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Danardo Sanjay Jones

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Résumé de l'article

Le présent article analyse des données provenant d'entrevues de neuf personnes noires criminalisées et de neuf avocats de la défense (cinq Blancs, trois Noirs, un Arabe) portant sur l'utilité d'une plus grande visibilité raciale dans les instances de détermination de la peine. Les données révèlent entre ces groupes un fossé qui provient de réponses différentes à ce que j'appelle « le paradoxe de la visibilité ». Pour les personnes noires, ce paradoxe se manifeste dans des situations dans lesquelles l'importance accordée à la race peut avoir à la fois des conséquences défavorables et favorables sur la détermination de la peine. Les avocats de la défense et les juges soulignent les possibilités d'amélioration qu'offre la visibilité de la race, qui occulte une préoccupation bien réelle des Noirs criminalisés, lesquels croient dans bien des cas que la couleur de leur peau joue contre eux dans la détermination d'une peine pénale.

L'article explore d'ailleurs les réserves d'ordre éthique qui découlent de ce paradoxe. Il fait également valoir que les stratégies de détermination de la peine fondées sur la race ne sont pas sans conséquence, ni même sans conséquence grave. Au contraire, du point de vue des personnes criminalisées qui ont participé à la recherche, la conséquence n'est pas uniquement le risque que l'attention portée à leur race donne lieu à une peine plus lourde (notamment une peine plus longue et purgée dans des conditions plus sévères), mais elle constitue aussi un affront à leur dignité. Malgré tout, les avocats de la défense ont milité ardemment en faveur d'une plus grande visibilité raciale pour lutter contre ce qu'ils jugent comme une intransigeance dans le domaine judiciaire et dans le domaine des poursuites au moment de composer avec les questions liées à la race lors de procédures de détermination de la peine. De telles perspectives revêtent une importance primordiale pour les juges qui imposent la peine à des personnes noires, ainsi que pour les avocats en ce qui concerne la conception et l'application de stratégies judiciaires au profit de leurs clients noirs.

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Probing The Data: Perspectives on Race Visibility in Canadian Sentencing Proceedings

Danardo Sanjay Jones[*]

This article analyzes interview data from nine Black criminalized individuals and nine defence lawyers (five white, three Black, and one Arab) about the utility of heightened race visibility in sentencing proceedings. The data reveals a schism between these groups, reflecting different responses to what I refer to as "the paradox of visibility." For Black people, this paradox occurs when an emphasis on race may simultaneously have a deleterious and ameliorating impact on sentencing. Defence lawyers and judges laud the ameliorative potential of race visibility, which obscures the genuine concern shared by criminalized Black individuals about how they believe their Blackness betrays them in the criminal sentencing context. In this regard, the article explores ethical concerns arising from this paradox. It also argues that race-based strategies at sentencing are not a no-cost or low-cost proposition. Indeed, from the criminalized research participants' point of view, the cost is not only the risk that an emphasis on race may result in a higher sentence, including longer and harsher custodial sentences, but also an affront to their dignity. In contrast, 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. These perspectives are critical for sentencing judges tasked with sentencing Black individuals and for lawyers who are developing and deploying legal strategies to assist their Black clients.

Le présent article analyse des données provenant d'entrevues de neuf personnes noires criminalisées et de neuf avocats de la défense (cinq Blancs, trois Noirs, un Arabe) portant sur l'utilité d'une plus grande visibilité raciale dans les instances de détermination de la peine. Les données révèlent entre ces groupes un fossé qui provient de réponses différentes à ce que j'appelle « le paradoxe de la visibilité ». Pour les personnes noires, ce paradoxe se manifeste dans des situations dans lesquelles l'importance accordée à la race peut avoir à la fois des conséquences défavorables et favorables sur la détermination de la peine. Les avocats de la défense et les juges soulignent les possibilités d'amélioration qu'offre la visibilité de la race, qui occulte une préoccupation bien réelle des Noirs criminalisés, lesquels croient dans bien des cas que la couleur de leur peau joue contre eux dans la détermination d'une peine pénale.
L'article explore d'ailleurs les réserves d'ordre éthique qui découlent de ce paradoxe. Il fait également valoir que les stratégies de détermination de la peine fondées sur la race ne sont pas sans conséquence, ni même sans conséquence grave. Au contraire, du point de vue des personnes criminalisées qui ont participé à la recherche, la conséquence n'est pas uniquement le risque que l'attention portée à leur race donne lieu à une peine plus lourde (notamment une peine plus longue et purgée dans des conditions plus sévères), mais elle

[*] Danardo S. Jones, Associate Professor, Windsor Law

> *constitue aussi un affront à leur dignité. Malgré tout, les avocats de la défense ont milité ardemment en faveur d'une plus grande visibilité raciale pour lutter contre ce qu'ils jugent comme une intransigeance dans le domaine judiciaire et dans le domaine des poursuites au moment de composer avec les questions liées à la race lors de procédures de détermination de la peine. De telles perspectives revêtent une importance primordiale pour les juges qui imposent la peine à des personnes noires, ainsi que pour les avocats en ce qui concerne la conception et l'application de stratégies judiciaires au profit de leurs clients noirs.*

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 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."[1]

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.[2] 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.[3] 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*.[4] 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

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1 *R v "X,"* 2014 NSPC 95 [*X*].

2 See 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; Public Safety Canada, "Government of Canada Takes Steps to Address Overrepresentation of Indigenous, Black, and Racialized People in the Criminal Justice System" (21 March 2023), online: <www.canada.ca/en/public-safety-canada/news/2023/03/government-of-canada-takes-steps-to-address-overrepresentation-of-indigenous-black-and-racialized-people-in-the-criminal-justice-system.html>; *R v Anderson*, 2021 NSCA 62 [*Anderson*]; *R v Wournell*, 2023 NSCA 53 [*Wournell*]; *R v Morris*, 2021 ONCA 680 [*Morris* 2021]; *R v Morris*, 2023 ONCA 816 [*Morris* 2023]; 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" (Master's Thesis, University of Montreal, 2023), online: <papyrus.bib.umontreal.ca/xmlui/handle/1866/32495> [unpublished].

3 Dugas, *supra* note 2 at 122.

4 *Anderson*, *supra* note 2; *Wournell*, *supra* note 2; *Morris* 2021, *supra* note 2; *Morris* 2023, *supra* note 2.

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.

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.[5] 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.[6] 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 individuals believ 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 second section briefly discusses key definitions of race, racialization, and anti-Black racism. The third 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 fourth section explores the epistemological

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5 The data were also used in Danardo S. Jones, "Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing" (LLM Thesis, York University, 2020) at 39, online:<digitalcommons.osgoode.yorku.ca/llm/39> [unpublished].

6 See Dugas, *supra* note 2. See also Daniel J Song & Christine Boyle, "When Race Matters in Sentencing: *R. v. Ramsay* and *R. v. Hamilton*" (2004) 22:6 Criminal Reports 86.

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.[7] 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 any criminal wrongdoing. Indeed, through pernicious racialization practices, Black lives are inscribed from their social inception with risk, lethality, and danger.[8]

A. 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.[9] Race takes on pseudo-scientific legitimacy when viewed in this way, even though it is not rooted in biology.[10] Most scholars view race as a socially constructed phenomenon that is shaped, in part, by discursive patterns. In essence, we speak race into existence.[11] While race is socially constructed and lacks a biological foundation, its impacts and consequences are still

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7 Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System" (1995) 105 Yale LJ 677 at 716 [Butler, "Racially Based Jury Nullification"].

8 On this reading, racial identities and their concomitant narratives predate the existence of the bodies on which they are ultimately engrafted. 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." See Sara Salih, *Judith Butler* (London: Routledge, 2002) at 62. See also Wesley Crichlow, "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).

9 Danardo S Jones, "Anchoring Lifeline Criminal Jurisprudence: Making the Leap from Theory to Critical Race-Inspired Jurisprudence" (2023) 46:1 Dal LJ 1 at 18. See also Cheryl I Harris, "Whiteness as Property" (1993) 106:8 Harv L Rev 1707; Theodore W Allen, *The Invention of the White Race*, vol 1: *Racial Oppression and Social Control* (London: Verso, 2012). Some authors suggest that biological race and social constructivism are not incompatible. See Robin O Andreasen, "Race: Biological Reality or Social Construct?" (2000) 67:S1 Proceedings of the 1998 Biennial Meetings of the Philosophy of Science Association 653.

10 Jones, *supra* note 9 at 18.

11 Richard Delgado, Jean Stefancic & Angela Harris, *Critical Race Theory: An Introduction*, 3rd ed (New York: New York University Press, 2017) at 9.

real.[12] 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.[13]

Race can be construed as a sensate and social phenomenon forged through relations.[14] 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.[15] 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."[16] 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."[17]

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."[18] 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.

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.[19] 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.[20] For instance, when Fanon "discovered" his Blackness, he remarked that "[he] was battered down by tom-toms, cannibalism, intellectual

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12 See Richard John Perry, *"Race" and Racism: The Development of Modern Racism in America* (New York: Palgrave Macmillan, 2007). See also Manning Marable, "Beyond Racial Identity Politics: Towards a Liberation Theory for Multicultural Democracy" (1993) 35:1 Race & Class 113.

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

14 Catherine Kendig, "Race as a Physiosocial Phenomenon" (2011) 33:2 History & Philosophy Life Sciences 191.

15 "Minstrel Show," *Britannica*, online: <www.britannica.com/art/minstrel-show>. See generally John Tehranian, "The Last Minstrel Show? Racial Profiling, the War on Terrorism and the Mass Media" (2008) 41:3 Connecticut L Rev, online: <ssrn.com/abstract=1312941>.

16 Vinson Cunningham, "The Argument of Afropessimism," *The New Yorker* (20 July 2020), online: <www.newyorker.com/magazine/2020/07/20/the-argument-of-afropessimism>.

17 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 Studies 49 at 51.

18 Frantz Fanon, *Black Skin, White Masks* (London: Pluto Press, 1952) at 116 [Fanon, *Black Skin*].

19 See Delgado, Stefancic & Harris, *supra* note 11.

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

deficiency, fetichism, racial defects, slave-ships, and above all else: 'Sho'good eatin.'"[21] 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.[22] 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."[23]

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."[24] 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."[25] By implementing 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.[26]

B. 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."[27] Even the term "Blackness," a concept used extensively in my writing, is "hotly contested."[28] However, most theories of anti-Black racism locate the genesis of Black subordination in racial slavery and the transatlantic slave trade.[29] 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

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21 Fanon, *Black Skin*, *supra* note 18 at 112.

22 See Fanon, *Black Skin*, *supra* note 18. 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.

23 Fanon, *Black Skin*, *supra* note 18 at 115.

24 Delgado, Stefancic & Harris, *supra* note 14 at 10. See also 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 [Crenshaw, "Demarginalizing"].

25 Jones, *supra* note 9 at 19. See also Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241; Harris, *supra* note 24; Crenshaw, *supra* note 24.

26 See Harris, *supra* note 24; Crenshaw, "Demarginalizing," *supra* note 24.

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

28 *Ibid* at 25.

29 Ken Donovan, "Slavery and Freedom in Atlantic Canada's African Diaspora: Introduction" (2014) 43:1 Acadiensis 109.

anti-Black stereotypes.[30] 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.[31] Black bodies were deemed inferior, heathenistic, subhuman, sexually promiscuous, unpleasant, violent, unintelligent, and depraved.[32]

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.[33] In order to justify the economic imperative, a narrative was created to make the 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.[34] So, in essence, anti-Black hate was deployed as a tool for economic subordination.[35] 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.[36] Over time, the control methods have included slave patrols,[37] weaponized rape,[38] anti-miscegenation policies,[39] segregation,[40] intimidation,[41] restrictive immigration policies,[42] 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.[43]

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30 See Afua Cooper, "Acts of Resistance: Black Men and Women Engage Slavery in Upper Canada, 1793–1803" (2007) 99:1 Ontario History 5; 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; Kenneth Morgan, *A Short History of Transatlantic Slavery* (London: IB Tauris, 2016) at 6.

31 See Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point, NS: Fernwood Publishing, 2017).

32 Donovan, *supra* note 29 at 109; Maynard, *supra* note 31.

33 See Morgan, *supra* note 30.

34 See *ibid*.

35 See 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. 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.

36 See Maynard, *supra* note 30.

37 See *ibid*.

38 See Donovan, *supra* note 29.

39 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 641–43.

40 Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999) at 17 and 250–52.

41 *Ibid* at 187.

42 Mosher, *supra* note 39 at 641.

43 See Backhouse, *supra* note 40; Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858–1958* (Toronto: University of Toronto Press, 2010).

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.[44] Constance Backhouse has documented how the Ku 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.[45] Although slavery and de jure anti-Black racism no longer exist in Canada, their impacts are still evident through various interrelated methods and institutions.[46] 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.[47]

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.[48] Indeed, "[a]ntiblackness and anti-Black racism reside

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44 See Mosher, *supra* note 39.

45 Backhouse, *supra* note 40 at 182; Mosher, *supra* note 39 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 43 at 20.

46 See Carl E James & Tana Turner, *Towards Race Equity in Education: The Schooling of Black Students in the Greater Toronto Area* (Toronto: York University, 2017); David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) [Tanovich, *Colour of Justice*]; Ontario Association of Children's Aid Societies, *One Vision One Voice: Changing the Ontario Child Welfare System to Better Serve African Canadians Practice Framework*, Part 1: *Research Report* (Toronto: Ontario Association of Children's Aid Societies, 2016); Ontario Human Rights Commission, *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).

47 Henry A Willis et al, "The Associations between Internalized Racism, Racial Identity, and Psychological Distress" (2021) 9:4 Emerging Adulthood 384 at 384–85 [citations omitted]; 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.

48 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; David M Tanovich, "Race, Sentencing and the 'War on Drugs'" (2004) 22:6 Criminal Reports 45.

within institutions as well as ideologies of whiteness, white supremacy, and fear of the Black body."[49] 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.[50] 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.[51] 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).

Table 1: Criminalized Research Participants Demographic Information

Name	Age/Sex	Offence
S.L.	30, Female	Drug and firearm possession
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

[49] 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 55, citing Ibram X Kendi, *How to Be an Antiracist* (New York: Random House, 2023).

[50] 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).

[51] One participant was sixty-three years old.

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).

Table 2: Defence Lawyer Research Participants Demographic Information

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
G.C.	28 March 2019	Male/Black

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.[52] 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.

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[52] 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.

A. 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 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?[53]

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.[54] 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 have them drive the collection and analysis of the data. Indeed, "making oneself known," as Fanon exhorted, requires counter-hegemonic methodologies.[55] 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."[56]

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53 Swethaa Ballakrishnen, *Putting Yourself in Your Scholarship* (LSA Conference, San Juan, Puerto Rico, 2023) ("[i]f you don't know who I am, you have no coordinates for my analysis").

54 See Alistair J Campbell, "Let the Data Speak: Using Rigour to Extract Vitality from Qualitative Data" (2020) 18:1 Electronic J Business Research Methods.

55 Fanon, *Black Skin*, *supra* note 18 at 115.

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

B. 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.[57] As Paul Butler, writing in the American context, remarked, "criminal law is racist because it is an instrument of white supremacy."[58] As such, legal scholars must go beyond the doctrinal-focused method of conducting race and criminal law research.[59] However, Black researchers must often grapple with the complexities of utilizing counter-hegemonic methodologies and epistemologies while attending to issues of positionality and bias.[60] For critical race scholars, the goal is to enhance the audibility of marginalized voices in research.[61] 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."[62] Moreover, "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."[63] 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.[64] 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.[65] As Kimberle Crenshaw asserts, there exists "no scholarly perch outside the social dynamics of racial power from which merely to observe and analyze."[66] Indeed, neutrality or objectivity in research is a myth; scholarship is inherently political.[67] No scholarly tradition is insulated from this

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57 See David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40:2 SCLR 655 [Tanovich, "Charter of Whiteness"].

58 Butler, "Racially Based Jury Nullification," *supra* note 7 at 693.

59 Jones, *supra* note 9 at 7. As Laura Gomez argues, "CRT provides us with methodological guideposts that challenge mainstream assumptions about research and interpretation." See Laura E Gomez, "Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field" (2010) 6 Annual Rev L & Social Science 487.

60 See Tukufu Zuberi & Eduardo Bonilla-Silva, *White Logic, White Methods: Racism and Methodology* (Lanham, MD: Rowman & Littlefield, 2008); Tayyab Mahmud, "Foreword: What's Next? Counter-stories and Theorizing Resistance" (2018) 6:3 Seattle J Social Justice 6; Steven Jordan, "Who Stole My Methodology? Co-opting PAR" (2003) 1:2 Globalisation Societies & Education 185.

61 Delgado, Stefancic & Harris, *supra* note 14 at 9. See also Alex M Johnson Jr, "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.

62 Delgado, Stefancic & Harris, *supra* note 14 at 10. See generally Johnson, *supra* note 61.

63 Delgado, Stefancic & Harris, *supra* note 14 at 10.

64 Fanon, *Black Skin*, *supra* note 18 at 111.

65 Kimberle Crenshaw, "Introduction" in Kimberle Crenshaw & et al, eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New York University Press, 1995) iii at xiii [Crenshaw, "Introduction"].

66 *Ibid*.

67 *Ibid* at xiii.

observation: we tell stories through our scholarship.[68] 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.[69]

C. Theoretical Framework

The interview data were analyzed using critical race theory [CRT].[70] CRT is a powerful analytical tool for understanding the complex connection between criminal justice and anti-Black racism.[71] 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.[72] CRT seeks to reclaim narratives and recentre the perspective of racialized people to counterbalance and challenge the narratives imposed and projected upon them.[73] 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.[74] At its core, CRT is concerned with understanding and changing what Crenshaw referred to as "the vexed bond between law and racial power."[75]

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 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

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68 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.

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

70 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 Social Justice 253; Kathy Charmaz & Linda Liska Belgrave, *The Sage Handbook of Interview Research: The Complexity of the Craft* (Los Angeles: Sage Publications, 2012) at 347; Jessica T DeCuir-Gunby, Thandeka K Chapman & Paul A Schutz, *Understanding Critical Race Research Methods and Methodologies: Lessons from the Field* (Oxford: Routledge, 2018); Daniel G Solórzano & Tara Yosso, "Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research" (2002) 8:1 Qualitative Inquiry 23.

71 See Malagon, Huber & Velez, *supra* note 70.

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

73 Delgado, Stefancic & Harris, *supra* note 14 at 9. See also Johnson, *supra* note 40.

74 Delgado, Stefancic & Harris, *supra* note 14 at 9–10; Jones, *supra* note 9 at 17–19.

75 Crenshaw, "Introduction," *supra* note 65 at xiii.

the discursive spaces that (re)produce and reinforce notions of criminality, risk, and blameworthiness.[76] 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.[77]

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.[78] 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.

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

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[76] 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 Richard Delgado and Jean Stefancic, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 2013) 97 at 102.

[77] 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: <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-ontari/>.

[78] 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.

were unsuitable for pursuing strategies or tactics that could result in long-term legal reform with wide-reaching benefits.[79] 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 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.[80]

CRT helps us understand how litigation strategy involving race talk can have ethical and strategic dimensions.[81] 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?[82] 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?[83] Unfortunately, you will find that ethical rules do not provide much guidance on the costs and benefits of race talk in criminal litigation.

A. 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

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79 See Robert Knox, "Strategy and Tactics" (2012) 21 Finnish YB Intl L 193; Ariel Levy, "The Perfect Wife," *The New Yorker* (23 September 2013), online: <www.newyorker.com/magazine/2013/09/30/the-perfect-wife>; Jones, *supra* note 9; Saul Alinsky, *Rules for Radicals: A Pragmatic Primer for Realistic Radicals* (New York: Knopf Doubleday, 1989) at 40 (for example, Saul Alinsky asserts: "[w]henever 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 critical race theory (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 and the promotion of a progressive agenda. See Derrick A Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation" (1976) 85:4 Yale LJ 470.

80 See Jones, *supra* note 9. 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, Patricia Williams, a critical race scholar, 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 Patricia J Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights Minority Critiques of the Critical Legal Studies Movement" (1987) 22:2 Harv CR-CLL Rev 401.

81 Jones, *supra* note 9.

82 Law Society of Ontario, "Rules of Professional Conduct," online: *Law Society of Ontario* <lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>.

83 See Bell, *supra* note 79.

IRCA would achieve this goal. D.F. was not the only 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?[84] 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, 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 "IRCAs 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

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[84] *R v Parks*, [1993] 15 OR (3d) 324, OJ 2157 [*Parks*, cited from OR]; *Morris* 2021, *supra* note 2. *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.

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 IRCAs, they were unconvinced that IRCAs 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.[85] 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 reactiveness."

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.

B. 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 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.

1. 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

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[85] Kent Roach, "Making Progress on Understanding and Remedying Racial Profiling" (2004) 41:4 Alta L Rev 895 at 903.

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.'"[86] He further explained that "the court should consider that when sentencing the person." E.B.'s, S.L.'s, and 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.[87] 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."[88]

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.[89]

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

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86 The reference "to get food" is Jamaican for acquiring the economic necessities for basic survival.

87 Butler, "Racially Based Jury Nullification," *supra* note 7 at 680.

88 See Paul Butler, "The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform" (2019) Freedom Centre J 75 [Butler, "System Is Working"]; Tommie Shelby, "Justice, Deviance, and the Dark Ghetto" (2007) 35:2 Philosophy & Public Affairs 126; Raff Donelson, "Blacks, Cops, and the State of Nature" (2017) 15 Ohio State Journal of Criminal Law 183.

89 See note 45 above. See also 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); Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003); Tanovich, *Colour of Justice*, *supra* note 46; Tanovich, "Charter of Whiteness," *supra* note 57.

can be recast as evidence in support of race-based policing and sentencing practices.[90] These race-based assumptions create a self-fulfilling prophecy about Black people's propensity for violent crimes.[91] E.B. explained that the reason for this is because "the system is built expecting you to come back."[92] 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?"

C. 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."[93]

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 invisiblizing 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 court[94] – a

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90 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 at 916. See also Wesley W Bryant, "Internalized Racism's Association with African American Male Youth's Propensity for Violence" (2011) 42:4 J Black Studies 690.

91 *Ibid*.

92 See Bryant, *supra* note 90. 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, "System Is Working," *supra* note 88.

93 Jones, *supra* note 9 at 11.

94 *R v Ipeelee*, 2012 SCC 13 at 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.

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.[95]

1. 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.[96] 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.[97] 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.

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."[98] 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."[99] 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.[100] 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.[101]

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95 Henry S Richardson, "Moral Reasoning," *Stanford Encyclopedia of Philosophy* (Fall 2018), online: <https://plato.stanford.edu/archives/fall2018/entries/reasoning-moral/>.

96 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).

97 Harris, *supra* note 12 at 1714.

98 WEB Du Bois, *The Souls of Black Folk* (Chicago: Dover Publications, 1903) at 2 [emphasis added].

99 SR Moss & DE 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, online: <doi.org/10.1177/0160597619832628>.

100 Anne C. Bailey, "For hundreds of years, enslaved people were bought and sold in America. Today most of the sites of this trade are forgotten," *New York Times* (12 February 2020), online: <www.nytimes.com/interactive/2020/02/12/magazine/1619-project-slave-auction-sites.html?auth=login-google1tap&login=google1tap>.

101 See Robyn Maynard, *Policing Black Lives State Violence in Canada from Slavery to the Present* (Black Point, NS: Fernwood Publishing, 2017).

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.[102] 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 simply "outrun" one's Blackness or avert the gaze that strips the Black body of dignity and agency.[103]

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."[104] 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!"[105]

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."[106] 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-Black racism.[107] The white gaze is a visual phenomenon not exclusive to the sighted.[108] As Osagie Obasogie found in his study, "race becomes visually salient through constitutive social practices that give rise to visual understandings of racial

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[102] Laraine Wallowitz, "Chapter 9: Resisting the White Gaze: Critical Literacy and Toni Morrison's 'The Bluest Eye'" (2008) 326 Counterpoints 151, online: <www.jstor.org/stable/42980110>.

[103] See Ibrahim X. Kendi, "On the Racist Ideas Jesse Owens Could Not Outrun," Black Perspectives (February 21, 2016) online: <www.aaihs.org/on-the-racist-ideas-jesse-owens-could-not-outrun/>.

[104] Ralph Ellison, *Invisible Man* (New York: Modern Library, 1992).

[105] Fanon, *Black Skin*, *supra* note 18 at 116 [emphasis added].

[106] See Constance Backhouse, *Petticoats and Prejudice: Women's Press Classics: Women and Law in Nineteenth-century Canada* (Toronto: Canadian Scholars' Press, 2015).

[107] 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. WEB Du Bois, *The Souls of Black Folk* (Chicago: Dover Publications, 1903) at 2.

[108] See Osagie K Obasogie, "Do Blind People See Race: Social, Legal, and Theoretical Considerations" (2010) 44:3–4 Law & Soc'y Rev 585.

difference for blind and sighted people alike."[109] 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."[110] 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.[111] 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."[112] 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, 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?

2. 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 proferred as archetypal. Given this status, these descriptions are not

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109 *Ibid* at 585.
110 Ellison, *supra* note 105.
111 Fanon, *Black Skin*, *supra* note 18 at 116–17.
112 Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1961) at 150.

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.[113]

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."[114] In essence, the gaze is a phenomenological process related to racial voyeurism.[115]

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 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

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113 *R v Biya*, 2018 ONSC 6887. The conviction was quashed at *R v Biya*, 2021 ONCA 171.

114 Fanon, *Black Skin*, *supra* note 18 at 116.

115 David Woodruff Smith, "Phenomenology," *Stanford Encyclopedia of Philosophy* (Summer 2018), online: <plato.stanford.edu/archives/sum2018/entries/phenomenology/>.

affront to individual and collective dignity faced by the offender and their communities.[116] 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 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.[117] The "damaged" narrative can create an inaccurate and dangerously misleading depiction of the varied and complex meanings ascribed to Black peoples' experiences.[118] 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.[119]

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 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.

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116 Unfortunately, there is no data on whether these reports or the taking of judicial notice reduce the harshness of custodial sentences in a quantitative or qualitative manner. See Lisa Kerr, "How the Prison Is a Black Box in Punishment Theory" (2019) 69:1 UTLJ 85.

117 See Tuck, *supra* note 72.

118 *Ibid*.

119 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.

3. 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."[120] 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.[121]

Nakatsuru J was also the sentencing judge in *R. v Morris*.[122] 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 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."[123] 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.[124]

As Justice Louis Lebel explained in *R. v Ipeelee*, "[w]ho are courts sentencing if not the offender standing in front of them?"[125] 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

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120 *R v Jackson*, 2018 ONSC 2527 at para 149 [*Jackson*] [emphasis added].
121 *Ibid* at 111.
122 *R v Morris*, 2018 ONSC 5186.
123 *Morris*, *ibid* at 83 [emphasis added].
124 *Jackson*, *supra* note 121.
125 *Ipeelee*, *supra* note 95 at para 86.

extend leniency and not additional blame – blame ascribed for being and existing.[126] But can judicial leniency or mercy get us closer to properly assessing moral blameworthiness?[127] 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.[128]

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.[129] 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.[130] 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.[131]

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.[132]

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126 Some scholars assert that introducing mercy into criminal sentencing may (over)correct the system's increasingly punitive responses. See 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.

127 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.

128 Richard Delgado, "Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation" (1985) 3:1 Minnesota JL & Inequality; Barbara A Hudson, "Mitigation for Social Deprived Offenders" in A Von Hirsh & A Ashworth, eds, *Principled Sentencing: Readings on Theory and Policy*, 2nd ed (Oxford: Hart Publishing, 1998) 205.

129 See James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York: Oxford University Press, 2005).

130 See *ibid*.

131 Lizzie Seal & Alexa Neale, "Racializing Mercy: Capital Punishment and Race in Twentieth-century England and Wales" (2020) 38:4 Law & History Rev 883

132 Butler, "Racially Based Jury Nullification," *supra* note 7.

V. 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.