Name it, Then Change it: Addressing Anti-Black Racism in the Canadian Criminal Justice System

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Introduction

How do you fix a broken system? The Canadian criminal justice system is not only broken but is also harshly oppressive of marginalized groups. African Canadians have felt the weight of the criminal justice system crushing their communities for centuries. After the abolition of slavery, an atrocity that greatly benefited white settlers, racism transformed to maintain racial disparities in power and wealth. Today, unconscious bias and explicit racism play a major role in contributing to the overrepresentation of African Canadians being arrested and convicted. To balance the scales of the justice system and fully realize the Section 15 right to equality under the Charter, legal actors must recognize racism in all of its forms and actively work to prevent biases in their decision making.

Critical Race Theory (CRT) is a framework which can be used to analyse the intersections of race, law, and power in the Canadian legal system. This paper will analyse the law using critical race theory to provide historical context[1] to inequities in the justice system. It will focus on the discretionary powers of the Crown in light of our constitutional rights and assess areas for anti-racism interventions within the criminal justice system. Applying CRT to key documents such as the Decision to Prosecute, the Criminal Code, the Charter, and the Donald Marshall Jr. Inquiry will provide a new perspective that includes the experiences of African Canadians. The perspective and language gained through this insight can be used to inform policies and educational programs to reduce the systemic over-incarceration of African Canadians, within a Nova Scotian context.

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[1] Mari J. Matsuda et al., *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Colorado: Westview Press, 1993) at 6-7.

Using Critical Race Theory, this paper will provide a historic examination of how the justice system has institutionalized racial discrimination, as well as assess common law precedent in order to better understand the disparities seen in incarceration rates today. This paper argues that Crown prosecutors have the greatest authority and ability to directly address and reduce the overrepresentation of incarcerated African Canadians. Because of their role as the "gatekeepers of the criminal justice system"[2], intervention at the level of the Public Prosecution Service is instrumental for combatting anti-black racism to eliminate racial oppression of African Canadians.

Definitions

"African" refers to people born on the continent of Africa.

"African Canadian" refers to all people of African descent living in Canada.[3]

"People of African Descent" is an all-encompassing term for the diverse groups of African descendants including African immigrants, people of Caribbean heritage, African Canadians, and African Nova Scotians.

"Black" is a political term which recognizes our unified descent as African peoples while acknowledging a common experience of oppression as a minority group. This term is interchangeable with "People of African Descent".

"African Nova Scotian" consists of African descents who are residents of the province of Nova Scotia or who have a substantial connection to one of the fifty-four historic black communities in the province.[4]

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[2] Joan Jacoby & Edward Ratledge, "The power of the prosecutor: gatekeepers of the criminal justice system*"* (2016).

[3] James W. St. G. Walker, Black Canadians, *The Canadian Encyclopedia* (2013) online: < https://www.thecanadianencyclopedia.ca/en/article/black-canadians >

[4] Michelle Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come*" (*2013) 36:2 at pp 419459. See For full description of the diversity of backgrounds that make up the Historic African Nova Scotian identities.

It is important to acknowledge that different cultural populations of People of African descent living in Nova Scotia have varying levels of access to power and resources depending on their local or non-local background and intersectional identities.

A Critical Race Analysis Demands a Reflection on Canadian History

Critical Race Theory helps to examine colonial history and how conceptions of racial dominance placed the White identity in power[5] and shaped the legal and social life of African Canadians. Pre-Confederation Canada consisted of colonies under British and French rule.[6] The White settler society greatly profited from owning unfree Black and Indigenous people and their labour for hundreds of years.[7] The buying and selling of Black people, and the non-consensual unpaid labour from approximately four thousand Indigenous and Black enslaved people helped build infrastructure and wealth for white settlers during the seventeenth and eighteenth centuries.[8] White settlers in Canada participated in and profited from the Atlantic slave trade. [9] From the beginning of their history in Canada, the Black identity became associated with slavery, giving People of African Descent a subordinate role in society.[10]

At the time, slavery was legal and accepted as a normal, natural facet of settler colonial society. Slave owners included government officials, judges, members of the Executive Council, business owners, etc.[11] This dynamic is described as a colonial relationship, where one side is left dependent on the other, forced to relate on terms unilaterally defined by the dominant

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[5] George Sefa Dei, "The Intersections of Race, Class, and Gender in the Anti-Racism Discourse." *Inequality in Canada: A Reader on the Intersections of Gender, Race and Class*. 2nd ed (Don Mills, Ontario: Oxford University Press, 2010).
[6] Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present,* (Black Point, Nova Scotia: Fernwood Publishing, 2017) at 20.
[7] Marcel Trudel "L'esclavage Au Canada Francais" (1960) Le presses de L'universite de Laval.
[8] *Ibid.*
[9] *Maynard*, *supra* note 6 at 25. [13]
Ibid at 24.
[10] James W. St. G. Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa, Ontario: Canadian Historical Association, 1985) at 16.
[11] *Trudel*, *supra* note 8.

society[12]. This structural power has been very beneficial for white settlers and their descents and thus has persisted throughout centuries.

This process created structural inequalities, but colonization also included aspects of socialization. During slavery, there was a heightened level of surveillance of captured Africans.[13] Enslaved Africans often resisted their subordination and would escape despite enormous risks. When caught, the runaways would be physically abused, taken to court, and/or held for extended periods in colonial jails.[14] This pattern of control created an imagined link between blackness and criminality. Colonizers promoted negative social conceptions of Black and Indigenous people[15] which allowed systemic racism to be widely socially accepted with a clear conscience. The characteristics that had been attached to blackness during slavery such as criminality, lack of intelligence, dangerousness, and disobedience [16] trained society to fear Black bodies, which provided the state with justification for the systematic arrest and detention of Black people.

So how is slavery relevant, 400 years later? Although slavery was abolished in 1834, the meaning of Blackness which was solidified during their enslavement continues to exist in present day stereotypes.[22] "Black lives, while nominally free, became relegated to a separate and unequal status in all realms of society."[17] The inferiority ascribed to Blackness in this era would affect the treatment of Black Canadians for centuries to come[18], allowing racism to adapt to modern Canadian culture through institutional racism. Targeted patterns of state surveillance, arrest, and spatial confinement of people of African Descent have been consistent and evolved over time.

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[12] Patricia A. Monture-Angus "Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice" *Inequality in Canada: A Reader on the Intersections of Gender, Race and Class*. 2nd ed (Don Mills, Ontario: Oxford University Press, 2010).
[13] *Ibid* at 23.
[14] *Ibid* at 25.
[15] *Maynard, supra* note 6 at 20.
[16] *Ibid.*
[17] *Ibid* at 30.
[18] *Ibid.*

Post-Slavery Restrictions on Freedom

The state enforced segregation of Blacks from White communities which promoted the social stigma of Black communities and legalized a new practice of controlling Black movement. Segregation was a way of maintaining racial subordination across all aspects of society after slavery's end. Beginning in the 1920s, African Nova Scotians were subject to "sundown laws" which were curfews or bylaws that ordered Blacks to be out of town or indoors by a certain time in the evening.[19] 100 years later, the state continues to enforce heightened surveillance of Black communities. The effect has been to maintain the structural racial inequalities initiated by slavery and segregation by contributing to the disproportionate arrest and incarceration of African Canadians. By understanding the origins of organized confinement, Canadians can deconstruct myths of Black people being more susceptible to crime than their white counterparts, which research has proven untrue.

In light of this historical context, critical race theorists apply the presumption that racism has contributed to all present-day manifestations of group advantage and disadvantage along racial lines. Colonization created a white supremacist racial hierarchy, giving white men priority for the inheritance of Canadian lands, wealth, and social and political rights.[20] Racist ideologies promoted in the formation of Canada had the impact of creating a present criminal justice system which is inextricably linked to racial subordination and perpetuating cycles of criminalization of people of African Descent. The criminal justice system is the main institution that perpetuates the economic deprivation of people of African Descent[21] in Nova Scotia.

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[19] Barrington Walker, *The History of Immigration and Racism in Canada: Essential Readings.* (Toronto, Ontario: Canadian Scholar's Press, 2008).
[20] *Maynard, supra* note 6 at 32.
[21] *Ibid.*

What is Critical Race Theory, and Why do we need it?

Any analysis of the legal system without a critical race lens is to attempt to apply racial neutrality within a historic context that has never been neutral towards African people or their descendants. Critical race theory questions dominant legal claims of neutrality, colorblindness, and meritocracy and sees them rather as camouflages for the self interest of powerful entities in society.[22] Legal claims of colorblindness presume an ideology of equal opportunity that ignores the fact that race carries significant social meaning. The central elements of critical race theory have been identified by scholars as:

- An analysis of how traditional interests and values serve as vessels of racial subordination
- Challenging ahistoricism and insisting on a contextual/historical analysis of the law.
- The claim that current inequalities are linked back to historic institutional practices.
- The presumption that racism has contributed to all present manifestations of group advantage and disadvantage along racial lines.
- Advances the cause of racial justice and works toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression.[23]

Understanding the meaning of Institutionalized Racism

In the process of colonization racism became embedded into the institutions of justice. Institutional racism is a covert form of racism inflicted upon the total Black community by acts of the total white community. It is more difficult to identify but no less destructive of human life.[24] Institutionalized racism appears to be a product of the shift in culture post-slavery. In the

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[22] *Matsuda*, *supra* note 1.
[23] *Ibid.*
[24] Kwame Ture and Charles V. Hamilton, *Black Power: The Politics of Liberation* (New York, New York: Random House, 1967) at 4.

1940s, Canadian provinces and municipalities passed legislative reforms and anti-discrimination laws[25] and cultural change came along with it. Racism and violence became considered "un-Canadian," [26] which perhaps due to fear of public scrutiny explains the historic failure of courts and lawyers to recognize and call out racism in the justice system.

The struggle to acknowledge racism can be explained by the theory of nonrecognition. Nonrecognition is the systematic and psychological denial of racial subordination. Theorists propose that "when an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness." [27] The repression of an individual's recognition of racial subordination in effect allows it to continue.[28] To the detriment of Black people, attempting to deny racial consideration hides the underlying racial oppression.[29]

"Arguably the key defining aspect of anti-Black racism in Canada is the denial that it exists."[30] The theory of nonrecognition helps to explain how this pattern of denial persists. Nonrecognition permits a court to describe, to accommodate, and then to ignore issues of subordination.[31] An example of nonrecognition can be seen in the NS Decision to Prosecute. The document reads "The following factors are to be excluded from consideration in determining whether the public interest is best served by a prosecution: The alleged offender's race, religion, sex, national origin, or political associations."[32] Here, nonrecognition is used to describe an

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[25] James W. St. G. Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa, Ontario: Canadian Historical Association, 1985) at 18.
[26] *Ibid* at 19.
[27] Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan. L. Rev. 317 at 323.
[28] Neil Gotanda, *A Critique of "Our Constitution is Colour-Blind"* (1991) 44 Stan L Rev 1.
[29] *Gotanda, supra* note 28 at 37
[30] Michelle Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come*" (*2013) 36:2 at pp 419-459.
[31] *Gotanda,, supra* note 28 at 36.
[32] Nova Scotia Public Prosecution Service, *The Decision to Prosecute (Charge Screening) (*Nova Scotia: Public Prosecution Service, 2015*)* at 9.

instance in which subordination could arise (in the prosecution of a suspect), accommodate by making it explicit in policy that race should not be considered, and then ignoring potential issues of racial oppression. This in effect allows a prosecutor to disregard systemic issues of racial discrimination by excluding race as a conscious consideration altogether. Modern racism is more subtle, so nonrecognition is easily employed by the courts to maintain an appearance of objectivity and fairness in the justice system.

Overrepresentation of African Canadians in the Criminal Justice System

Repression of the truth has resulted in institutionalizing rather than exposing and altering the conditions of racial exploitation.[33] The failure to recognize inequities has created a criminal justice system which has been described as the primary means of violence[34] against Black and Indigenous communities. Black inmates make up 8.6 percent of the prison population, despite Black Canadians accounting for only 3.5 percent of the Canadian population.[35] The current Prime Minister Justin Trudeau has recognized that interactions between Black Canadians and the corrections system involve serious issues of discrimination from the stage of policing to overrepresentation in our prisons.[36] With a deeper understanding of how legal history has shaped the social position of Black Canadians, educators and policy makers can be better equipped to attempt to repair the Canadian criminal justice system. An example of a policy that has properly considered historic underpinnings of racism is *The Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia.* Nova Scotia's Public Prosecution Service has made a significant stride towards addressing racial discrimination against Indigenous communities which can be used as a model for which to frame a policy for African Nova Scotians.

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[33] *Lawrence*, supra note 25.
[34] *Maynard, surpa* note 6 at 85.
[35] *Ibid.*
[36] Policy Options, *Canada Is Recognizing The International Decade For People Of African Descent. It's A Key Opportunity To Address Anti-Black Racism In The Justice System* (April 2018), online: < https://policyoptions.irpp.org/magazines/april-2018/doing-justice-by-black-canadians/ >.

Anti-Discrimination Policy in Nova Scotia

Despite their unique status, Mi'kmaw people have been historically disadvantaged as a result of colonial laws and policies and have become disproportionately involved in the criminal justice system in Nova Scotia, as elsewhere in Canada.[37] The Supreme Court of Canada has recognized the unique history of Indigenous peoples and their treatment by the criminal justice system in landmark cases *R. v. Gladue* and *R. v. Ipeelee*. [38] The Public Prosecution Service recently developed a policy that takes into consideration this special legal and constitutional status of Indigenous peoples. It is significant that a Chief Crown attorney acknowledged that "because of their unique circumstances and culture along with a history of racism and discrimination, Indigenous peoples are afforded special consideration within the criminal justice system."[39] The acknowledgement that special considerations are afforded to Indigenous people is a big step toward achieving substantial equality for the Mi'kmaw people.

Applying Critical Race Theory to analyse the racial disparities in our criminal justice system could greatly assist with the creation of a desperately needed a racial equity policy for African Nova Scotians. The Supreme Court of Canada has taken judicial notice of the unique African Nova Scotian experience,[40] therefore Nova Scotia has great potential for creating an intervention to address anti-Black racism in pursuit of equal rights.

African Nova Scotians and the Law

In Nova Scotia, Scot Wortley completed a report on street checks which put into empirical terms the disturbing racial bias in policing and laying charges that contribute to the

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[37] Public Prosecution Service, *Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia* (Nova Scotia: Public Prosecution Service, 2018).
[38] Public Prosecution Service, *News Release: Fair Treatment of Indigenous Peoples Prosecution Policy to Direct Crown Attorneys*, (Feb 2019), online: < https://novascotia.ca/news/release/?id=20190226001 >
[39] *Ibid.*
[40] R. v. S. (R.D.), [1997] 3 S.C.R. 484 at 46

overrepresentation of the Black population in the criminal justice system. This report debunks the stereotype that Blackness is linked to criminality. The evidence shows that police oversurveillance of Black communities causes the Black population to come into contact with the police more, on average, than their white counterparts. In the Halifax Regional Municipality (HRM) between 2006 and 2017, Black people were involved in 18.4% of the street checks conducted by police, even though they only make 3.7% of the population.[41] The Black population in HRM is street checked at a rate almost 6x higher than the White population.[42] This is the equivalent of almost two street checks for every Black person, while conducting one street check for every three white people. Interestingly, the HRM has a higher street check rate than other jurisdictions despite having a smaller population than other jurisdictions.[42] This implies that anti-Black racism is more of an issue in policing in Nova Scotia than for other jurisdictions.

Furthermore, police statistics provided that between 2006 and 2017, almost 1/3rd of the Black male population of the Halifax region were charged with a crime. This is in comparison to only 6.8% of white men who were charged.[43] Black women were also found to be charged at a higher rate than both White women and men. This report confirmed that the extreme overrepresentation of Black men in charge statistics is consistent with community allegations that police practices target Black men and contribute to their criminalization.[44] I would extend this analysis to include the targeting and criminalization of Black women as well. This research suggests that oversurveillance of Black communities continues to be a tactic specifically to control and confine the Black population.

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[41] Nova Scotia, Human Rights Commission, *Halifax, Nova Scotia: Street Checks Report* (Toronto: University of Toronto, 2019) at 104.
[42] *Ibid* at 104 "Halifax has a higher street check rate (29.4 street checks per 1000 population). This rate is higher than many other jurisdictions including Montreal (13.3), Vancouver (16.1) and Ottawa (6.3)". [42] *Supra, note* 40 at 104.
[43] *Ibid,* at 137.
[44] *Ibid,* at 140-141.

In 2017, the United Nations Working Group released a report on the challenges facing African Canadians. The UN Working Group stated that they are deeply concerned about the human rights situation of African Canadians.[45] People of African Descent in Canada continue to live in poverty and are overrepresented in the criminal justice system. The Working Group noted their specific concern with the racial bias at all levels of the criminal justice system, from police racial profiling to the exercise of prosecutorial discretion, pretrial incarceration, and disparities in sentencing.[46] The criminal justice system involves many parties, so where should an intervention to address overrepresentation take place?

Prosecutors as Gatekeepers of the Criminal Justice System

Prosecutors hold tremendous power, essentially controlling entry to the criminal justice system. Therefore, Crown prosecutors have the greatest authority and ability to improve racial equity and directly address overrepresentation of Black people in the CJS. Although they have limited influence over the racial discrimination taking place at the police stage, with knowledge of such bias, they can counteract the issue once it reaches the court. Their powers include decision-making on dismissing or varying charges, accepting or rejecting cases, moving cases through alternative justice, and recommending a sentence.[47] These are discretionary powers which critically impact not only individuals, but all of society due to their ability to shape the patterns of the criminal justice process.[48]

The core of elements of prosecutorial discretion are provided by the Supreme Court of Canada in *Kreiger v Law Society of Alberta* as the following:

a. the discretion of whether to bring the prosecution of a charge laid by police
b. the discretion to enter a stay of proceedings in either a private or public prosecution

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[45] *Report of the Working Group of Experts on People of African Descent on its mission to Canada*, 36 Sess, UNGA, Human Rights Council, UN Doc A/HRC/36/60/Add.1 (2016)
[46] *Ibid* at 8.
[47] Joan Jacoby & Edward Ratledge, "The power of the prosecutor: gatekeepers of the criminal justice system*"* (2016).
[48] *Ibid.*

c. The discretion to accept a guilty plea to a lesser charge
d. the discretion to withdraw from criminal proceedings altogether
e. the discretion to take control of a private prosecution[49]

An intervention addressing anti-Black racism is vital specifically at this stage due to the high expectation from the courts of prosecutors to make unbiased decisions, and the major impact their decisions have on the efficiency (or inefficiency) of the criminal justice system.

The SCC states that in the exercise of criminal prosecution, these powers constitute the core of the Attorney General's office and are protected from the influence of improper political and other vitiating factors by the principle of independence.[50] What makes these powers so unique is that the listed discretionary decisions are not subject to interference by other arms of government. For example, the court stated that "the conduct of the litigants before the court and their tactics are subject to judicial control, determining what charge an accused person will face, is not."[51] Clearly, prosecutors are granted a high level of trust to make discretionary decisions. They should ensure prosecutorial discretion is exercised using a critical race lens in order to maintain the highest level of integrity in their decision making.

The Supreme Court of Canada explains that prosecutorial discretion is effectively nonreviewable by the courts and declared that it is imperative for discretion to be exercised in a fair and objective way.[52] Only in cases where a defendant brings forward explicit evidence to convince the court the accused has or will suffer the loss of a fundamental right to justice which would tend to undermine the integrity of the administration of justice or is grossly disproportionate to the offence committed, can a judge intervene.[53] In other words, there is a high

[49] *Krieger v Law Society of Alberta*, 2002 SCC 65 at 46.
[50] *Ibid* at 21.
[51] *R. v. Mattatall*, 2013 NSSC 31 at 18.
[52] R. v. Regan, 2002 SCC 12 at 168.
[53] *R. v. Mattatall*, 2013 NSSC 31 at 18.

bar to reach to impose any sort of review over prosecutors discretionary decisions. Therefore, it is critical for prosecutors to aspire to the highest level of ethical decision making in this role.

It has been proposed that prosecutors possess the greatest part of discretionary power exercised in our judicial system.[54] The power to detain in custody, negotiate pleas, to disclose or not disclose evidence prior to trial, to prefer indictments, and to stay proceedings are decisions which can indeed frame the outcome of the rest of an accused person's life. The role of a prosecutor is seen by the SCC as a matter of public duty for which no one has greater responsibility.[55] As an agent for the state and crown, the prosecutor is trusted with tremendous powers in the administration of justice. Therefore, in order to adhere to the court's high standards of fairness and justice, the Crown ought to apply a critical race lens to any decision-making analysis required in their exercise of discretion.

Review of the Donald Marshall Jr Inquiry Recommendations

The province of Nova Scotia has a long history of tension between Black and Indigenous communities and law enforcement officials. [56] The Donald Marshall, Jr., Inquiry provides a detailed report of the nature of systemic racial discrimination and its impact on criminal investigations. The Royal Commission provided a number of recommendations to improve the administration of justice in Nova Scotia. For example, the Royal Commission recommended that policy directives on plea discussions and agreements be revised to establish a clear basis for the exercise of prosecutorial discretion in such discussions and agreements.[57] Since this report came out, a policy on the *Decision to Prosecute* has been created and released by the PPS, outlining

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[54] William Gourlie, "Role of the Prosecutor: Fair Minister of Justice with Firm Convictions" (1982) 46 Sask. L. Rev. 293.

[55] *Boucher v The Queen*, [1955] SCR 16.

[56] Gabriella Jamieson "Using Section 24(1) Charter Damages to Remedy Racial Discrimination In The Criminal Justice System" (2017) 22 Appeal 71.

[57] Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations (Nova Scotia:* Royal Commission on the Donald Marshall, Jr., Prosecution, 1989) at 16.

the factors to consider. However, this policy has become outdated because of its colorblind treatment of those accused. This document is still an important guide for Crown prosecutors but needs to be supplemented with a policy that contextualizes the long history of racial discrimination in this country, re-enforced by the current criminal justice system. The Royal Commission's conclusion that within the administration of criminal justice in Nova Scotia, there are serious shortcomings that must be addressed[58] is a point still rings true today.

The Royal Commission made the recommendation that the Attorney General establish continuing professional education programs for Crown Prosecutors, which would include (a) an exposure to materials explaining the nature of systemic discrimination towards Black and Native peoples in NS and the CJS[59] and (b) an exploration of means by which Crown prosecutors can carry out their functions so as to reduce the effects of systemic discrimination in the NS criminal justice system.[60] 30 years later and there is still much work to be done to fulfill these recommendations. A critical race analysis of the current Decision to Prosecute can assist in achieving these goals.

Critical Race Analysis of the Decision to Prosecute

The Nova Scotia Public Prosecution Service policy states that the "decision to prosecute or to discontinue a prosecution is the most important decision that a prosecutor makes in the criminal justice process."[61] The Decision to Prosecute is based on a neutral, unbiased system. A critical race analysis shows how a presumption of neutrality can result in bias against African Nova Scotians. The Supreme Court of Canada has recognized that a significant segment of community members holds overtly racist views, and a larger segment subconsciously operates on

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[58] *Ibid* at 18.
[59] *Ibid* at 10.
[60] Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations (Nova Scotia:* Royal Commission on the Donald Marshall, Jr., Prosecution, 1989) at 26
[61] Nova Scotia Public Prosecution Service, *The Decision to Prosecute (Charge Screening) (*Nova Scotia: Public Proscution Service, 2015*)* at 1.

the basis of negative racial stereotypes.[62] This means that a significant amount of Canadians either directly or unknowingly judge people based on racist perceptions. One way in which this bias may impact the decision to prosecute is through the jury system.

In Nova Scotia, a prosecution will proceed only if the prosecutor is satisfied that there is a realistic prospect of conviction.[63] The language used in the policy places a strong emphasis on a conviction rather than assessing the evidence for the case on its merits. A realistic prospect of conviction is to be analysed in terms of "how strong the case is likely to be presented in court."[64] This language seems to shift the focus from assessing the evidence itself, to the prosecutors ability to argue the case in court and displace the jury's presumption of innocence.[65] A colorblind system presumes the analysis of a reasonable prospect of conviction is neutral, one that treats all parties entering the justice system the same. Research shows this is not the case. The assessment of the whether a jury is reasonably likely to convict an accused Black person, within a local community known to hold racist stereotypes is essentially a practice which relies on racism to justify the decision to prosecute.

Applying critical race theory to this assessment reveals embedded institutional racism. The overwhelming majority of people in positions of power in the courtrooms including jurors, are White.[66] The test for whether there is sufficient evidence to move the case forward relies on the Crown's belief of whether a reasonable jury is more likely than not to convict an accused of the alleged charge(s).[67] White jurors are most likely to be influenced by racial stereotypes, as they tend to have the least awareness about the dynamics of racism.[68] Simulated jury studies have

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[62] *R v S (R.D.),* [1997] 3 SCR 484 at 46.
[63] Nova Scotia Public Prosecution Service, supra note 58 at 2.
[64] *Ibid.*
[65] *Public Prosecution Service, Supra,*, note 61 at 3.
[66] Cynthia Petersen "Institutionalized Racism: The Need for Reform of the Criminal Justice System (Jury Selection)" (1993) 38 McGill L.J. 147
[67] Alberta Justice, *The Decision to Prosecute* (Alberta: Alberta Justice, 2006).
[68] *Supra, note* 65.

shown that when the victim is white, the jury is more likely to find a person of color guilty than to find a white person in the same scenario guilty.[69] Although the prosecutor is assumed to make their decision based on the evidence, racial bias may factor into their decision-making. In the analysis of a reasonable likelihood of conviction, a Black accused is already at a disadvantage due to the inequities in the jury process. Therefore, this section of the decision to prosecute is itself flawed by racial bias, and it is likely that racial stereotyping can influence a prosecutor's evaluation of whether they can displace the jury's presumption of innocence.

Incorporating a critical race analysis into the decision to prosecute can negate the reliance on implicit bias that may motivate the prosecutor's decision to advance a case to trial. A potential revision to this assessment could resemble the language used in the Decision to Prosecute in Alberta. "Is the evidence sufficient to justify the commencement or continuation of proceedings?"[70] To assess the evidential threshold, this policy places more emphasis on the strength and reliability of the evidence presented in the case. An adjustment such as this could shift the focus from seeking a conviction and add more emphasis on assessing the quality and adequacy of the evidence available to support a prosecution.

The difference between the policies in Alberta and Nova Scotia is one instructs Crowns to consider whether the evidence supports moving a prosecution forward, where the other policy focuses on whether a conviction is achievable. Of course, Alberta also requires prosecutors to assess whether there is a reasonable likelihood of conviction but does not rely on it as heavily for reaching the evidential threshold. In other words, although the policies are both directed at the same goals, minor differences in language and presentation of the NS policy may support a culture of conviction rather than impassionate justice seeking. Changes to the NS policy could be a potential intervention for mitigating implicit bias against African Nova Scotian accused.

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[69] *Petersen, supra,* note 65.
[70] *Alberta Justice, Supra* note 66.

The second portion of the Decision to Prosecute requires an analysis of whether prosecution is in the public interest.[71] A critical race analysis of the public interest considerations can provide a different perspective, one which includes the lived experiences of African Nova Scotians. The Decision to Prosecute policy provides a number of public interest factors the prosecutor must take into account on a case by case basis. Applying a critical race analysis to the public interest factors will reveal the need for anti-racist interventions in the justice system.

Public interest factor (o) requires the Crown to consider in contemplation of proceeding with prosecution, the necessity to maintain public confidence in Parliament, the legislature, and the administration of justice.[72] Justice statistics from last year show that almost half of Canadians lack confidence that the criminal justice system is fair.[73] In Nova Scotia it was found that regardless of racial background, the majority of respondents believe the police treat Black people worse or much worse than White people.[79] Less than 1/3rd of NS respondents believe that Black people are treated the same as White people. The necessity to maintain public confidence in the administration of justice requires a combined effort of parties to combat anti-Black racism within the criminal justice system, and the front facing actors are the police and the prosecutors. Police interventions are not within the scope of this paper, but Crown prosecutors can surely increase public confidence in the administration of justice through careful consideration of the decision to prosecute.

Public interest factor (m) "whether the alleged offender is willing to co-operate in the investigation or prosecution of others" is particularly concerning for Black accused. The decision to prosecute should not rely on whether the offender will cooperate in an investigation given the

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[71] *Public Prosecution Service, Supra,* note 61 at 7.
[74] *Public Prosecution Service, Supra,* note 61 at 8.
[72] *Public Prosecution Service, Supra,*, note 61 at 8-9.
[73] Canada, *Department of Justice State of the Criminal Justice System – 2019 Report Justice Canada* (Ottawa: 2019)
[79] *Nova Scotia, Supra* note 40 at 155.

historical background of tension between Black communities and law enforcement in Nova Scotia. It was found that 44.6% of HRM respondents believe that Halifax police often abuse their power.[74] Almost half of the population believe the police abuse their power, and more than half believe that Black people are treated worse than White people.[75] This reveals an alarming level of distrust of police in HRM. These factors make it unfair for a prosecutor to base any portion of their decision to prosecute on cooperation with a criminal investigation, as criminal investigations substantially target Black community members. If a Black accused generally fears the police due to a long local history of abuse of their community members, and this fear leads to increase the likelihood of his prosecution, this provision is biased against that person.

Public interest factor (i) requires the Crown to consider whether the consequences of any resulting conviction would be unduly harsh and oppressive.[74] Application of Critical Race Theory provides context within the criminal justice system. Studies show that when convicted for the same crime, members of the Black population are likely to serve more custodial time on average than their white counterparts.[76] This practice is unduly harsh. Systemic incarceration has oppressive consequences for Black communities, even after serving their sentence, as acquiring a criminal record creates barriers to future employment opportunities. Criminal records have been characterized by theorists as negative credentials. "Negative credentials are those official markers that restrict access and opportunity rather than enabling them. Negative credentials confer social stigma and generalized assumptions of untrustworthiness.[77] A critical race analysis of public interest factor (i) shows that it is problematic and contributes to the perpetuation of systemic racism towards Black communities.

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[74] *Nova Scotia*, *Supra* note at 155.
[75] *Nova Scotia*, *Supra* note at 155.
[76] Scot Wortley "*Hidden intersections: research on race, crime, and criminal justice in Canada"* (2003) Canadian Ethnic Studies, 35:3 at 99-117.
[77] Joseph Mensah & Christopher J Williams*, Boomerang Ethics: How Racism Affects Us All* (Black Point, Nova Scotia: Fernwood Publishing, 2017) at 220.

Overall, the Public Prosecution Service is overdue for an updated version of the *Decision to Prosecute* policy that includes a critical race analysis. The criminal justice system needs to have a holistic understanding of the communities it intends to serve. The highest court in the country, the Supreme Court of Canada (SCC), has acknowledged the history of anti-Black racism in Canada and noted that it can be traced back to slavery, laws and practices enforcing segregation in education, employment, and other economic opportunities.[78] The Court set the precedent that the reasonable person, as an informed and right-minded member of the community, must be aware of the history of discrimination faced by disadvantaged groups in Canadian society. [79] This precedent should not be taken lightly, and I argue that in order to address the overrepresentation of Black Canadians in the prison population, prosecutors must exercise their discretionary decisions with Critical Race Theory in mind. Without recognizing the link between social oppression and the institution of law, specifically the criminal justice system, will be to accept and reproduce inequity and maintain a hegemonic system.

Duty to Adhere to the Canadian Charter of Human Rights

The Constitution of Canada forms the supreme law. It is the backbone of Canadian human rights law. Section 32 of the Charter provides that the Charter applies:

a. to the Parliament and the government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and

b. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Supreme Court of Canada has made it clear that the actions of government officials are subject to the Charter [80] exclusively because government has the capability to authoritatively

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[78] *R v S (R.D.), supra* note 64, note this was within the context of considering the issue of whether a judge, an impartial actor in the justice system, exhibited a reasonable apprehension of bias by considering the history of racism, for which the court decided in the negative.
[79] *R v S (R.D.), supra* note 64 at 46.
[80] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 261.

encroach on individual freedoms.[81] The prosecutor is a legal advocate for the Crown, therefore their actions must comply with the Charter.

Suppression of the Right to Reasonable Bail

Section 11(e) of the Charter provides that any person charged with an offence has the right to not be denied reasonable bail without just cause.[82] This provision creates a basic entitlement to bail. "Just cause" consists of the scenarios in which the denial of bail is justified. Bail is supposed to be denied only for those who pose a "substantial likelihood" of committing an offence which endangers the protection or safety of the public. Moreover, detention is justified only when it is necessary for public safety.[83] CRT begs the question of whether negative racial stereotypes contribute to Black people being perceived as dangerous in the eyes of the criminal justice system. This could be one explanation for Black accused being more likely to be denied bail.[84]

Section 515(1) of the Criminal Code provides that unless a plea of guilty by the accused is accepted…that the accused be released on his giving an undertaking without conditions, unless the prosecutor…shows cause of why the detention of the accused in custody is justified.[85] This provision together with the Charter right to reasonable bail implies a presumption of release, and yet this presumption is continuously rejected in Nova Scotia. In 2017 it was reported that the

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[81] *Ibid* at 262.
[82] *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 11(e).
[83] *R. v. Morales,* [1992] 3 S.C.R. 711 at 39.
[84] *Wortley, supra* note 75.
[85] Criminal Code R.S., c. C-34, s. 515(1) full provision: Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice. [93] Richard Woodbury, CBC, "Nova Scotia Records 192% Jump in Inmates presumed innocent and awaiting trial." (2017)

number of people presumed innocent yet kept in detention has increased 192% over ten years.[93] Nova Scotia also has the highest proportion of inmates kept in jail on remand in the country. Between 2005 and 2016, African Nova Scotians made up the greatest number of remanded adults (13%) after Caucasians (73%), although they only comprise about 2% of the provincial population.[86] According to stakeholders in the justice system, remand has inadvertently become a practical sentence for those accused of an offence.[87] This is unacceptable, and contrary to the Canadian principle of being innocent until proven guilty. This shows a need for intervention and reform in the Nova Scotian justice system.

The proper function of the bail system is to protect the public against danger or criminal activity alone. However, research shows that accused who are held in custody before trial are more likely to be convicted and receive longer sentences.[100] Evidence suggests that pre-trial detention is frequently used by the prosecution to coerce guilty pleas from accused persons.[88] This is an outright unethical use of the bail system. This system is not in place to aid the prosecution in seeking a conviction. It is no coincidence that Black accused are more likely to be denied bail and held in pre-trial custody than accused from other racial backgrounds.[89] Anti-Black racism is thus rife at the pre-trial stage of the criminal justice system.

Although federal statutes create a presumption of release, the justice system in Nova Scotia has barriers in place that prevent this practice. Research reports that the largest contributor of charges which led to the increase in remand over the last 10 years is administration of justice offences, the most common ones being failure to comply with a court order or breach of probation.[90] Accused are more likely to be found guilty on administration of justice offences than

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[86] Nova Scotia Department of Justice, *Remand in Nova Scotia 2005-2016* (Nova Scotia: Department of Justice, 2018)
[87] *Ibid.*
[88] *Wortley*, supra note 75.
[89] *Ibid.*
[90] Department of Justice, *JustFacts: Bail Violations, AOJOs and Remand* (Ottawa: Department of Justice, 2017)

other offences[91] and custody is the most common sentence in cases including administration of justice offences. So, there are more charges being laid of (non-violent) offences that carry higher rates of a guilty verdict, which are more likely to lead to prison time. These patterns strongly reinforce the systemic incarceration of Black Canadians. The increasing number of these charges being laid has been identified as an issue because it puts unnecessary pressure on the justice system. The current approach to breaches perpetuates individual cycles of incarceration and takes resources away from other cases, such as ones involving serious offences.[92]

An increase in prosecutors' requests for a surety for bail seems to be another evolution of structural racism. More often, Nova Scotian prosecutors are requesting a surety, which is onerous on the accused. These requirements create barriers which disproportionately impact marginalized communities who may not be able to meet the financial burden for the accused to be released. Furthermore, the Supreme Court of Canada called sureties one of the most onerous forms of release and advised that it should not be used until other options have been considered and rejected.[93] This court is binding on the decisions of provincial prosecutors, therefore the practice of requesting sureties in Nova Scotia courts ought to be restricted.

On the occasion that bail is granted, minorities in Canada are subject to more release conditions.[94] Curfews, area restrictions, and mandatory supervision restrictions make conditions in Nova Scotia increasingly unreasonable. Bail is in place to grant reasonable freedom so long as there is not a substantial likelihood the accused will commit a criminal offence while on bail or interfere with the administration of justice.[95] However, in consideration of these restrictive factors together with the oversurveillance of Black communities, it is clear that bail serves as

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[91] Canada, Department of Justice, *Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament*) (Ottawa: Department of Justice, 2019)
[92] Ibid.
[93] *R v Antic*, 2017 SCC 27.
[94] *Wortley, supra* note 75.
[95] *R. v. Morales,* [1992] 3 S.C.R. 711. at 45.

another structure for upholding institutional racism. A critical race lens requires the state to acknowledge parallels between pre-trial detention and the restriction of Black movement enforced through sundown laws from the post-emancipation period. This system repeats patterns of racial and economic subordination that continue to be overlooked.

In Nova Scotia, justice system stakeholders expressed the view that the rates of overrepresentation of Black and Indigenous people in the criminal justice system "are not indicative as any bias towards these groups."[96] Rather, they believe that overrepresentation is a result of the socio-economic realities such as poverty and lack of social programs available to these groups. These comments make it clear that legal actors today still do not acknowledge the complexities of institutional racism that perpetuate cycles of inequality within the criminal justice system. Such prevalent beliefs expose the need for the creation of an anti-Black racism policy centering Critical Race Theory, as well as educational programs for stakeholders and decision-makers in the justice system.

Pre-trial custody has been identified as an alarming issue in Nova Scotia, especially for Black and Indigenous people. Prosecutors need be aware of the ways in which bias may arise in their own practices that contribute to the systemic criminalization of African Nova Scotians. Actively seeking pre-trial detention undermines the Canadian Charter right to not be denied reasonable bail without just cause. Bail conditions imposed contrary to the 515(1) presumption against conditions are prejudicial to the Black population. A policy, in conjunction with anti-Black racism training and ongoing education has the potential to adjust discriminatory decision-making patterns of the Public Prosecution Service. Appropriate interventions at this level of the criminal justice system could reduce bias and thus, dramatically decrease the number of Black

[96] Nova Scotia Department of Justice, *Remand in Nova Scotia 2005-2016* (Nova Scotia: Department of Justice, 2018)

and Indigenous people being sent to prison.

Substantive Equality Rights Must be Realized

It is imperative that prosecutors keep Charter principles at the forefront of their decision-making analysis. Section 15 of the Charter provides the right to equality. This constitutionally protected right should be at the forefront of decision making in exercising prosecutorial discretion.

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race[97]
>
> (2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race.[98]

The legal values conveyed through the Charter's special legislation can operate as a guide for prosecutorial discretion within the context of curbing anti-black racism and decreasing the overrepresentation of people of African Descent in the criminal justice system.

The Supreme Court guarantees substantive equality rights. A critical race analysis of Canadian history demonstrates that substantive equality rights have never been achieved for the African Canadian population as a whole. Although African Canadians have always believed in and fought for the right to equal treatment, the legal system does not live up to the standards set by the Supreme Court. Substantive equality rights aspire to "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[99] Until anti-Black racism interventions are employed, the Black population will remain subject to patterns of state detention. As James Walker declared, "the

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[97] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 15(1).
[98] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 15(2).
[99] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171.

problem is embedded in history, and historical understanding is essential to unlocking solutions with any promise of success."[100]

Conclusion

This paper sheds light on how structural racism has legally and culturally transformed since Pre-Confederation Canada to the present day. The goal of this paper is to push the majority population to commit to a holistic understanding of African Canadian history and ultimately improve access to the constitutionally protected human rights for all. Applying critical race theory within an African Nova Scotian legal context has provided a rich discussion on how implicit bias in decision making has forcefully sustained a racial imbalance in power within the criminal justice system.

However dark the history, the Canadian legal system is capable of making tremendous strides towards racial equity, as exemplified in the release of the *Fair Treatment of Indigenous People in Criminal Prosecutions* policy. This work begins with a critical race analysis of the criminal justice system and a call to action for Crown prosecutors to adopt anti-racist practices in their treatment of African Canadian people. It is crucial that intervention happens at the level of the Crown prosecutors, as they have proven to be powerful players in the criminal justice system. The Director of Public Prosecutions should issue a directive critical race policy to address anti-Black racism from within the Crown Prosecutor's office, as well as continuing anti-discrimination education and training. The desired result would be a continuous decline in the number of African Canadians held in custody. Taking such action would improve public confidence in the justice system for both majority and minority populations.

Working as a Crown prosecutor comes with considerable power, with which they must exercise a cautious responsibility. The Public Prosecution Service has a duty to abide by the

[100] Walker, supra note 10 at 24.

Charter, and meaningfully consider the right to equality and reasonable bail when making discretionary decisions. Research has revealed explicit discrimination in how law enforcement charges African Nova Scotian people. Therefore, Crown prosecutors now have an even greater responsibility to engage in anti-racist practices by considering Critical Race Theory in their decision making, to strive towards the equal balancing of the scales of the justice system.

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