a sharper understanding of the meaning of these terms in that blame and punishment are not “a-racial” or acontextual concepts but, rather, fundamental concepts to racialization practices. Blame is shaped by and reinforces race-based logics, which is then harnessed to support decisions around whom to charge, prosecute, and ultimately punish.⁵¹⁴ Black offenders must confront issues around their moral responsibility for the particular offence and consider how to address pre-inscribed notions of blame that preceded

⁵¹⁴ As Butler explains, we are essentially “punishing people for “negative” reactions to racist, oppressive conditions. Butler, *supra* note 34 at 716.

any criminal wrongdoing. Indeed, through pernicious racialization practices, Black lives are inscribed from their social inception with risk, lethality, and danger.⁵¹⁵

i. Race and Racialization

Race is a deceptively simple idea. At its most basic, it is a system of taxonomy that groups human beings based on supposedly immutable physical characteristics and, in some understandings, intellectual, moral, and psychological characteristics.⁵¹⁶ Race takes on pseudo-scientific legitimacy when viewed in this way, even though it is not rooted in biology.⁵¹⁷ Most scholars view race as a socially constructed phenomenon that is shaped, in part, by discursive patterns. In essence, we speak race into existence.⁵¹⁸ While race is socially constructed and lacks a biological foundation, its impacts and consequences are still real.⁵¹⁹ For instance, Blackness is a racial category that has remained stubbornly tied to pernicious pseudo-biological notions that separate peoples of African descent from humanity, thereby increasing widespread tolerance of violence against them. Indeed, recognizing and fully embracing one's Blackness involves consistently reflecting on the fragility of one's life.⁵²⁰

⁵¹⁵ On this reading, racial identities and their concomitant narratives predate the existence of the bodies they are ultimately engrafted on. See Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory" (1988) 40:4 *Theatre Journal* 519; All bodies are gendered from the beginning of their social existence (and there is no existence that is not social), which means that there is no "natural body" that pre-exists its cultural inscription. This seems to point towards the conclusion that gender [and race] is not something one is, it is something one does, an act, or more precisely, a sequence of acts, a verb rather than a noun, a "doing" rather than a "being" - Sara Salih, *Judith Butler* (London: Routledge, 2002) at 62. See also Wesley Crichtlow, "Weaponization and Prisonization of Toronto's Black Male Youth" (2014) 3:3 *Intl J Crime, Justice, & Social Democracy* 113; Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008).

⁵¹⁶ Jones, *supra* note 82 at 18. Biological notions of race are false. For CRT scholars' race is socially constructed. See Harris, *supra* note 175; See Allen, *supra* note 175; Some authors suggest that biological race and social constructivism is not incompatible, see Andreasen, *supra* note 175.

⁵¹⁷ Jones, *supra* note 82 at 18.

⁵¹⁸ Delgado, Stefancic & Harris, *supra* note 13 at 9.

⁵¹⁹ See Richard John Perry, *"Race" and racism: the development of modern racism in America*, 1st ed. ed (New York: Palgrave Macmillan, 2007); See Manning Marable, "Beyond racial identity politics: towards a liberation theory for multicultural democracy" (1993) 35:1 *Race & Class* 113.

⁵²⁰ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Oakland: University of California Press, 2007) at 28.

Race can be construed as a sensate and social phenomenon forged through relations.⁵²¹ We construct race through our interactions and experiences of the social world. Thus, Blackness can be construed as a web of relations as viewed through particular eyes that (de)construct Black bodies in ways that align with prevailing racial discourses. In the sentencing arena, the gaze of the racial voyeur reduces Blackness to a taxonomy of predetermined tropes that are leveraged for sentencing expediency. The Black offender, thereby, often performs a particular minstrel to access whatever, if any, advantage one gains from leaning into racial pathologies.⁵²² The Fanonian concept of epidermalization of inferiority captures this process with precision and eruditeness. The epidermalization of inferiority is “the process by which societal inferiority of Black people is grafted onto the skin.”⁵²³ According to Seunghyun Song, “[w]hen confronted with racial prejudices, black individuals act in certain ways that render them inferior. ... In other words, epidermalization of inferiority refers to the process in which people of colour relativize themselves to the white norm.”⁵²⁴

Essentially, Black offenders must engage in racial performatives that align with these tropes. The role being performed must coincide with what is, or can be, seen by what Frantz Fanon lamented are the “only real eyes.”⁵²⁵ These inscriptions are etched into society’s psyche and not easily altered. The power to write race is vested in the scribe who writes with the eyes, not the stylus or pen. Eyes that reduce the Black body to a canvas on which “white eyes see nothing good,” according to A.W., one of the criminalized research participants.

⁵²¹ See Catherine Kendig, “Race as a Physiosocial Phenomenon” (2011) 33:2 *History and Philosophy of the Life Sciences* 191.

⁵²² Adam Augustyn, “Minstrel show: Description, History, & Facts” in *Britannica*; John Tehranian, “The Last Minstrel Show? Racial Profiling, the War on Terrorism and the Mass Media” (2009) 41:3 *Conn L Rev* 1.

⁵²³ Vinson Cunningham, “The Argument of ‘Afropessimism’”, *The New Yorker* (13 July 2020), online: <<https://www.newyorker.com/magazine/2020/07/20/the-argument-of-afropessimism>>.

⁵²⁴ Seunghyun Song, “Bridging Epidermalization of Black Inferiority and the Racial Epidermal Schema: Internalizing Oppression to the Level of Possibilities” (2017) 4:1 *DiGeSt: J Diversity & Gender* S 49 at 51.

⁵²⁵ Fanon, *supra* note 15 at 116.

Race is also linked to the concept of racialization. Whereas race is taxonomic, racialization creates and sustains racial categorizations for reasons grounded in power and material distribution.⁵²⁶ Put differently, the process of racialization creates, restores, reinforces, and revitalizes racial categories. Blackness as a racial category gains meaning and status through this process.⁵²⁷ For instance, when Fanon “discovered” his Blackness, he remarked that “[he] was battered down by tom-toms, cannibalism, intellectual deficiency, fetichism, racial defects, slave-ships, and above all else: ‘Sho’good eatin.’”⁵²⁸ In essence, Black people are discursively shackled by a white supremacist epistemic that constructs Blackness as a pathology, deficient and other. Indeed, it often requires an act of radical resistance and reimagining to visualize racial equality without privileging white ways of knowing and being.⁵²⁹ However, how do we begin to imagine the seemingly impossible, the fantastical, the unimaginable, the non-white? According to Fanon, “[since] the other hesitate[s] to recognize me, there remain[s] only one solution: to make myself known.”⁵³⁰

Acknowledging the negative impact of portraying Blackness as a monolithic and pathological experience is crucial as no Black person represents the characteristics, contradictions, and complexities of white supremacist perceptions of Blackness. In this sense, racialization is antithetical to “the notion of intersectionality and anti-essentialism – no person has a simple, easily stated, and unitary identity.”⁵³¹ As I have stated elsewhere, “an intersectional framework analyzes how multiple sources of oppression can ‘intersect’ to create an axis of vulnerability that is more than just the sum of its parts. Hence, it is not enough for us to sequentially analyze each locus of oppression; rather, the intersection must be apprehended on its own terms.”⁵³² By implementing

⁵²⁶ See Delgado, Stefancic & Harris, *supra* note 13.

⁵²⁷ See Marable, *supra* note 12 at 114.

⁵²⁸ Fanon, *supra* note 15 at 112.

⁵²⁹ See Fanon, *supra* note 15 It is argued that, to root out possible insurgency, the Black mind continues to be the site of extraordinary racial violence: to kill Black bodies, Black thought and imagination must first be suppressed.

⁵³⁰ *Ibid* at 115.

⁵³¹ Delgado, Stefancic & Harris, *supra* note 13 at 10; See Harris, *supra* note 177; See Crenshaw, “Intersection”, *supra* note 177.”

⁵³² Jones, *supra* note 82 at 19; See Crenshaw, “Mapping”, *supra* note 177; Harris, *supra* note 177; Crenshaw, “Intersection”, *supra* note 177.

an intersectional approach in our critical evaluations of Blackness, we avoid falling into the trap of essentialism, which reduces Blackness to a universal, unitary white supremacist phenomenon.⁵³³

ii. Anti-Black Racism

Some scholars contend that “the term anti-Black racism is intriguing. Its meaning is multi-layered and configured differently, it could mean several things.”⁵³⁴ Even the term “Blackness,” a concept used extensively in my writing, is “hotly contested.”⁵³⁵ However, most theories of anti-Black racism locate the genesis of Black subordination in racial slavery and the transatlantic slave trade.⁵³⁶ To understand these definitional tensions, we must examine the various dimensions of anti-Black racism while exploring the concept’s historical and contemporary manifestations. The transatlantic slave trade and racial slavery produced, reproduced, and reinforced a definitional frame that significantly contributed to contemporary anti-Black stereotypes.⁵³⁷ It was also instrumental in assigning value to Black bodies – both aesthetic and financial. Modern tropes, for example, about Black dangerousness were deployed as tools of subordination to keep enslaved Black people servile and reduced to units of economic value – so-called animate chattel.⁵³⁸ Black bodies were deemed inferior, heathenistic, subhuman, sexually promiscuous, unpleasant, violent, unintelligent, and depraved.⁵³⁹

Thus, Black hate was not simply about pigmentation or xenophobia; it was more sinister and viler. It was about commerce – the need to build wealth on the enslaved Africans’ literal and figurative backs.⁵⁴⁰ In order to justify the economic imperative, a narrative was created to make the

⁵³³ See Harris, *supra* note 177; See Crenshaw, “Intersection”, *supra* note 177.

⁵³⁴ Kuwee Kumsa et al, “The Contours of Anti-Black Racism: Engaging Anti-Oppression from Embodied Spaces” (2014) 1:1 J Critical Anti-Oppressive Soc Inquiry 21 at 21.

⁵³⁵ *Ibid* at 25.

⁵³⁶ Donovan, *supra* note 182.

⁵³⁷ See Cooper, *supra* note 183; See Milan Hrabovský, “The Concept of ‘Blackness’ in Theories of Race” (2013) 22:1 Asian & African Studies; See also Samuel L Hart, “Axiology--Theory of Values” (1971) 32:1 Philosophy & Phenomenological Research 29; Morgan, *supra* note 183 at 6.

⁵³⁸ See Maynard, *supra* note 19.

⁵³⁹ Donovan, *supra* note 182 at 109; See Maynard, *supra* note 19.

⁵⁴⁰ See Morgan, *supra* note 183.

subordination of Black people more acceptable to Europeans. Race provided that narrative – namely, that Blacks are animals, closer to beasts of burden than human beings, and lack the enlightened qualities that guaranteed the human rights granted to propertied white men during that era.⁵⁴¹ So, in essence, anti-Black hate was deployed as a tool for economic subordination.⁵⁴² However, the social construction of Blackness as a pathology was not simply a method with which to steal Black labour; it was also utilized to dissociate Black bodies from worth, dignity, and humanity.

The structural and institutional apparatuses used to control and dehumanize Black bodies stretch from slavery to the present.⁵⁴³ Over time, the control methods have included slave patrols,⁵⁴⁴ weaponized rape,⁵⁴⁵ anti-miscegenation policies,⁵⁴⁶ segregation,⁵⁴⁷ intimidation,⁵⁴⁸ restrictive immigration policies,⁵⁴⁹ and other destructive and insidious measures of denying Black people full citizenship and inclusion within Canadian society. However, when slavery was abolished in the British colonies, it was immediately replaced by other structures that sustained white supremacy.⁵⁵⁰

The period between slavery and the contemporary Black experience in Canada was also marked by moments of extraordinary structural violence, some legislated and others that persisted through the attitudes of white Canadians about race.⁵⁵¹ Constance Backhouse has documented how the Ku

⁵⁴¹ See *ibid.*

⁵⁴² See Calathes, *supra* note 72 Race and class have been inextricably linked since slavery and continued, albeit in different formats, throughout the subsequent years. We see this today with the building up of the prison industrial complex — which is economically dependent on the mass incarceration of Black and Indigenous peoples.

⁵⁴³ See Maynard, *supra* note 19.

⁵⁴⁴ See *ibid.*

⁵⁴⁵ See Donovan, *supra* note 182.

⁵⁴⁶ Clayton Mosher, “The Reaction to Black Violent Offenders in Ontario -- 1892-1961: A Test of the Threat Hypothesis” (1999) 14:4 Sociological Forum 635 at 641–643.

⁵⁴⁷ Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900--1950* (Toronto: University of Toronto Press, 1999) at 17 and 250–252.

⁵⁴⁸ *Ibid* at 187.

⁵⁴⁹ Mosher, *supra* note 546 at 641.

⁵⁵⁰ See Backhouse, *supra* note 547; Walker, *supra* note 19.

⁵⁵¹ See Mosher, *supra* note 546.

Klux Klan, a white supremacist group that was initially formed in the United States, took root in communities across parts of southern Ontario and disseminated its hate-filled message about race mixing – an attitude that was shared in large part by many Canadians from the mid-nineteenth century to the mid-twentieth century.⁵⁵² Although slavery and de jure anti-Black racism no longer exist in Canada, their impacts are still evident through various interrelated methods and institutions.⁵⁵³ This structural and multigenerational oppression has resulted in profound apprehension and unease, which has led to troubling degrees of internalized racial hate. In the psychology literature,

[i]nternalized racism is conceptualized as the product of systems of privilege and societal values that, over time, erode an individual's sense of value and undermine the collective action of a minority racial and/or ethnic group. Scholars argue that internalized racism represents a multi-dimensional construct, distinct from racial discrimination that includes: *belief in a biased representation of history* (acceptance of distorted historical facts that favor the White majority; *internalization of negative stereotypes* (accepting the negative stereotypes about African Americans; and *alteration of physical appearance* (an individual's conscious or unconscious desire or attempts to change their appearance to fit a Eurocentric aesthetic including perceptions of hair.⁵⁵⁴

With all of this in mind, we can define anti-Black racism as the consequence of an evolution of hate entrenched in societies and their institutions, which has been mobilized and manipulated to keep peoples of African descent subjugated and oppressed.⁵⁵⁵ Indeed, “[a]ntiBlackness and anti-

⁵⁵² Backhouse, *supra* note 547 at 182; Mosher, *supra* note 546 at 643. Studies also found that around that time, anti-Black racism suffused the entire criminal justice system. As legal historian Barrington Walker argues, “the criminal law was an integral part of how race was produced, managed, and expressed in the racial liberal order that framed the Black experience in Canada.” Walker goes on to note that “when Blacks appeared before the criminal courts, ‘race,’ whether tacitly or overtly, procedurally or rhetorically, was on trial.”; Walker, *supra* note 19 at 20.

⁵⁵³ See James & Turner, *supra* note 187; Tanovich, *supra* note 196; Ontario Association of Children's Aid Societies, *supra* note 187; note 232.

⁵⁵⁴ Willis et al, *supra* note 398 at 384–385; Karen D Pyke, “What is Internalized Racial Oppression and Why Don't We Study it? Acknowledging Racism's Hidden Injuries” (2010) 53:4 Sociological perspectives 551.

⁵⁵⁵ Some commentators have described the Canadian War on Drugs as a War on Blackness. See Akwatu Khenti, “The Canadian war on drugs: Structural violence and unequal treatment of Black Canadians” (2014) 25:2 Intl J Drug Policy 190; Tanovich, *supra* note 70.

Black racism reside within institutions as well as ideologies of whiteness, white supremacy, and fear of the Black body.”⁵⁵⁶ In this sense, anti-Black racism can be understood as a form of external and self-imposed scrutiny that erodes Black peoples’ existence, dignity, and worth.

III. METHODOLOGY AND THEORETICAL FRAMEWORK

The research data under analysis were generated from semi-structured, in-depth interviews with nine Black criminalized individuals and nine criminal defence lawyers.⁵⁵⁷ These participants were primarily recruited through community contacts and word of mouth. The criminalized participant group (Group 1) consisted exclusively of self-identified Black people who had been convicted and sentenced in the past for committing a criminal offence. These individuals all hail from Ontario, mainly from the Greater Toronto Area and Ottawa, and include male-identifying and female-identifying participants from different socio-economic brackets. None were currently entangled in the criminal justice system. Participants ranged in age from early thirties to early sixties.⁵⁵⁸ They were Canadian citizens or permanent residents of Jamaican ancestry who were either under-employed or unemployed and had not attended a post-secondary institution. Some of the participants spoke the Jamaican language. As a native speaker of the Jamaican language, I translated these interview transcripts. The Group 1 interviews were conducted in March and April 2019. Each research participant was contacted by telephone to discuss availabilities, the project’s scope, and their involvement. The Group 1 research participants were interviewed over the telephone. The interviews ranged from fifteen minutes to over one-and-a-half hours (see Table 1).

⁵⁵⁶ Fear of Blackness creates and perpetuates anti-Black racist practices. Ann E Lopez & Gaëtane Jean-Marie, “Challenging Anti-Black Racism in Everyday Teaching, Learning, and Leading: From Theory to Practice” (2021) 31:1–2 J School Leadership 50 at 51; See Ibram X Kendi, *How to Be an Antiracist* (New York: Random House Publishing Group, 2023).

⁵⁵⁷ I also took handwritten notes contemporaneously with the interviews. I did not, however, transcribe the recordings of the interviews. The Jamaican interviewees’ interview data (which were provided in the Jamaican language) was translated by me (I am a native speaker of the Jamaican language).

⁵⁵⁸ One participant was sixty-three years old.

Name	Age/Sex	Offence
S.L.	30, Female	Drug trafficking and firearms
A.W.	48, Male	Drug trafficking
J.M.	39, Female	Assault
M.B.	35, Male	Drug trafficking
M.W.	38, Male	Mischief
O.J.	43, Male	Drug trafficking
C.L.	63, Male	Assault
S.R.	32, Female	Firearm possession
E.B.	34, Male	Robbery with a firearm

Table 1: Criminalized Research Participants Demographic Information

The criminal defence lawyer participant group (Group 2) consisted of male-identifying and female-identifying members of the criminal defence bar in Ontario and Nova Scotia. Except for G.S. and J.T., all of them had been members of the defence bar for over ten years. I emailed each potential participant and explained the scope of the project and their involvement. We agreed on a time and date for the interview, which generally lasted between fifteen and thirty minutes. Most of the interviews were conducted in person. Several interviews were done by telephone. The interviews were all conducted between March and April 2019 (see Table 2).

Name	Interview date	Gender/Race
H.D.	17 April 2019	Female/white
J.T.	4 April 2019	Female/white
D.F.	28 March 2019	Female/white
G.S.	28 March 2019	Female/Arab
S.H.	30 July 2019	Female/Black
L.L.	27 March 2019	Female/Black
T.L.	29 March 2019	Male/white
A.B.	28 March 2019	Female/white

Table 2: Defence Lawyer Research Participants Demographic Information

In all the interviews, I utilized a prepared script of questions. The questions concerned the participants' perception of introducing race and anti-Blackness into sentencing proceedings. However, as each interview unfolded, necessary adjustments were made by employing probing questions.⁵⁵⁹ The study used a small and non-random sample; however, the participant responses provided texture and specificity to critical conversations about using race-conscious sentencing strategies to target the known problems of Black over-incarceration and anti-Black bias in criminal sentencing. The results provided an informative and rich illustration of the diverging views of defence lawyers and Black criminalized individuals about introducing the impacts of anti-Blackness and race into sentencing proceedings. Importantly, the responses may also provide data that scholars lack on whether or when it is appropriate to mobilize an awareness of race and anti-Black racism at the sentencing phase. The data, particularly the findings from the Group 1 participants, represent a small but not insignificant sample of the voices of those who theoretically stand to benefit as well as lose from the mobilization of race during sentencing. Indeed, the data illustrates a gulf between the views of the criminalized research participants and the defence lawyers, which requires serious attention.

i. Researcher Positionality

I am a Black male criminal defence lawyer and criminal law scholar who has spent years holding fast to the notion that we can litigate, to some extent, anti-Blackness out of existence through meticulous, incremental strategic jurisprudence. Admittedly, as a defence lawyer, I began this project with a sense of excitement about the potential of race-conscious sentencing reports as a new tool for combating anti-Black racism at the sentencing phase. I was surprised and disheartened, therefore, to learn from the criminalized Black people I interviewed that they took a

⁵⁵⁹ See Rapley, *supra* note 81; Bahn & Weatherill, *supra* note 81.

very different view that was generally misaligned with the views of the defence lawyers who are supposed to represent their interests. These insights struck me initially as a disappointment and a dilemma. However, I reminded myself throughout the study that research is about investigation and discovery, notwithstanding how these discoveries challenge my intellectual or political commitments. But out of this disappointment, I learned humility and gained perspective on the research process. What I initially conceived as a dilemma has become a source of incredible insight. Indeed, grappling with the tensions between intellectual commitments and the world(s) of the research participants brought to light the hidden, under-examined burdens of anti-Blackness on Black lives and experiences. In most instances, the interview process gave the research participants a space to voice those experiences.

The incongruencies between what I learned from the criminalized research participants, which will be explored in greater detail below, and my experiences as a defence lawyer revealed insights on anti-Black racism and criminal justice that I either have never considered or had previously considered and rejected. It forced me to reconsider what I had come to think of as a unified “Black fight” against anti-Blackness in the criminal justice system. I learned that there is no unified front, just people surviving, at times, by employing conflicting strategies. But how do I acknowledge similarities and differences in the lived experiences of the research participants and myself? In other words, how do I engage in critical self-reflexivity without eliding the full complexity and diverse ways in which Black people process their experiences with the criminal justice system?⁵⁶⁰

Arguably, researchers must adopt a methodological stance that permits the data to speak for themselves and avoid leaping to conclusions, especially those that align with their politics, desires, or theoretical commitments.⁵⁶¹ However, discarding one’s theoretical commitments and personal insights is difficult. I do not strive to bury my experiences – instead, I have resisted the urge to

⁵⁶⁰ Swethaa Ballakrishnen, *Putting Yourself in Your Scholarship* (San Juan, Puerto Rico, 2023). “If you don’t know who I am, you have no coordinates for my analysis”).

⁵⁶¹ See Alistair J Campbell, “Let the Data Speak: Using Rigour to Extract Vitality from Qualitative Data” (2020) 18:1 *Electronic Journal of Business Research Methods* 1.

have them drive the collection and analysis of the data. Indeed, “making oneself known,” as Fanon exhorted, requires counter-hegemonic methodologies.⁵⁶² I, too, have a vantage point about anti-Blackness and criminal justice in Canada that may converge or be dissimilar to the views shared by my research partners. The challenge is accounting for these biases without overpowering the research participants’ voices. As Roy Suddaby aptly explained, I must “constantly remind [myself] that [I am] only human and that what [I] observe is a function of both who [I am] and what [I] hope to see.”⁵⁶³

ii. Researching Race and Criminal Law While Black

To counter and challenge the prevailing orthodoxy in criminal law scholarship, Black researchers must adopt approaches and strategies that directly challenge the victor-oriented, white supremacist discourse that dominates criminal law scholarship.⁵⁶⁴ As Paul Butler, writing in the American context, remarked, “criminal law is racist because it is an instrument of white supremacy.”⁵⁶⁵ As such, legal scholars must go beyond the doctrinal-focused method of conducting race and criminal law research.⁵⁶⁶ However, Black researchers must often grapple with the complexities of utilizing counter-hegemonic methodologies and epistemologies while attending to issues of positionality and bias.⁵⁶⁷ For critical race scholars, the goal is to enhance the audibility of marginalized voices in research.⁵⁶⁸ According to Richard Delgado, Jean Stefancic, and Angela Harris, “[t]he ‘legal storytelling’ movement urges black and brown writers to recount their experiences with racism and the legal system and to apply their own unique perspectives to assess law’s master narratives.”⁵⁶⁹ Moreover, “because of their different histories and experiences with oppression

⁵⁶² Fanon, *supra* note 15 at 115.

⁵⁶³ Roy Suddaby, “From the Editors: What Grounded Theory Is Not” (2006) 49:4 *Academy Management J* 633 at 635.

⁵⁶⁴ See Tanovich, *supra* note 9.

⁵⁶⁵ Butler, *supra* note 34 at 693.

⁵⁶⁶ Jones, *supra* note 82 at 7; As Laura Gomez argues, “CRT provides us with methodological guideposts that challenge mainstream assumptions about research and interpretation.”: Gomez, *supra* note 31.

⁵⁶⁷ See Zuberi & Bonilla-Silva, *supra* note 28; Mahmud, *supra* note 11; Jordan, *supra* note 11.

⁵⁶⁸ Delgado, Stefancic & Harris, *supra* note 13 at 9; See Johnson, *supra* note 13.

⁵⁶⁹ Delgado, Stefancic & Harris, *supra* note 13 at 10; See generally Johnson, *supra* note 13.

black, [Indian], Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know. Minority status, in other words, brings with it a presumed competence to speak about race and racism.”⁵⁷⁰ But, arguably, the freedom of being and knowing are not privileges afforded to Black voices in scholarly and juridical spaces. Through the vehicle of anti-Black racism, as Fanon explained, Black experiences are “woven ... out of a thousand details, anecdotes, stories” that are foreign to the Black epistemic.⁵⁷¹ While Black people may be here with many different histories – slavery or not, middle passage or not – the shackling to a white supremacist epistemic while in the Americas seems to be what is shared.

Indeed, a critical dimension of critical race methodology is avoiding the distanced, “omniscient narrator” approach to research and, instead, cultivating and displaying self-awareness about one’s own positionality.⁵⁷² As Kimberle Crenshaw asserts, there exists “no scholarly perch outside the social dynamics of racial power from which merely to observe and analyze.”⁵⁷³ Indeed, neutrality or objectivity in research is a myth; scholarship is inherently political.⁵⁷⁴ No scholarly tradition is insulated from this observation: we tell stories through our scholarship.⁵⁷⁵ Critical race scholarship concedes that it is not “neutral” but recognizes that the same is true of other forms of scholarship. This is a way of acknowledging the relativity and contingency of knowledge. It is also a means of trying to “unlearn” hegemonic Eurocentric modes of thinking and perceiving. All scholarly work reflects or expresses the author’s paradigm, whether implicitly or explicitly, and, to the extent that some scholarship registers as “neutral,” it is not because that scholarship is, in fact, more objective or pure but, rather, because the scholar who produced it is privileged enough to be in the mainstream.⁵⁷⁶

⁵⁷⁰ Delgado, Stefancic & Harris, *supra* note 13 at 10.

⁵⁷¹ Fanon, *supra* note 15 at 111.

⁵⁷² Crenshaw, *supra* note 26 at xiii.

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid* at xiii.

⁵⁷⁵ Parker & Lynn, *supra* note 166.

⁵⁷⁶ See Delgado, *supra* note 29.

iii. Theoretical Framework

The interview data were analyzed using critical race theory (CRT).⁵⁷⁷ CRT is a powerful analytical tool for understanding the complex connection between criminal justice and anti-Black racism.⁵⁷⁸ Critical race scholars have looked at the operations of anti-Black racism and how racialized people's narratives might be recast as pathological or deviant. Indeed, the punishment system and the broader criminal justice system create and reinforce a pathologized image of Black bodies as unrepentant, remorseless, and damaged social reprobates – an image that dictates outcomes for Black people who interface with the system.⁵⁷⁹ CRT seeks to reclaim narratives and recentre the perspective of racialized people to counterbalance and challenge the narratives imposed and projected upon them.⁵⁸⁰ CRT is organized around several tenets: the ordinariness of racism, racial realism, the critique of liberalism, the social construction thesis, intersectionality, and the voice of colour thesis.⁵⁸¹ At its core, CRT is concerned with understanding and changing what Crenshaw referred to as “the vexed bond between law and racial power.”⁵⁸²

CRT analyses can productively explain the criminal justice system's pathologies, demonstrate its inadequacy, and, ultimately, reveal the paradoxicality of tackling anti-Black racism in the system by making Blackness more or less visible and explicit. Put another way, if white supremacy is entrenched within the criminal justice system, then these interventions may be of limited use. While courts have acknowledged the endemic nature of anti-Black racism in Canadian society, there remains a reluctance on the part of many jurists and scholars to accept the inherent limitation

⁵⁷⁷ See Maria C Malagon, Lindsay Perez Huber & Veronica N Velez, “Our Experiences, Our Methods: Using Grounded Theory to Inform a Critical Race Theory Methodology” (2009) 8 *Seattle J Soc Justice* 253; Kathy Charmaz & Linda Liska Belgrave, *The SAGE Handbook of Interview Research: The Complexity of the Craft* (Los Angeles: SAGE Publications, Inc., 2012) at 347; DeCuir-Gunby, Chapman & Schutz, *supra* note 235; Daniel G Solórzano & Tara Yosso, “Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research” (2002) 8:1 *Qualitative Inquiry* 23.

⁵⁷⁸ See Malagon, Huber & Velez, *supra* note 577.

⁵⁷⁹ See Tuck, *supra* note 469.

⁵⁸⁰ Delgado, Stefancic & Harris, *supra* note 13 at 9; See also Johnson, *supra* note 13.

⁵⁸¹ Delgado, Stefancic & Harris, *supra* note 13 at 9–10; Jones, *supra* note 82 at 17–19.

⁵⁸² Crenshaw, *supra* note 26 at xiii.

of colour-blind doctrinal analyses in understanding and, indeed, remedying anti-Black racism in the administration of criminal justice. CRT-inspired advocacy aims to counter and subvert the “record” by centring or “smuggling” Black voices into the discursive spaces that (re)produce and reinforce notions of criminality, risk, and blameworthiness.⁵⁸³ However, undermining so-called official accounts of Blackness, as criminal law discourses represent it, requires a qualitative accounting by Black people of the criminal justice system.⁵⁸⁴

IV. RESULTS: WHAT DOES THE DATA TELL US?

The interview data disclosed three key observations: (1) defence lawyers tend to prioritize reduced sentences and believe IRCAs may achieve this goal; (2) criminalized Black individuals worry that their Blackness will lead to higher sentences; and (3) criminalized Black individuals believe that seeking a reduced sentence based on social/racial factors may harm dignity. The data also revealed a schism between the individuals in Group 2, who mostly agreed that emphasizing Blackness during sentencing was effective, and those in Group 1, who resoundingly wanted to minimize the focus on their race.⁵⁸⁵ The interview data from Group 1 were remarkably consistent in suggesting two broad concerns. First, participants were concerned about their dignity interest. More particularly, they expressed that their dignity as individuals and their families or communities’ dignity would be negatively impacted by efforts to secure a lower sentence by spotlighting their social and racial disadvantage. Relatedly, some suggested that advocating for a lower sentence in this way would be akin to begging for mercy since it could be regarded as a bid for special treatment and, as such, would be abasing.

⁵⁸³ However, critical race scholar Patricia Williams argues that “[w]hile rights may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks.” Patricia Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” in *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 2013) 97 at 102.

⁵⁸⁴ CABL, *supra* note 12.

⁵⁸⁵ The data illustrate a form of acoustic separation between defence lawyers and Black offenders in sentencing. The seminal article on acoustic separation in criminal law is by Meir Dan-Cohen, “Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law” (1983) 97:3 Harv L Rev 625.

Second, the participants in Group 1 were anxious that race talk would backfire and would result in a heavier sentence since, in their experience, Blackness tends to invite harsher criminal justice responses. To these participants, the suggestion that emphasizing their Blackness could result in a lower sentence by attenuating moral blameworthiness seemed counter-intuitive. In contrast, the primary impulse driving defence lawyers' perspectives seemed to be their belief that filing race-based pre-sentence reports or urging the court to take judicial notice of race and anti-Black racism could materially reduce their clients' sentences, which was their central goal in client-centred advocacy. Many of the participants in Group 2 described these strategies as potentially useful mitigative tools.

As a criminal defence lawyer, I empathize with the lawyers' desire to prioritize the client's needs without considering the larger context. On this measure, the success of a litigation strategy depends on whether it benefits a single client's interests. However, through my involvement in strategic litigation and anti-Black racism advocacy, I also understand the inclination to prioritize overarching objectives. This approach sometimes came at the cost of individuals whose cases were dismissed due to "bad facts" or were unsuitable for pursuing strategies or tactics that could result in long-term legal reform with wide-reaching benefits.⁵⁸⁶ Both approaches measure their success roughly the same way – does the strategy help to reduce jail time – whether for an individual client or in terms of the statistical averages for Black people in Canada? This measure is important, but it is also incomplete. It does not pay sufficient regard to how Black people – as individuals and

⁵⁸⁶ See Knox, *supra* note 306; Ariel Levy, "The Perfect Wife" *The New Yorker* (23 September 2013), online: <<https://www.newyorker.com/magazine/2013/09/30/the-perfect-wife>>; Jones, *supra* note 82; See Alinsky, *supra* note 3 at 40. For example, Alinsky asserts, "[w]hen we think about social change, the question of means and ends arises. The man of action views the issue of means and ends in pragmatic and strategic terms. He has no other problem; he thinks only of his actual resources and the possibilities of various choices of action. He asks of ends only whether they are achievable and worth the cost; of means, only whether they will work"; The late CRT scholar, Derrick Bell, discussed this dilemma in the context of school desegregation litigation. He found that civil rights lawyers were attempting to serve two masters - the client on the one hand and the promotion of a progressive agenda. See Bell, *supra* note 49.

diverse community members – measure success, and it certainly does not pay adequate attention to how they calculate costs, including the costs to their individual and collective dignity.⁵⁸⁷

CRT helps us understand how litigation strategy involving race talk can have ethical and strategic dimensions.⁵⁸⁸ For example, do you proceed to make a race-based argument knowing that your client is concerned that it may result in unintended consequences despite the legal accuracy or even the benefit of that argument? Do you persist in the face of your client’s anxieties? Do you dismiss their concerns as paranoia? Do the *Rules of Professional Conduct* provide you with an answer to this quandary?⁵⁸⁹ Do you prioritize the wider community’s interests if your case has wide appeal and may progressively transform the law, or do you consider yourself bound by your client’s fears and individual concerns? Or, put differently, what master do you serve?⁵⁹⁰ Unfortunately, you will find that ethical rules do not provide much guidance on the costs and benefits of race talk in criminal litigation.

i. Observation 1: Most Defence Lawyers Prioritize Reduced Sentences and Believe Race-Conscious Sentencing Strategies May Achieve This Goal

The defence lawyers in Group 2 seemingly prioritized a client-centred advocacy approach to criminal sentencing. For example, D.F., a white female defence lawyer, explained that her “goal is to use these reports to get the best deal for my client.” We glean from D.F.’s assertion that her primary focus in using an IRCA is to achieve what she considers to be an optimal sentencing outcome for her Black client. She did not specify what would constitute such an outcome, but it is clear from her comment that utilizing an IRCA would achieve this goal. D.F. was not the only

⁵⁸⁷ See Jones, *supra* note 82; Some commentators argue that community or cause lawyers should not adhere to blind fidelity to the law, but rather “community lawyers should consider the morality and practicalities of a client’s or community’s situation”. See Alfieri, *supra* note 99; However, critical race scholar, Patricia Williams argues that “while rights may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks”. See Williams, *supra* note 99.

⁵⁸⁸ Jones, *supra* note 82.

⁵⁸⁹ Law Society of Ontario, “Rules of Professional Conduct”, online: *Law Society of Ontario* <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>>.

⁵⁹⁰ See Bell, *supra* note 49.

defence lawyer who expressed this view. G.C., a Black male defence lawyer, said he must “work a lot harder for [his] Black clients, so [he] welcome[s] any tool that will make the job easier.” G.C. did not explain how IRCAs made the “job [of representing Black clients] easier.” But how can IRCAs make the “job of representing Black clients easier” given the entrenched anti-Black racism in our criminal system?⁵⁹¹ According to H.D., a white female lawyer, “given the judicial resistance to talking about race, we must infuse the system with a sense that these are issues that must be grappled with.”

But do these reports make the system less hostile towards Black offenders? Most of the defence lawyers admitted that the criminal system is inherently racist. T.L., a white male defence lawyer, expressed the fact that he believes that “systemic bias exists.” He asserted that “a lot of people’s livelihood is invested in the status quo ... to discriminate is a skillset.” Moreover, he explained that “civil society does not work for everybody. ... You become the thing that you are made to become.” When asked whether race and culture should be considered in sentencing proceedings involving Black offenders, he responded: “[Y]es, it should be considered because the inherent belief that the system is equal is false.” Despite their acknowledgement that the system is racist, most of the defence lawyers saw IRCAs as a welcomed tool in a seemingly limited toolbox.

Interestingly, A.B., a white female defence lawyer, expressed support of IRCAs but with some caveats. For example, she asserted that “race shouldn’t be a factor to consider. Instead, the court should consider their background. What if a Black kid grew up the same as a white kid – does race matter then – I don’t think so!” She emphasized that race is not the only factor that drives draconian sentencing practices. For example, she explained that race was not the most important factor to consider during sentencing in drug cases. She listed several factors that she finds more critical: “history of mental and physical health issues, the right judge, criminal record, no family support,

⁵⁹¹ *Parks*, *supra* note 64; *Morris ONCA 2021*, *supra* note 51. *Parks*, in the jury selection context, and *Morris*, in the sentencing context, are often cited as examples of how race talk in criminal proceedings can be harnessed to address entrenched institutional anti-Black racism.

no job prospects, lack of community stability – it’s more about socio-economics/poverty than it is about colour.”

She further added that “there is no link between race and crime.” Later in the interview, A.B. seemingly contradicted her earlier assertion by adding that the “mistreatment of Blacks generally and historically affects members of that group, especially when they are being sentenced – too many Aboriginals and Blacks [are] in jail – they are targeted.” Moreover, she explained that “the government is wasting money on prisons. They should invest in social programs. These problems are not just historical but ongoing. Don’t just punish people for cultural and systemic issues.” A.B. seemingly supported context-based sentencing that focused not on race but on socio-economic and cultural deprivation. While she did not use the term intersectionality, she would appear to support a sentencing methodology that adopted an intersectional lens.

G.S., a female Arab lawyer, expressed concerns similar to A.B. She explained that “IRCA’s are a bit of a distraction from the actual issue.” In fact, she asserts that many of these cases “shouldn’t have gone to sentencing – far too much emphasis on sentencing to rectify historical wrongs. We need to rectify them from the beginning.” Nonetheless, she still believes that “race affects sentencing.” Her primary concern was that addressing race at the sentencing stage obscures the real concern of anti-Blackness at other junctures along the criminal process. For example, she recounted an experience in bail court where a justice of the peace stated: “[W]e know that rap music and drugs go hand in hand. Not so in country music, rock-n-roll or a church choir.” She expressed concern that this putative link between race, culture, and crime is rampant in the criminal system, ranging from investigation to sentencing.

G.S. and A.B. espoused a broader, more nuanced application of race/culture discourse across the criminal process. While they both saw a role for IRCA’s, they were unconvinced that IRCA’s adequately addressed the multidimensional issues faced by Black accused/offenders. Indeed, they were concerned that addressing these issues at the back end of the system would do little to

eradicate the problem of anti-Black racism in the criminal system.⁵⁹² In fact, G.S. believed that “the criminal justice system is ill-equipped to address accountability in a meaningful way. It is not possible to achieve it in the current criminal justice system. The current system is more punitive than rehabilitative. The broader community would benefit from outside intervention as opposed to reactivity.”

J.T., another white female defence lawyer, was attuned to the fact that Black clients may not share the views espoused by defence lawyers, but she understood that this was not because of dignitary trade-offs and the real possibility that the strategy could backfire but, rather, because of the different levels of faith in the criminal system. She explained that “lawyers have this blind faith in the system. ... The offenders have no faith in the system. They must feel that their Blackness put them in this situation, then why would they want to highlight it.” Her opinion broadly aligned with the criminalized interviewees’ perceptions around race visibility in sentencing proceedings. Indeed, all of the defence lawyers expressed concerns about racism and unconscious/implicit bias in the sentencing process. Yet most welcomed IRCAs, or the taking of judicial notice of anti-Blackness, as tools to address this issue meaningfully. I found this “blind faith in the system,” as J.T. remarked, somewhat paradoxical given the lawyers’ overwhelming agreement that the system is racist and that the key actors within it (crown prosecutors, justices of the peace, and judges) may harbour implicit bias.

ii. Observation 2: Criminalized Black Individuals Worry Their Blackness Will Lead to Harsher Sentences

A.W., a forty-eight-year-old man, explained that “even though I cannot see inside the judge’s mind, I believe that Black people are sentenced harsher because of our colour.” Indeed, most of the research participants in Group 1 opposed race being raised during sentencing. According to E.B., a thirty-four-year-old criminalized man who had spent four years in prison for armed

⁵⁹² Kent Roach, “Making Progress on Understanding and Remediating Racial Profiling” (2004) 41:4 Alberta LR 895 at 903.

robbery, “Black men get harsher sentences.” As such, he explained that “race should not be considered” in criminal sentencing. Both A.W. and E.B. desired a sentencing regime that was race neutral and colour blind – one that focused less on their race and more on the offence and their level of blameworthiness. In the eyes of the criminalized research participants, the answer is obvious – they did not see value in making their race visible. Indeed, they perceived their race as being an obstacle to fair treatment.

Internalized Racial Stereotypes

Interestingly, when asked about their opinions on any links between race and crime, four of the nine criminalized research participants commented that Black men are more likely to be involved in gun and drug crimes. One criminalized research participant stated that the link between race and crime “depends on the crime. But the environment has a lot to do with it. We are a product of our environment.” E.B. explained that “there is a relationship between race and crime ... the population on the inside shows this.” He also stated: “Black people get charged more for violence and drugs and gun offences.” When asked to explain her opinion on this phenomenon, S.L., a thirty-year-old female, remarked that “all people engage in crime, but Black people do more shootings and robberies, but they get more blame because of racism.” She continued by stating that “there is a link between Blackness and crime, especially when it comes to drugs and guns.” S.L. disclosed that she had been charged but ultimately acquitted of gun possession. She explained that she was familiar with this lifestyle and had many friends and family members who were either currently or in the past caught up in that lifestyle. According to S.L., this type of lifestyle was necessary to survive. E.B. stated that “[no] different choices [are] there for him.” In fact, O.J, a forty-three-year-old man, stated that “having a gun is necessary to survive and get ‘food.’”⁵⁹³ He further explained that “the court should consider that when sentencing the person.” E.B.’s, S.L.’s, and

⁵⁹³ The reference “to get food” is Jamaican for acquiring the economic necessities for basic survival.

O.J.'s comments seem to suggest that some Black people may view Black criminality as a rational means of self-preservation.

Arguably, if Black Canadians are “more likely” to engage in street-level criminality for survival or self-preservation, it may be a symptom of racist structural disadvantage.⁵⁹⁴ Paul Butler explained this phenomenon in the American context:

[C]riminal conduct among African Americans is often a predictable reaction to oppression. Sometimes black crime is a symptom of internalized white supremacy; other times it is a reasonable response to the racial and economic subordination every African-American faces every day. Punishing black people for the fruits of racism is wrong if that punishment is premised on the idea that it is the black criminal's “just deserts.”⁵⁹⁵

Butler's assertions were made in the American context, and insofar as they are grounded in a particular national history, they are not entirely transferrable to the Canadian context. However, their basic insight is also compelling in the Canadian context.⁵⁹⁶

There is a danger in framing a causal theory that links economic and racial subordination to criminality. E.B.'s, O.J.'s, and S.L.'s comments align with pernicious racial stereotypes that associate Black individuals with guns and drugs – a link that is borne out of anti-Black racism. Indeed, while their comments speak to a more complex phenomenon (that is, internalized anti-Black racism), they nonetheless can be recast as evidence in support of race-based policing and sentencing practices.⁵⁹⁷ These race-based assumptions create a self-fulfilling prophecy about Black people's propensity for violent crimes.⁵⁹⁸ E.B. explained that the reason for this is because “the

⁵⁹⁴ Butler, *supra* note 34 at 680.

⁵⁹⁵ See Butler, *supra* note 52; Tommie Shelby, “Justice, Deviance, and the Dark Ghetto” (2007) 35:2 *Philosophy & Pub Affairs* 126; Raff Donelson, *Blacks, Cops, and the State of Nature* (Rochester, NY, 2017).

⁵⁹⁶ See note 232; See Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 230; See note 249; Tanovich, *supra* note 196; Tanovich, *supra* note 9.

⁵⁹⁷ Tanovich, *supra* note 9 at 916; Wesley W Bryant, “Internalized Racism's Association With African American Male Youth's Propensity for Violence” (2011) 42:4 *J Black Studies* 690.

⁵⁹⁸ Tanovich, *supra* note 9 at 916.

system is built expecting you to come back.”⁵⁹⁹ He further asserted that “convictions, criminal records and court conditions prevent reintegration and rehabilitation – it’s a barrier.” He recounted being stopped for driving a luxury vehicle, being carded by police, and also being racially profiled in bail court. He discussed his conviction and the various collateral consequences that flowed from it, which included difficulties finding work and potential deportation proceedings. Having served four years in prison for armed robbery, he found it difficult to reintegrate and find employment. E.B. stated that this and other reasons make Black people “automatically hate the police and law system ... and if you hate it, then why would you obey it?”

iii. Observation 3: Criminalized Black Individuals Believe That Seeking a Reduced Sentence Based on Social and Racial Factors May Harm Core Interests

The data suggest that amplified race visibility does not always align with Black criminalized people’s core interests (equality, liberty, autonomy, and dignity). For example, M.W., a thirty-eight-year-old criminalized research participant, expressed his desire for a colour-blind sentencing regime, stating: “[I]f I did the crime, I deserve to be punished and to treat me otherwise would be undignifying.” He also asserted: “[I]f I did the crime, then my race shouldn’t matter.” In addition, he explained that “it should be what you did, not your race, that should be considered ... if you commit a crime, then it should not matter the race and culture of the person.” His comments suggest that he would prefer colour blindness in sentencing proceedings. Indeed, the data reveal a paradox in how Black identity is negotiated in the sentencing context and the broader criminal justice system. Elsewhere, I have argued that attempts to make anti-Black racism an explicit factor in criminal proceedings engage what I have termed “the paradox of visibility.”⁶⁰⁰

The paradox of visibility has two prongs. The first prong reveals how a focus on Blackness can attract pernicious stereotypes and harsh criminal justice responses; it highlights the difficulty of

⁵⁹⁹ Indeed, what can we learn by acknowledging racism as a design feature of the criminal justice system – and not a bug in the system? See Butler, *supra* note 52.

⁶⁰⁰ Jones, *supra* note 82 at 11.

promoting more positive narratives of Blackness, suggesting that it may be safer to minimize attention to Blackness altogether. Whereas the second prong highlights the contradictions, tensions, and absurdities of efforts aimed at obscuring or invisibilizing Blackness. It captures the impossibility of minimizing attention to Blackness, suggesting that it may be more pragmatic to promote more positive (counter-)narratives of Blackness. However, it may be impossible to resolve this paradox, especially in the sentencing arena where the express goal is to make moral judgments about the individual standing before the court⁶⁰¹ – a task that, in the case of Black offenders, necessarily involves either an acknowledgement of their Blackness, or an effort to disregard their Blackness, within the moral reasoning process.⁶⁰²

iv. When Black Looks Back

When asked about his perspective on the links between race and crime, A.W. suggested that “there’s nothing good about Black in the eyes of white people.” In this sense, Blackness is understood as imposing a burden. A.W.’s assertion has three dimensions. First, it construes white eyes as an instrument for measuring Black worth. Second, by singling out white people, it implicitly assumes that Black lives are viewed more favourably through other, non-white, racialized or even Black eyes. Third, it implies a certain sense of inescapability from the normative evaluations of the white gaze.⁶⁰³ It appears that A.W. viewed the worth of Black bodies as being equivalent to property owned by white people. Arguably, A.W.’s claim suggests that white people locate Black worth exclusively in the nucleus of whiteness.⁶⁰⁴ Thus, being worthy becomes equated with being white. For this reason, A.W. expressed reticence about emphasizing race during sentencing proceedings, given the worthlessness of Black lives, according to his assertion, as viewed through white eyes.

⁶⁰¹ *Ipeelee*, *supra* note 47; See also Silver, Ulmer & Silver, *supra* note 47.

⁶⁰² Richardson, “Stan Encyclopedia Phil”, *supra* note 48.

⁶⁰³ Scholars have written about how the white gaze (re)shapes, destroys and renders worthless Black lives. See Sherene Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998).

⁶⁰⁴ Harris, *supra* note 175 at 1714.

But seeing or unseeing Blackness is fraught with complexities. The Black offender on display before the court for sentencing may be seen in ways that are incongruent with how he would like to be seen. W.E.B. DuBois identified this psychic dilemma over a century ago. He stated that Black people exist in “a world which yields him no true self-consciousness, but only lets him *see* himself through the revelation of the other world.”⁶⁰⁵ In essence, the voyeur holds the power to construct and see the offender in ways that align with their biases and world-views on race. Such “racial voyeurism” is endemic and stretches back to slavery. Some scholars have defined racial voyeurism as the “surveillance and display of racialized bodies, especially black bodies. In this practice, race is treated as a spectacle, often at the expense of black agency.”⁶⁰⁶ The Black body as object featured prominently in the slave markets of the Americas, Caribbean, and West African Coast, where Black bodies were put on display for ocular consumption, valuation, and dissection.⁶⁰⁷ Over the centuries, the marketplaces in which Black bodies have been paraded and displayed have shifted from auction blocks and plantations to prisons, courtrooms, schools, and street corners.⁶⁰⁸

Under the gaze of the racial voyeur, Blackness is transformed – mutated into something alien. In those moments, the Black body is reconfigured in meaning and identity.⁶⁰⁹ For Black people, the identity on display and under scrutiny is not their own. Still, despite its extrinsic origins, they are viscerally aware that this image of Blackness has been engrafted on them. It is now their burden to bear. The first prong of the paradox may suggest that obscuring or invisibilizing Blackness may be a logical means to mitigate or subvert the deleterious consequences that flow from racial voyeurism. Yet the second prong reveals this as an impossible and illogical strategy. One cannot

⁶⁰⁵ Du Bois, *supra* note 143 at 2.[emphasis added].

⁶⁰⁶ See Sonita R Moss & Dorothy E Roberts, “‘It Is Likely a White Gene’: Racial Voyeurism and Consumption of Black Mothers and ‘White’ Babies in Online News Media” (2020) 44:1 *Humanity & Society* 131.

⁶⁰⁷ Anne C Bailey & Danielle Bowman, “For hundreds of years, enslaved people were bought and sold in America. Today most of the sites of this trade are forgotten.”, (12 February 2020), online: *History News Network* <<https://www.hnn.us/article/for-hundreds-of-years-enslaved-people-were-bought->>.

⁶⁰⁸ See Maynard, *supra* note 19.

⁶⁰⁹ Laraine Wallowitz, “Chapter 9: Resisting the White Gaze: Critical Literacy and Toni Morrison’s ‘The Bluest Eye’” (2008) 326 *Counterpoints* 151.

simply “outrun” one’s Blackness or avert the gaze that strips the Black body of dignity and agency.⁶¹⁰

In *Invisible Man*, Ralph Ellison equates invisibility with race, and, specifically, with Blackness, in the sense that everything about his individuality and character is obscured and rendered invisible by virtue of his skin. He writes in the book’s prologue: “I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves or figments of their imagination, indeed, everything and anything except me.”⁶¹¹ On this reading, Black criminalized people who want to be treated as equal to non-Black criminalized people do not want to be invisible; they want to be visible in the way in which white people are – as persons in our society who are seen as individuals and not as cyphers or placeholders onto which we project a standardized set of characteristics. Indeed, as Fanon explained in *Black Skins, White Masks*, “already I am being dissected under white eyes, *the only real eyes*. I am fixed. Having adjusted their microtomes, they objectively cut away slices of my reality. I am laid bare. I feel, I see in those white faces that it is not a new man who has come in, but a new kind of man, a new genus. Why, it’s a Negro!”⁶¹²

What Fanon describes can only be understood as an affront to dignity and autonomy. It suggests that the attempts at invisibility by the criminalized research participants are futile because their Blackness is always present and the associated “stigma carries in the race.”⁶¹³ It is that bitter truth that they must negotiate. For Black offenders, the Blackness on display and under scrutiny in sentencing proceedings is not their own; it is not their own deeply felt identities but, rather, the distorting projections of the white gaze grounded in historical tropes and narratives steeped in anti-

⁶¹⁰ Ibram X Kendi, “On the Racist Ideas Jesse Owens Could Not Outrun - AAIHS”, (21 February 2016), online: *Black Perspectives* <<https://www.aaihs.org/on-the-racist-ideas-jesse-owens-could-not-outrun/>>.

⁶¹¹ Ellison, *supra* note 137.

⁶¹² Fanon, *supra* note 15 at 116 (emphasis added by author).

⁶¹³ See Constance Backhouse, *Petticoats and Prejudice - Women’s Press Classics: Women and Law in Nineteenth-Century Canada* (Toronto: Canadian Scholars’ Press, 2015).

Black racism.⁶¹⁴ The white gaze is a visual phenomenon not exclusive to the sighted.⁶¹⁵ As Osagie Obasogie found in his study, “race becomes visually salient through constitutive social practices that give rise to visual understandings of racial difference for blind and sighted people alike.”⁶¹⁶ Ellison explains that the “invisibility to which [he] refer[s] occurs because of a peculiar disposition of the eyes of those with whom [he] come[s] in contact. A matter of the construction of their inner eyes, those eyes with which they look through their physical eyes upon reality.”⁶¹⁷ In this vein, the criminalized Black individuals, like A.W., may understand the white gaze, whether through internal or physical eyes, as an ontological dismemberment or reconfiguration of their Black bodies. Thus, their objective would be to avert the gaze, and any strategy that requires fixing the gaze upon them would be deemed unreasonable and risky.

To exist in Black skin is a continuous struggle between the desire for free expression and predestination. Fanon’s explication of visibility sheds light on the criminalized research participants’ apprehensions around race visibility in criminal sentencing.⁶¹⁸ As Fanon explains, “when the black man, who has never felt as much a ‘Negro’ as he has under white domination, decides to prove his culture and act as a cultivated person, he realizes that history imposes on him a terrain already mapped out, that history sets him along a very precise path and that he is expected to demonstrate the existence of a ‘Negro’ culture.”⁶¹⁹ What became apparent from the data is that some criminalized Black people may attempt to obscure their race and racial experiences to avoid the meanings they believe have become associated with Blackness and how those meanings may increase their risk for harsher punishment and impact their dignity and liberty interests. So, what can be done? Should Black offenders lean into the gaze to force engagement with what is seen,

⁶¹⁴ This duality thereby creates a Du Boisian sense of double consciousness. Black offenders must attend to both realities: their own self-image, and that which is projected onto them. W E B Du Bois, *The Souls of Black Folk* (Chicago: Dover Publications, 1903) at 2.

⁶¹⁵ See Osagie K Obasogie, “Do Blind People See Race - Social, Legal, and Theoretical Considerations” (2010) 44:3/4 Law & Soc’y Rev 585.

⁶¹⁶ *Ibid* at 585.

⁶¹⁷ Ellison, *supra* note 137.

⁶¹⁸ Fanon, *supra* note 15 at 116–117.

⁶¹⁹ Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1961) at 150.

albeit not what the offender wants to be seen? In other words, can they perhaps evade the paradox by making the first prong of the paradox explicit – that is, by forcing a reckoning with the pernicious stereotypes that are projected onto Black bodies and with the racist structures that produce and reinforce them? Is this the point of race-based sentencing strategies like IRCAs?

V. IRCAS AND THE PARADOX OF VISIBILITY

Looking at the use of IRCAs, we find another contradiction. It appears that IRCAs simultaneously attempt to force a reckoning with pernicious stereotypes while also reinforcing those same stereotypes. First, IRCAs or the exercises of judicial notice that are contemplated by leading IRCA cases can provide background information about anti-Black racism, thereby calling out pernicious anti-Black stereotypes. For example, IRCAs may identify data to support the claim that Blackness is read in particular ways that can be pathological and can lead to harsher criminal justice responses. Yet IRCAs often rely on the tropes they ostensibly should seek to undermine when moving from this contextual information to describing individual offenders. By emphasizing the social deprivations or criminogenic factors that the individual Black offender has experienced, IRCAs paint a pathologized image that expressly or implicitly emphasizes Black recalcitrancy, intellectual ineptitude, poverty, and propensity for violence. In essence, IRCAs traffic in race pathologies. However, an argument could be made that IRCAs would lose their meaning and efficacy if they were sanitized of pathologies.

A pathologized image of Blackness aligns with an array of received wisdom on race at the sentencing stage. When presented in relation to the broader social context – that is, as something that fits a larger pattern – this pathologized image is proffered as archetypal. Given this status, these descriptions are not easily displaced and reinforce the broader heuristical lenses through which Blackness continues to be configured and reconfigured. Often, the Black body on display for judicial consumption must explicitly or implicitly align with these descriptions to be seen. As we have seen, attempts to tell a counter-narrative by highlighting how anti-Blackness can also

impact individuals whose stories are not marked by poverty, fatherlessness, low educational attainment, and the like have backfired in some sentencing cases.⁶²⁰

Yet when the pernicious archetype is the only image presented before the judicial gaze, that gaze can then operate as an exercise of racial voyeurism that becomes a self-fulfilling prophecy – one that overdetermines Blackness from without, where every case example confirms the pernicious pattern. There are fundamental problems, then, with attempting to address Blackness either by contextualizing or countering pernicious stereotypes. However, the supposed alternative of not addressing race is not available because Blackness cannot easily be cloaked – whether we scrap IRCAs or re-engineer them. The issue is not the document itself but with a more complex phenomenon – the white gaze. Fanon described the white gaze as the “only real eyes” – eyes that “cut away slices of [his] reality” and “laid [him] bare.”⁶²¹ In essence, the gaze is a phenomenological process related to racial voyeurism.⁶²²

IRCAs highlight these racial tropes to mitigate a Black offender’s sentence. The first prong of the paradox would suggest that this strategy may produce deleterious effects. However, under the second prong, we learn that any effort to attenuate Blackness will have a negligible impact on whether and how Blackness is seen in the sentencing arena. Thus, the absence of an IRCA is not a solution because invisibilizing race does not move race out of the sentencing calculus. The criminalized participants wanted the gaze to be subverted – hence, their suspicion of IRCAs. For them, the first prong of the paradox – the fear of being perceived as Black – dominated, but they did not seem to grapple with the second prong – the impossibility of avoiding the gaze. The lawyer participants, however, wanted to use IRCAs, suggesting that they were not aware of the first prong of the paradox but were more attuned to the second prong. They recognized that race will always

⁶²⁰ *Biya 2018*, *supra* note 8; The conviction was quashed at *Biya 2021*, *supra* note 8.

⁶²¹ Fanon, *supra* note 15 at 112.

⁶²² David Woodruff Smith, “Phenomenology” in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy*, summer 2018 ed (Metaphysics Research Lab, Stanford University, 2018).

be an issue but felt sanguine about their ability to leverage it favourably. However, they did not account for the challenges and maybe even the impossibility of doing so.

With the conflicting perspectives on race visibility in sentencing from both groups, it is essential to address two key concerns. First, do race-based pre-sentence reports reduce sentences? There was disagreement on this issue between the two groups of interviewees. Most of the defence lawyers believed that these reports could improve outcomes for Black offenders. In contrast, the criminalized participants believed the opposite and, in some cases, felt these types of reports would cause them more harm. Second, if race-based pre-sentence reports do reduce sentences, at what cost does it happen, including the costs to dignity that some of the criminalized research participants identified?

In assessing whether the expanded use of race-based sentencing strategies can positively impact sentencing outcomes to justify their use despite their associated costs, it is helpful to think about sentencing in both quantitative and qualitative terms. The former requires an analysis of sentence reduction in terms of time (quantitative) and the corresponding impact on Black communities. For example, a slight reduction in time, in the numerical sense, may not be worth the potential trauma and affront to individual and collective dignity faced by the offender and their communities.⁶²³ In that vein, it is important to critically assess the various benefits, risks, and costs associated with any explicit discussion of race and anti-Black racism at the sentencing stage.

Sentencing reform involving race-based pre-sentence reports can only be justified if its positive material benefits on communities and individuals outweigh its costs. Still, the benefits and costs of such reform are hard to measure. Even if these reports materially reduce sentences, there are risks of individual (re)traumatization and the unintended reinforcement of stereotypes. To the extent that defence lawyers are proposing sentencing reform centred on the expanded use of race-based pre-sentence reports, they must be prepared to acknowledge that these reports are not

⁶²³ Unfortunately, there is no data on whether these reports or the taking of judicial notice reduce custodial sentences. See Lisa Kerr, “How the prison is a black box in punishment theory” (2019) 69:1 UTLJ 85.

necessarily a “no-cost” or “low-cost” proposition for the individuals and communities they seek to benefit. While race-based pre-sentence reports are potentially helpful documents, their production can be challenging for the offenders who must reveal and revisit personal traumatic experiences with anti-Blackness.

Further, those responsible for writing and presenting these reports must consider whether or how much focus should be placed on pathologized and damage-centred depictions of Blackness.⁶²⁴ The “damaged” narrative can create an inaccurate and dangerously misleading depiction of the varied and complex meanings ascribed to Black peoples’ experiences.⁶²⁵ Moreover, this intense focus can inadvertently reinforce or reify certain pernicious notions about the inherent shortcomings of Black people. Another risk of the “damage” narrative is that it could paint a bleak picture of Black offenders that can work against a judge’s willingness to consider rehabilitative sentences and to credit expressions of remorse.⁶²⁶

One way in which IRCAs (and Black offenders) can circumvent both prongs is by not seeking to avert or reinforce the gaze. They must instead confront sentencing judges with an uncomfortable truth – that is, “[w]hen they *see* Blackness, they are *seeing* what they want to *see*.” Their gaze brings to the sentencing process an array of extraneous factors about risk, worth, and character that colour the judicial assessment of blameworthiness and moral desert. Arguably, we confront anti-Blackness by both acknowledging it as a phenomenon that operates through generalizations and by resisting its operations through a focus on the details of the individual beyond/apart from their Blackness.

So, while we cannot evade or hide Blackness, we can counterbalance it with a genuine engagement with the individual, which is ultimately a mechanism for eroding anti-Black attitudes. Another

⁶²⁴ Tuck, *supra* note 469.

⁶²⁵ *Ibid.*

⁶²⁶ See Susan A Bandes, “Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition” in Jill Hunter et al, eds, *The Integrity of Criminal Process* (New York: Bloomsbury Publishing, 2018) 309.

potential shortcoming of IRCAs and race-based sentencing strategies is marketing that claims that it does something about the white gaze. IRCAs can perform an educative role only if judges take them seriously. But, even if IRCAs were removed, that would not address the gaze. To perform an educative role, an IRCA must avoid monolithic, flat narratives of Blackness. They should expose judges to Blackness as a diverse, multifaceted, intersectional phenomenon.

VI. RACE-BASED SENTENCING AS A PLEA FOR MERCY

In *R. v Jackson*, Justice Shaun Nakatsuru explained that the IRCA defence adduced “makes [him] think whatever my sentence is, it should not simply write you off as a criminal not worth the time to help be better. There is a better way to get to your sentence.”⁶²⁷ Nakatsuru J found it necessary to remind himself and others (judges, the accused and lawyers) that, despite these pre-inscriptions, he should not write off Jamaal Jackson:

I see the path that have [sic] lead you here. The road you took was not helped by being Black in a white world. More importantly, based upon the information from Mr. Wright and others, there is still hope for you. I include yourself in that Mr. Jackson. You still have hope for yourself. You still have the ability to learn from your past mistakes. I am not saying that you have shown yourself to have done so. I am just saying you still have the ability to do so. Put another way, Mr. Jackson, I am enough of a realist to recognize real rehabilitation, shown by actions not just words, is not going to be easy for you. But I have been given enough information to accept that it still remains a real possibility.⁶²⁸

Nakatsuru J was also the sentencing judge in *R. v Morris*.⁶²⁹ In *Morris* and *Jackson*, Nakatsuru J penned impassioned decisions to the offenders and their communities. The decisions emphasized the dignity and worth of the offenders and the need to centre these values when sentencing a Black offender. In *Morris*, he explained that “[s]ome may question why I am giving you leniency. For a

⁶²⁷ *Jackson*, *supra* note 69 at para 149 [emphasis added].

⁶²⁸ *Ibid* at 111.

⁶²⁹ *R v Morris*, 2018 ONSC 5186 [*Morris ONSC*].

15-month sentence is a lenient sentence. Some may argue that you are *not worthy*. That you have failings. That you have not yet shown to have turned your life around.”⁶³⁰ He explained:

In my opinion, we have to get past this idea of waiting for the perfect person to be lenient. Waiting for the most benevolent soul by the standards of the privileged and the few, before we decide to extend consideration for leniency. For we may be waiting a long time. The young man who makes the choice to pick up a loaded illegal handgun will not likely be a product of a private school upbringing who has the security of falling back upon upper middle class family resources. Rather, he is likely to be a product of oppression, despair, and disadvantage. Likely he is someone who cannot turn his life around on a dime even if he wanted to. In short, he is you, Mr. Morris.⁶³¹

As Justice Louis Lebel explained in *R. v Ipeelee*, “[w]ho are courts sentencing if not the offender standing in front of them?”⁶³² Interestingly, Nakatsuru J considered the pathological inscriptions assigned to Kevin Morris, Jamaal Jackson and other young Black men who come before sentencing courts as a catalyst to extend leniency and not additional blame – blame ascribed for being and existing.⁶³³ But can judicial leniency or mercy get us closer to properly assessing moral blameworthiness?⁶³⁴ In that vein, is the marshalling of race and anti-Black racism in sentencing proceedings an attempt to appeal to judicial mercy or leniency? Arguably, when we adjudicate blame acontextually, offenders from racial backgrounds that some view as intrinsically more blameworthy due to pseudo-scientific and outdated notions of race construction receive unfair amounts of blame and harsher penal responses than white offenders.⁶³⁵

⁶³⁰ *Morris*, *ibid* at 83 [emphasis added].

⁶³¹ *Jackson*, *supra* note 69.

⁶³² *Ipeelee*, *supra* note 47.

⁶³³ Some scholars assert that introducing mercy into criminal sentencing may (over)correct the system’s increasingly punitive responses. See Lacey & Pickard, *supra* note 486.

⁶³⁴ See Carol Steiker, “The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System” in Michael Klarman, David Skeel & Carol Steiker, eds, *The Political Heart of Criminal Procedure: Essays on Themes of William J Stuntz* (Boston: Cambridge University Press, 2012) 212.

⁶³⁵ Richard Delgado, “Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation” (1985) 3:1 Minnesota JL & Inequality; Hudson, *supra* note 387.

The data seem to suggest that the criminalized participants may see judicial mercy or leniency as an affront to Black dignity and thus cling to their notions of colour-blind sentencing.⁶³⁶ Equal treatment, even harsh treatment, is perhaps more welcomed than preferential treatment grounded in white compassion. But can mercy be made compatible with justice? For example, one may perceive mercy as undesirable given that it necessarily involves the performance of power differentials, whereby an empowered individual chooses to extend a benefit that the disempowered individual has no right to claim and is expected to receive in a spirit of gratitude.⁶³⁷ This conceptualization of mercy seems to track with notions of degradation and serves as an affront to Black dignity. There may be some value in mercy, however, especially when mercy tempers the zeal to punish without due consideration for structural violence.⁶³⁸

Mercy does not track with degradation if conceptualized as a bilateral grant rather than the performance of power differentials. IRCAs may, if deployed in a principled manner, facilitate and promote a two-way flow of mercy wherein power relations are flattened, and dignity is made a central consideration in sentencing determinations. The proposed approach imagines a situation whereby the state seeks mercy from Black Canadians by providing quantitatively and qualitatively better sentences for Black offenders, and, in turn, a Black offender may feel morally emancipated when they make a plea for mercy or leniency. Such an approach can be considered as a shared grant of mercy. One in which the state and Black offenders seek and grant mercy. This approach is a dignity-affirming compromise. It is not about compensating for past wrongs; instead, it serves as the repatriation of stolen or lost dignity. As Butler explains, the state is essentially “punishing people for ‘negative’ reactions to racist, oppressive conditions.”⁶³⁹

⁶³⁶ See James Q Whitman, *Harsh justice: criminal punishment and the widening divide between America and Europe* (New York: Oxford University Press, 2005).

⁶³⁷ See *ibid.*

⁶³⁸ Lizzie Seal & Alexa Neale, “Racializing Mercy: Capital Punishment and Race in Twentieth-Century England and Wales” (2020) 38:4 Law & His Rev 883.

⁶³⁹ Butler, *supra* note 34.

VII. CONCLUSION

This article has analyzed interview data on the emphasis of anti-Black racism and race in sentencing proceedings generated from two stakeholder groups: Black criminalized individuals and defence lawyers. The data reveals a schism between these groups. It also highlights an inherent paradox between racial visibility and invisibility in the sentencing context. The defence lawyers mostly supported increased race visibility in sentencing through judicial notice and IRCAs. In contrast, the criminalized research participants expressed reluctance about race visibility in sentencing because of their concern that it may result in harsher sentences while impacting their core interests. This tension raises important ethical questions about maintaining the client's best interests. It also invites us to consider whether race-based strategies at sentencing are a no-cost or low-cost proposition.

These perspectives are critical in how sentencing judges interpret existing sentencing principles and how lawyers develop legal strategies to assist their Black clients. It is still an open question whether the continuing centring of Black voices and perspectives in sentencing proceedings is worth the cost, despite what these voices or perspectives may reveal about the system or what reactions they might provoke. It has been ten years since the introduction of IRCAs and four years since the data collection used in this article. It may well be time for scholars to evaluate empirically what impact, if any, increased utilization of race-based pre-sentence reports and judicial notice in sentencing proceedings have had on Black incarceration rates and the perceptions of the key stakeholders.

CONCLUSION

I began this project six years ago to assess what was then an emerging sentencing strategy for Black offenders. The race and sentencing landscape has significantly shifted. I could not have imagined the expansion and ubiquity of race-conscious pre-sentence reports. Some of what has occurred has surprised me, i.e., the judicial acceptance of this sentencing methodology, while others were more predictable, i.e., the high cost to Black dignity. This dissertation raised many questions and expressed bitter truths about whether the criminal law system can provide justice for Black people.

The Bitter Truth

Yearning for meaning and purpose in a world that defines me in ways I can not defy nor hope to decipher — Yes, I seek out worth for a body long stripped of a soul. But today, I am disillusioned with that senseless, gruelling task — with the guttural cry for dignity that no one cares to hear and those who do scream inaudibly alongside me. Like the soulful lamentation of the songstress, I question: “What good am I? Heaven only knows”. I want to escape: To “take the wings of the morning and dwell in the uttermost part of the sea.” There, I may find peace or perhaps the scorching harshness of inevitability. But, alas, escaping, like so many other things, comes at a high cost. My ancestors escaped to certain death. Some found freedom in the briny depths. Others from the hangman’s noose. While many stood firm in the bitter truth — resolving to face the inescapability with stubborn dignity. They chose life in a sea of death: “while a voice within [them] cried,” they were “sure someone may answer [the] call. And this bitter earth ... may not ... be so bitter after all.”

Some inexplicable force urged them to choose life instead of the sweet release of nothingness. Oh, sweet, nothingness — to become invisible — forgotten. To dissolve into oblivion where nothing matters: A place free of expectations, where one can evade the blistering sting of reality. But the inescapability of woes is a bitter truth: a truth that stretches its voice across voids and always exists. It is omnipresent — stifling. Screaming: “What good am I? Heaven only knows”. Today, the songstress’ lamentation is especially loud — Her voice haunting. There are days when I drown out her cries. The days when hope returns, and

dignity stands stubbornly in the courtyard of despair. On those days, I brave the bitter truth and the cold gaze of reality.⁶⁴⁰

Granted, I perhaps raised more questions than I provided answers, but my aim was never to solve a problem that, from a racial realist perspective, is likely intractable and permanent. Instead, my more modest aim was to highlight some of the issues that constrain harm-reduction strategies that can ameliorate the conditions of those currently enmeshed in the system from taking root. This more modest harm-reduction approach is what I refer to as lifeline criminal jurisprudence. The more radical, transformative work that is needed to bring about the type of racial justice that sees an end to the embeddedness of anti-Black racism in the criminal legal system is laudable but, from a racial realism perspective, may be untenable under the current political and social and legal conditions. However, the two approaches are not mutually exclusive and must work together. Hope is a powerful tool. The racial realist ethic does not preclude hope – instead, it is critical of idealistic notions of racial progress that have no grounding in reality. I am confident that readers will understand that accepting the reality of current racial conditions does not preclude action. It is a call to action that accepts the terrain as it is and not as it should be. Like other white supremacist power structures, the criminal legal system is formidable and not easily dismantled or infiltrated.⁶⁴¹ Its dismantling will take a moral consensus that the evil of racism should not form a part of our society; however, this consensus will not be manufactured through race-based litigation alone or idealistic notions of racial progress through non-radical incrementalism.

The limitations of racial reform through criminal litigation have received little attention in Canada. However, Black liberation through criminal justice reform, particularly constitutional litigation and other progressive agenda-based litigation, has moderately succeeded in the trial (*R v Le*) and sentencing contexts (*R v Morris* and *R v Anderson*). A more radical break from the current approaches remains unlikely. Take, for example, the reasonable person abstraction – a fiction that dominates so much of criminal law jurisprudence. This rational, sober-minded individual is the

⁶⁴⁰ Written by Danardo S. Jones. This spoken word was inspired by the song “This Bitter Earth” by Dinah Washington (1960) and Psalm 139:9 KJV.

⁶⁴¹ See Jonathan Simon, “Criminal law in an age of mass incarceration” (2020) 70:2 U Toronto LJ 177.

normative standard by which conduct is measured in determining criminal fault. The question arose in *Peart* of whether a reasonable person should be imbued with racial subjectivity. Put differently, what race is the reasonable person? The ONCA, per Justice Doherty, refused to racialize the hypothetical, reasonable person.⁶⁴² The reasonable person concept is designed to establish an objective standard, which means it must be aracial; however, in a white supremacist society, aracial is read as white. Justice Doherty acknowledged, though he attempted to reconcile this dilemma and held that:

the realization that the hypothetical, reasonable person is to some degree reflective of the judge's own preconceptions is what makes an appreciation of social context so important. An understanding of how others legitimately view the circumstances serves to counteract the subjectivity of the judge's own view of the world. A proper reasonable apprehension of bias inquiry demands that the judge be aware of his or her own world view and appreciate how others may see the relevant circumstances. As difficult as it may be to blend these perspectives, it is no answer to abandon that effort in favour of an inherently subjective and one-sided inquiry.⁶⁴³

But is it possible or desirable to racialize the reasonable person? For example, does the reasonable Black man come with the same racial baggage as the non-fictional Black man? Is he subjected to the same gaze? Is he ascribed the same pathologies associated with Black masculinity? Justice Doherty declined to subjectivize the reasonable person and held that the reasonable person is aware of racial dynamics and patterns.⁶⁴⁴ This individual is above the muck. Free from the biases that beset the unreasonable among us. In some constitutional analyses, for example, in the detention context, the reasonable person must fit in the shoes of the racialized accused. So, for example, the reasonable, over-policed and criminally profiled Black man may be detained the moment he encounters police.

⁶⁴² *Peart v Peel Regional Police Services*, *supra* note 253 at 55.

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid* at para 42

However, in the detention context, the reasonable person can only temporarily don the clothes, indeed, the ontologies and epistemological realities of racialized people. This temporary positioning supposedly grants the reasonable person necessary insights into racial patterns, histories, etc. The reasonable person, in essence, becomes an avatar that can temporarily inhabit the ontologies of the accused and thereby gains the legitimacy and perhaps authenticity to tell the tale of the body that it temporarily inhabits. So, for example, in *Le*, the reasonable person becomes Black by placing himself in the accused's shoes. In so doing, he channels the narratives, pathologies, and pain of Black-lived realities. At that moment, the reasonable person is indistinguishable from the accused. The accused is measured against what the reasonable person in his shoes should have known or done in the circumstances. Any deviation from this normative standard may pose challenges for the accused in establishing a breach of his right under section 9 of the *Charter*.

Chapters three and four discussed some of the costs and benefits of Black liberation through race-conscious sentencing. Little scholarly attention has been paid, and far less litigation has been focused on Black liberation through criminal trial advocacy. *Theriault* represents a missed opportunity and perhaps a cautionary tale about criminal litigation as a tool for racial justice. The reasons for this state of affairs are simple: criminal procedure and substantive criminal law masquerade as aracial, ahistorical, and neutral. Indeed, the criminal law's animating principles often obscure the case's underlying racial epistemic and ontologies. In *Theriault*, we witness a similar reluctance by Di Luca J to draw on the obvious racial/social context that animated the case to provide the necessary analytical insight for his credibility assessments and treatment of other crucial evidence.

The chapters told four distinct but interrelated stories about Blackness in the criminal legal system. Each chapter identified pernicious racial justice issues at specific junctures of the criminal process. Many of the issues have long, pernicious histories which have damaged countless Black lives and communities. The aim of the chapters was not simply a rote recitation of notorious facts that even governments and courts have long recognized and acknowledged. Instead, they examined how, despite official acknowledgment, there have been limited structural changes, much less the

eradication of anti-Blackness in the criminal legal system. What was discovered is that the system is ill-equipped and, at times, explicitly resistant to change and acknowledging State complicity in the harms that have come before the court. This is especially obvious in the context of sentencing, where the State shares no blame for its contribution to the conditions that lead individual offenders down a path of criminal offending. Instead, the State, through the judiciary, in cases like *Morris*, is abstracted into a position of semi-innocence. Indeed, the offender is the only one who is compelled, through sentencing mechanisms like IRCAs, to lay bare their pathologies in hopes of mitigation. The system, despite its role in maintaining and creating pathological conditions in which people must traverse and survive, shoulders no blame and is not made to seek mercy in the way it is expected of Black offenders. But how can one assign blame without understanding the context? Instead of solely focusing on individual harm, we should also consider collective responsibility. Arguably, when we only focus solely on punishment, particularly individualized punishment, it limits our ability to think creatively. Ultimately, an even more complex question emerges: what can be achieved under our current regime? Should the goal of racial justice be limited to bringing these pathologies and their devastating effects on Black lives to judicial consciousness? Indeed, is this consciousness-raising a path towards the system getting real about itself and concretely integrating this into decision-making?⁶⁴⁵

While IRCAs are meant to provide sentencing judges with much-needed context about the offender, they can and often do, as the data shows, reinforce entrenched pathologies. However, I think the issue lies in the act of pathologizing, which ultimately leads to reinforcing the pathologized narrative. Real pathologies grow up wherever there are real deep system injustices. The people around these pathologies are then coded as pathological even though they had limited or, in some instances, no input into their creation. Take, for example, the Black man as a criminal and dangerous pathology – one that continues to persist since Black enslavement. There is an institutional problem at play here. Instead of providing context, IRCAs, because they tend to

⁶⁴⁵ The idea of bringing to consciousness was borrowed from Sarah Lucia Hoagland, *Lesbian ethics: toward new value*, 1st ed ed (Palo Alto, CA: Institute of Lesbian Studies, 1988).

showcase certain pathologized traits that have been coded to Black bodies, end up doing the work of the very system that it aims to disrupt. But is there a constructive way to address these pathologies? Is there any value in recognizing them without resorting to pathologizing?

Above, I discussed the importance of centring hope in our quest for racial justice. But, given current conditions, what does hope look like, given the intransigent attitudes toward reforms that center Black perspectives? Are there inherent limitations on racial justice reforms, or should people manage their expectations about what the system can deliver? What does a reimagining of criminal law require to take root? What does it mean to get *real* in the face of white supremacy? There is a genuine concern that pushing the system too hard may backfire and strip away recent, modest gains. But we can still imagine; we can still hope.

Imagine a criminal system that saw Black lives in terms of radical possibilities and not ciphers on which to etch pathologies and tropes.

Imagine a criminal system that declared the high numbers of Black bodies in prisons and the criminal courts to be a moral and social crisis that brought the entire system into disrepute.

Imagine a criminal system that considered the lives of those who were not before it for judgment but were nonetheless collateral damage in its pursuit of moral blame and punishment.

Imagine a criminal system that repairs and restores broken trust—one that seeks mercy from those it was created to erase.

Imagine a criminal system that accepts its share of responsibility for the material conditions that stymied Black lives.

Imagine a criminal system that considered the role of the State in shaping life choices and inscribing Black lives from birth with burdens.

Imagine a criminal system that encouraged judges to see their children standing before them whenever they are confronted with a Black body.

Reimagining the criminal legal system requires a shift in consciousness and attitudes about power and race. So much of what is acknowledged as vile features of the system is overlooked as being so ingrained as to be unchangeable or just defects that can be isolated and remedied. Take, for example, the notion that IRCA reports can bring down the high rates of Black incarceration in Canada. The evidence does not support this. I have reviewed all of the published race and sentencing cases across Canada that used IRCAs or similar reports or where judges took judicial notice of anti-Blackness. The sentencing outcomes in these cases often did not deviate from previous sentencing ranges or practices. Therefore, the question that must be answered is why we persist in designing strategies to work within a structure that will inevitably neutralize them. Much of this dissertation and current research agenda wrestle with this question. As I see it, the puzzle is that the system has demonstrated a formidable staying power and resilience to attack that calls for abolition or dismantling seem naive or impracticable. But should this stifle imagination? In this dissertation, I posited that such knowledge is a call to action and presents an opportunity for clarity and realism – not debilitation or paralysis. Imagination has always played a role in the fight for justice and freedom.

I wrote this conclusion on the one hundred and ninety-first anniversary of the *Abolition Act* that gave manumission to Enslaved Africans in the former British Empire. Black peoples across the former British slave world celebrate today as Emancipation Day. It is a day of reflection and thanksgiving to our ancestors who imagined a day that their progenies would no longer suffer the sting of the slavers' whip or the scorching heat of the sun on their heads as they toiled on white plantations. While my lot is far better than my ancestors, I still suffer the bitterness of white superiority. The plantation is ubiquitous, and the whip hovers over my head like the mythical sword of Damocles. So, in many ways, we remain unfree in a *de facto* sense, for everywhere I look, I am in chains – physically, epistemically, ontologically and psychically.

Nevertheless, like my ancestors, I dare to imagine that “*better must come.*” Hope was never killed, even as the body was destroyed and burnt. I realize that hope in the face of despair and stifling subordination is no easy feat and may even seem idealistic and absurd. I take comfort in knowing that my ancestors knew this burden but endured. We stand to gain much from their example. It

was never easy and will never be easy. So much of this dissertation fixated on interrogating the myriad ways in which white supremacy infects the criminal legal system and its pernicious impacts on Black people. I am mindful that the dissertation may signal to some that pursuing racial justice under current circumstances is futile. However, this is not the objective of this work; instead, I hope it has provided a clear understanding of some of the significant racial justice impediments. Demarcating and diagnosing the problem is critical to meaningful racial justice reform. In future work, I aim to offer concrete solutions to many of these diagnoses. In order to move towards this more complex goal, I require a clear view of the problem – a view not obscured by current scholarship and jurisprudence – that centers Black voices.

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