PARADOXICAL RACE VISIBILITY IN CANADIAN SENTENCING LAW

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Using insights from Critical Race Theory ("CRT"), this article illustrates how Canada's proportionality-driven criminal sentencing structure (re)produces, invigorates, and sustains pernicious race-based discourses. Indeed, the concept of proportionality can reinforce archaic norms and notions about Black bodies' status, belonging, identity, and worth. Moreover, the demands of proportionality, with its fixation on calibrating blame, can distort and pathologize Black lives in a perverse attempt at sentence mitigation, resulting in what I refer to as the paradox of visibility. The article uses an analysis of Impact of Race and Culture Assessments (IRCAs) reports to explore paradoxical race visibility. This allows us to better comprehend and redefine the impact of incorporating race awareness into the criminal sentencing process, which can have positive and negative consequences. Indeed, introducing race at the sentencing phase is a challenging and perhaps even a paradoxical manoeuvre—but one that may also be logical insofar as we operate within the cruel illogic of white supremacy.

L'auteur en appelle à la théorie critique de la race pour illustrer comment la structure canadienne de détermination de la peine, qui fonctionne selon une dynamique de proportionnalité, produit et reproduit, alimente et perpétue les discours pernicieux à tendance raciale. En effet, le principe de proportionnalité peut renforcer des normes et notions archaïques concernant le statut, le sentiment d'appartenance, l'identité et la valeur des Noirs. En outre, les exigences de la proportionnalité, qui se focalisent à quantifier le blâme, peuvent déformer et vulnérabiliser les vies des Noirs dans une tentative perverse de diminution de la peine, ce qui cause ce que l'auteur appelle le paradoxe de la visibilité. Cet article propose une analyse des rapports d'évaluation de l'incidence de l'origine ethnique et culturelle pour éclairer le paradoxe de la visibilité, afin de mieux comprendre et de redéfinir l'incidence que peut avoir le principe de conscientisation de la race lorsqu'on l'intègre au processus de détermination de la peine, avec ses avantages et ses inconvénients. En effet, tenir compte de la race au moment de déterminer la peine pose un défi, et constitue peut-être même une démarche paradoxale—ou logique, si tant est que nous fonctionnions selon l'illogisme cruel du suprémacisme blanc.

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Introduction

Two recent appellate decisions, *R v Anderson* and *R v Morris,* took up the issue of how sentencing judges should weigh a Black offender's race and experience of anti-Black racism within a proportionality-based sentencing structure.[2] In *Anderson*, Justice Derrick, writing for a unanimous Nova Scotia Court of Appeal ("NSCA"), held that sentencing judges "should carefully consider the systemic and background factors detailed in an IRCA [Impact of Race and Culture Assessment]. It may amount to an error of law for a sentencing judge to ignore or fail to inquire into these factors."[3] IRCAs are designed to highlight specific cultural, social, and

2 *R v Anderson*, 2021 NSCA 62 [*Anderson*]; *R v Morris*, 2021 ONCA 680 [*Morris*]; Maria C Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal LJ 103 at 121; The ONCA had earlier taken up the same issues in *R v Hamilton*. See *R v Hamilton*, 2004 CanLII 5549 (ONCA) [*Hamilton*]; *R v Borde*, 2003 CanLII 4187 (ONCA) [*Borde*]; Gay Abbate, "Appeal court hands down harsher terms for drug mules", *The Globe and Mail* (4 August 2004), online: <https://tinyurl.com/2kb4vj5n> [perma.cc/36MP-UUAM]; Richard Devlin & Matthew Sherrard, "The Big Chill?: Contextual Judgment after *R. v. Hamilton and Mason*" (2005) 28:2 Dal LJ 409; David M Tanovich, "Race, Sentencing and the 'War on Drugs'" (2004) 22 Crim Reports (6th) 45; Dale E Ives, "Inequality, Crime and Sentencing: *Borde, Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law" (2004) 30 Queen's LJ 114; Sonia N Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56:4 UTLJ 285.

3 *Anderson*, *supra* note 2 at para 118.

political mitigating factors at play in a Black offender's life that ought to be considered in sentencing.[4] Justice Derrick held that sentencing judges need not be satisfied that the offender has established a causal connection to the crime before experiences of Blackness and anti-Black racism can properly be considered as a mitigating factor.[5] In *Morris,* the Court of Appeal for Ontario ("ONCA"), in a unanimous decision, held that: "[t]here must … be some [causal] connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue."[6] The ONCA further held that absent this connection any raced-based mitigation "becomes a discount based on the offender's colour."[7]

Both decisions, *Anderson* and *Morris*, acknowledged the presence of anti-Black racism and its possible relevance to sentencing but adopted different positions on translating the harms of anti-Black racism into concrete sentencing outcomes. Crucially, in adjudicating this issue, both decisions took for granted that the sentencing process must be

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

5 *Anderson*, *supra* note 2. *Anderson* was greeted with enthusiasm and publicly praised by lawyers as a progressive step toward a fairer sentencing system for Black offenders; See Canadian Association of Black Lawyers, "CABL applauds the decision in R v Anderson, 2021 NSCA 62 for recognizing that Impact of Race and Culture Assessments (IRCAs) can be a valuable resource for sentencing" (19 August 2021), online: <https://tinyurl.com/yzar7nrp> [perma.cc/5SHB-8JNP] [Canadian Association of Black Lawyers, "IRCA"]. Terry Davidson, "Court examines race and culture assessments in sentencing African Nova Scotians", *Law360 Canada* (23 August 2021), online: <https://www.law360.ca/ca/articles/1755794> [perma.cc/X2SZ-BAYQ]. Elizabeth Raymer, "N.S. decision on use of Impact of Race and Culture Assessment expected to have national impact", *Canadian Lawyer* (27 August 2021), online: <https://tinyurl.com/y6fdswm4> [perma.cc/UCW3-HPHQ].

6 *Morris*, *supra* note 2 at para 97.

7 *Ibid* at para 97. *Morris* attracted reactions ranging from tepid and cautious optimism to disappointment. See Lisa Kerr, "Ontario's top court says anti-Black racism should be considered in the legal system. That's a start", *The Globe and Mail* (11 October 2021), online: <https://tinyurl.com/mwzk837m> [perma.cc/VXC5-6W5J]. Sean Fine, "Ontario appeal court tells judges not to over-emphasize the effects of racism when sentencing Black offenders", *The Globe and Mail* (8 October 2021), online: <https://tinyurl.com/2s4xjsfj> [perma.cc/F9EA-GXR7]. Ammar, "BLAC responds to Ontario Court of Appeal decision in R v Morris" (8 October 2021), online: <https://tinyurl.com/jvs6rj59> [perma.cc/R6UW-FMGJ].

structured through a proportionality assessment.[8] Indeed, jurisprudential inquiries in Canada (but not necessarily all those adopted or supported by scholars) take as their starting point the fundamental premise that proportionality should govern legal punishment—a central premise within the criminal justice system that finds expression in statute,[9] case law,[10] and jurisprudential theory dating back to Hammurabi.[11] This starting assumption is reasonable and inevitable since courts work within a statutory scheme that expressly mandates proportionality-driven sentencing. However, the analysis below will show that despite philosophical and jurisprudential assumptions about how proportionality ensures equality, the proportionality principle limits how much racial justice could be achieved through sentencing reform of the kind invited in *Anderson*.[12]

By undertaking a focused doctrinal analysis of contemporary caselaw on whether and how a Black offender's race should be accounted for within the proportionality analysis, this article will touch on more profound debates about the principle of proportionality and the justifiability of punishment.[13] This article argues that the principle of proportionality, as conceptualized in Canadian sentencing law, with its fixation on notions of blameworthiness that reinforce pathologized narratives of Black lives and communities, may be incompatible with racial justice[14]—at least in a racist society like ours, where anti-Black racism is a longstanding structural feature.[15]

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8 *Morris*, *supra* note 2 at para 61; *Anderson*, *supra* note 2 at para 142.

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

10 *R v Ipeelee*, 2012 SCC 13 at para 37 [*Ipeelee*]; *R v Lacasse*, 2015 SCC 64 at para 12; *R v Friesen*, 2020 SCC 9 at paras 30–33 [*Friesen*]; *R v M (CA)*, 1996 CanLII 230 at para 80 (SCC) [*M (CA)*]; *Re BC Motor Vehicle Act*, 1985 CanLII 81 at para 129 (SCC) [*MVA*]; *R v Nur*, 2015 SCC 15 at paras 43–44 [*Nur*].

11 See Andrew von Hirsch, "Proportionality in the Philosophy of Punishment" (1992) 16 Crime & Justice 55 [von Hirsch, "Philosophy"]. Andrew von Hirsch, "Proportionate Sentences: A Desert Perspective" in Andrew von Hirsch & Andrew Ashworth, eds, *Principled Sentencing: Readings on Theory and Policy*, 2nd ed (Oxford: Hart Publishing, 1998) [von Hirsch, "Desert Perspective"].

12 *Anderson*, *supra* note 2 at para 145.

13 See Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011).

14 See Michael Tonry, "Proportionality, Parsimony, and Interchangeability of Punishments" in Michael Tonry, ed, *Why Punish? How Much? A Reader on Punishment* (New York: Oxford University Press, 2011) 217. See BA Hudson, "Punishing the Poor: Dilemmas of Justice and Difference" in William C Heffernan & John Kleinig, eds, *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford: Oxford University Press, 2000) 189 at 189.

15 James W St G Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa: Canadian Historical Association, 1985) at 7.

I reviewed 92 recently reported sentencing decisions from across Canada, and overwhelmingly from Ontario and Nova Scotia—the two jurisdictions where IRCAs are most frequently used and have been the subject of appellate analysis.

These decisions were from the period of November 2014—the year when the first reported use of an IRCA occurred in *R v "X"*—to August 2023. The dataset of 92 cases was analyzed on two registers. First, I identified the criminal offences for which the offenders were being sentenced in order to determine which types of offences have been attracting racism-conscious sentencing. As explained below, these reports are disproportionately used in cases involving serious criminal activity that is stereotypically associated with Black people, such as gun violence and drug trafficking.[16] Second, I identified common social markers (such as fatherlessness or early exposure to violence) that are cited by sentencing judges in these decisions and thereby associated, in our jurisprudence, with Blackness. As explained below, these social markers tend to track pernicious stereotypes about dysfunction in Black families and communities.

The decisions all considered how issues of race and culture can or should be introduced into the sentencing arena through either judicial notice or race-conscious pre-sentence reports. This systematic case analysis unearths concerning trends whereby racism-conscious sentencing practices and strategies may inadvertently reinforce some of the anti-Black stereotypes they are intended to confront. With these trends in mind, this article queries whether and how courts can achieve racial justice for Black offenders within a proportionality-driven sentencing regime. The conclusion is: if we accept that our proportionality-based sentencing regime is premised on an understanding of morality and social responsibility that assumes fundamental notions about basic equality that are inconsistent with Black peoples' experiences in Canada, then we must confront the possibility that the notion of fit and proportionate sentences for Black people cannot be achieved without a wholesale dismantling and restructuring of the current institution of punishment.[17]

The concept of proportionality can reinforce archaic norms and notions about Black bodies' status, belonging, identity, and worth.[18] Moreover, the demands of proportionality, with its fixation on calibrating

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16 See Akwasi Owusu-Bempah, *Black Males' Perceptions of and Experiences with the Police in Toronto* (PhD Thesis, University of Toronto Centre for Criminology and Sociolegal Studies, 2014) [unpublished].

17 See Office of the Correctional Investigator, Annual Report 2016–2017, by Ivan Zinger (Canada: Office of the Correctional Investigator, 2017), online: <https://tinyurl.com/2axb249a> [perma.cc/S3ZF-3CRT].

18 Tonry, *supra* note 14.

blame, can distort and pathologize Black lives in a perverse attempt at sentence mitigation, resulting in what I refer to as the paradox of visibility. The theme of paradoxical race visibility aims to comprehend and redefine the impact of incorporating race awareness into the criminal sentencing process, which can have positive and negative consequences. Indeed, introducing race at the sentencing phase is a challenging and perhaps even a paradoxical manoeuvre—but one that may also be logical insofar as we operate within the cruel illogic of white supremacy.

This article, the first of two companion pieces, explores race visibility's contradictory and pernicious nature when examined through existing sentencing theories. The second article, however, will pivot to consider qualitative data generated from two interview groups querying what various stakeholders think about inviting an explicit consideration of anti-Black racism and an offender's Blackness/race into sentencing.[19] Section One of this present article will discuss Canadian sentencing law's fundamental objectives and principles, focusing on how Canadian sentencing jurisprudence conceptualizes the proportionality principle and incorporates the retributive theory of punishment. Following that, Section Two will focus on the genealogy of IRCAs, what they contain and the critical cases that consider their utility in Canadian sentencing jurisprudence. Section Three analyzes the inherent tensions of race amplification and the paradoxicality of race discourse in sentencing proceedings.

1. Section One

A) The Principle of Proportionality

Before examining the specifics of the race and sentencing jurisprudence reviewed for this article, it is necessary to understand the legislative scheme that structured those decisions and the theories of justice that animate it. The principle of proportionality and the institution of criminal punishment more broadly raise a host of philosophical questions that ultimately cluster around a fundamental problem: i.e., under what conditions, if any, can the liberal State justifiably inflict intentional harm on an individual?[20] Section 718 of the *Criminal Code* implicitly answers that problem by expressly setting out the purpose and principles of

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

20 Marie Manikis, "Recognizing State Blame in Sentencing: A Communicative and Relational Framework" (2022) 81:2 Cambridge LJ 294 at 314 [Manikis, "State Blame"]. Antony Duff & Zachary Hoskins, "Legal Punishment" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2018 ed (Stanford: Metaphysics Research Lab, Stanford

criminal sentencing in Canada.[21] These include parity, totality, restraint, and proportionality. Among these basic tenets, proportionality is elevated as the "fundamental principle" of criminal sentencing.[22] The principle of proportionality requires sentencing courts to ensure sentences are proportionate in that the punishment reflects the offence's gravity and the offender's moral blameworthiness.[23]

As conceptualized and entrenched in Canadian sentencing law, proportionality functions as a restraint mechanism against excessively severe punishments or those considered disproportionately lenient.[24] In other words, punishment must be commensurate with blameworthiness: offenders should receive no more or less punishment than they deserve.[25] However, sentencing judges must also weigh other complicated and contradictory factors.[26] For example, under the section 718 sentencing framework, judges must balance retributive (moral desert) and consequentialist (utility) considerations.[27]

Proportionality is venerated in Canadian sentencing law and has a constitutional dimension.[28] Described as the "*sine qua non* of a just sanction,"[29] all other sentencing principles are secondary and must, in their application, promote proportionality.[30] For a sentence to be considered fair and just, it must be proportionate to the gravity of the offence and the offender's degree of responsibility/moral blameworthiness.[31] Some

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University, 2018); Mirko Bagaric, "Proportionality in Sentencing: its Justification, Meaning and Role" (2000) 12:2 Current Issues in Crim Justice 143 at 155.

21 *Criminal Code, supra* note 9, s 718. This section came into force on September 3, 1996. Gerry Ferguson, "A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code", *Research and Statistics Division, Department of Justice Canada* (10 August 2016), online: <https://tinyurl.com/4jepe2re> [perma.cc/C25H-AYCY].

22 *Criminal Code*, *supra* note 9; Marie Manikis, "The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions" (2022) 59:3 Osgoode Hall LJ 587 at 604 [Manikis, "Proportionality"].

23 *Criminal Code*, *supra* note 9.

24 *M (CA)*, *supra* note 10 at para 80; *Ipeelee*, *supra* note 10 at para 37; *R v Nasogaluak*, 2010 SCC 6 at para 42 [*Nasogaluak*]; *Nur*, *supra* note 10 at paras 43–44.

25 See von Hirsch, "Desert Perspective", *supra* note 11.

26 *Morris*, *supra* note 2 at para 102.

27 Bagaric, *supra* note 20 at 145.

28 *Nasogaluak*, *supra* note 24; *Friesen*, *supra* note 10; *Ipeelee*, *supra* note 10; *R v Bissonnette*, 2022 SCC 23.

29 *Ipeelee*, *supra* note 10 at para 37.

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

31 *Criminal Code*, *supra* note 9; *Nasogaluak*, *supra* note 24 at para 41.

scholars suggest that proportionality has two dimensions: ordinal and cardinal.[32]

Ordinal proportionality suggests that a sentence must reflect the gravity of the offence relative to other offences and the various degrees of seriousness in the range of conduct covered by the offence.[33] To a large extent, ordinal proportionality also incorporates retributivism—as it regards different levels of blameworthiness as a legitimate basis (or perhaps the only legitimate basis) for assigning different sentences.[34] Cardinal proportionality makes the link between proportionality and blameworthiness more evident by seeking an absolute correspondence between wrongdoing and blameworthiness.[35] Cardinal proportionality also assumes it is possible to find some non-arbitrary quantum of punishment for a given crime: i.e., that not only can we rank-order crimes and punishments from least to most severe, but also that we can ensure any individual crime and its punishment are properly matched on their own terms.[36]

Briefly, retributive theories of punishment broadly hold that wrongdoers morally deserve punishment.[37] In other words, sentencing judges must strike an appropriate and fair balance of just deserts.[38] From a retributive perspective, proportionality is understood as a theory of justice which ostensibly allocates punishment based on moral desert.[39] Moreover, retributivism is retrospective in that it aims to punish offenders for their past conduct (i.e., the offence they were convicted of committing). Some retributivists assert that proportionality is equitable because it seeks to curb arbitrary punishment and ensure parity in sentencing allocation.[40] Von Hirsch contended that when proportionality is disregarded, offenders are unfairly visited, through the penalties imposed on them, with more implicit blame (or less) than the actual blameworthiness of their conduct warrants.[41]

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32 Andrew von Hirsch, "Proportionality in the Philosophy of Punishment: From 'Why Punish?' to 'How Much?'" (1991) 25:3–4 Israel LR 549 at 572.

33 Manikis, "State Blame", *supra* note 20 at 317; See Alec Walen, "Retributive Justice" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Summer 2021 ed (Stanford: Metaphysics Research Lab, Stanford University, 2021).

34 Walen, *supra* note 33.

35 *Ibid*.

36 *Ibid.*

37 Bagaric, *supra* note 20 at 145.

38 *Nasogaluak*, *supra* note 24 at para 42.

39 See von Hirsch, "Philosophy", *supra* note 11 at 79.

40 *Ibid*.

41 *Ibid* at 70.

Retribution is a justification for punishment and shares commonalities and premises with proportionality. Both proportionality and retribution aim to apportion and calibrate blame/moral culpability by ensuring that sentences are proportionate to the gravity of the crime and the offender's level of blameworthiness.[42] A fundamental aim of retributivism and proportionality is aligning and balancing blameworthiness and desert.[43] Proportionality does not purport to say why punishment is good, but only the conditions under which it is just.[44] Retributivism, however, supplies the theoretical and philosophical justification for punishment: i.e., offenders morally deserve punishment for their wrongful acts, but that punishment must be commensurate with their level of blameworthiness and the gravity of the offence.[45]

In contrast, consequentialist theories of punishment are forward-looking and attempt to use the offender's punishment to promote forward-looking goals, mainly preventing future criminal behaviour by the offender and the wider public through deterrence and rehabilitation.[46] Retributivists contend that offenders should be considered and treated as rational agents, not tools to achieve consequentialist goals.[47] They worry that offenders may be unfairly subjected to harsher punishment than they deserve to achieve broader goals like deterrence.[48] Nevertheless, consequentialists would hold that because punishment is—normatively speaking—a bad practice, its imposition must carry some benefit to the offender and society.[49] For some scholars, punishment can only be justified on consequentialist grounds, given the significant burdens imposed on citizens by the practice. If the consequential benefits do not outweigh the detrimental effects of the practice, then the practice is unjustifiable.[50]

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42 *M (CA)*, *supra* note 10 at para 81; von Hirsch, "Philosophy", *supra* note 11 at 81. Retributive accounts of punishment tend to be premised on specific theories of culpability (or moral blameworthiness), especially the choice-based conceptions of culpability. See R A Duff, "Choice, Character, and Criminal Liability" (1993) 12:4 Law & Phil 345; The Court also adopted this conception of culpability in *R v Ruzic*, 2001 SCC 24 at para 34.

43 *Nasogaluak*, *supra* note 24 at para 42.

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

45 See Walen, *supra* note 33.

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

47 See Walen, *supra* note 33.

48 *Ibid*.

49 *Ibid*.

50 Duff & Hoskins, *supra* note 20.

However, using punishment to advance societal goals contradicts the retributive ethic.[51]

Section 718 directs judges to combine retributive and consequentialist approaches, even though these two approaches conflict according to philosophical debate. While retribution is not expressly part of the section 718 framework, it is implicit in the notion of proportionality as enshrined in the *Criminal Code* and explicitly expounded by the Supreme Court of Canada ("the Court").[52] For example, in *R v Nasogaluak*, Justice Lebel held that "the rights-based, protective angle of proportionality is counterbalanced by its alignment with the 'just deserts' philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused."[53] Moreover, in *R v M (CA)*, the Court, in holding that retribution is a legitimate principle of Canadian sentencing law, explained that retribution:

> is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions.[54]

The sentencing principles and practices outlined above have animated the Canadian criminal justice system long before being codified in section 718 of the *Criminal Code*. Increasingly, courts and commentators are turning their attention to how social context considerations, including pervasive anti-Black racism, should inform the application of these principles.[55] Social context can inform consequentialist theories of punishment since the goals of deterrence and rehabilitation are more likely to be achieved when diverse members of the public perceive the system as legitimate and when efforts to rehabilitate offenders are designed with attentiveness to different individuals' material circumstances and cultural expectations.[56]

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51 See von Hirsch, "A Desert Perspective", *supra* note 11. According to von Hirsch, "the institution of criminal punishment is not an appropriate 'instrument' to resolve social problems".

52 *Criminal Code*, *supra* note 9, s 718; *M (CA)*, *supra* note 10 at paras 79–80; *MVA*, *supra* note 10 at para 129.

53 *Nasogaluak*, *supra* note 24 at para 42.

54 *M (CA)*, *supra* note 10 at para 79 [emphasis in original].

55 See *Anderson*, *supra* note 2; *Morris*, *supra* note 2; Dugas, *supra* note 2.

56 See Barbara A Hudson, "Mitigation for Socially Deprived Offenders" in von Hirsch & Ashworth, *supra* note 11. See Richard Delgado, "Rotten Social Background:

Retributivist theories, for their part, are concerned with appropriately calibrating blameworthiness. Some retributivist scholars accept that social deprivation, for example, the impact of racism on the offender, should be considered if it is appropriate in the blame calculus.[57] Many sentencing decisions are likewise attentive to the significance of racism and other social context factors—though these factors are frequently taken up in a limited fashion.[58] In an early leading decision on the significance of anti-Black racism in criminal sentencing, *R v Hamilton*, Justice Doherty offered the following observation about the limits of sentencing proceedings as a venue to address social inequalities: "A sentencing proceeding is … not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or 'make up' for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime."[59] Since *Hamilton*, advocates have tried to push social context more to the foreground, primarily through the use of IRCAs.

2. Section Two

A) IRCAs: Creating Space for Race in a Proportionality-Driven Sentencing Structure

Scholars who study race and sentencing have sought to reduce Black mass incarceration and confront anti-Blackness in the criminal justice system by redressing the known problem of colour-blind sentencing.[60] They investigate how the fundamental principle of proportionality, enshrined in section 718.1 of the *Criminal Code* and interpreted by the Court, can be applied to promote fairer sentences for Black offenders. The problem of disproportionately harsh punishment for Black offenders is well-documented. For example, recent studies by the Office of the Correctional Investigator ("OCI") have recorded that Black Canadians are over-represented in the Federal prison population. The OCI found in 2015–2016 and 2016–2017 that while Black Canadians represented only 3% of Canada's population, they make up 8.6% of all those federally incarcerated.[61] One study found that "Black offenders were most likely

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Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation" (1985) 3:1 Minnesota JL & Inequality 9.

57 Duff & Hoskins, *supra* note 20.

58 See *Borde*, *supra* note 2.

59 *Hamilton*, *supra* note 2 at para 2.

60 See Canadian Association of Black Lawyers, "IRCA", *supra* note 5; Davidson, *supra* note 5; Raymer, *supra* note 5; Ives, *supra* note 2 at 124; Dugas, *supra* note 2.

61 Officer of the Correctional Investigator, Annual Report 2015–2016, by Howard Sapers (Canada: Office of the Correctional Investigator, 2016), online: <https://tinyurl.com/bddw4h2p> [perma.cc/8QC9-P3RA]. Zinger, *supra* note 17.

to be incarcerated in … Ontario."[62] In *R v Jackson*, Justice Nakatsuru commented, "stripped to its essentials, African Canadians have been jailed three times more than their general representation in society for quite some time. The problem is not getting better."[63]

Studies suggest that when specific criminal behaviour gets assigned to particular bodies in the public imagination, there is a corresponding increase in punishment severity and frequency.[64] In other words, when a specific crime—for example, drug possession—becomes associated with a particular racial group, that racial group is more likely to be investigated for and convicted of that offence and is more likely to be sentenced harshly for it. The cycle becomes self-reinforcing, as the overrepresentation of a particular group among those punished for a given offence is misinterpreted as evidence that group members are more likely to commit that offence.[65]

The general phenomenon described above, whereby specific communities are targeted for greater punitive responses, has long impacted Black people. The criminalization of Black people dates back to slavery and has been unrelenting.[66] While that more detailed history is beyond the scope of this paper, the key point, for present purposes, is that it has resulted in entrenched stereotypes about Black criminality that help to explain the contemporary data showing the mass incarceration of Black people. Because of the phenomenon's self-reinforcing nature, anti-Black stereotypes also work to "naturalize" excessively harsh sentences by giving the false impression that they reflect greater blameworthiness, i.e., that they are, in fact, proportionate. Concurrently, Black people are not immune from taking on this perverse narrative themselves. Black people can and

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62 Research Branch Correctional Service of Canada, A Profile of Visible Minority Offenders in the Federal Canadian Correctional System, by Shelley Trevethan & Christopher J Rastin (Canada: Research Branch Correctional Service of Canada, 2004) at 12, online: <https://tinyurl.com/2p9ndp3e> [perma.cc/RP8F-D788].

63 *R v Jackson*, 2018 ONSC 2527 at para 40 [*Jackson*].

64 Anne-Marie Singh & Jane B Sprott, "Race Matters: Public Views on Sentencing" (2017) 59:3 Can J Corr 285 at 303. See David A Sklansky, "Cocaine, Race, and Equal Protection" (1995) 47:6 Stan L Rev 1283.

65 See Canadian Association of Black Lawyers, "Race and Criminal Injustice: New report from CABL, Ryerson's Faculty of Law and the University of Toronto confirms significant racial differences in perceptions and experiences with the Ontario criminal justice system" (10 February 2021), online: <https://tinyurl.com/yu2uhzfv> [perma.cc/F98Z-3KQR] [Canadian Association of Black Lawyers, "Race and Criminal Injustice"].

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

do internalize these presuppositions. Nonetheless, these stereotypes find their genesis and are reinforced through white supremacist ideologies.[67]

Indeed, notions about Black criminality, dangerousness, and recalcitrance predate current expressions of anti-Blackness in Canada's criminal justice system. These notions justified Black slavery and post-slavery attitudes about Black lives.[68] Frantz Fanon aptly noted that Black lives are "woven" from these and other invidious presuppositions.[69] These notions construct a distorted and grotesque imagery that stands as an external projection of Blackness that is paradoxically made more prominent when Black people make attempts at eliding it or deploying it as a means of explaining their material condition. I refer to this phenomenon as the paradox of race visibility, which I discuss in more detail below.

B) What are IRCAs?

IRCAs were first introduced in Nova Scotia in the case of *X* in 2014, followed by *Jackson* in Ontario in 2018.[70] In Canada, IRCAs have become an increasingly popular method that defence lawyers use to introduce race and anti-Blackness in sentencing. IRCAs highlight specific cultural, social, and political mitigating factors that judges should consider when sentencing Black offenders.[71] However, unlike "regular" pre-sentence reports, which sentencing judges routinely order, IRCAs are not prepared by state agents like probation officers. Instead, social workers, often in private practice, with specialized knowledge about systemic anti-Black racism prepare IRCAs.

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67 John T Warren, "Doing Whiteness: On the Performative Dimensions of Race in the Classroom" (2001) 50:2 Communication Education 91 at 103. Henry A Willis et al, "The Associations Between Internalized Racism, Racial Identity, and Psychological Distress" (2021) 9:4 Emerging Adulthood 384 at 384–385.

68 See Maynard, *supra* note 66.

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

70 *X*, *supra* note 4 at para 41; *Jackson*, *supra* note 63 at para 42. Before those cases, Defence counsel would simply, raise the issue of the offender's race and culture to provide the sentencing judge with some context to assist him/her in arriving at a proportionate sentence. See *R v Ferrigon*, 2007 CanLII 16828 (ONSC); *R v Duncan*, 2012 CanLII 35904 (ONSC). There are recent cases, however, where counsel does not submit a CIAR/IRCA report. See *R v Reid*, 2016 ONSC 8210; *R v Desmond*, 2018 NSSC 338; *R v Brissett & Francis*, 2018 ONSC 4957; *R v Williams*, 2018 ONSC 5409; *R v Elvira*, 2018 ONSC 7008; *R v Nimaga*, 2018 ONCJ 795.

71 These reports have been referred to as Cultural Impact Assessment Reports ("CIAR"), Enhanced Pre-Sentence Reports ("EPR") and IRCA. See *X*, *supra* note 4 at para 34; Duff & Hoskins, *supra* note 20 at 6.

IRCA writers provide sentencing judges with information on the offender's background, including insights about systemic racism and other structural inequalities and their likely impact on the offender's decision to commit the offence. In this way, as explained by Justice Derrick (as she then was) in *X*, IRCAs can provide sentencing judges with "a more textured, multi-dimensional framework for understanding [the defendant], his background and his behaviours."[72]

IRCAs have been described in *Anderson* as providing "indispensable" insight in a "[comprehensive] and [efficient manner]" into the multi-dimensional ways anti-Black racism brought the offender before the court.[73] For example, the IRCA adduced in *Morris* highlighted mitigative factors that aimed to contextualize blame and inform sentencing determinations. The ONCA held that,

> [t]he moral blameworthiness of Mr. Morris's conduct is mitigated by his mental and physical health issues, as well as his educational and economic disadvantages. All of those factors are influenced by the systemic anti-Black racism Mr. Morris has experienced. The factors can only properly be understood, for the purposes of determining the appropriate sentence, by having regard to that context.[74]

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

C) The Jurisprudential Genealogy of IRCAs

The infusion of race consciousness into the sentencing process is not new, having been a feature of Canadian sentencing law since the 1996 *Criminal Code* reforms and the Court's 1999 decision in *R v Gladue*.[75] Since then, we have seen the Court direct sentencing judges to take a more careful approach when sentencing Indigenous offenders.[76] Indeed, failure to do so is an error in law and subject to appellate intervention.[77] Lawyers and activists advocated for a similar approach to sentencing Black offenders, arguing that both communities face similar plights.[78] Indeed, while not

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72 *X*, *supra* note 4 at para 198.

73 *Anderson*, *supra* note 2 at para 119. See *Morris*, *supra* note 2 at para 99; *X*, *supra* note 4 at para 194.

74 *Morris*, *supra* note 2 at para 179.

75 *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*].

76 *Ibid*; *Ipeelee*, *supra* note 10.

77 *Gladue*, *supra* note 75 at para 93; *Ipeelee*, *supra* note 10 at para 87.

78 *Borde*, *supra* note 2 at para 27; *Morris*, *supra* note 2 at para 90.

driven by the same legislative, constitutional, and judicial imperatives, IRCAs share similarities with *Gladue* reports.[79]

Before the implementation of IRCAs, *R v Borde* established that in certain cases, judges may appropriately consider systemic and background factors when determining sentencing, as long as those factors are connected to the offence committed and the values of the offender's community.[80] In *Borde*, the ONCA considered the appropriate sentence for a 19-year-old Black man convicted of aggravated assault, gun possession and breaching his release order. The sentencing judge imposed 5-year imprisonment, which the ONCA lowered to 4 years given Borde's youth and because this was his first penitentiary sentence. Notably, however, the ONCA declined to reduce Borde's sentence to account for anti-Black racism. It reasoned that, despite the importance of considering Black offenders' systemic and background factors, these factors would not affect the sentence length, even if they were considered, given the seriousness of the offence.[81]

A year later, the ONCA in *Hamilton* considered the same issue it did in *Borde*, i.e., the role that race and anti-Black racism should play in sentence proceedings.[82] That case involved the sentencing of Ms. Hamilton, a young Black single mother convicted of cocaine importation. Despite not being provided with any social context information from defence counsel, the sentencing judge considered Ms. Hamilton's race, gender, and the prevalence of anti-Black racism in Canadian society and ultimately sentenced her to a 20-month conditional sentence. The ONCA altered the sentence and imposed 20-month imprisonment. The ONCA concluded that the trial judge erred in sentencing Ms. Hamilton to a conditional sentence and reasoned that, where the offence is sufficiently serious, imprisonment will be the only reasonable response "regardless of the ethnic or cultural background of the offender."[83]

Some scholars read *Hamilton* as limiting the reach and use of social context evidence in the sentencing of Black offenders.[84] They argue that in *Hamilton*, Justice Doherty limited the mitigative scope of submissions on the impact of anti-Blackness on the offender when he held that "[t]he fact that an offender is a member of a group that has historically been subject to systemic racial and gender bias does not in and of itself justify any mitigation of sentence. Lower sentences predicated on nothing more than membership in a disadvantaged group further neither the principles

79 *Morris*, *supra* note 2 at para 90. See Dugas, *supra* note 2.

80 *Borde*, *supra* note 2 at para 30.

81 *Ibid* at para 35.

82 *Hamilton*, *supra* note 2 at para 141.

83 *Ibid* at para 100.

84 Devlin & Sherrard, *supra* note 2 at 433.

of sentencing, nor the goals of equality."[85] Ostensibly, Justice Doherty worried that such a move would be perceived as an endorsement of race-based sentencing discounts—which would offend the proportionality principle in that it would allow demographics to act as a shorthand rather than requiring a context-specific analysis. [86]

Nevertheless, in the period between *Hamilton* and *Morris*, some sentencing judges displayed less resistance when offenders introduced, whether through IRCAs or by inviting the court to take judicial notice, how anti-Blackness influenced their life choices and, indeed, the commission of the particular crime.[87] In *Morris*, which was decided 17 years after *Hamilton*, the ONCA again considered the role of social context evidence of race and anti-Blackness in sentencing proceedings.[88] Mr. Morris, a young Black man, was convicted of gun possession and sentenced to 12 months' imprisonment. The Crown appealed the sentence, claiming that it was unfit and that the sentencing judge erred in his consideration and treatment of the defence evidence about the impact of anti-Black racism. *Morris* provided the ONCA with its first opportunity to consider the utility of IRCAs in sentencing proceedings involving Black offenders. The ONCA clarified the evidentiary value of race-based pre-sentence reports and explained how they could help judges contextualize and assess moral blameworthiness and blend the various sentencing objectives. Moreover, the ONCA held that there must be some evidentiary connection "between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue" and not the strict causal connection that *Hamilton* imposed.[89]

In *Morris*, the ONCA was presented with two expert reports—one general (Report on Crime and the Black Male Experience in Toronto) and one specific to Mr. Morris (Sibblis report on Morris' Social History). The former provided an in-depth review of the various ways anti-Black racism manifests in the lives of young Black Torontonian men. The latter report focused exclusively on the social history of Mr. Morris as described by Mr. Morris and other close collaterals, including his mother. According to the ONCA, the report on the experience of Black male Torontonians ("the general report"), particularly as it relates to race and criminal justice, "could have been the subject of judicial notice."[90] However, the court found that "[t]he [general] report gave the trial judge the benefit of a

85 *Hamilton*, *supra* note 2 at para 133.

86 *Ipeelee*, *supra* note 10 at para 75.

87 *Hamilton*, *supra* note 2 at paras 135–137. See e.g. *Ipeelee*, *supra* note 10.

88 The decision was upheld in part on appeal.

89 *Morris*, *supra* note 2 at para 97; *Hamilton*, *supra* note 2 at paras 135–137.

90 *Morris*, *supra* note 2 at para 42.

scholarly, comprehensive, and compelling description of the widespread and pernicious effect of anti-Black racism."[91]

In Nova Scotia, the issue of how anti-Blackness and race should inform sentencing has been commonplace in the lower courts for several years.[92] However, the NSCA first considered this issue in *Anderson*.[93] The case involved the sentencing of a young Black man convicted of gun possession. The sentencing judge imposed a conditional sentence with strict conditions. The Crown appealed, not to ask the NSCA to overturn the sentence (the Crown had sought a penitentiary sentence initially), but instead asked the court to guide sentencing judges tasked with sentencing Black Nova Scotians. *Anderson* considered how IRCAs and comparable sources of information about race and anti-Black racism should inform sentencing proceedings involving African Nova Scotian offenders. The NSCA held that "[t]he 'method' employed for sentencing African Nova Scotian offenders should carefully consider the systemic and background factors detailed in an IRCA. It may amount to an error of law for a sentencing judge to ignore or fail to inquire into these factors."[94]

In *Morris* and *Anderson*, both appellate courts held that the information contained in IRCAs, whether standing alone or complemented by judicial notice or other comparable information, is indispensable in sentencing proceedings involving Black offenders.[95] In *Morris,* it was held that IRCAs must provide an objective and balanced picture of the offender that judges can use to make sentencing decisions.[96] To maintain objectivity, IRCA writers must "carefully consider the information available in the primary

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91 *Ibid*.

92 *X*, *supra* note 4. African Nova Scotians have a unique relationship with the Canadian State which ought to inform how judges contextualize the background and systemic factors of Black Nova Scotian Offenders. See Adrienne Lucas Sehatzadeh, "A Retrospective on the Strengths of African Nova Scotian Communities: Closing Ranks to Survive" (2008) 38:3 J Black Studies 407. See also Michelle Y Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal LJ 419. See also Shayla Martin, "A Journey Through Black Nova Scotia", *The New York Times* (12 September 2022), online: <https://tinyurl.com/bdfn3vmk> [perma.cc/6M9C-ZNUD].

93 Observers have hailed *Anderson* as being a superior decision. Faisal Mirza (now Justice Mirza of the Ontario Superior Court of Justice), one of the lawyers who acted for Mr. Morris, commented to reporters that "the ruling [*Morris*] [is] one 'to build on'" but said "the Nova Scotia decision [*Anderson*] 'demonstrated a superior understanding of the historical and current detrimental impact of racism … I hope in Ontario we will get to the same place one day as well'" (see Fine, *supra* note 7); Canadian Association of Black Lawyers, IRCA, *supra* note 5.

94 *Anderson*, *supra* note 2 at para 118.

95 *Morris*, *supra* note 2 at para 123; *Anderson*, *supra* note 2 at para 111.

96 *Morris*, *supra* note 2 at paras 144–145.

source documents collected."[97] Both courts endorsed the expanded use of IRCAs while encouraging judges to take judicial notice of anti-Black racism in Canada and its impacts on Black Canadians.[98] Moreover, Crown attorneys will rarely seek to qualify an IRCA writer as an expert witness,[99] subject to the following caveat by the ONCA: IRCAs must "be prepared to a high professional and authoritative standard," "maintain objectivity," and "cannot purport to speak for the offender or advocate on the offender's behalf. A social context report must also distinguish between facts and an offender's perceptions and beliefs as stated to the author."[100] In *Anderson*, Justice Derrick held that "[t]o be a credible resource for the courts, IRCAs need to be prepared to a high professional and authoritative standard."[101]

Morris and *Anderson* have created more space for heightened race visibility/consciousness in sentencing proceedings by firmly endorsing IRCAs.[102] Both decisions have also given sentencing Judges greater clarity around what consideration(s) should judges afford to structural anti-Black racism in sentencing proceedings.[103] The ONCA suggests to those who defend, prosecute and sentence Black offenders that the general report introduced in *Morris* should be read and reread and presumably relied on by courts, even for those Black offenders who do not hail from Toronto or share very little in common with Mr. Morris or young, Black Torontonian men.[104] While the social history report in *Morris*, prepared by Professor Sibblis, spoke explicitly about Mr. Morris's life experiences, the report on crime and the Black experience in Toronto was more general, albeit focused on a specific phenomenon—young Black men's interaction with criminal justice in Toronto. The general report encapsulates how anti-Black racism influences life choices and constrains opportunities. Arguably, when read alone, the general report fails to connect how structural anti-Blackness specifically manifested in Mr. Morris's life. By advocating for more precise attention to individual lived experience, I am not advocating for a stronger emphasis on a "causal connection" between anti-Blackness and how the offender came before the court, but rather a more precise understanding of how anti-Blackness affected the life of a particular offender.

Those whom the ONCA suggests read and rely on the general report must strive to understand the complexity and multi-dimensionality of

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97 *Ibid* at para 146.
98 *Ibid* at para 123; *Anderson*, *supra* note 2 at para 111.
99 *Anderson*, *supra* note 2 at para 30.
100 *Morris*, *supra* note 2 at para 145.
101 *Anderson*, *supra* note 2 at para 109.
102 *Morris*, *supra* note 2 at para 145.
103 *Ibid* at para 146.
104 *Ibid* at para 43.

Black lives.[105] Indeed, the generic assessments in the general report, if relied on perfunctorily by sentencing judges, threaten to compress Blackness into a monolithic experience that ignores intersectionality, which can become harmful or inapposite in the sentencing context where reliance on stereotypes and broad generalizations have a detrimental impact on Black offenders' liberty, dignity, and self-worth. Indeed, by its very nature, anti-Blackness operates by flattening experience, generalizing, and thereby dehumanizing individuals.[106]

My specific intervention is that the flattening of Blackness in the general report as an urban, male-centric experience elides the complexities of Black identities and reinforces pernicious tropes that may backfire when relied on to provide background information about Black offenders. Precisely, the objection here is not regarding the reliance on a general report in conjunction with an individualized social history, as was done in *Morris*; my concern is that a general report focused on broad social phenomena as they impact one facet of diverse Black communities (e.g., young Black men in Toronto), designed to provide context for a more individualized inquiry, should not, *on its own*, be taken to encapsulate diverse Black experiences. In the companion article, I explain the danger of portraying Blackness as a monolithic experience. When we use an intersectional approach to evaluate race critically, we avoid the pitfall of essentialism. Essentialism assumes all Black individuals share the same experiences of oppression and desire the same liberation. Instead, we should be encouraged to deconstruct identities and challenge harmful stereotypes to explore identity without harmful assumptions.[107]

It is harmful to, consciously or unconsciously, attempt to match the life experiences of the offender before the court with those experiences highlighted in the general report. While the offender may share common experiences with the generic, amorphous "young Black Torontonian men" featured in the general report, they are also unique—a uniqueness that challenges the rote recitation of a static Black criminal justice experience. It is this uniqueness that must drive sentencing assessments. However, the

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

[106] See generally Kimberle Crenshaw, "Introduction" in Kimberle Crenshaw et al, eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New York Press, 1995) [Crenshaw, "Introduction"]. Richard Delgado, Jean Stefancic & Angela Harris, *Critical Race Theory: An Introduction*, 3rd ed (New York: NYU Press, 2017).

[107] See Jones, "Perspectives", *supra* note 19.

complexity here is that, on the one hand, courts should eschew reliance on the archetypes or stereotypes that result from a perfunctory acceptance of the content in a general report, but, on the other hand, specific life stories must be read in the context of general social trends in order to detect and name systemic racism.

The ONCA held that it was appropriate for the sentencing judge in *Morris* to rely on both reports to determine a fit sentence for Mr. Morris. Despite criticizing the social history report for offering opinions that purportedly went beyond the author's expertise, the ONCA explained that: "[w]e are confident that with more experience in preparing these reports, and added guidance from the courts, authors of these reports will appreciate the need to present an objective assessment, while avoiding appearing to take on the role of advocate for the offender."[108] Moreover, "courts may acquire relevant social context evidence through the proper application of judicial notice or as social context evidence describing the existence, causes and impact of anti-Black racism in Canadian society, and the specific effect of anti-Black racism on the offender."[109] However, the ONCA did not make failure to take judicial notice of anti-Blackness a legal error in those cases where IRCAs are not employed.[110] Thus, in Ontario, any failure to consider social context evidence about the impacts of anti-Black racism on the offender will not necessarily warrant appellate intervention.

In contrast, in *Anderson*, the NSCA held that "a sentencing judge cannot preclude comparable information being offered, or fail to consider an offender's background and circumstances in relation to the systemic factors of racism and marginalization. To do so may amount to an error of law."[111] Moreover, sentencing judges should take judicial notice of incontrovertible facts such as "the existence of anti-Black racism."[112] This recognition, however, does not limit the inclusion of this reality in an IRCA. Justice Derrick added that such an inclusion "will contribute to deepening the awareness and understanding of judges, Crown prosecutors, defence counsel, probation officers, correctional officials, parole officers and others who are dealing with the offender."[113]

While not making it a legal error to fail to consider anti-Black racism, it is evident that the ONCA has endorsed using IRCAs and race-based social

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108 *Morris*, *supra* note 2 at para 147.

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

110 *Ibid*.

111 *Anderson*, *supra* note 2 at para 118.

112 *Ibid* at para 42.

113 *Ibid* at para 111.

context evidence in sentencing proceedings.[114] The ONCA explained that while IRCAs "are not commonly used in Ontario," it was hopeful that "their preparation can be adequately funded and they will become a common feature of sentencing in Ontario in appropriate cases."[115] Both *Anderson* and *Morris* suggest that judicial notice of historical and contemporary forms of anti-Blackness and the indispensable content in IRCAs must complement each other.[116] The Court concluded the same in the *Gladue* context.[117] Acknowledging notorious and indisputable facts, such as the existence of anti-Black racism, provides, as the Court held in *R v Ipeelee*, "the necessary *context* for understanding and evaluating the case-specific information presented by counsel."[118] In sentencing Black offenders, an IRCA is a vehicle for presenting this case-specific information.

D) Post-IRCA Observations

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

I observed that in 38 of the 50 reviewed Ontario cases, defence counsel did not rely on IRCAs. In fact, only 12 documented cases mentioned the use of an IRCA. In 21 Ontario cases, the court relied on pre-sentence reports. Indeed, in 15 Ontario cases, defence counsel relied exclusively

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114 *Morris*, *supra* note 2 at para 147.

115 *Ibid*.

116 *Ibid* at para 113; *Anderson*, *supra* note 2 at para 111.

117 *Ipeelee*, *supra* note 10 at para 60; See Jonathan Rudin, "Aboriginal over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 SCLR 687; Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System", online: <https://tinyurl.com/mr297hez> [perma.cc/C4BP-QBW4] .

118 *Ipeelee*, *supra* note 10 at para 60 [emphasis in original].

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

Outside of the sentencing context, some of the reasons most cited for declining the use of an expert may include cost, time, and efficiency.[119] For example, in *R v DD*, a non-sentencing case involving the delayed reporting of childhood sexual abuse, the Court held that there was no need to bring in an expert to testify about the implications of delayed reporting of child sexual abuse [or lack thereof] because a simple jury instruction would suffice.[120] The Court explained that "expert evidence is time-consuming and expensive. Modern litigation has introduced a proliferation of expert opinions of questionable value. The significance of the costs to the parties and the resulting strain upon judicial resources cannot be overstated."[121] According to the Court, the expert's opinion in *DD* could be distilled to a bald, generic principle that aligned with existing law and was, therefore, properly the subject of a jury instruction. Here, by contrast, the very essence of an IRCA is that it is not generic or universalizable. Indeed, in the sentencing context, *Anderson* and *Morris* have emphasized the indispensability of the case-specific content in IRCAs—whether standing alone or complemented by judicial notice. Indeed, as we will see, claims that the kind of information offered in IRCAs enhances the sentencing process warrants further exploration.

But there may be other less apparent reasons why offenders decline to use IRCAs. For example, as with expert reports discussed in *DD*, IRCAs are expensive and may take a long time to prepare.[122] A Black offender with a Legal Aid Ontario ("LAO") certificate can apply for IRCA funding in Ontario.[123] However, to be eligible for LAO IRCA funding, a Black offender must be facing two years or more of incarceration or be a young

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119 *R v DD*, 2000 SCC 43 at para 56.

120 *Ibid* at para 58.

121 *Ibid* at para 56.

122 Sentencing and Parole Project, "Enhanced Pre-Sentence Report (EPSR)", online: <https://tinyurl.com/mvzyw9jx> [perma.cc/T83D-U9PQ]; Jason Miller, "'Fundamentally unfair': Judges slam cost and delays with 'essential' anti-Black racism reports", *Toronto Star* (28 February 2023), online: <https://tinyurl.com/54wre8aj> [perma.cc/6DNN-ZV76].

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

person facing a jail sentence.[124] The eligibility criteria make it evident that IRCA funding decisions are driven partly by the seriousness of the charge.[125] What, if any, implications flow from this funding eligibility policy?

One potential implication becomes apparent from the sentencing decisions reviewed for this article. All 92 decisions in my dataset were analyzed to identify the offence(s) for which the Black offenders were sentenced. I found that a higher percentage of these cases involved serious crimes related to drugs and firearms—offences stereotypically linked to Black Canadians.[126] For example, LAO's funding policy will predictably lead to more reliance on IRCAs in cases involving serious crimes, and this prediction is not only based on the data but is also consistent with larger Canadian trends. It is unreasonable to presuppose that Blackness is not an essential factor in sentencing cases involving charges that are deemed less serious in terms of the penalty they attract or public perception of their gravity, for example, theft or other offences not stereotypically associated with Black people. There are perhaps cogent reasons for this phenomenon, which implicate legal ethics, litigation strategy, client instructions, funding policies, and access to justice imperatives. Often, these concerns conflict with each other.

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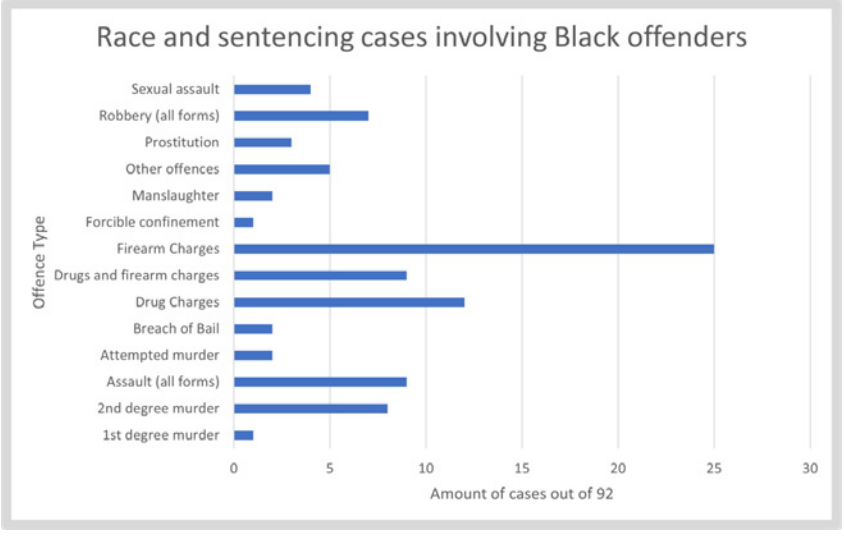
[124] Legal Aid Ontario, "Impact of Race and Culture Assessments (IRCAs)", online: <https://www.legalaid.on.ca/irca/>.

[125] *R v Husbands*, 2019 ONSC 6824, aff'd 2024 ONCA 155; *R v TJT*, 2018 ONSC 5280. See Figure 1 for a table of IRCA decisions. *Anderson*, *supra* note 2; *Morris*, *supra* note 2.

[126] Jones, "Perspectives", *supra* note 19; Department of Justice Canada, *Overrepresentation of Black People in the Canadian Criminal Justice System* (Ottawa: Department of Justice Canada, 2022).

Figure 1—Reported Race and Sentencing Cases involving Black Offenders from 2014–2023 that involved the use of IRCAs or judicial notice of race.[127]



The decision to direct limited funds towards more serious charges carrying greater sentencing jeopardy is a pragmatic one, but it has broader impacts on the geographic and cultural communities from which Black offenders hail. An inadvertent link becomes reinforced when offence severity is used as the barometer to determine funding eligibility for IRCAs. Indeed, such policies further strengthen the trope that links Blackness and serious criminality. It is not IRCAs *per se* that preserve this link, nor is that the objective of IRCAs—quite the opposite. IRCAs are supposed to sever this invidious, deeply entrenched link. So, how do they become implicated in its strengthening? Briefly, any strategy that reinforces the union of Blackness and serious criminality, such as drug and firearm-related offences, must be carefully weighed. If IRCAs are almost exclusively used to explain the relationship between Blackness and gun or drug charges, then their cumulative effect on sentencing judges, lawyers and other stakeholders could be the entrenching of pernicious stereotypes that Black people are more likely to carry guns and use or traffic illegal drugs. As noted above, these pernicious stereotypes contribute to harsher sentences for Black people—the exact phenomenon that IRCAs are meant to redress.[128]

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

128 Department of Justice Canada, *supra* note 126.

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

As noted above, race amplification or visibility through the expanded use of IRCAs impacts more than sentencing outcomes. It can concretize or attenuate existing stereotypes that justify the cruelty that all Black people, not just the individual offender, endure from the criminal justice system and society more broadly. The anti-Black stereotypes bred and amplified in our criminal courts impact all Black people, even those who do not come before sentencing court.[129] Indeed, the race narratives in IRCAs are not exclusive to the offenders. Instead, they are collective narratives whose use and interpretation will reverberate outside the courtroom. Thus, a sentencing decision that consciously or unconsciously reinforces stereotypical links between Blackness and gun and drug crimes affects more Black people than the offender before the court.

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

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[129] *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).

deadly feedback loop that is evidenced by the mass incarceration of Black people in Canada.[130]

The iconography and accompanying narrative of the "dangerous Black person" is central in the decision-making around whom police officers investigate, arrest and charge.[131] It can also direct Crown prosecutors about what cases to proceed with and ultimately guide Judges in sentencing Black offenders. Moreover, the influx of Black offenders before the criminal courts and in prison reinforces the narrative of the recalcitrant, remorseless, and dangerous Black criminal. Thus, anti-Black racism within the criminal justice system not only targets Black "offenders" but is also instrumental in their creation. In some cases, this narrative travels with the offender from their initial arrest through to the sentencing phase, which can result in disproportionate sentences for Black offenders. There is also cogent evidence to suggest that Blackness is a central consideration in the public's perception of sentence appropriateness.[132]

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

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[130] Research and Statistics Division Department of Justice Canada, *Black People in Criminal Courts in Canada: An Exploration Using the Relative Rate Index*, by Charbel Saghbini & Lysiane Paquin-Marseille (Canada: Research and Statistics Division Department of Justice Canada, 2023). Paul Butler, "The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform" (2019) Freedom Centre J 75 at 130.

[131] See David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); 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); Ministry of the Solicitor General, *Report of the Independent Street Checks Review*, by Michael H Tulloch (Toronto: Queen's Printer for Ontario, 2018); Toronto Police Service, *Race & Identity Based Data Collection Strategy: Understanding Use of Force & Strip Searches in 2020* (Toronto: Toronto Police Service, 2020). There are also gendered stereotypes that can also come into play.

[132] Canadian Association of Black Lawyers, "Race and Criminal Injustice", *supra* note 65.

The anti-Blackness that IRCAs ought to highlight to judges is how the anti-Blackness that beset the offender from birth gets harnessed to punish him. Indeed, IRCAs must explain how anti-Blackness can shape an offender's experiences in different areas of social life and contribute to their decision to commit a particular offence. They also should explain how the offender's reactions to anti-Blackness shape perceptions of behaviours deemed criminal and, ultimately, how those perceptions become the basis for punishment.[133] As discussed in more detail in the companion article, sentencing is invariably about *Blackness* when a Black offender is involved: Specifically, how Blackness is seen by judges or attempted to be invisibilized by Black offenders. I refer to this as the paradox of race visibility. Black thinkers like Fanon have discussed this phenomenon, which deserves our sustained attention.[134]

3. Section Three

A) The Paradox of Visibility

Through the concept of the paradox of visibility, I seek to understand and (re)conceptualize how centering race consciousness within the sentencing process can act as a double-edged sword. In some contexts, a focus on Blackness operates to disadvantage Black Canadians interfacing with the criminal justice system. In contrast, in other contexts, a refusal to focus on Blackness can support the myth of colour blindness and racial neutrality in the criminal justice system. Unfortunately, this paradox has been overlooked by many well-meaning and careful commentators looking at the emergence and ascendancy of IRCAs in Canadian criminal sentencing. We confront the paradox of visibility in sentencing cases where the infusion of race consciousness can simultaneously promote and erode dignity and access to justice.

Over three decades ago, Professor Martha Minow delved into a related issue within the American context. She pointed out that concentrating on differences could lead to recreating them, but dismissing those differences would diminish their significance to those who hold them dear as part of their identity.[135] This article aims to, in contrast, focus on the paradox

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133 Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System" (1995) 105:3 Yale LJ 677 at 694 [Butler, "Jury Nullification"].

134 Fanon, *supra* note 69.

135 Martha Minow & Donald C Langevoort, "The Supreme Court, 1986 Term" (1987) 101:1 Harv L Rev 7 at 12. As stated by Minow in the Bilingual and Special Education context "[a]re the stigma and unequal treatment encountered by minority groups better remedied by separation or by integration of such groups with others? Either remedy risks reinforcing the stigma associated with assigned difference by either ignoring it or focusing on it. This double-edged risk is the "difference dilemma." See Martha Minow, "Learning

engendered by emphasizing or increasing the visibility of Blackness in criminal sentencing. The paradox of visibility recognizes that, for Black people, "denying difference" is not an option: Indeed, those individuals who are read as Black are subjected to so much explicit and implicit bias that claims about "colour-blindness" are generally disingenuous or naïve.[136] As Fanon aptly asserted: "I slip into corners, I remain silent, I strive for anonymity, for invisibility. Look, I will accept the lot, as long as no one notices me. My Blackness was there, dark and unarguable. And it tormented me, pursued me, disturbed me, angered me."[137]

From a criminal sentencing perspective, highlighting an offender's Blackness seems like a losing strategy because of the racist association of Blackness with dangerousness and recalcitrance, but avoiding mentioning their Blackness also seems like a losing strategy because their Blackness is visible and has been all along. Indeed, given the incessancy of Blackness, it may be futile to avert the judge's gaze. Given the futility of deflecting attention from Blackness, we confront the issue of the desirability of forcing judges to confront the relevance of anti-Black racism and the risk of doing so in a way that exacerbates stereotypes. The risk is that a particular type of Blackness, one that is tragic and pathological, is provided as the lens through which to analyze a Black offender's conduct.[138] We risk reinforcing this belief when Blackness is routinely offered to explain an offender's behaviour, especially when Blackness is presented as a tragic archetype: fatherlessness, early exposure to violence, abject poverty, high school drop-out, single-mother raised, youthhood criminality. Such an approach sacrifices Black dignity for the chance of sentencing mitigation. Any sentencing strategy that seeks to essentialize Blackness to explain a Black offender's actions is problematic.[139] It is an affront to dignity and, at best, presents a distorted picture of the individual offender; hence, it cannot generate a truly fit sentence that attends to the complex, unique humanity of the person standing before the court.[140]

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to Live with the Dilemma of Difference: Bilingual and Special Education" (1985) 48:2 Law & Contemporary Problems 157.

136 Blackness becomes even more prominent under the white gaze. See Sherene Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998). Carl E James, "Students 'at Risk': Stereotypes and the Schooling of Black Boys" (2012) 47:2 Urban Education 464.

137 Fanon, *supra* note 69 at 117.

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

139 See generally Crenshaw, "Mapping", *supra* note 105; Harris, *supra* note 105; Crenshaw, "Intersection", *supra* note 105.

140 *Ipeelee*, *supra* note 10 at para 75.

A thorough review of the decisions in my dataset highlights how Blackness is often articulated as tragic and pathological in sentencing proceedings. In order to quantify the social indicators used by judges in sentencing, I thoroughly reviewed all 92 decisions and coded them accordingly. Social indicators refer to biographical information about an offender's social, cultural, and socio-economic background that may be considered as mitigating factors due to their relevance in understanding why the offender appeared before the court and their potential for rehabilitation. To identify these indicators, I analyzed the available sentencing reasons and excerpts from IRCAs. *Morris* is the only decision in the set of 92 decisions where an IRCA was appended in its entirety. In other decisions, IRCAs were excerpted; in particular, IRCAs are heavily excerpted in *X*, *Anderson*, and *Jackson*. In others, IRCAs are referenced but not excerpted, and as noted above, in some cases, IRCAs were not received, but the judge did receive submissions from defence counsel about the offender's background. Because I relied mainly or exclusively on the sentencing decisions, I coded the information that the judge highlighted; we do not know what the offenders said about themselves or what else may have been included in the IRCAs. We can assume, however, that the social indicators relied on by the judge were either those stressed by defence counsel or those factors that the judge regarded as relevant to sentencing.

To code the decisions, I started by reading each individually and identifying every discrete social indicator referenced by the judge. I then worked to identify commonalities among those indicators to cluster them into categories that could be analyzed quantitatively. Apart from the offenders' age, I identified 15 discrete social indicators. These indicators frequently arose across the decisions and could encompass all of the discrete indicators I had identified in each decision, with two exceptions: *R v Biya* and *R v Tennant.*[141] Both cases are outliers. As explained below, in the other 90 cases, the identified social indicators were negative or pathological. Conversely, Mr. Biya, who was convicted of firearm and drug trafficking offences, came from a stable nuclear family; his siblings were academically gifted, and he was enrolled in a four-year advanced diploma program. As for Mr. Tennant, the sentencing judge highlighted

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[141] See *R v Tennant*, 2019 ONSC 1764 [*Tennant*]; *R v Biya*, 2018 ONSC 6887 at para 36 [*Biya*]; The conviction was subsequently quashed on appeal, but there was no appellate consideration of the sentencing: *R v Biya*, 2021 ONCA 171; *R v Peart*, 2022 BCSC 680 at para 38. The court took judicial notice of anti-Black racism. However, in that case, Mr. Peart's positive upbringing and prosocial history made him a poor candidate for sentence mitigation because no connection could be made between his race and the systemic anti-Blackness that he claims contributed to the commission of the crime.

that he "grew up in a loving, stable home with the presence of both of his parents."[142]

After expressly contrasting Mr. Morris' multiple negative social indicators with Biya's positive social indicators, the judge in *Biya* concluded that the *Morris* principles (as identified by Justice Nakatsuru) regarding systemic anti-Black racism and overrepresentation were not applicable.[143] In *Tennant*, the sentencing judge declined to accede to the defence counsel's submission regarding the principles enunciated by Justice Nakatsuru in *Jackson* about the historical discrimination and racism faced by "Afro-Canadians."[144] Both these decisions imply that only negative/pathological factors are applicable. This phenomenon is borne out by the indicators that were relied on as relevant in the other 90 cases.

In the other 90 cases I coded, the social indicators included neutral biographical details such as age and gender. I coded for age categories, noting that many offenders were young, but there was variation. Concerning gender, all but three of the 92 cases involved male offenders. Notably, the general report from *Morris* includes an extensive analysis of Black masculinity. This gendering of IRCAs is significant because it invisibilizes the Black women who come before the criminal justice system and warrants further analysis that is beyond the scope of this article.[145]

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

The social indicators that clustered around the offender's relationship with his father were organized into two categories: "Fatherlessness" refers to cases where there was no father in the home at all, including cases where the offender had never met their father or had only met their father briefly. "Challenging relationship with father" refers to situations where the offender described their father as having neglected them, as having

142 *Tennant*, *supra* note 141 at para 5.

143 *Biya*, *supra* note 141 at para 36.

144 *Tennant*, *supra* note 141 at paras 43–44.

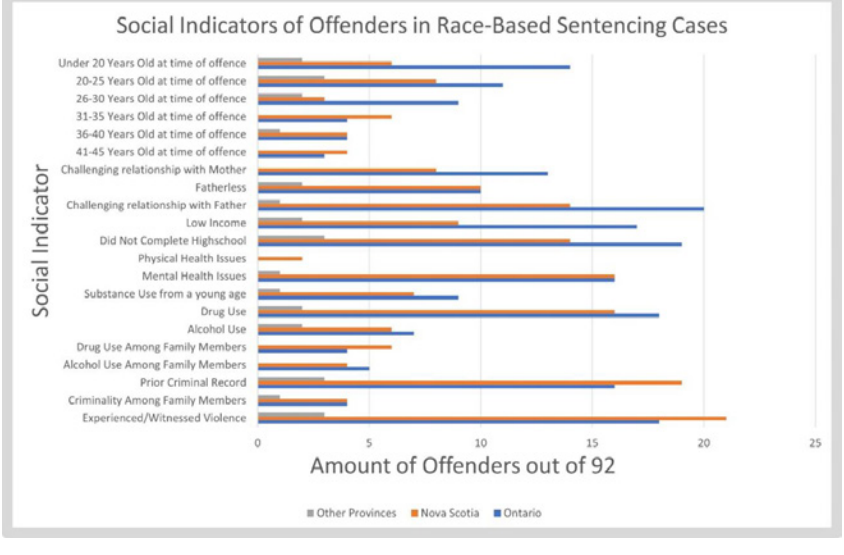
145 For a more developed analysis of this critique, see Danardo Jones & Elizabeth Sheehy, "*R v Desjourdy*: A Narrative of White Innocence and Racialized Danger" (2021) 99:3 Can Bar Rev 611.

never been a strong presence in their lives, or as having been described as "emotionally remote," as strict, as abusive, or as having subjected the offender to corporal punishment. "Fatherlessness" and "challenging relationship with father" correlate with being raised in a single-mother household.

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

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

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



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

B) The Demands of Proportionality

The visibility paradox becomes even more acute when we consider the demands of proportionality and its requirement for blame articulation and allocation. Indeed, strict application of the proportionality framework can lead to unjust sentences for Black offenders, even though proportionality aims to work against biased sentencing. For instance, the concept of proportionality and blame is rendered hollow when we consider the crimes committed by people with minimal opportunities and options due to structural anti-Black racism and that Black people who do commit crimes are more likely to be blamed than their white counterparts.[146] There are two dimensions to this claim: (1) Black people who commit crimes do so, in part, because they are structurally disadvantaged and overexposed to criminogenic factors and have fewer opportunities to live "pro-socially"; and (2) the mass incarceration of Black people does not indicate that Black people commit more crimes, so much as the fact that they are over-surveilled, over-prosecuted, and over-punished compared to their white counterparts.[147] Black Canadians are stereotyped as incorrigible, inherently violent, blameworthy and dangerous due to racist stereotypes that were part of the logic of slavery.[148] Today, the State detects crime and determines individual criminal sentences in part by determining the extent to which a person is violent, incorrigible, blameworthy and dangerous. Yet, behaviours coded as dangerous and violent are frequent responses to conditions of systemic oppression. In the general report adduced in *Morris*, the authors explained that "evidence suggests that Black youth engage in violence as a means of 'self-help' resulting from the belief that the police cannot, or will not, provide them with adequate protection."[149]

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146 Department of Justice Canada, *supra* note 126; Butler, "Jury Nullification", *supra* note 133 at 716.

147 See Department of Justice Canada, *supra* note 126.

148 See William Renwick Riddell, "The Slave in Upper Canada" (1919) 4:4 J Negro History 372. Frank Mackey, *Done with Slavery: The Black Fact in Montreal, 1760-1840* (Montreal: McGill-Queen's Press, 2010.

149 See *Morris*, *supra* note 2.

Indeed, a critical examination of our proportionate-based approach to sentencing reveals that we are, as Paul Butler asserts, "punishing people for 'negative' reactions to racist, oppressive conditions."[150]

Acknowledging structural inequalities does not excuse criminal conduct; instead, it helps to contextualize and deconstruct blame assessments "by forcing a reckoning with the pernicious stereotypes that are projected onto Black bodies and with the racist structures that produce and reinforce them."[151] Failing to consider this could lead judges, defence lawyers, and Crown prosecutors to unconsciously rely on stereotypes that link certain races to criminal behaviour, perceived danger, and incorrigibility.[152] A critical and under-theorized issue is the a-racial and a-contextual assumptions inherent in proportionality/blame assessments.[153] As Carol Steiker asserts, "retributivism's chief distortion is its inability to take account of the effects of widespread social and economic inequality on its central determination of desert."[154] Indeed, "[w]hat has been thought of as proportionality … is not a naturally existing relationship, but a product of political and social construction, cultural meaning-making, and institution-building."[155]

This distortion is apparent in the ONCA's proportionality assessments in *Hamilton* and *Morris*. For example, in *Morris*, the ONCA, while acknowledging widespread and entrenched anti-Black racism, under-emphasized the impact such recognition should have on blameworthiness and how blame assessments exacerbate sentencing disproportionality.[156] In *Morris*, the ONCA addressed the question, which has also been taken up in *Borde* and *Hamilton*, of how systemic anti-Black racism should factor into proportionality assessments.[157] In other words, when sentencing a Black offender, how does a keen understanding and acknowledgement

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150 Butler, "Jury Nullification", *supra* note 133 at 716.

151 Jones, "Perspectives", *supra* note 19.

152 Devon W Carbado & Daria Roithmayr, "Critical Race Theory Meets Social Science" (2014) 10 Annual Rev L & Soc Science 149 at 153.

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

154 Carol Steiker, "The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System" in Michael Klarman, David Skeel & Carol Steiker, eds, *The Political Heart of Criminal Procedure: Essays on Themes of William J Stuntz* (New York: Cambridge University Press, 2012) 212 at 224.

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

156 *Ibid* at 3.

157 *Borde*, *supra* note 2; *Hamilton*, *supra* note 2.

of anti-Black racism help guide judges toward a proportionate sentence? Arguably, anti-Black racism is *prima facie* relevant to proportionality assessments because it:

1. Constrains social opportunities (e.g., education, employment, housing, etc.);[158]

2. Increases the risk of involvement in the criminal justice system;[159]

3. Increases the qualitative harshness of the experiences of sentences—insofar as those sentences are administered by institutions like prisons and parole offices that frequently operate more harshly and violently towards Black people than their white counterparts.[160]

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

1) Assumption #1: No Blame Attaches to the State

Courts must focus exclusively on the offender and assess their level of blame in part by acknowledging deprivations, harm, and trauma offenders have experienced, but they are not required to expressly name and condemn those who caused the deprivations, harm, and trauma; in other

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158 Statistics Canada, Study: A labour market snapshot of Black Canadians during the pandemic (Canada: Statistics Canada, 2021), online: <https://tinyurl.com/ytmespka> [perma.cc/2ZKK-5A2S]. Robyn Maynard, "Canadian Education Is Steeped in Anti-Black Racism" (29 November 2017), online: *The Walrus* <https://thewalrus.ca/canadian-education-is-steeped-in-anti-black-racism/> [perma.cc/GDX7-35KM]. Centre for Equality Rights in Accommodation, National Right to Housing Network & Social Rights Advocacy Center, Housing Discrimination & Spatial Segregation in Canada (2021) at 13, 17, online: <https://tinyurl.com/3ewfhnzt> [perma.cc/HFT2-J8SY].

159 Ontario Human Rights Commission, *A Disparate Impact: Second Interim Report on the Inquiry Into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2020); Nova Scotia Human Rights Commission, *Halifax, Nova Scotia: Street Checks Report*, by Scot Wortley (Toronto: Nova Scotia Human Rights Commission, 2019). Canadian Association of Black Lawyers, *Race and Criminal Injustice: An examination of public perceptions of and experiences with the Ontario criminal justice system*, by Scot Wortley, Akwasi Owusu-Bempah & Huibin Lin (Toronto: Ryerson University Faculty of Law, 2021).

160 *R v Gabriel*, 2017 NSSC 90 at para 82; See Tom Cardoso, "Bias behind bars: A Globe investigation finds a prison system stacked against Black and Indigenous inmates", *The Globe and Mail* (24 October 2020), online: <https://tinyurl.com/nhc9apda> [perma.cc/UR8C-E4L7].

words, without *blaming* those who harmed the offender. Consequently, the State is allowed to be abstracted into a position of semi-innocence.[161] The ONCA reasoned that, under the proportionality doctrine, no blame should be ascribed to society for its complicity in maintaining systemic anti-Black racism.[162] In fact, the ONCA held that "[i]f society's complicity in institutional racism means denunciation and general deterrence should play a lesser role in sentencing for serious crimes, it will follow that Black offenders who commit those serious crimes, such as gun crimes, will receive shorter jail sentences than other similarly situated non-Black offenders."[163] Thus, the individual offender, and not the State—despite State complicity in maintaining social inequalities that frame life choices—attracts all blame and hence all punishment. However, two distinct problems arise from this reasoning:

1. The ONCA considers itself constrained by and committed to proportionality. Consequently, it fixates on blame and can only try to lower individual blameworthiness (as it relates to personal responsibility) to account for anti-Black racism—rather than envisioning radically different responses that would address the root causes and core effects of anti-Black racism.

2. The ONCA is unwilling to ascribe blame to the State except in the vaguest terms. This unwillingness diminishes Black people's claims based on their lived experience of racism and makes it difficult to meaningfully calibrate the offender's blameworthiness since the implication is that only the offender shoulders the lion's share of the blame for the offence.[164]

This glaring contradiction—i.e., the ONCA acknowledging the State, including the justice system's, complicity in the maintenance of systemic anti-Black racism and the impacts of anti-Black racism on individual blameworthiness while nevertheless deploying a proportionality analysis that contemplates the allocation of moral blameworthiness to the offender but does not allocate any responsibility to society/State—demonstrates one way in which proportionality cannot co-exist with racial justice.[165]

Furthermore, the ONCA expressly declined the invitation by interveners, the Black Legal Action Centre (BLAC), to apportion some

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161 *Morris*, *supra* note 2 at para 56; Manikis, "Proportionality", *supra* note 22.

162 See *Morris*, *supra* note 2.

163 *Ibid* at para 84.

164 It appears that the *Morris* court was similarly concerned, as Justice of Appeal Doherty was in *Hamilton*, that allocating societal blame for the offender's conduct would promote a "determinist theory of crime." *Hamilton*, *supra* note 2 at para 140.

165 See generally Manikis, "State Blame", *supra* note 20.

blame to society when fashioning a sentence for a Black offender, holding that no such objective exists under the current sentencing framework.[166] Thus, IRCAs must omit any reference to blame distribution that considers state complicity to fit within current doctrinal parameters. As a result, IRCA writers and those who endorse their wider deployment have had to learn a lesson in compromise. Whether they struck an improvident bargain to transform what began as a fringe and counter-hegemonic movement into a mainstream procedural exercise remains an open question. However, as I have said elsewhere, *Morris* should be read as a call to action, not the final word on sentencing reform for Black offenders in Ontario.[167]

2) Assumption #2: Frankly Acknowledging Systemic Racism as a Cure

The ONCA assumes that the sentencing process is redeemable and expiated through what it describes as "a frank acknowledgement" of systemic anti-Black racism.[168] Indeed, the ONCA seems to suggest that a frank acknowledgment is an ameliorative response, albeit not a complete one, to the problem of anti-Black racism in sentencing proceedings. According to the ONCA, "[a] frank acknowledgement of the existence of, and harm caused by, systemic anti-Black racism, combined with a careful consideration of the kind of evidence adduced in this case, will go some distance toward disassociating the sentencing process from society's complicity in anti-Black racism."[169] However, if the offender expresses such remorse or expiation, it will yield little, if any, forgiveness, mercy, or dissolution of blame.

Anti-Blackness strips Black bodies of the ability to express or sense remorse, embody innocence or be worthy of mercy.[170] Arguably, a bare, generic acknowledgment of responsibility by the offender has almost no expiative value, but here, the ONCA's analysis suggests that such an acknowledgement is meaningful and materially significant when performed by/on behalf of the state.[171] With respect, decoupling the sentencing process from anti-Black racism will require more than "[a] frank acknowledgement."[172] Arguably, recognition without more is, at

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166 *Morris*, *supra* note 2 at para 83.

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

168 *Morris*, *supra* note 2 at para 86.

169 *Ibid.*

170 See Steiker, *supra* note 154; See Jones & Sheehy, *supra* note 145.

171 See Sara Ahmed, "The Nonperformativity of Antiracism" (2006) 7:1 Meridians 104.

172 *Morris*, *supra* note 2 at para 86.

best, hollow and, at worst, fosters retrogression.[173] What is required is a fundamental rethinking of our sentencing process from the vantage point of the system's most vulnerable and targeted.

Conclusion: Breaking Away from Proportionality?

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

The *Morris* decision highlights the competing and paradoxical interests at play when sentencing Black offenders. Unfortunately, *Morris* does not resolve this paradox—one that infects the sentencing process and the broader justice system and requires a radical, structural change. That radical change may involve abandoning the proportionality principle, with its retributivist fixation on punishing people for their moral blameworthiness.[174] The proportionality principle does not focus our attention on eliminating racist structural conditions by maximizing the potential of Black criminalized persons and their communities. Instead, it focuses on deciding how much blame and punishment to allocate to an individual Black offender—even though their conduct was shaped partly by structural conditions, and the punitive responses driven by the

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[173] See Derrick A Bell, "*Brown v. Board of Education* and the Interest Convergence Dilemma" in Kimberle Crenshaw et al, *supra* note 106. See Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed (Chicago: University of Chicago Press, 2008). See *Morris*, *supra* note 2.

[174] See von Hirsch, "Philosophy", *supra* note 11.

allocation of blame are likely to perpetuate those same conditions while reinforcing pernicious stereotypes about Blackness and criminality.[175]

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

175 Tuck, *supra* note 138.