ADDRESSING ANTI-BLACK RACISM IN SENTENCING: A CRITICAL COMPARISON OF *R V ANDERSON*, AND *R V MORRIS*

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The release of R v Anderson, 2021 NSCA 62 and R v Morris, 2021 ONCA 68, marked the first time that IRCAs were considered by appellate courts in Canada despite IRCAs being used in sentencing hearings in Nova Scotia and Ontario since 2014. This paper critically assesses Anderson and Morris to highlight and discuss their differences. This critical assessment is necessary because the SCC has not weighed in on the use of IRCAs, and the NSCA and ONCA differ in their approach. As such, other jurisdictions will be looking to the NSCA and ONCA for guidance in IRCA cases. This is especially true now that the federal government has provided some financial support to roll IRCAs out across the country. This paper concludes that Anderson should be considered more persuasive authority on IRCAs primarily because it adopts a holistic approach to addressing anti-Black racism in sentencing, rather than the limited, piecemeal approach adopted in Morris.

La publication des décisions R v Anderson, 2021 NSCA 62 et R c Morris, 2021 ONCA 68 a fait date : pour la première fois, des cours d'appel au Canada se sont penchées sur les évaluations de l'incidence de l'origine ethnique et culturelle (EIOEC), bien que ces évaluations aient servi lors d'audiences de détermination de la peine en Nouvelle-Écosse et en Ontario depuis 2014. L'auteure jette un regard critique sur les décisions Anderson et Morris pour mettre en évidence et analyser leurs différences; une évaluation nécessaire, car la CSC ne s'est pas encore prononcée sur l'application des EIOEC, et aussi parce que les cours d'appel de la Nouvelle-Écosse et de l'Ontario n'ont pas la même façon de traiter la question. D'autres provinces s'inspireront de ces deux cours d'appel pour les dossiers d'EIOEC. C'est d'autant plus vrai maintenant que le gouvernement fédéral a accordé un soutien financier pour la généralisation des EIOEC dans l'ensemble du pays. La conclusion : la leçon d'Anderson est plus probante en matière d'EIOEC, surtout parce que la Cour y adopte une méthode holistique pour traiter le racisme anti-Noirs dans la détermination de la peine, par opposition à la méthode ponctuelle et limitée qu'on voit dans Morris.

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Contents

Introduction

In 2021, the Courts of Appeal of Nova Scotia and Ontario released decisions addressing the relevance and use of Impact of Race and Cultural Assessments ("IRCAs") in sentencing Black convicted persons: *R v Anderson*,[2] and *R v Morris*.[3] Although sentencing courts in both jurisdictions had considered IRCAs in multiple cases beginning with *R v X*,[4] in 2014, *Anderson* and *Morris* marked the first time that IRCAs were considered by appellate courts in Canada. *Anderson* and *Morris* were heard one month apart, and their respective rulings were released two months apart. While *Anderson* and *Morris* are similar in many ways—both cases involve weapons-related offences, Black convicted persons, IRCAs and the consideration of anti-Black racism in sentencing, 5-panel courts, and multiple intervenors—their outcomes are different. For example, in *Anderson* the court adopts a holistic approach to IRCA evidence in sentencing, meaning it informs the entire sentencing analysis, whereas the court in *Morris* adopts a piecemeal approach, meaning the IRCA evidence is relevant to some factors but not others.

2 2021 NSCA 62 [Anderson].

3 2021 ONCA 680 [*Morris*].

4 2014 NSPC 95 [*R v X*].

This paper builds on my earlier work, "Committing to Justice: The Case for Impact of Race and Cultural Assessments in Sentencing Black Offenders",[5] in which I provide a systematic and doctrinal review of the need to consider historical and systemic anti-Black racism in sentencing Black people in Canada. It was released prior to the appellate decisions in *Anderson* and *Morris*, and therefore only addresses the trial decisions. This paper picks up where "Committing to Justice" left off. It critically assesses *Anderson* and *Morris* to highlight and discuss their differences.[6] This critical assessment is necessary for two reasons. First, the Federal Government recently announced funding to support the rollout of IRCAs in sentencing across the country, which means that multiple jurisdictions will be looking to Nova Scotia and Ontario for guidance. Second, neither decision was appealed and there is no precedent from the Supreme Court of Canada ("SCC") on the use of IRCAs in sentencing, so neither *Anderson* nor *Morris* will serve as the persuasive authorities in other provinces. I argue that *Anderson* is the better decision, primarily because it is grounded in Critical Race Theory ("CRT").[7]

CRT engages in a critical assessment of law that centers race and racism. Although the core tenants can vary, some of the common elements of CRT scholarship include: that race is a social construction; that racism is ordinary, not aberrational; that law is not neutral, it is part of the social fabric that creates and maintains power imbalances along racial lines and upholds white supremacy; that "colorblindness" in law ignores and perpetuates inequality for racialized groups; and that legal actors should work toward a norm of racial equality.[8] *Anderson* does not touch on every tenant of CRT. However, it does centre race and the lived experiences of Black people, acknowledge that the law is not neutral, and works toward substantive equality.

CRT provides the appropriate foundation to understand and begin to address anti-Black racism in the criminal justice system, including the mass incarceration of Black people. It supports using the existence and effect of anti-Black racism to contextualize the entire sentencing analysis

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5 Maria C Dugas, "Coming to Justice: The Case for Impact of Race and Cultural Assessments in Sentencing Black Offenders" (2020) 43:1 Dal LJ 103 ["Committing to Justice"].

6 This paper incorporates and elaborates on my comments during an invited lecture for a sentencing class at the Schulich School of Law at Dalhousie University, co-taught by Prof. Adelina Iftene and Justice Mel Green in 2022.

7 I credit my colleague, Prof. Michelle Williams, for highlighting this point.

8 See e.g. Kimberle Crenshaw, *Critical Race Theory: They Key Writings That Formed the Movement* (New York: New Press, 1996); Richard Delgado *et al*, *Critical Race Theory: An Introduction*, 3rd ed, (New York: New York University Press, 2017); Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'" (1991) 44:1 Stan L Rev 1.

(and, I would argue, the entire criminalization process[9]) as opposed to adopting the piecemeal approach underpinning the decision in *Morris*.

Some cases decided outside of Nova Scotia have adopted *Morris* as guiding authority because they see *Anderson* as being specifically limited to the circumstances of African Nova Scotian offenders.[10] However the principles established in *Anderson* should be applicable to all Black offenders. The Nova Scotia Court of Appeal ("NSCA") focused on African Nova Scotians because the person before the court was African Nova Scotian. This should not detract from its comments that the case is also about sentencing Black offenders more broadly.[11] The court also states that it is using the terms "offenders of African descent, African Canadians, African Nova Scotians, and Black offenders" and 'racialized offenders' "interchangeably".[12] Limiting the principles of *Anderson* to African Nova Scotian offenders undermines the very principles that it seeks to establish: that systemic and background factors, including the harm that anti-Black racism perpetrates through society and the criminal justice system, must be interrogated, and holistically considered in the sentencing analysis for Black people. A holistic approach to the evidence can account for the fact that the racism African Nova Scotians experience could be different than the racism Black people experience in other parts of the country. The principle that the evidence should be considered holistically remains the same.

Part 1 describes what IRCAs are and summarizes *Anderson* and *Morris* at the trial level, and the path to the appellate decisions in each case. This provides the background for the comparison that follows in Part 2, where I consider: the extent to which the *Gladue* methodology is relevant to addressing social context evidence for Black convicted persons, the importance of IRCA evidence in sentencing Black convicted persons, the nexus required between systemic evidence and the convicted person or their offence, and the relevance of systemic evidence to the sentencing principles in the *Criminal Code*.[13] In Part 3, I address three remaining points of contention in *Morris*: the court's explicit refusal to consider state fault in contributing to anti-Black racism that plays a role in bringing

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9 See e.g. *R v Davis,* 2021 ONSC 8163 [*Davis*] at para 63(h), addressing after the fact conduct. The court, with reference to *Morris* at para 106 states that acknowledging the reality and impact of anti-Black racism "is not restricted to the sentencing process, but should be and must be recognized in all aspects of the criminal justice system." See *R v AA,* 2022 ONSC 4310 [*AA*], where the court takes anti-Black racism into consideration in bail per s 493.2(b) of the *Criminal Code*.

10 See e.g. *R v Lugela,* 2021 ABPC 310 at para 42.

11 *Anderson, supra* note 2 at para 2.

12 *Ibid* at para 14; see also *R v Wournell,* NSCA 2023 53, at note 32 [*Wournell*].

13 *Criminal Code*, RSC 1985, c C-64 [*Code* or *Criminal Code*].

the person before the court, its statement that Black people do not have different conceptions of justice, and its willingness to speak "on behalf of" the Black community. Where applicable, I also consider how these issues were addressed in *Anderson.* A short conclusion follows.

Part 1: Background

Anti-Black racism is pervasive in Canadian society. It affects all our institutions, including the entirety of our criminal justice system.[14] For example, Black people are disproportionately victims of crime,[15] police street checks[16] and police brutality;[17] disproportionately denied bail;[18] disproportionately incarcerated; [19] subjected to harsher treatment while incarcerated;[20] and disproportionately denied parole.[21] In 2021-2022, Black people represented only 3.5% of the Canadian population, but 9.2%

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[14] See e.g. Canadian Civil Liberties Association, "Anti-Black Racism in Canada's Criminal Justice System Fact Sheet" (November 2021) online: <https://tinyurl.com/r2hnkwee> [perma.cc/EFS9-RHEF]; Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point, Nova Scotia: Fernwood Publishing, 2017); David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); Robert S Wright & Jacqueline Barkley, "Race as a Significant Variable in the Legal System", *The Society Record* (31 May 2014) online: <https://tinyurl.com/2br3ks39> [perma.cc/NF5Z-ZXEH]; Akwasi Owusu-Bempah, Scot Wortley, "Race, Crime, and Criminal Justice in Canada" in Sandra Bucerius, Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (London: Oxford University Press, 2014); Canadian Civil Liberties Association, "Anti-Black Racism in Canada's Criminal Justice System" online: <https://tinyurl.com/2p8duxxv> [perma.cc/9V87-XWT6].

[15] Government of Canada, "Overrepresentation of Black People in the Canadian Criminal Justice System" (2022) online: <https://tinyurl.com/422tf9br> [perma.cc/KQ2G-QLR6].

[16] See e.g. Dr. Scot Wortley, "Halifax, Nova Scotia: Street Checks Report" (March 2019), online: <https://tinyurl.com/yryu6c3v> [perma.cc/N9YV-S2DP]; The Honourable Michael H Tulloch, "Report of the Independent Police Oversight Review" (Toronto: Queens Printer for Ontario, 2017) online: <https://tinyurl.com/vjfcmjxn> [perma.cc/QUE5-E53V]. The Honourable Michael H Tulloch, "The Report of the Independent Street Check Review" (Toronto: Queen's Printer for Ontario, 2018) online: <https://tinyurl.com/yjxwesak> [perma.cc/LUF8-P3N3].

[17] Tulloch, *supra* note 16.

[18] See e.g. Nova Scotia Department of Justice "Corrections in Nova Scotia: Key Indicators" (March 2021), online: <https://tinyurl.com/3yzk9nnx> [perma.cc/V57X-5NTR]; Canadian Civil Liberties Association, "Anti-Black Racism in Canada's Criminal Justice System", *supra* note 14.

[19] See e.g. any of the annual reports of the Office of the Correctional Investigator: <https://tinyurl.com/2c4f5wj6> [perma.cc/T3MQ-PR4R].

[20] Canada, Office of the Correctional Investigator, "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report" (February 2014), online: <https://tinyurl.com/2p9zbb4s> [perma.cc/MY8L-MNT4].

[21] *Ibid.*

of the federally incarcerated population.[22] The most recent Annual Report of the Office Correctional Investigator ("OCI") noted that a decade after the OCI released its study on the experience of Black people in federal penitentiaries,[23] "very little has changed for Black persons and in many respects, their situation has deteriorated even further. All the issues identified in 2013 remain today."[24] This echoes the OCI's statement in 2017, that despite the data being repeatedly collected, "very little appears to have changed for Black people in federal custody."[25]

IRCAs were developed in Nova Scotia to address the lack of race and racism-related information being presented and considered in sentencing decisions. In *R v X*, the first case to consider an IRCA, the court was provided with 3 reports, none of which considered that "X" was an African Nova Scotian youth convicted of shooting his African Nova Scotian cousin, in their historic African Nova Scotian community. There was only fleeting reference to "X"s race in any of the reports. "X"'s lawyers sought out social worker Robert Wright to prepare an IRCA. Judge Derrick qualified Mr. Wright as an expert and allowed him to give opinion evidence on race and culture.[26]

IRCAs have been used in some sentencing decisions in Nova Scotia since *R v X* in 2014, and in Ontario since *R v Jackson*,[27] in 2018.[28] They are a sentencing tool that provides the court with information about historical and ongoing anti-Black racism in society and how that racism has affected the person before the court for sentencing.[29] IRCAs assume that race and

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22 Canada, Office of the Correctional Investigator, "Annual Report 2021–2022" (Ottawa 2023), online: <https://tinyurl.com/3kjpmefh> [perma.cc/3C2A-SFVE].

23 Canada, Office of the Correctional Investigator, *supra* note 20.

24 "Annual Report 2021-2022", *supra* note 22. Canada, Office of the Correctional Investigator, "Annual Report 2016–2017" (Ottawa: 2017), online: [perma.cc/K6TM-QAMG]

25 "Annual Report 2016–2017", *supra* note 24 at 55-56.

26 *R v X, supra* note 4 at 15.

27 2018 ONSC 2527 [*Jackson*]. *Jackson* is a sentencing decision involving an African Nova Scotian man convicted of weapons offences in Ontario.

28 The Ontario court first considered the relevance of anti-Black racism in sentencing in *R v Borde*, 2003 CanLII 4187 (ONCA) [*Borde*] and *R v Hamilton*, 2004 CanLII 5549 (ONCA) [*Hamilton*]. The ONCA concluded that racism is relevant "where it may have played a role in the offence". See *Borde* at para 32, *Hamilton* at paras 133-135. Advocates in Ontario should also be credited with getting the courts to consider systemic and background factors in relation to moral blameworthiness, as discussed in further detail in Part 2. This was an area where the courts stalled in Nova Scotia for many years following *R v Gabriel*, 2017 NSSC 90 [*Gabriel*]. Advocates in both jurisdictions where therefore essential to the development of IRCA jurisprudence.

29 See e.g. "Committing to Justice", *supra* note 5 at 105-106, *Anderson, supra* note 2 at 114.

culture are relevant factors for the court to consider in order to render a "just" sentence. I pause here to note that given the pervasive anti-Black racism in Canada, and specifically within our criminal justice system, as evidenced by the mass incarceration[30] of Black and Indigenous people, it is questionable that any sentence imposed on a Black or Indigenous person is "just".

Despite the undeniable anti-Black racism that exists in Canada, as recognized by numerous courts, government bodies, and international groups;[31] and despite the role that this racism plays in our criminal justice system, as recognized by, for example, the Marshall Inquiry,[32] IRCAs were not readily adopted by Crown prosecutors or the judiciary as one way of addressing the effects of anti-Black racism on how people are criminalized. The jurisprudence is riddled with myriad arguments against the use, admissibility, and scope of systemic and background evidence, as I have described elsewhere.[33] Although *Anderson* and *Morris* appear to have ushered in a new area where Crown counsel has conceded and/or courts have concluded that IRCAs are relevant to sentencing, new arguments have arisen to curtail IRCAs and their potential impact. Some of those arguments will be addressed in this paper. First, a summary of Anderson and Morris.

A) *R v Anderson*

The police found Mr. Anderson to be in possession of a loaded firearm during a "random" traffic stop on a highway in Halifax, at 10:00pm.[34]

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30 I use mass incarceration here intentionally rather than "over incarceration" or "disproportionate incarceration". The latter terms suggest that there is an appropriate level of incarceration which society should accept. Instead, Mass Incarceration challenges the use of incarceration in general.

31 See e.g. *R v S (RD)*, 1997 CanLII 324 (SCC) [*RDS*]; *R v Golden*, 2001 SCC 83 at para 83; African Canadian Legal Clinic, *Errors and Omissions: Anti-Black Racism in Canada*. Report of the ACLC to CERD (80th Session) (Toronto: African Canadian Legal Clinic, 2012); Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point, Nova Scotia: Fernwood Publishing, 2017); United Nations' Working Group, "Statement to the Media by the United Nations' Working Group of People of African Descent, on the Conclusion of its Official Visit to Canada, 17–21 October 2016" (21 October 2016), online: [perma.cc/D7XX-Y6TV]; Office of the Correctional Investigator, "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report" (February 2014), online: [perma.cc/QJ58-96TC] [OCI, A Case Study of Diversity in Corrections].

32 See e.g. *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings*, (1989) at 4, 26, Recommendation 12 [*Marshall*].

33 "Committing to Justice", *supra* note 5.

34 Given what we know about carding in Nova Scotia, this could have been a racial profiling issue. See e.g. Dr. Scot Wortley, "Halifax, Nova Scotia: Street Checks Report"

A trial judge found him guilty of multiple weapons-related offences.[35] At sentencing, the Crown sought a two to three-year federal sentence, emphasizing the need for deterrence. The defence sought a Conditional Sentence Order ("CSO"). The sentencing decision turns on the consideration of systemic anti-Black racism in society and the criminal justice system specifically. The Crown sought to use anti-Black racism in the criminal justice system as an aggravating factor, for example by relying on the police's use of racist street checks to argue that Mr. Anderson was not living a "pro-social lifestyle" and that "society should not "be held responsible or hostage for [Mr. Anderson's] unfortunate life circumstances".[36] The court instead accepted Defence counsel's argument that systemic anti-Black racism and its effects on Mr. Anderson should be a mitigating factor. The court sentenced Mr. Anderson to a CSO and probation, emphasizing that sending him to jail would "not help" and would not provide an opportunity for rehabilitation.[37]

The appeal to the NSCA also focused on how to address racism in sentencing. The Crown initially appealed the sentence, but later reframed its appeal as seeking appellate guidance on how IRCAs should be considered in sentencing. Its factum argued that an "exceptional circumstances" requirement should be used when sentencing African Nova Scotian offenders for gun crimes.[38] The Crown abandoned this approach at the hearing, perhaps because, as one of the intervenors argued, "African Nova Scotians do not need an additional legal hurdle as a prerequisite to community-based sentences."[39] Given the nature of the appeal as one for guidance and not contesting sentence, Mr. Anderson's role in the appeal was limited.[40] Instead, Intervenors were largely responsible for arguing the importance of considering systemic racism and IRCAs in sentencing.[41] For its part, the Crown supported the use of IRCAs in sentencing.[42]

The five-person panel at the NSCA upheld the sentence and concluded that courts need to evolve in how they sentence African Nova Scotian people, by "taking into account evidence of systemic and background

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(March 2019), online: <https://tinyurl.com/yryu6c3v> [perma.cc/KQD6-JZ8R]; J Michael MacDonald & Jennifer Taylor, "Independent Legal Opinion on Street Checks" (October 2019), online (pdf): <https://humanrights.novascotia.ca/news-events/news/2019/street-checks-legal-opinion> [https://perma.cc/2B8R-3UG7].

35 *Criminal Code, supra* note 13 at ss 86(1), 90(1), 91(1), 95(2)(a), 94(1).

36 *Anderson, supra* note 2 at para 35.

37 *Ibid* at paras 105–107.

38 *Ibid* at para 74

39 *Ibid* at para 77.

40 See e.g. *Ibid* at para 86.

41 *Ibid* at paras 87–90, 95–100.

42 *Ibid* at para 112.

factors and the [convicted person's] lived experience … at every step in the sentencing process, and in the ultimate crafting of a just sanction."[43]

B) *R v Morris*

The court convicted Mr. Morris on weapons-related offences for carrying a concealed, prohibited weapon and ammunition in public. At the time of his arrest, the police hit Mr. Morris with their car, and later continued to question him after he asked for a lawyer. The court found these ss. 7 and 9 *Charter* breaches did not warrant a stay of proceeding, but they did warrant a three-month reduction in Mr. Morris' sentence.[44] The Crown sought a 4–4.5-year custodial sentence. The defence argued that a one-year sentence was appropriate, before accounting for *Charter* breaches. Justice Nakatsaru's decision builds on the framework for sentencing Black convicted persons that he first developed in *R v Jackson* months earlier.[45]

Justice Nakatsaru acknowledged the seriousness of gun-related crimes, and the fear gun violence can cause. He stated the court's role is "to give expression to that fear … but it is not … to give into it." He elaborates that "Reason must control emotion in sentencing. Because in our system, a sentence is not just about the crime. It must be also about the offender. It must be about the particular facts of the case. A sentence must be multi-dimensional. It must be proportionate."[46] Justice Nakatsaru found that systemic and background factors are relevant to moral blameworthiness, general deterrence and denunciation, how to characterize the seriousness of the offence, and the choice to act.[47] He sentenced Mr. Morris to 15 months in custody and 18 months' probation, less three months for *Charter* violations, which resulted in a further one day in jail after credit for pre-trial custody.[48]

On appeal to the Court of Appeal for Ontario ("ONCA"), the Crown argued that the sentence was unfit, and the trail judged erred in his reasons, in particular by allowing the systemic and background evidence to "overwhelm" all other relevant sentencing considerations. Mr. Morris argued that the trial judge properly considered the evidence, and that social context evidence is relevant to sentencing Black convicted persons.[49]

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43 *Ibid* at para 164.

44 *R v Morris,* 2018 ONSC 5186 at para 86–97 [*Morris Trial*].

45 *Jackson, supra* note 27.

46 *Morris Trial, supra* note 44 at para 52.

47 *Ibid* at paras 55–62.

48 *Ibid* at paras 97–98.

49 *Morris, supra* note 3 at para 4–8.

There were ten intervenors.[50] While the five-person panel at the ONCA agreed social context evidence *may* be considered where relevant, it *may* only be relevant to moral responsibility and to "blending" the principles and objectives of sentencing. It is not relevant to how courts characterize the seriousness of the offence, which is instead "determined by its normative wrongfulness" and its threat of harm.[51] The ONCA allowed the appeal and would have varied the sentence to two years less a day's incarceration followed by 18 months' probation before credit for pre-trial custody. Given the lengthy delay in the case being heard by the ONCA, the sentence was permanently stayed.

The following Parts critically assess *Anderson* and *Morris*, supporting the conclusion that *Anderson* is better precedent. I have focused on seven key aspects as these are the ones where the courts diverge, where they adopt problematic reasoning, or commentators have confused their holdings.

Part 2: Critical Comparison of *Anderson* and *Morris*

This Part will show that while *Anderson* and *Morris* are similar in some respects, they nevertheless diverge on a key issue: how the court should consider systemic evidence in sentencing.

A) The Extent to Which the *Gladue* Methodology is Relevant to Addressing Social Context Evidence for Black Convicted Persons.

To varying degrees, both *Anderson* and *Morris* discuss the argument that the *Gladue* sentencing methodology should not extend to Black people. A complete review of the sentencing framework for Indigenous people, and a detailed account of colonial harm has been provided elsewhere.[52] However, some truncated explanation is necessary to engage with this point of comparison between the two appellate decisions.

With the amendments to the *Criminal* Code's sentencing provisions in 1996, Parliament explicitly instructed courts to consider alternatives to

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50 The Black Legal Action Center, Canadian Association of Black Lawyers, Aboriginal Leal Services, David Asper Centre for Constitutional Rights, Criminal Lawyers' Association, Urban Alliance on Race Relations, Canadian Civil Liberties Association, Canadian Muslim Lawyers Association, South Asian Legal Clinic of Ontario, Chinese and Southeast Asian Legal Clinic, and Colour of Poverty/Colour of Change.

51 *Morris, supra* note 3 at paras 183–184.

52 See e.g. Jonathan Rudin, Indigenous People and the Criminal Justice System, 2nd ed. (Toronto: Emond Publishing: 2022); The Truth and Reconciliation Commission Final Report, online: <https://nctr.ca/records/reports/> [perma.cc/6LNJ-LSXZ].

imprisonment for Indigenous peoples, in section 718.2(e).[53] This provision was meant to address the mass incarceration of Indigenous peoples and to recognize their unique experiences and the impacts of colonialism on their communities. In *R v Gladue* and *R v Ipeelee*, the SCC stressed that section 718.2(e) was remedial in nature and provided guidance on *how* sentencing courts should do this work.[54] The SCC instructed courts to consider the following factors for every Indigenous person regardless of the offence:

> (a) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[55]

Section 718.2(e) also explicitly states that it applies to "all offenders", and the SCC has interpreted this to mean that it *is* applicable to all offenders.[56] Thus, Parliament's directions to "consider all available sanctions, other than imprisonment, that are reasonable in the circumstances … for all offenders" means that this provision applies to Black people. It is not surprising that Black people would rely on this provision to argue that courts need to consider historical and ongoing systemic anti-Black racism in sentencing Black people. Yet, various state actors have argued that the remedial sentencing approach codified in s 718.2(e) does not apply to Black people because the provision only explicitly names "Aboriginal offenders".[57] This is an odd argument, in that opponents of adopting a remedial sentencing approach for Black people rely on the explicit recognition of "Aboriginal offenders" in s 718.2(e), but essentially ask the court to ignore the explicit language of "all offenders". Additionally, the language in s 718.2(e) is itself problematic because it perpetuates the myth that anti-Black racism does not exist in Canada, by not explicitly referencing another racialized group that has a unique history in this country that has created devasting outcomes from Black people, including our mass incarceration.

In *Anderson* the court states that while judges have recognized that Indigenous people have a distinct history and place in the constitutional

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53 *Criminal Code, supra* note 13 at s 718.2(e).

54 *R v Gladue*, 1999 CanLII 679 (SCC) at paras 35, 57 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 Rothstein (dissenting in part) [*Ipeelee*].

55 *Gladue, supra* note 54 at para 93, *Ipeelee, supra* note 54 at para 59.

56 *Gladue, supra* note 54 at paras 43, 70.

57 "Committing to Justice", *supra* note 5.

framework, background and systemic factors are "similarly relevant" to sentencing Black people. This is not only because Black people have experienced similar effects of discrimination and marginalization in Canada. The court also notes, "African Nova Scotians have a distinct history reflected in how they arrived here and their experience over the past 400 years. This history is rooted in systemic and institutionalized racism and injustice … It is a history of slavery, oppression, and direct and systemic racism, braced by laws and legal practices."[58] *Anderson* aligns with CRT in this regard by acknowledging historical and ongoing systemic racism.

In *Morris,* the Respondent argued that social context evidence should "play a prominent role" in sentencing Black offenders, though they did not equate sentencing Black people with sentencing Indigenous people.[59] Some of the intervenors argued that the factors used to justify a different sentencing approach for Indigenous people also apply to Black convicted people—like overincarceration, anti-Black racism, distrust of police, and societal disadvantages.[60] The court declined to equate the two groups for two reasons: because "the language in s. 718.2(e) could not be clearer" where parliament made specific reference to Aboriginal offenders, and because the rationale for applying a different sentencing approach for Indigenous people does not apply to Black people. That is, although Black people experience racism that *may* mitigate their responsibility, they do not have a "unique" relationship with Canada and do not have different conceptions of justice.[61]

There are myriad problems with comparing Indigenous and Black experiences as a means of excluding Black people's entitlement to the remedial nature of s. 718.2(e). Most obviously, it directly contradicts the letter of the law that s. 718.2(e) applies to everyone. Second, it wrongly assumes that entitlement is a zero-sum game; that by accounting for anti-Black racism, we are taking something away from Indigenous people. Third, it renders invisible the *real* harm that Black people have endured and continue to endure and fails to recognize that Black people also have a unique relationship with Canada. It says that because you are not Indigenous, the harm that you have experienced does not matter. Collectively, this rhetoric falsely pits Black people and Indigenous people against each other in the eyes of the court.[62] It creates a macabre sort of "oppression Olympics". It ignores the sense of community that often exists

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

59 *Morris, supra* note 3 at para 8.

60 *Ibid* at para 117.

61 *Ibid* at paras 121–123.

62 I Credit Brandon Rolle, from the African Nova Scotian Justice Institute for highlighting this point during a panel discussion that we both participated in.

between Black and Indigenous people as people who have experienced the state sanctions genocide and erasure of their people and their culture.[63] It also ignores the fact that people can be both Black and Indigenous, and that these people endure a unique experience of racism that must be acknowledged and addressed.

To be clear, I am not saying that Indigenous people do not have a unique experience in Canada and in the criminal justice system more specifically, nor am I saying that this distinction should be eliminated. I am arguing that the methodology for differential sentencing under s 718.2(e) should be extended to Black people given our unique experience—including slavery, segregation, state-sanctioned violence, mass incarceration, and pervasive anti-Black racism—in Canada.

B) The Importance of IRCA Evidence in Sentencing Black Convicted Persons.

Both *Anderson* and *Morris* emphasize the importance of systemic and background evidence in sentencing Black convicted persons. This is not surprising, since the Crown in *Anderson* conceded that IRCAs are relevant and important, and the Crown in *Morris* agreed that systemic and background evidence is relevant to some sentencing factors. In both decisions the courts note the importance of this type of evidence. In *Anderson,* for example, the court says that IRCAs should be available in any sentencing for a person of African descent;[64] that the evidence can provide a foundation for sentences other than incarceration;[65] that although courts can take judicial notice of anti-Black racism, an IRCA is helpful;[66] and that they enhance the credibility of the criminal justice system.[67] Similarly, in *Morris* the court says that the evidence is not only admissible, but in many cases "essential to the obtaining of an accurate picture of the offender as a person and a part of society;"[68] that the evidence can be the subject of

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63 Burnley "Rocky" Jones spoke to this point in his submissions to the Marshall Inquiry: "I speak particularly to the native community and say as we support your struggle. I hope that there's a possibility of us having a combined struggle based on the integrity and the power that resides in both of our communities, because indeed we have a common oppressor. We are part of this country together. Your history is somewhat different than ours. You have different claims that we do. But the reality of it is the same person who oppresses you oppresses me. The same institutions that come to bear on you come to bear on me." See Consultation Transcript, November 25, 1988–9:40 a.m. at 167, online: <https://tinyurl.com/53p9y5n2> [perma.cc/4H8M-K2SS].

64 *Anderson, supra* note 2 at paras 92–93, 103.

65 *Ibid* at para 120–122.

66 *Ibid* at para 111.

67 *Ibid* at para 142.

68 *Morris, supra* note 3 at para 91.

judicial notice or brought as social context evidence;[69] that the expert report detailing the systemic evidence about racism in the criminal justice system in Ontario, "bears reading and re-reading by those called upon to prosecute, defend, and sentence Black offenders;"[70] and that the evidence enhances the legitimacy of the criminal justice system.[71]

While both courts seemingly give the IRCA evidence positive endorsements, the NSCA goes further than the ONCA in emphasizing the importance of this evidence to the sentencing process. It holds that sentencing judges need to carefully consider systemic and background factors in sentencing a Black person. Failing to do so *may* amount to an error of law.[72] The NSCA also states that a sentencing judge *should* provide detailed reasons about how the court has considered the systemic evidence. Again, failing to do so *may* warrant appellate intervention.[73] "May" and "should" are permissive, not definitive. I read these paragraphs as the NSCA putting lower courts notice that it is watching and willing to overturn a sentencing decision where the judge fails to properly deal with the evidence. In other words, the NSCA is calling on the judiciary to "show their work," or risk being overturned on appeal.

This interpretation is supported by the NSCA's recent decision to overturn the sentence in *R v Wournell*.[74] The NSCA concluded that the trail judge did not give "proper attention" to Wournell's circumstance, and that there was "nothing in the judges reasons to indicate that he went beyond his awareness of the [IRCA] information to applying it in the course of discharging the delicate task of contextualized sentencing."[75] Nor did the trial judge engage with any of the principles discussed in *Anderson* with respect to how IRCA evidence should be used.[76] This reasoning parallels the argument I made in "Committing to Justice", that judges must give detailed reasons so that reviewing courts and community members can clearly ascertain how the evidence has been considered in the sentencing analysis.[77]

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69 *Ibid* at para 42.

70 *Ibid* at para 43.

71 *Ibid* at para 106. We need to be critical and skeptical of the courts explicit statement that it is doing something to improve the reputation of a punitive, carceral, and coercive system. I have addressed this point elsewhere. Maria C Dugas, "Locating *R.D.S.* in *R v Anderson*: addressing anti-Black racism in the Criminal Justice System" (under consideration, *Journal of Law and Social* Policy). I will address it in more detail in Part 3.

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

73 *Ibid* at para 123.

74 *Wournell, supra* note 12.

75 *Ibid* at para 62.

76 *Ibid* at para 63.

77 "Committing to Justice", *supra* note 5 at 154–155.

C) The Nexus Required Between Systemic Evidence and the Convicted Person or Their Offence.

Courts generally agree on the ability to take judicial notice of systemic racism. There is guidance on this point from the SCC.[78] A more contentious part of the IRCA jurisprudence relates to whether the court can take judicial notice of the *impact* of systemic racism on a convicted person.[79] While some courts have been willing to infer a certain degree of impact,[80] others, including the NSCA and the ONCA, are clear that the court requires *some* connection between the systemic evidence and the person before the court.

The SCC addressed the nature of the required nexus between the systemic evidence and the person being sentenced in *Ipeelee.* At paragraph 82, the SCC quotes from *R v Collins*,[81] that the authorities do not establish a burden on Indigenous people "to establish a causal link between the systemic and background factors and commission of the offence." Instead, the nexus required by s. 718.2(e) is "much more modest" than a causal link.[82] In *R v Borde* and *R v Hamilton,* the ONCA said race and background factors could be considered where they had "played a role in the commission of the offense."[83] In *Hamilton,* Justice Doherty reasoned that the respondent needed to establish that her offending behaviour was a "direct result of systemic racial and gender bias".[84] However, in *R v Jackson*, Justice Nakatsaru specifically addressed this aspect of *Hamilton* and reasoned that a "direct connection" would amount to a "systemic barrier that would perpetuate inequality for African Canadians" because it is difficult if not impossible to prove.[85] Instead, he adopted reasoning from the Court of Appeal of Saskatchewan that the link between systemic factors and the person before the court "is based on inferences drawn from the evidence based on the wisdom and experience of the sentencing judge."[86]

Some commentary has suggested that *Anderson* and *Morris* diverge on the nature of the nexus required in IRCA jurisprudence. At least one

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78 See e.g. *R v Le,* 2019 SCC 34 at para 71; *RDS*, *supra* note 31.

79 See e.g. "Committing to Justice", *supra* note 5 at 139–142; *R v Brisset and Francis,* 2018 ONSC 4957; *R v Clarke,* 2019 ONSC 5868.

80 See e.g. *R v Reid*, 2016 ONSC 8210; *R v Elvira*, 2018 ONSC 7008; *R v Williams*, 2018 ONSC 5409.

81 2011 ONCA 182.

82 *Ipeelee, supra* note 54 at para 82, citing *R v Collins,* at paras 32–33.

83 *Borde, supra* note 28 at para 32; *Hamilton, supra* note 28 at paras 133–135.

84 *Hamilton*, *supra* note 28 at para 137.

85 *Jackson, supra* note 27 at para 111.

86 *Ibid,* citing *R v FL*, 2018 ONCA 83, at para 46, quoting the SKCA.

article wrongly states that *Anderson* requires no nexus at all.[87] However, based on a close reading of the decision, in the context of the existing jurisprudence, it is evident that *Anderson* does require *some* connection. The NSCA states that a "judge does not have to be satisfied a causal link has been established" between the systemic factors and the person before the court.[88] It immediately references *Gladue* and *Ipeelee* where the SCC says that counsel needs to provide the court with relevant information regarding the impact of those systemic factors on the convicted person. In fact, it cites to paragraph 82 of *Ipeelee*, quoting from *Collins* as mentioned above. It is reasonable to conclude that *Anderson* does require some connection for the court to mitigate based on anti-Black racism, but it does not require a causal connection.

In *Morris*, the court says there needs to be "some connection" between the evidence and convicted person. Without this connection, the ONCA says mitigation "becomes a discount based on the offender's colour."[89] This is a contentious, if not irritating, statement. There have been countless comments and arguments against a "race-based discount" whenever there is an argument in favour of IRCAs and addressing, or at least considering, pervasive, systemic, anti-Black racism in sentencing and other parts of the justice system.[90] I would counter that you can infer a certain degree of impact for any Black person that comes in contact with the criminal justice system, especially those that come before the court for sentencing. At the very least, we know the criminal justice system has a disproportionate impact on Black people at every stage of the process. We have the Marshall Report, the Wortley Report, and various other reports that acknowledge the existence of anti-Black racism in the criminal justice system.[91] It is wrong to dismiss this as a "discount based on colour", when

87 Judge Wayne K Gorman, "The Impact of Anti-Black Racism on the Sentencing of 'Black Offenders' in Canada: What is the Correct Approach?" (2022) 58 Ct Rev 42–47.

88 *Anderson, supra* note 2 at 118.

89 *Morris, supra* note 3 at para 97.

90 See e.g. "Committing to Justice", *supra* note 5 at 141.

91 *Marshall*, *supra* note 32; Wortley, *supra* note 16. See e.g. Akwasi Owusu-Bempah & Scot Wortley, "Race, Crime, and Criminal Justice in Canada" in Sandra Bucerius & Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (London: Oxford University Press, 2014); Commission on Human rights, "Report of the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance", UNECOSOC, 2004, Un Doc E/CN 4/2004/18 Add 2; ACLC, *supra* note 31; African Canadian Legal Clinic, *Civil and Political Wrong: The Growing Gap Between International Civil and Political Rights and African Canadian Life: A Report on the Canadian Government's Compliance with the International Covenant on Civil and Political Rights*, report by Anthony N Morgan & Darcel Bullen (Toronto: African Canadian Legal Clinic, 2015); United Nations' Working Group, "Statement to the Media by the United Nations' Working Group of People of African Descent, on the Conclusion of its Official Visit to Canada, 17–21 October 2016" (21 October 2016), online: [perma.cc/

in reality, many assumptions, sometimes deadly ones, are made about Black people based on nothing more than the colour of our skin.

In practice, *Anderson* and *Morris* are more dissimilar on the connection requirement than is initially evident. The distinction is significant and relates to the burden of proof. In *Anderson,* it is implicitly assumed that there is a connection between the systemic evidence and the person before the court and that it is relevant to the sentencing analysis. In other words, the court will presume that a connection exists and look at the IRCA evidence for context. Unless the convicted person does not want an IRCA, one will always be before the court. In *Morris,* this presumption does not exist. Instead, the convicted person has to *prove* that there is a connection between the systemic evidence and their circumstances, and then argue about its relevance to the sentencing analysis.[92] On the facts of *Morris,* despite the IRCA evidence, the court said it did not have evidence to detract from the seriousness of the offence,[93] and that there was no evidence to support Mr. Morris' claim that he ran form police because he was afraid he was about to be attacked.[94] In practice, the distinction between *Anderson* and *Morris* on this point relates to the issue of burden, sources of evidence, the reliability of the evidence, and what it goes to. On this issue *Anderson* is more aligned with CRT because it works towards the of norm of racial equality by easing the burden on an accused person to prove how anti-Black racism manifests in their interactions with the criminal legal system, and by recognizing that substantive equality requires differential treatment.[95]

The relevance of the IRCA evidence is discussed in detail in the following part.

D) The Relevance of Systemic Evidence to the Sentencing Principles in the *Criminal Code.*

The *Criminal Code* mandates judges consider multiple factors in rendering a sentence. This includes the parity principle, aggravating and mitigating factors, deterrence, denunciation, rehabilitation, and the fundamental principle of proportionality, which includes moral blameworthiness

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D7XX-Y6TV]; Canada, Office of the Correctional Investigator, A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report (February 2014), online: [perma.cc/QJ58-96TC].

92 The relevance of the IRCA evidence is discussed in detail in Part D.

93 *Morris, supra* note 3 at 78.

94 See *ibid* at para 21. At paragraph 23, the court states that Mr. Morris stopped once he realized that the person chasing him was a police office. This helps to contextualize his flight from police. On this point, see also, *Davis*, *supra* note 9 at para 63(h).

95 See e.g. *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC).

and the seriousness of the crime. In assessing moral blameworthiness, the court considers the person's choice to act. The question is, given that courts adopt IRCA evidence as relevant, how is it relevant, or which factors is it relevant to?[96] This is arguably the key area where *Anderson* and *Morris* diverge, and where *Anderson* does a better job, if the objective is to remediate the sentencing process in the best way possible in this regard.[97]

Anderson adopts the African Nova Scotian Decade for People of African Descent's ("ANSDPAD") recommendation for a "holistic application" of the IRCA evidence.[98] IRCA or systemic evidence must be considered "in the assessment of every relevant sentencing consideration."[99] This Includes: contextualizing the gravity of the offender the degree of responsibility; revealing the existent of mitigating factors or explaining their absence; addressing aggravating factors and offering a deeper explanation for them; informing the principles of sentencing and the weight to be accorded to denunciation and deterrence[100]—in particular, general deterrence should "be applied with caution" to not overpower other factors and lead to a disproportionate sentence;[101] identifying rehabilitative and restorative options for the offender and appropriate opportunities for reparations by the offender to the victim and the community; strengthening the offender's engagement with their community; and informing the application of the parity principle.[102] IRCA and systemic evidence is also relevant to how the court sets the sentencing range for the offence.[103] IRCA evidence is therefore relevant to all aspects of the sentencing analysis, according to *Anderson*.

Comparatively, *Morris* adopts a piecemeal approach to the evidence and tries to parse out what the evidence goes to—in a way that courts typically do no approach the evidence in a Pre-Sentence Report, for example. *Morris* accepts that IRCA evidence is relevant to moral blameworthiness, sentencing objectives, and to how to balance sentencing principles, but the court concludes it is not relevant to how the court characterizes the seriousness of the offense.[104] The court strives to maintain a distinction "between factors relevant to the seriousness or gravity of the crime… and

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96 See e.g., Adelina Iftene, Robert Currie & Steve Coughlan, *Annual Criminal Law Review 2021* (Toronto: Thomson Reuters, 2022), at 512–523: "Social Context in the Sentencing of Black Canadians" [Iftene, *Criminal Law Review*].

97 This is not to suggest that *Anderson* leaves nothing to be desired.

98 *Anderson, supra* note 2 at para 122.

99 Iftene, *Criminal Law Review, supra* note 96 at 515.

100 See e.g., *Anderson, supra* note 2 at para 160 re: need to be assessed contextually.

101 *Ibid* at para 153.

102 *Ibid* at para 121.

103 Iftene, *Criminal Law Review, supra* note 96 at 520.

104 *Morris, supra* note 3 at paras 79–81, 99, 102, 106.

factors relevant to the offender's degree of responsibility," to avoid the "misapplying" the proportionality principle.[105] The gravity side of the equation includes the seriousness of the offence, denunciation and general deterrence, to which systemic factors are not relevant. The responsibility side of the equation includes specific deterrence, rehabilitation, and moral blameworthiness, to which systemic factors *may* be relevant.

The *Morris* approach is convoluted, and ultimately leaves little room for social context to be considered relevant.[106] First, it parses general and specific deterrence, saying that social context evidence can allow the judge to give less weight to specific deterrence and more weight to rehabilitation in their sentencing analysis.[107] However the court connects general denunciation to the seriousness of the crime, which it says cannot be attenuated to account for systemic racism.[108] How can IRCA evidence not be relevant to the seriousness of the offence, but relevant to how judges balance the principles of sentencing? A sentencing judge does not consider the IRCA evidence in determining the seriousness of the offence, but they do consider it when they balance seriousness with the other sentencing principles? Second, *Morris* misses the mark, in that determining the seriousness of the offence is itself a contextual exercise. The court even engages in a contextual analysis of gun crime in *Morris*. It says that Morris' possession of a gun in this case is more serious because he possessed it in public, inferring that it would be less serious if he possessed it in his home: this is a contextual analysis. Why is the court willing to engage in a contextual analysis to increase criminality—here making Morris' possession more serious—but not to decrease criminality, by considering *why* Morris possessed the gun in public? The court could be distinguishing between contextual factors relevant to *who* committed the crime as opposed to contextual factors unrelated to the characteristics of the person before the court. This distinction may be valid in the abstract, but in practice it breaks down and risks giving insufficient attention to anti-Black racism. This paper returns to this point, but a related point must be made first.

IRCA evidence is relevant to moral blameworthiness. This relationship has evolved overtime. For example, in *R v Gabriel,* the first

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105 *Ibid* at para 77. For more on proportionality, see e.g. Adelina Iftene, "Sentencing Vulnerability I: Conceptualizing the Incorporation of Personal Characteristics and Experiences at Sentencing" (2024) 61:2 Osgoode Hall LJ 2024 (forthcoming); Marie Manikis, "Recognizing State Blame in Sentencing: A Communicative and Relational Framework" Cambridge LJ (2022) 81:2 294–322; Danardo Jones, "Parodoxical Race Visibility in Canadian Sentencing Law" (currently unpublished).

106 See e.g. Iftene, *Criminal Law Review, supra* note 96 at 519.

107 *Morris, supra* note 3 at para 79–81.

108 *Ibid* at paras 69, 77.

superior court decision to consider an IRCA, the Justice Wright stated that IRCA evidence does not go to moral blameworthiness; that it "… would be wrong to suggest that there should be a lowered standard of moral responsibility. The purpose of [IRCAs] is not to justify lower expectations or to offer excuses."[109] This led courts to reason for a few years that IRCAs were not relevant to moral blameworthiness. Thankfully, Justice Nakatsaru and the counsel involved in *Jackson* and the trial decision in *Morris* laid the groundwork for the use of IRCA evidence to mitigate moral blameworthiness.[110] As Judge Buckle aptly stated in *R v NW* in 2018, in reference to *Ipeelee*, that this sentencing approach "is not suggesting that moral culpability is potentially diminished because of [a] person's race or cultural background. … [it] is potentially diminished because of the 'constrained circumstances' which they may have found themselves in because of the operation of systemic and background factors that are connected to their race or cultural background."[111] This should not be interpreted as essentialism. It recognizes that anti-Black racism is a harm perpetrated against Black people than can, but does not always, lead to their criminalization.

Anderson held that systemic and background factors are relevant to moral blameworthiness.[112] *Morris* is a little bit different on this point. Remember, the Crown stated that IRCA evidence might be relevant to moral blameworthiness. The ONCA held that it "may be relevant" to moral culpability.[113] However, on the facts, the ONCA said that Morris' legitimate fear of people in his community, including the police, which lead him to possess a handgun, was "only a limited mitigating factor." This is because "he still chose to arm himself in public with a concealed, loaded, deadly weapon," and that his reasons for choosing to arm himself do not detract from the seriousness of the crime he committed.[114]

This brings us back to the consideration of the seriousness of the offence. If we cannot consider *why* Morris possessed the handgun, or at least assign limited weight to it because the crime is "serious", and we consider the seriousness of the offence in a quasi-vacuum—where some contextual factors like the public-private distinction are relevant, but not others like *why* the person feels they need to have a gun in public—then when are we able to meaningfully consider Morris' constrained choices?

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109 *Gabriel, supra* note 28 at 52.

110 *Jackson, supra* note 27; *Morris Trial, supra* note 44.

111 2018 NSPC 14, at para 15. This is rightly shifting the blame back onto the state/society for the harm of racism, not placing it directly on the individual who must act within constrained circumstances.

112 *Anderson, supra* note 2 at paras 121, 146.

113 *Morris, supra* note 3 at para 97.

114 *Ibid* at para 101.

He had a legitimate fear of people in his community *including police*. This is directly connected to why he was in possession of a gun *in public*. This should be part of the contextual analysis of his offending behaviour. It should impact how serious the offence is.[115] The characterization of a crime as either "serious" or "not serious" in this case strips context that helps exculpate Morris and emphasizes context that further criminalizes him. This is significant in a decision that purportedly enhances the legitimacy of the criminal justice system by purportedly addressing anti-Black racism.

Morris also concluded that IRCA and systemic evidence is relevant to sentencing ranges insofar is it may justify a sentence below the typical sentencing range. [116] This approach fails to consider that sentencing ranges have likely been set in cases without consideration of IRCA and systemic evidence. As Dr. Iftene notes, a "one-size-fits all sentencing range" fails to account for the unique circumstances of Black people and undercuts the principle of substantive equality.[117]

A holistic approach, which uses IRCA evidence as an analytical lens through which to interpret and understand the criminal justice system, aligns with CRT because it acknowledges and seeks to account for racism's insidious and pervasive nature. Racism itself is not piecemeal; it is systemic. Addressing it therefore requires systemic approach. A holistic approach also enables courts and justice system participants to apply this analysis more easily beyond the sentencing process. As one of the final steps in the criminalization process, sentencing will have meaningful but limited impact on addressing anti-Black racism in the criminal justice system. Interventions are needed at all stages, from how we define criminal behaviour, policing, deferrals, charging, bail, prosecuting, trial, through to parole and release.[118] The transition from using systemic evidence in

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[115] As pointed out to me by Prof. Manikis, another possibility would be for this sentencing factor to "take a back seat" in some cases where other factors, like state blame and rehabilitation could be paramount.

[116] See e.g. *ibid* at para 177; Iftene, *Criminal Law Review, supra* note 96 at 520.

[117] Adelina Iftene, "Sentencing Vulnerability I: Conceptualizing the Incorporation of Personal Characteristics and Experiences at Sentencing" (2024) 61:2 Osgoode Hall LJ (forthcoming) at 22.

[118] This work is already happening for both Indigenous and Black people. The *Gladue* analysis has move beyond sentencing to bail, for example. For a critique, see e.g. Jillian Rogin, "*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Car Bar Rev 325. We also see examples of systemic evidence being considered for Black people. See e.g. *R v AA*, *supra* note 9, interpreting s 493.3 of the *Criminal Code*, which requires peace officers and judges to consider the circumstances of accused who belong to vulnerable populations that are overrepresented in the criminal justice system

sentencing to other aspects of the criminalization process is smoother when we do not have to adopt a piece meal approach to the evidence.

Part 3: Additional Points of Contention

This Part continues to compare *Anderson* and *Morris*. It is a standalone section rather than a subsection of the previous Part because it is mostly focused on *Morris* given that *Anderson* quickly dispenses with the issue of considering state fault, does not purport to speak on behalf of the Black community to increase criminality for gun-related offences, and does not address the issue of different conception of justice as a basis for remedial sentencing frameworks.

A) Accounting for State Fault

Anderson and *Morris* split on the court's willingness to account for state fault in the sentencing analysis. In both cases, Intervenors argued that because society is complicit in anti-Black racism, the court loses some of its moral authority to denounce and deter conduct where anti-Black racism plays a role in that conduct.[119] Especially where anti-Black racism is pervasive in the criminal justice system itself. If the state is complicit in bringing the person before the court, how can it legitimately blame and punish them?[120] At the very least, the court should account for state fault in sentencing.[121]

In *Anderson*, the court agreed that courts should consider state fault in their sentencing analysis, presumably as part of the holistic approach: "… the use of denunciation and deterrence to protect societal values should be informed by a recognition of society's role in undermining the offender's prospects as a pro-social and law-abiding citizen."[122] The court notes the denunciation is "'communicative and educative' and 'reflects that Canadian law 'is a system of values'".[123] It should not be used as a proxy for increased incarceration.[124] Instead, as argued in *R v RBW*, denunciation and deterrence should be assessed holistically, and should

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and that are disadvantages in obtaining release when making bail decisions. See also, *R v EB,* 2022 ONSC 4383, at para 43.

119 *Anderson, supra* note 2 at para 159; *Morris, supra* note 3 at para 82.

120 See e.g. Manikis, *supra* note 105 at 304 referring to Duff's communicative theory in relation to state blame.

121 See e.g. *ibid*; Danardo Jones, "Paradoxical Race Visibility in Canadian Sentencing Law" (currently unpublished).

122 *Anderson, supra* note 2 at para 159.

123 *Ibid* at para 149, citing *R v Friesen*, 2020 SCC 9 at para 105.

124 Argument made by the Respondent in oral submissions in *R v RBW*, 2023 NSCA 58.

lead lawyers and judges to ask how its communicative purpose can be achieved.[125] Judicial reasoning and analyses can achieve this purpose. By adopting a holistic approach, the court could recognize and consider the state's role in perpetuating anti-black racism that contributed to bringing the person before the court. It could enable the court to "consider harm, individual, as well as social, that results from the exercise of state power, which can remain hidden, misunderstood, or in part wrongly attributed within a myopic understanding of blame and censure.[126] This approach aligns with CRT by acknowledging that the law is not neutral and that society is complicit in anti-Black racism and the overincarceration of Black people.

Morris explicitly rejects not only the Intervenors' augment about accounting for state fault, but also this part of *Anderson*. In footnote 3, the ONCA quotes this passage from *Anderson* and states, "If this passage means that deterrence and denunciation take on less significance in sentencing for serious crimes if society is somehow complicit in the circumstances relevant to the commission of the offence, we must, with respect and for the reasons set out, disagree with that conclusion."[127] For the ONCA, attributing fault as between the convicted person and society should "play no role in fixing the appropriate sentence in gun-related crimes."[128]

The court is unwilling to attribute state fault in the sentencing calculus, but it *is* willing to put the burden of state fault on the person being sentenced. It states that because Black communities experience disproportionate rates of gun violence, "any failure to unequivocally and firmly denounce serious gun crimes, … through the punishment imposed, implies tolerance of those crimes when committed by certain offenders in certain communities."[129] In other words, the court will significantly punish Black people for the sociological effects of anti-Black racism in their communities—which contributes to gun crime in their communities—but will not account for the role that colonialism and racism plays in bringing the person before the court. As Manikis explains, the court is offloading societal blame onto the person being sentenced.[130] For example, she states:

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125 *Ibid.*

126 Manikis, *supra* note 105 at 295. Prof. Manikis suggests that accounting for state fault could be achieved by an additional "stand-alone analysis" that would allow for "a more nuanced and comprehensive communication of blame and harms in sentencing" at the individual and state level.

127 *Morris, supra* note 3 at note 3.

128 *Ibid* at para 83.

129 *Ibid.*

130 Manikis, *supra* note 105.

> Recognizing the impact of colonialism and social deprivation on the offender suggests that the state has a contributory role in producing criminality. Nevertheless, within the current sentencing framework, there is no stand-alone communicative endeavour that analyses state blame in its own right and therefore this additional understand of blame is glossed[131] over by a narrow focus on the offender's culpability.[132]

This offloading of blame is even more problematic because the court also purportedly adopts a sentencing approach that "enhances the legitimacy of the criminal justice system in the eyes of the community and, in particular, those in the community who have good reason to see the criminal justice system as racist and unjust."[133] In other words, the court is offloading state blame for systemic racism onto individual Black offenders, while claiming that their approach acknowledges and addresses the impact of anti-Black racism, and expects that this will enhance the credibility of the justice system.

Prof. Joshua Sealy-Harrington has questioned whether *Morris* is more about concealing than addressing anti-Black racism.[134] I have referred to this "lip service" the court gives to addressing anti-Black racism—where it *talks* about changing, but does not *actually* change—and identified it as potential interest convergence.[135] For example, in *Morris* the court says sentencing judges "must acknowledge societal complicitly in systemic racism and be alert to the possibility that the sentencing process itself may foster that complicity," but that "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

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131 This footnote is included in Manikis' article at footnote 35: "This limit has been noted by S. Lawrence and D. Parkes, "R v Turtle: Substantive Equality Touches Down in Treaty 5 Territory" (2020) 66 C.R. (7th) 430 and E. Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34 C.J.L.S. 437, 439, which highlights that describing Indigenous mass incarceration as a crisis, without meaningfully identifying state responsibility for that state of affairs, results in deepening and strengthening Canada's colonial narrative. The effect is to distance, and even disappear legal responsibility for ongoing colonial violence."

132 Manikis, *supra* note 105 at 301.

133 *Morris, supra* note 3 at para 106. *Anderson* is not entirely off the hook in terms of trying to enhance the credibility of the justice system. The NSCA also comments that IRCAs will enhance credibility because "Respect for the law and the maintenance of a just, peaceful and safe society is not achieved by putting disproportionate numbers of Black and Indigenous offenders behind bars having left unaddressed, in the context of sentencing, the deeply entrenched historical disadvantage and systemic racism that more than likely had a hand in bringing them before the courts." *Anderson, supra* note 2 at para 124.

134 Joshua Sealy-Harrington, online: <https://tinyurl.com/84rrpb7a> [perma.cc/RT86-C4A8].

135 Dugas, "Locating R.D.S. in Anderson", *supra* note 71.

some distance toward disassociating the sentencing process from society's complicity in anti-Black racism."[136] In *Morris* the ONCA's "careful consideration" of the evidence leads them to reason that the seriousness of the crime only accounts for contextual factors that increase criminality, and moral blameworthiness is only slightly mitigated because the crime is so serious. This outcome lead Dr. Iftene to conclude that *Morris's* acknowledgement that anti-Black racism has "symbolic relevance… may do little in practical terms."[137]

B) Different Conceptions of Justice

Another troubling aspect of *Morris* is its assertion that Black communities do not have different conceptions of justice, such that a different approach to sentencing cannot be similarly justified as it is for Indigenous people. Without reference to argument or evidence, the court states, "there is no basis to conclude that Black offenders, or Black communities, share a fundamentally different view of justice, or what constitutes a "just" sentencing in a given situation."[138] It is possible that there was no evidence before the court on this point. The court could have said that. There is a difference between something not existing and no evidence being presented about it.

The requirement for a "fundamentally different view of justice" is a further example of the problematic requirement that Black people map their experience onto Indigenous experiences for the court to recognize a different sentencing approach. One of the rationales for the different sentencing framework for Indigenous peoples, as recognized by *Gladue* and *Ipeelee,* is that criminal sentencing as enshrined in the *Code* does not align with Indigenous values, experiences, and perspectives, and that "just" sentencing could look different for Indigenous communities.[139]

Part of the problem with this requirement, and the statement in *Morris* that it does not exist, is that it adopts a colonial and racist view of Black people. It potentially only looks back so far as Black people's arrival in Canada to establish whether we have different conceptions of justice. Of course, this paints an incomplete picture of Black people. It renders invisible our customs, traditions, and ways of building community that pre-date our arrival in Canada and continue in various forms in Canada. It erases our history and defines us through a colonial gaze shaped by slavery and forced migration. Even if courts look to our post-arrival customs and

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136 *Morris, supra* note 3 at para 86.

137 Iftene, *Criminal Law Review, supra* note 96 at 522.

138 *Morris, supra* note 3 at para 122.

139 See e.g. *Gladue, supra* note 54 at paras 70–74, 77.

experiences to determine whether we have different conceptions of justice, there is evidence to support that we do.[140]

Further, if we look at Black people's history and experiences in Ontario or Nova Scotia through a critical race lens, it becomes clear that the criminal justice system's complicity in, and support of, our subjugation, could lead us to have a different conception of what a "just" sentence looks like for our people. This is especially true for conduct that is stereotypically associated with our communities, like gun and drug-related offences. In Nova Scotia, for example, things like the state razing and forced relocation of our communities into areas that the police under-protect and over-surveil; the use of the criminal justice system to enforce segregation, the mass incarceration of our people, especially our young people; the over-representation of our families in child custody matters; and the connection between all of these factors and the history of slavery in this province, undercut the court's ability to render a "just" sentence.[141] This is especially true from our perspective. It is also likely to be true from the perspective of people outside of our communities, if the court adopts the standard of the reasonable person as defined by the SCC in *RDS*.[142]

C) Speaking on Behalf of the Black Community

A connected and final point of contention in *Morris* is the court's audacity to speak on behalf of the Black community, and to say that the Black community wants Black people to be incarcerated. It states:

> [85] As pointed out in the "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario", Black communities experience a disproportionate share of serious violent crime in the Toronto area.

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[140] See e.g. Michelle Y Williams, "African Nova Scotian Justice: A Change Has Gotta Come" (2013) 36:2 Dal LJ 419–49.

[141] *Anderson, supra* note 2 at para 96, citing ANSDPAD factum: "[Slavery] separated us from our original cultures, languages, traditions and peoples. It subjected us to horrific violence and trauma in a hostile and foreign environment. It is a testament to African Nova Scotian resilience, ingenuity and resourcefulness, that our people survived and thrived within this context of oppression. It is within this history that we developed our unique cultural, social, economic, political, spiritual and social traditions, practices, institutions and ways of relating to sustain us. It is through this context that *African Nova Scotians are a distinct people*. (emphasis in the original).

[142] *RDS*, *supra* note 31 at para 47, with reference to *NS v SMS*, 1992 CanLII 15001 (NSFC) para 108, "… [Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. *Royal Commission on the Donald Marshall, Jr., Prosecution*). A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally."

> Black youth in particular report higher levels of both violent victimization and violent offending than youth from other racial groups. Law-abiding members of those communities are the victims of overt and systemic anti-Black racism. They are also the victims, both direct and indirect, of the harm caused by gun-related crimes in their communities. Are these law-abiding members of the community to be told that the message of denunciation and deterrence, which applies to gun crimes committed in other communities, is to be muted in gun crimes committed against them in their community so the court can acknowledge the reality of anti-Black racism, a reality that those members of the community know only too well? *We strongly doubt that more lenient sentences for the perpetrators of gun crimes will be seen by the law-abiding members of the community as a positive step towards social equality.* Any failure to unequivocally and firmly denounce serious gun crimes, like those committed by Mr. Morris, through the punishment imposed, implies tolerance of those crimes when committed by certain offenders in certain communities (emphasis added).[143]

A colleague recently referred to this as "perverse judicial notice"—where the court seems to conclude this fact on its own initiative, which often contradicts what community is saying in these circumstances. Judges speaking on behalf of Black communities to increase criminalization is also problematic for at least five additional reasons.

First, it pits accounting for systemic anti-Black racism and addressing denunciation and deterrence as mutually exclusive factors. On this reasoning, courts cannot denounce and deter behaviour while also accounting for systemic anti-Black racism. *Anderson* suggests that not only can courts accomplish both goals, but also that sentencing someone to incarceration in these circumstances "will not help".[144] Rather a community sentence—which gives someone the opportunity to access culturally competent resources in community that are not available in provincial and federal institutions—could provide the opportunity to address deterrence, denunciation, accountability, and reparation.[145]

Second, it assumes that courts cannot account for communities' experience of systemic racism and the convicted person's experience of it at the same time. But courts are already called on to balance (perhaps) competing objectives in the sentencing calculus. The sentencing principles require courts to consider the circumstances of the person being sentenced, their conduct, and the impact on community.[146] And the assumption that the convicted person and the community's needs are conflicting is itself

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143 *Morris, supra* note 3 at para 85.

144 *R v Anderson,* 2020 NSPC 10 at para 105 [*Anderson Trial*].

145 *Ibid.*

146 *Criminal Code, supra* note 13 s 718.

problematic. Especially when Black communities are repeatedly calling for racial justice in our criminal justice system within and outside of these cases.

Third, it places the full blame for gun crime in these communities on Black convicted people, while not accounting for society and the criminal justice system's role in creating, or at least exacerbating, the circumstances that lead to gun-related offences.

Fourth, the court speaks to the need for IRCA writers to "present an objective and balanced picture of the offender for the court."[147] As such, the report writer "cannot purport to speak for the offender or advocate on the offender's behalf."[148] IRCAs are written by Black experts on Black history and Anti-Black Racism. Ms. Sibblis, the report writer cautioned in *Morris*, is a clinical social worker and a PhD candidate. She is told to remain objective in explaining how anti-Black racism impacts the person being sentenced, yet the judiciary can speak on behalf of the Black community? The call for objectivity from people speaking against anti-Black racism is reminiscent of the backlash against Judge Sparks in *RDS*.[149]

Finally, the judiciary in many (likely all) provinces and at the SCC-level does not reflect the proportion of Black people in Canada. Black people represent about 3.5% of the Canadian population, 3.5% of the population in Nova Scotia, and 4% of the population in Ontario. Despite efforts to increase judicial diversity in Nova Scotia, for example, there has never been a Black or African Nova Scotian jurist on the NSCA. I was the first African Nova Scotian Law Clerk at the NSCA, in 2017-2018.[150] Chief Justice Michael Tulloch sits on the ONCA. He was the first Black judge appointed to the court in 2012.[151] A survey conducted shortly before his appointment found that only 25 jurists appointed to the bench between 1989-2010 were "visible minorities."[152] There has never been a Black person appointed to the SCC. The first racialized person, Justice Mahmud Jamal, was appointed in 2021,[153] and the first Indigenous person, Justice

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147 *Morris, supra* note 3 at para 144.

148 *Ibid.*

149 *Supra,* note 31.

150 There is now a dedicated articling position for IB&M Students at the NSCA.

151 Government of Canada, "Ontario Judicial Appointments Announced" (22 June 2012) online: <https://tinyurl.com/58dj578u> [perma.cc/GV6C-QK5Z].

152 Diversity Institute, "Improving Representation in the Judiciary: A diversity Strategy" (27 June 2012) online: <https://tinyurl.com/bddsfpff> [perma.cc/UGG3-FPAN].

153 The Supreme Court of Canada, "The Honourable Mahmud Jamal" online: <https://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=mahmud-jamal> [perma.cc/E32D-T484].

Michelle O'Bonsawin, was appointed in 2022.[154] Given the overwhelming non-Black composition of the judiciary in Canada at the provincial and federal level, how can the court purportedly speak for Black communities at all, let alone in a way that contradicts the statements we make for ourselves?

Conclusion

The analysis above shows that the contentious issues within and between *Anderson* and *Morris* are interconnected. Judges cannot talk about moral blameworthiness without also talking about the seriousness of the crime. Judges cannot talk about what will do justice in the circumstances without understanding historically rooted anti-Black racism. Judges cannot consider the harm done to community without understanding the convicted person as a member of that community. Judges cannot address anti-Black racism in sentencing without also addressing state fault for anti-Black racism.

This leads to the conclusion that a piecemeal approach to IRCA and systemic evidence is unworkable. The sentencing factors are interconnected such that they cannot be placed in distinct boxes, with the evidence being relevant to some but not all factors. The *Morris* approach leaves little room for social context evidence to be relevant and meaningfully applied. As articulated in *Anderson,* a holistic approach to the evidence is necessary if courts are going to *actually* account for systemic anti-Black racism in sentencing. This approach is informed by CRT, which provides the necessary framework to interrogate and address anti-Black racism in the criminal justice system.

[154] The Supreme Court of Canada, "The Honourable Michelle O'Bonsawin" (11 January 2023) online: <https://tinyurl.com/29csdsym> [perma.cc/REW9-4PDN].