Black Femininity and the Erasure of African Nova Scotian Women and their Victimhood in Our Criminal Justice System

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Abstract

For centuries, pervasive social constructions of Black women and their femininity within our Criminal Justice System has undermined access to justice. These biases work to attribute certain stereotypes that lead to the erasure of real women and their experiences, a fact that has had distinct legal consequences, particularly for victims of intimate partner violence. African Nova Scotian women continue to be disproportionately criminalized, and this paper argues that racist attributions of hyper-sexuality, whether due to perceived submissiveness or aggression, serve to perpetuate this issue. Through a multidisciplinary analysis of sociological, historical, and legal works, this paper examines both past and more contemporary barriers for African Nova Scotian women in navigating systemic and interpersonal violence, using the recent case of Samanda Ritch as an example of this dynamic. This paper finishes by recommending an expansion of available legal defences for those situationally coerced into participating in criminal activity by the threat of their abuser and co-accused's presence. It is further recommended that those with discretionary powers in the criminal justice system carrying a positive duty to act in a manner consistent with the *Charter* engage with explicit cultural competency requirements as a means for gauging their professional competency. Both recommendations will work to combat the dehumanizing consequences of these images reflected in our legal system that negatively frame certain themes relating to their experience, femininity, and bodily autonomy. Ultimately, it is concluded that the fragility of legal protection offered to African Nova Scotian women is borne out of the legacy of white supremacy, and active steps must be taken within the province and beyond to ensure these abuses do not persist.

Table of Contents

Introduction

Canadian institutions have caused wide-ranging suffering to African Nova Scotians (ANS) since their forced settlement in this province. The work of Sociologist Patricia Hill Collins is instructive in understanding the damage caused by misogynoir as it is reflected in our systems. For Black women, the abuse suffered is often driven by institutionally entrenched racist and sexist narratives undermining their femininity. If the effects of this pervasive bias are to be considered through a legal lens, there is a distinct inclination by our systems to target ANS women through perceived failures to meet traditional conceptions of femininity, while overlooking the context of their lives. This dynamic comes to erase the complexity of ANS women within the Canadian Criminal Justice system and their experiences at the intersection of race, gender, and class.

The following discussion will begin by examining how socially constructed images of Black women worked to influence the systemic abuse they suffered during slavery to show how these historical roots have influenced a trend in the legal treatment of Black women today. The effect of this bias institutionally will then be analyzed, both in the ways that it perpetuates their disproportionate criminalization and in how it undermines their ability to achieve justice as victims of sexualized violence. The mishandling of Samanda Ritch within our criminal justice system will be explored in light of how the double-edged influence of constructed images criminalized her as a victim of intimate partner violence (IPV).

Finally, two key recommendations will be put forward as a way to mitigate the dehumanizing effect of these images within our judicial processes, one narrow and one broad. The first is an argument for an increase in available defences for those situationally coerced into participating in criminal activity by the threat of their abuser and co-accused's presence. The second is a recommendation that those with discretionary powers in the criminal justice system be

compelled to engage with explicit cultural competency requirements per their positive duty to act in a manner that is consistent with the Charter. Both recommendations will work to combat trends reflected in our legal system that negatively frame certain themes relating to their experience, femininity, and bodily autonomy.

Ultimately, this paper argues that the influence of white supremacy on the broader Canadian consciousness permits a distinct blindspot towards ANS women who are victimized by violence in our justice system, leading to disproportionate criminalization. The fragility of legal protection offered is borne out of an inability to validate their victimhood through contextualizing the whole of their circumstances, both historically and immediately, as a consequence of systemic racism.

I. Understanding the Images of African Nova Scotian Women Require a Reflection on their Enslaved Experience

A. Hill Collins – The Welfare Mother and the Jezebel

Entrenched reductive images of ANS women's identity within the dominant consciousness operate as a controlling narrative in our criminal justice system's handling of their victimhood. Our institutions perceive Black womanhood through the prism of what Hill Collins refers to as the "four controlling images" driving social and structural oppression at the axis of race, class, and gender.[1] These ascribed identities are socially constructed and interrelated, existing against the feminine virtues upheld as traits of "true women": "piety, purity, submissiveness and domesticity".[2] It can be argued that the broader social consciousness views the most acceptable form of Black womanhood through the lens of the unsexed "mammy", an archetype Hill Collins

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[1] Patricia Hill Collins, *Controlling Images and Black Women's Oppression*, (Routledge: Nova York, 1991) at 266 [Hill Collins].
[2] *Ibid*.

describes as being controllable, obedient, nurturing, and servient.[3] Perhaps most important of those traits is the woman's propensity towards deference to white supremacy. Where there is a perceived failure to meet these expectations, the default assumption is one of promiscuity or low morals.[4]

There are two images of Black women that are particularly instructive in analysing the institutional perception of ANS women: the "Welfare Mother" and the "Jezebel".[5] The former is described as a "breeder" woman that is too sexually accessible. Conversely, the Jezebel is framed as a sexual aggressor.[6] Both images represent the ease with which clear indictors of victimhood are ignored in our judicial processes, as will be discussed further in Section II.

B. Early Nova Scotian Life and the Social Attitudes Embedded through Customary Slavery

These controlling images of Black women have since become embedded in the social consciousness of Euro-Nova Scotia in large part due to its origins in slavery, the period in which such ideas had been manufactured.[7] This history helps inform one's understanding of the unique experience of ANS women's victimhood as well as contextualize their limited access to justice in the legal sector today, in part due to these images. The Jezebel in particular emerged out of slavery where their portrayal was rampant and pervasive. Hill Collins indicates it was used to rationalize sexual assaults reported by Black women and perpetrated by elite white men, typically slaveholders. This era's "sexual ideology" encouraged an essentializing categorization of women based on opposing definitions of what an acceptable, self-abnegating woman ought to do.[8] A modern equivalent for the economic exploitation inherent within the institution of slavery is the

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[3] Hill Collins, supra note 1 at 266.
[4] *Ibid*.
[5] *Ibid* at 270-271.
[6] *Ibid*.
[7] *Ibid*.
[8] *Ibid* at 271.

sex trafficking, a form of abuse that will be briefly touched upon later in the third section discussing Ms. Samanda Ritch.[9]

Despite the commonly held notion that Canada had been a "safe haven" for Black people seeking to escape American slavery following the revolutionary war, the practice continued to be customarily enforced and a fixture of Nova Scotian life.[10] Carole Watterson-Troxler states that in the wake of the American revolutionary war, there remained a risk of being sold as slaves and forced into areas where the enslaved status of those with African ancestry was assumed, regardless of their actual legal status "pre-war" or "post-war". The proximity of ports and ease of shipping only encouraged this practice, thus intensifying the bodily insecurity of Black people.[11]

Williams indicates that white Nova Scotians came to benefit from the "unwritten rules of racial hierarchy" while exacerbating Black women's oppression.[12] Watterson-Troxler continues that the dominant interpretation of their role as workers skewed heavily towards being mere chattels, which consequently undermined their value were they to be free/hold legal status in NS. This perception of value motivated many to attempt quick sale and shipment of Black individuals in this capacity. Shelburne in particular had an active seaport with readily available connections to the West Indies and the Bahamas, as well as designated British areas with slave checkpoints into American states, making the bodily autonomy of Black Loyalists in this area distinctly vulnerable.[13] Most litigation concerning early ANS involved white individuals attempting to control them. There were, comparatively, significantly fewer cases wherein Black claimants made

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[9] Hill Collins, *supra* note 1 at 272; **note:** the case of Ms. Ritch's conviction is *R. v. Sparks and Ritch*
[10] Michelle Y. Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dalhousie L J at 428 [Williams].
[11] Carole Watterson-Troxler, "Re-enslavement of Black Loyalists: Mary Postell in South Carolina, East Florida, and Nova Scotia" (2008) 37:2 Acadiensis: Journal of the History of the Atlantic Region (JSTOR) at 77 [Postell in NS].
[12] Williams, *supra* note 7 at 432.
[13] Watterson-Troxler, *supra* note 11 at 77.

charges of wrongful claiming of ownership or apprenticeship against their captors.[14] Below, the experiences of two Black women viewed as key figures among the Black Loyalists who settled in NS will be discussed.

C. The Fragile Legal Status of Mary Postell and Lydia Jackson in Nova Scotia

Watterson-Troxler states that among those first ANS bringing their legal struggle to NS court was Mary Postell and her fight against her re-enslavement in Shelburne under British rule between 1786-1791.[15] Her treatment by as a Black woman by British forces as well as within the courts is not unique among those living in Nova Scotia historically, rather, it serves to create a picture of the fragility of legal protection afforded to Black people in NS at the time.[16]

Watterson-Troxler indicates that Postell had been enslaved by two documented families, Postell and Wearing, before fleeing for refuge at the British lines to work on Public works and Forts until being evacuated in 1782. During this evacuation, all Loyalists were taken either to other British colonies or returned home, however, Black Loyalists were not afforded the same degree of autonomy in deciding the orientation of their migration. The British distinguished between Black Loyalists, who were considered free, and the "Sequestered Negroes" who remained a form of real property. The former group was issued Certificates of Protection (CoP) meant to formalize their free status by Commanding Officers of the British Forces. White loyalists with slaves maintained the ability to dictate their movement and could buy, sell, and transport these individuals at whim. Postell had received her CoP prior to the evacuation as indicated in her testimony in 1791 to the NS Court, however, this certification was taken from her by a John MacDougal who stated he

[14] Watterson-Troxler *supra* note 11 at 79.
[15] Ibid., 71-72.
[16] Ibid., 72.

simply wanted to "look at it" and never returned.[17] This fact would come to have distinct legal consequences on the safety and autonomy of Postell and her daughters once in NS.

Watterson-Troxler states Postell arrived in Shelburne, NS in 1786 with her two daughters, Flora and Nelly, and a Jesse Gray after being forced by the latter to remain in the hold during their journey. The three women were listed as Gray's unpaid "servants" initially, but just months later, Postell took her children away to the Northern part of Shelburne after fearing he would sell them all back into the slave trade as she was no longer in possession of her CoP. Like other Black individuals who had relocated to NS around this time, she eventually went before the County Court to assert her status as a free woman. Postell indicated to the court that she had joined the British forces at Charles Town in 1780 and that Gray made her a de facto slave after travelling to NS with him. Gray claimed he purchased her in East Florida as chattel from his brother Samuel.[18]

Watterson-Troxler explains that the Court at the time required persons claiming ownership to produce the Bill of Sale within the year to claim these individuals as their own chattels, otherwise wages for service from that court date were owed. Gray presented the documentation, signed by his brother in East Florida in 1785, and obtained further community support from three other white men, resulting in Postell being returned to him. Approximately 16 months after this proceeding, Postell was sold to William Mangrum for 100 pounds of potatoes, one of the three men who supported Gray in the hearing. Gray kept her daughters.[19] The apparent coordination among salve owners to keep Black individuals under their network within NS demonstrates the customary nature of this practice at the time.

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[17] Watterson-Troxler, *supra* note 11 at 73-74.
[18] *Ibid* at 73-75.
[19] *Ibid* at 74-76.

Watterson-Troxler states that the second key legal challenge Postell pursued was in 1791 on behalf of her daughter Nelly after Gray had already sold her other daughter, Flora. She again explained to the court that she was a free Loyalist, along with the circumstances in which she came to be associated with Gray. Gray was required to pay bond, surrender Nelly to the court, and provide the next court with evidence that she was his property. If he failed to do so, his control over her would be lost. The same oral evidence was entered to the court on Friday, July 8, 1791, and Gray was told on the following Monday that he had a day to provide the court with his sureties for his appearance in the November court and to respond to the complaint against him there. An additional feature of this proceeding was that the court required more detail of the circumstances surrounding his claimed ownership of Postell and her girls, namely, the particulars that led to the creation of the 1785 Bill of Sale provided by Gray in the original claim. The language of the court indicates her claim was taken more seriously than the one prior and it received more court time and record than any other case of its kind.[20]

The story of Lydia Jackson in NS is one reminiscent of what Postell experienced, and is detailed by a John Clarkson in the Nova Scotia Archives.[21] The account indicates that Jackson was a free early ANS settler in what is now known as Guysborough County. After being abandoned by her husband, she sought board with a Loyalist in the area, Mr. Henry Hedley, who is first written as welcoming her as a companion to his wife. However, this arrangement soon transformed into demands of her either paying him for the time she spent under his roof or becoming bound to him as an indentured servant for a minimum of 7 years. This ultimatum clearly offering her no

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[20] Watterson-Troxler, *supra* note 11 at 78-79.

[21] John Clarkson's account of the story of Lydia Jackson (30 November 1791) in *Clarkson's Mission to America, 1791-1792* p. 89-90, Halifax, Nova Scotia Archives (Public Archives of Nova Scotia Publication no. 11) (F90 /N85/ Ar2P no. 11) [Jackson].

meaningful choice, and so she accepted to the terms communicated to her, not knowing the actual Indenture specified 39 years, entirely disregarding her status as a free woman.[22] This fact of her story goes to the commonly held assumption at the time that all Black people were slaves, and any passing interaction could be transformed into an opportunity to exploit their body for labour or profit.

The archives continue that the following day, she was sold to Dr. John David Bolman despite her free status for 20 pounds. It is stated that she was abused mercilessly while in his service, using instruments like tongs, sticks, rope "about the head and face", continuing even into the late stages of her pregnancy. One account detailed her being knocked to the ground and stamped upon. Jackson went to a local Attorney to lodge a former complaint regarding her treatment. Her case was brought before the Court in Lunenburg but was silenced by Bolman. No more is mentioned of the case by Clarkson, and so it is likely it was dropped entirely under the social pressure to do so. Bolman relocated Jackson to his farm just outside of town, providing explicit instruction for his servants to beat and punish her "as they thought fit" as retribution for her attempt to go through the courts to seek protection and justice for his treatment of her.[23]

Clarkson continues in his entry that, after three years in his service, Jackson escaped Bolman to Halifax through the woods. Upon her arrival in the city, she had a Memorial drawn up to present to the Governor, applied to the Chief Justice, and finally, to Clarkson. Clarkson attempted to reintroduce the case of her treatment to the courts, in addition to the issue of her free status to recover her owed wages, however, without the "forms of law" required, the matter was unlikely to be settled accordingly.[24] It should be noted that this situation had the very real potential

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[22] Jackson, *supra* note 21.
[23] *Ibid*.
[24] *Ibid*.

to put Jackson's freedom, security, and life at distinct risk. She had to put her faith in Clarkson that he would not coordinate to return her to her capture, and even still, the mere knowledge of her location could have been enough return her the violent situation she escaped. These two accounts have shown how easily this transport between individuals happened. Thankfully, Jackson, despite not getting the legal recourse she deserved for the kidnapping, enslavement, and abuse she suffered, she managed to leave Halifax for Sierra Leone, regaining her freedom and safety.[25]

Both women became de facto slaves in NS as a consequence of their CoP being removed from their possession, documents which formalized their free status. Without them, there had little means for anyone in this position of proving a claim of wrongful ownership or apprenticeship in court, should they even be afforded the opportunity to appear there and be heard. For Postell and Jackson, this reality erased their personhood, leading to years of exploitation, lost wages, and mental and physical violence. The system did very little to take action to protect these women or really acknowledge them as victims, a dynamic that can be said to have set the foundation for the type of institutionalized racism Ms. Ritch[26] faced in our justice system more recently. Her experience will be discussed at length in the section below. Ultimately, these stories demonstrate the fragility of early ANS' legal status upon arriving in the province under conditions where the pervasive assumption about their personhood was that they were a commodity to be exploited.

II. The Contemporaneous Strain of White Supremacist Images on ANS Women

A. The Effect of Constructed Images in Socio-Economic Conditions and Racial Profiling

Echoes of the social attitudes towards ANS women at the time of slavery remain in the Nova Scotian Imagination and are consequently reflected within the culture and organization of

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[25] Ibid.
[26] The case of Ms. Ritch's conviction is *R. v. Sparks and Ritch.*

our institutions today. The physical appearance and perceived demeanor rooted in the images of Black women described by Hill Collins have had a distinct influence on the type of systemic racism ANS women experience, particularly in our criminal justice system. While comparatively not as overt as what Postell and Jackson endured in the late 1700s, the disparity in legal treatment and remedial outcomes received by this community reveal how established, seemingly neutral policies and procedures can perpetuate a wide-ranging set of personal and collective costs. It can be argued that racialized attributions have often led to disproportionate criminalization of ANS women and an inability to contextualize their personhood beyond narrow character assumptions.

Contained in the 2017 United Nations Working Group's report on the systemic challenges faced by Indigenous Blacks in NS were the deeply rooted concerns over the fragility of their human rights – a remnant of slavery. Poverty remains a distinct issue within the community and both men and women continue to be overrepresented in the criminal justice system due to racial biases permeating all levels. It is reflected in police racial profiling, in exercising prosecutorial discretion, and in sentencing disparities when compared to other groups.[27] The report on Halifax street checks confirms the UN's finding that Black men make up a disproportionate number of those within charge statistics when compared to white men and women. This finding is consistent with the concerns expressed by the ANS community that police practices tend to unfairly persecute members, contributing to higher rates of criminalization.[28] Similarly racialized targeting can be extended towards Black women if the incarceration rates of ANS women are to be considered. In a United Nations committee report on the elimination of discrimination against women, it was

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[27] *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) at 8.
[28] Nova Scotia, Human Rights Commission, *Halifax, Nova Scotia: Street Checks Report* (Toronto: University of Toronto, 2019) at 140-141 [Halifax Street Checks].

found that there is a disproportionate number of both Indigenous and ANS women in incarceration. The committee continues that many of these women are classified at the maximum-security level, restricting their access to work and community programs offered through the system, despite women in the federal system generally being considered a low security risk.[29] The propensity to treat marginalized prison populations as a greater threat mirrors the Jezebel framing of the dangerous aggressor.

This stereotype is assigned to Black women early in Canada. In 2016, a 6-year-old girl in Peel, Ontario was handcuffed and forced to remain on her stomach for an hour with her hands behind her back, a position that put her at risk of asphyxiation, Global News reports. This abuse occurred after being called to respond at her elementary school when the child, consumed by a recent series of traumatic events in her life, began acting out.[30] The readiness of these officers to exert such physical force on a child in crisis before attempting other measures to de-escalate the situation is not only an example of how pervasive anti-Black racism is in our society, but of how quickly the state disregards their complexity and personhood. The reliance on the notion that she was a dangerous person posing a threat, whether unconscious or not, is likely what motivated their decision to pursue swift punishment instead of attempting to understand why she was upset.

A report from the NS Department of Justice indicates that those with a vested interest in our criminal justice system – judges, lawyers, court and police officers, and beyond – continue to dismiss the role of racial bias in producing these outcomes. They instead cite socio-economic

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[29] UNGA, Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada*, 42nd Session, UN Doc CEDAW/C/CAN/CO/7, 7 November 2008 at "33."

[30] Nicole Thompson, "Peel police ordered to pay $35K in damages for handcuffing 6-year-old girl who is Black" (January 7, 2021), online: *Global News* < https://globalnews.ca/news/7562798/peel-regional-police-human-rights-tribunal-order-girl-handcuffed/>, note that her name is protected for anonymity.

conditions within the community and inaccessibility of social programming as being the culprit of this overrepresentation.[31] While the positioning of ANS is an issue, the nature of the treatment experienced by ANS, like the Peel girl, requires examination beyond this socio-economic reality. Further, this reasoning is reflective of how certain stereotypes about the failure of Black motherhood undermines the goals of intersectional feminism and perpetuates poor socio-economic conditions. Hill Collins states that there is a common belief associated with images like the Welfare Mother and Jezebel that suggests a lack access to financial or social stability is indicative of moral destruction within Black communities, instead of a consequence of historical and institutionalized racism.[32] This reason provided by legal professionals in NS does not sufficiently account for the qualitative elements of their treatment. This fact is one of the reasons why reform of our criminal justice policies and procedures is required to ensure the complexities of marginalized communities are sufficiently contextualized.

B. The Erasure of Victimhood in the Context of Sexualized Violence: A Community and Societal Perspective

The images of ANS women not only influence how they are perceived as criminals but in their worthiness as victims as well, particularly in cases of sexualized violence. El Jones asserts that the pain and struggle experienced by Black women who are victims of this type of assault are continuously ignored. The type of mainstream feminism that has influenced institutional reform in the past has consistently neglected to incorporate intersectionality into its worldview.[33] This dynamic is not the only reason for the lack of meaningful justice is this regard. Kimberlé Crenshaw

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[31] Nova Scotia Department of Justice, *Remand in Nova Scotia 2005-2016* (Nova Scotia: Department of Justice, 2018).
[32] Hill Collins, *supra* note 1 at 266.
[33] El Jones, "How Many Times More Likely? Me Too and Black Canadian Women" *Halifax Examiner* (10 December 2017), online: <https://www.halifaxexaminer.ca/featured/how-many-times-more-likely/>.

states that the treatment of sexual assault against Black women within the community remains fraught and is largely ignored as gender-based issues and concerns of racial justice struggle for priority over the other.[34] Dr. Beverly Guy-Sheftfall supports this notion, stating:

> "Generally speaking, Black people do not believe that misogyny and sexism and violence against women are urgent issues. We still think that racism, police brutality, Black male incarceration, are the issues that we should be concerned about."[35]

A group of AFS women consulted by the Nova Scotia Advisory Council on the Status of Women (NSACSW) confirm this sentiment. The report discussed the unique obstacles facing women in the broader AFS community when trying to remove themselves from situations involving violent relationships.[36] Notably, many feel a distinct sense of grief at the idea of removing themselves or betraying their extended family and the social support networks fostered through community kinship.[37] There is an added fear of community rejection in response to them seeking help or resources given the emphasis on kinship, not only as a means of preserving culture but in maintaining resilience in the face of intergenerational trauma caused by white supremacy.[38]

The NSACSW continues that the spectre of historical institutional violence, continued discrimination, and unequal treatment have understandably instilled a collective mistrust or fear of available social service programs or justice remedies.[39] Women in this position are reluctant to seek out formal help to mitigate the risk to them, or find it impossible if situated in more rural or isolated areas where transportation services are not readily accessible. This latter issue distinctly

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[34] Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43:6 Stanford L Rev at 1282.
[35] Jones, *supra* note 33.
[36] *Nova Scotia Advisory Council on the Status of Women*, "Making Changes" (2018) 9th edition at 20 https://women.novascotia.ca/womens-safety/barriers-leaving [NSACSW].
[37] *Ibid*.
[38] Wanda Thomas Bernard and Claudine Bonner, "Kinship and Community Care in African Nova Scotian Communities" (2013) 4:1 J of the Motherhood Initiative at 156.
[39] NSACSW, *supra* note 36 at 20.

undermines their ability to quickly escape violent situations when needed. Where a woman's abuser is Black, there is a fear that reporting abuse will work to further promote racist social attitudes towards the Black community, and at Black men in particular.[40] This concern is not unfounded given the similarly disproportionate rates of discrimination, racial profiling, and incarceration experienced by Black men.[41] This element further complicates a Black woman's already vulnerable position.

If an external perspective on ANS women as victims is to be considered, there is a need to return to Hill Collins' Welfare Mother and Jezebel. There is a readiness to manufacture consent to abuse suffered through either image – assigned complicity or hypersexuality. These assumptions have the potential to lead to the conclusion that Black women are unlikely to be victims of abuse or sexualized violence. Hill Collins suggests that the image of the dangerous or promiscuous Black woman has created further divide in how they are perceived relative to white women.[42] A combination of these factors works to contribute to the erasure of ANS women's experiences as victims, and our system must be adaptive and responsive to these concerns when working to make it one that is concerned with justice for all.

The complexities of identity as an ANS women who is subjected to the violence of both interpersonal and institutionalized racism and sexism is consequently at risk of coming within the scope of the criminal justice system as abuse victims, not to have justice served on their behalf, but to be wrongfully convicted as co-accused of serious offences. The inability to validate victimhood or contextualize surrounding circumstances within our institutional processes is

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[40] NSACSW, *supra* note 36 at 20.
[41] Halifax Street Checks, *supra* note 28 at 140-141.
[42] Hill Collins, *supra* note 1 at 269.

reflective of their failure to protect Black women in this province. The case to be discussed below, unfortunately, is exemplary of this dynamic.

III. *R. v. Sparks and Ritch*: Analyzing the Erasure of Samanda Ritch

The case of *R. v. Sparks and Ritch* previously mentioned involves a woman who was arguably wrongfully convicted of first-degree murder under s. 235 of the Criminal Code and given a 25-year sentence with no possibility of parole.[43] The evidence used to convict her relied very heavily on her proximity to her abusive ex-partner, Mr. Calvin Sparks, the individual directly responsible for the killing of Ms. Nadia Gonzales.

It must first be acknowledged before beginning the analysis that much of the detail going into contextualizing the experiences of Ms. Ritch came out of two interviews with Emma Halpern, the Executive Director for the Halifax Chapter of the Elizabeth Fry Society.[44] This fact only further highlights the notion that the complexity and personhood of ANS women often goes overlooked in institutional processes. In researching the history of the case[45], Ms. Ritch's own perceptive on her life and the events that led to the charge of first-degree murder, was only heard from once and never presented to the jury. Ms. Ritch has told Halpern she is really upset her story was never formally acknowledged, nor made available to the jury to grapple with in deciding her judgment.[46] It is quite striking that one can be sentenced so harshly, and a reader of the case can be left with almost no impression of her positioning within the event that took place precipitating the charge.

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[43] *R. v. Sparks and Ritch*, 2020 NSSC 33 at para 34; *Criminal Code*, R.S.C., 1985, c. C-46 at s. 235.
[44] **Note:** Emma Halpern was given permission to share the personal circumstances of Ms. Ritch (of which she obtained through attendance in the court and in her direct work with Ms. Ritch) as part of our interview and in sharing as part of the class [E. Fry – Halpern Interview].
[45] History of the case here would include the pre-trial hearings (i.e. bail, Charter challenges, etc.), the trial, and the sentencing hearing.
[46] E. Fry – Halpern Interview.

Again, this readiness to assign moral blameworthiness is a reflection of racial biases and a condemnation of justice in NS.

There were three key themes that emerged in considering the case's implications on the experiences of ANS women, all of which will be discussed below.

A. Gaps in the available evidence pertaining to Ms. Ritch's conduct in relation to the event were filled by framing her as an extension of co-accused and abuser.

In exploring this first issue, it is crucial to note that almost the entire case against Ms. Ritch hinges on the testimony provided by an Undercover investigator who spoke to her after her arrest while being held in the custody of the state. Per U/C Sherri's testimony, the court cites her involvement in the murder as the following:

- Her general knowledge of the plan and the fact that she spent time with Mr. Sparks the day before the murder during his planning,
- Her bringing the black duffle bag with him to 33 Hastings Drive[47],
- Her request for Mr. Patterson to go into Mr. Bruce's room so Mr. Sparks could speak with him,
- Her ordering Mr. Bruce to clear the apartment to prepare for Ms. Gonzales' arrival, and
- The DNA evidence under the victim's nails indicating her proximity to Ms. Gonzales at some point in time.[48]

All of the details used to situate her role during the event came from the testimony provided by U/C Sherri, of which Ms. Ritch has expressed considerable concern over the contents of to Halpern.[49] The investigator frames her knowledge of the level of premeditation taken by Mr.

[47] **Note:** This was the location where the murder took place.
[48] *R. v. Sparks and Ritch*, 2020 NSSC 128; Interview of Emma Halpern (25 February 2021; 12 March 2021).
[49] E. Fry – Halpern Interview.

Sparks to exercise the murder as being indicative of her direct involvement in the planning. However, there is no further evidence to this affect presented at court demonstrating that a direct order was given to Ms. Ritch to engage in these activities for this specific purpose. Halpern indicated that this understanding is taken at face value from the investigator's account of their exchange.[50] It was revealed in the voir dire concerning the defence's s. 7 Charter application that U/C Sherri had only written her notes of their exchange after she left the cell based on brief statements she had taken in her cellphone's notes application. These notes relied entirely on the investigator's ability to recall a conversation that took place in the cells and lasted a duration of approximately 1 hour and 20 minutes.[51] The court acknowledged the possibility that U/C Sherri might have forgotten or misremembered pieces of their conversation, as she struggled to remember parts of her testimony even after reviewing them just prior to being questioned at the hearing.[52]

According to Halpern, Ms. Ritch objects to U/C Sherri's framing of her statements entirely, stating that the level of detail going into the preparation of the murder was only provided to her by Mr. Sparks after it happened. His demeanor following the murder is described as being "super hyped up", and he was "talking at her" about how he had executed his plans in retrospect. She asserts that she was never given any detail or purpose to the directives supplied by Mr. Sparks; this was instead assumed through the investigator's testimony. Further, Ms. Ritch has indicated that the DNA found under the victim's nails was the result of the two getting into a fight that night before the murder took place, a confrontation that Ms. Ritch says was instigated by Ms. Gonzales.[53] In fact, Halpern indicated that the DNA is never actually explained at trial in terms of

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[50] E. Fry – Halpern Interview.
[51] *R. v. Sparks and Ritch*, 2020 NSSC 128, at para 52.
[52] *Sparks and Ritch*, *supra* note 13, at para 52.
[53] E. Fry – Halpern Interview. **Note:** Halpern was told Gonzales "came at her".

how it came to fit within the facts of how this murder was carried out. A vague assumption was made about how the victim must have scratched Ms. Ritch during the attack that led to her death, however, there were witnesses who confirmed Ms. Ritch's story in stating they saw the two fight hours before the murder had occurred.[54]

B. Her proximity to violence and marginalized identity was not contextualized.

Her identity as a Black and Indigenous woman was vaguely acknowledged through the mention of a Gladue report in a bail hearing but had no meaningful impact in deciding that claim. The only other reference to her race, according to Halpern, was when a trial witness referred to her using a racial slur. The Judge and Crown verbally reprimanded the individual, but no analysis beyond this was done from anyone, not even by her defence. Halpern states that the disposability in the way she was addressed throughout made the guilty judgment unsurprising.[55]

Halpern emphasized that the bail hearing was her only opportunity to discuss her life and history. Ms. Ritch had suffered a series of tragic events throughout her life and had few opportunities to improve the rather isolated positioning she experienced growing up. She was placed in public housing until her father gained custody of her. She described her father had been "her life" in court, and had limited social connections outside of her father and brothers throughout her adolescence.[56] After being pulled from school early to do domestic work for her father and brothers, she was left in an environment where she says she dealt with constant bullying from

[54] E. Fry – Halpern Interview.
[55] *Ibid*.
[56] *R. v. Ritch* 2019 NSSC 246, paras 25-26.

family and her community.[57] Halpern further states that she often was made to sleep in the bathtub.[58]

Her romantic relationship with Mr. Sparks is described in this court hearing as being incredibly violent. She had been a sex worker while in Ontario, while he became a pimp. The fact that he had subjected her to constant abuse is known to the court, and Halpern indicates that there had been at least three physical assaults against her by her co-accused – all proximate to the event at issue.[59] Notably, Halpern noted that Mr. Sparks was attempting to traffic Ms. Ritch in contracting out the murder of Ms. Gonzales in exchange for Ms. Ritch's body. These facts go to her level of culpability, as she had little ability or option to remove herself from her circumstances. This information did not go beyond this bail hearing, and so was never brought before the jury in determining her guilt. Instead, they attributed their analysis of Mr. Sparks' known conduct surrounding the event onto her, as though she was an appendage of his or an equal agent.[60]

The court inadvertently acknowledged that her identity as a young Black woman made her susceptible to being taken advantage if let out on bail considering her proximity to the "world of drugs, pimps, and exotic dancing".[61] It can be argued that the court's impression of her lifestyle is in alignment is guided by the imagery described by Hill Collins – that she is complicit or instead an equally contributing aggressor – as no analysis of her vulnerability in relation to the case at hand was done at any point despite knowing she was routinely victimized by Mr. Sparks.

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[57] *Ibid*. para 26.
[58] E. Fry – Halpern Interview.
[59] *R. v. Ritch* 2019 NSSC 246, para 27; E. Fry – Halpern Interview.
[60] E. Fry – Halpern Interview.
[61] *R. v. Ritch* 2019 NSSC 246, para 46.

C. The system continued to fail to protect her as a victim throughout entire process.

As stated, the evidence provided by the investigator is what had been used to justify the charge of first-degree murder against her.[62] Contained in that account is fact that Ms. Ritch was terrified of Mr. Sparks, with her stating she fears he'll kill her if he gets out of prison (i.e. "C.J.'s going to shoot me if he gets out").[63] Halpern said that at the beginning of the proceedings, she asked to sever her case from Mr. Sparks due to her fear of him as her abuser. They denied this request, indicating it would cause procedural inefficiencies, namely, that the Crown would call him and he could come to put all of the blame for what occurred on her in his testimony. In reality, there was far more of a risk of that being done to him given the nature of her involvement both at the stage of planning and during the event itself.[64] Halpern revealed in her interview that, despite her taking active steps to avoid contact with her co-accused, she was transported to trial day-in-and-day-out with him in the same vehicle. During these rides, he allegedly continued to intimidate and threaten her not to testify against him. Halpern indicates that those facilitating this knew of this dynamic and did nothing to intervene to protect her from him.[65]

Halpern indicates that the social science of the last 30 years to this affect has not been adequately translated into our system's formal processes.[66] This fact is highlighted by the court's failure to contextualize her experience as an ANS woman and a survivor of IPV, instead attributing intention based on their perception of her in relation to her co-accused. The details of Ms. Ritch's life show that the system had never been there to protect her, even when Mr. Sparks continued to exert control over her while directly under the purview of the State. Further analysis of the

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[62] E. Fry – Halpern Interview.
[63] *R. v. Sparks and Ritch*, 2020 NSSC 128, at para 43.
[64] E. Fry – Halpern Interview.
[65] *Ibid*.
[66] *Ibid*.

psychology of being a battered woman and the effects of intergenerational racism on her socio-economic positioning is crucial in cases involving historically oppressed people, like those within the ANS community.

IV. Recommended Changes within Our Justice System

A. Expanding Available Defences in Cases of Intimate Partner Violence

As discussed in Section III, the power-dynamic between Mr. Sparks and Ms. Ritch was not sufficiently contextualized or weighed in discerning her moral culpability at trial. Given how severely constrained any meaningful avenues for escape had been in light of her circumstances, an argument for duress as a victim of IPV by her co-accused should have been attempted. The following discussion will provide a brief overview of the law of duress as it stands, highlighting the potential gaps in analysis which work to make access to this defence difficult for marginalized women in a similar position to Ms. Ritch.

The defence of duress is available statutorily and at common law. While its doctrinal interpretation has been debated in both iterations of the defence, both are largely understood in essence as the following: where "a person is ordered to commit an offence under threat of serious harm, has no reasonable way to avoid committing the offence, and the harm caused will be proportional to that avoided, then the person has a defence for committing the offence in question."[67] The degree of rigidity within the duress analysis is indicative of a gap in available

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[67] Steve Coughlan, "The Rise and Fall of Duress (or How Duress Changed Necessity Before Being Excluded by Self-Defence)" (2013). Queen's L J, Available at SSRN: https://ssrn.com/abstract=2323766 at 2. **Note on definition:** The author notes that this definition is considered an authoritative general interpretation of the defence in *R. v. Ryan*, 2013 SCC 3. *Ryan* further acknowledges the uncertainty surrounding how both the statutory and common law elements created by the case law over the years.

Brief distinction between statutory duress and at common law: In the case *R. v. Paquette*, 1977, SCC, Justice Martland stated that the s. 17 defence may only apply where the accused had actually been the person to commit the offence charged with. Here, it was found that the accused could be availed of a defence of duress where partial

defences for victims of IPV who are situationally coerced into participating in criminal activity by the threat of their abuser's presence and the anticipation of violence based on past activity.

While the court in *R. v. Ryan* ultimately found that the defence of duress was not available to the accused in that case, as had been applied by the lower courts, they indirectly acknowledged this gap in available defences afforded to those who commit an offence against a past abuser. The court in *Ryan* instead made a stay of the proceedings so that the matter would not be returned to trial in recognition of the abuse the accused and her daughter suffered by her husband and her limited voluntariness under the circumstances.[68] This recognition can be extended to those involved with violent crime due to the threat created by the proximity of their abuser and their actions.

i. Duress and Ritch

Returning to Ms. Ritch, the application of duress as a defence would have been fairly novel in this case under the current state of the law. As the court in *Ryan* states, the offence committed under compulsion of a threat must be done "for the purpose of compelling him or her to commit [the act]".[69] Ms. Ritch did not follow Mr. Sparks' directions on the night under a threat that was for the purpose of having Ms. Gonzales killed. Rather, she aided him because of an ever-present threat of extreme violence she grew to anticipate from him due to the history his abusive conduct against her. To not comply with his plan in the moment would risk a sort of retaliation likely equal to the fate suffered by Ms. Gonzales, a fact that could remove the criminal motive assigned to her

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liability is at stake existing outside of s. 17 for his role in driving the individuals responsible for a robbery which resulted in a murder. The common law form is conceived of and applied more broadly than the statutory defence and is available to those only implicated as parties – aiders and abettors – to an offence through common intention.

[68] *R. v. Ryan*, 2013 SCC 3 at Headnote.

[69] *Ibid* at para 2.

intentions. It should further be noted that, per the court's instruction in *Ryan*, proportionality itself is not a requirement in addition to moral voluntariness, but instead a facet of involuntariness.[70] Consideration of intention in common to commit a crime should be motivated by the policy reason that a person, while technically engaging intentionally with condemned conduct, should not be condemned morally. This defence is available for the purpose of exempting individuals from criminal liability where the fear rooted in the extremity of one's immediate environment.[71]

This notion is further supported by *R. v. Hibbert*, SCC 1995, where the court indicated that a finding of "no safe avenue of escape" is a new requirement to be considered for the common law defence of duress rooted in the evaluation of the accused's moral involuntariness. This component of the analysis is considered through a modified objective standard, taking into account the frailties of the accused in question.[72] The documented incidents of alleged physical assault in proximity to the murder, her claim that he would kill her if she went against him as presented in U/C Sherri's evidence, and his continued threats to her throughout the trial process all show the gravity of the threat she faced during the event.

The threat her co-accused posed is even acknowledged by the court in stating the "circumstances were horrific" and "indicated extreme brutality".[73] *R. v. Lavallee* speaks to the potential of the "heightened sensitivity of a battered woman to her partner's acts" to contribute to an apprehension of extreme violence or death where there is evidence the accused is in a battering relationship. The court here further acknowledges that the battered person's victimization often

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[70] Steve Coughlan, "The Rise and Fall of Duress (or How Duress Changed Necessity Before Being Excluded by Self-Defence)" (2013). Queen's L J, Available at SSRN: https://ssrn.com/abstract=2323766 at 12-13; *R. v. Ryan*, 2013 SCC 3.
[71] Edward Claxton, "Paquette v. The Queen" (1977) 15:2 Osgoode Hall L J at 439-440.
[72] *R. v. Hibbert*, SCC 1995 at Headnote.
[73] *R. v. Sparks and Ritch*, 2020 NSSC 33 at Headnote.

occurs within a cycle of violence.[74] A person like Ms. Ritch would have had a heightened awareness of her ex-partner's capacity for extreme violence given the number of previous incidents where he similarly showed a total disregard for her life.

If the "frailties"[75], per *Hibbert*, of ANS women as victims of IPV are to be considered in assessing safe avenue of escape, the trauma response[76] ought to be key in discerning moral voluntariness. A battered woman referenced above of one who is also a victim of intergenerational trauma due to past and present white supremacy could very well compound their response to the violence they are surrounded with and suffer from directly. If the NSACSW report discussed in Section II is to be considered again, this response would be balanced with the lack of resources and community support to escape a dangerous environment. The report suggests that vulnerable women seek out other ANS women in their community for support.[77] While this piece is crucial in emergent circumstances, the government and courts must shoulder this burden in a meaningful way and not leave it to individuals within communities to rectify barriers to addressing social problems caused by institutional racism. This work must centre those working within the capacity of the government acting to address the broken relationship between themselves, the institution as a whole, and the ANS community it has fostered for centuries.

B. Considering the Standard set in the Charter and Institutional Recognition of Substantive Equality Rights

As a final note, the court that convicted Ms. Ritch of 1st-degree murder was all white – a white judge, white jury, and white lawyers.[78] This fact highlights three major issues existing in our

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[74] *R. v. Lavallee*, [1990] 1 SCR 852 at p. 882.
[75] Term used in *R. v. Hibbert*, SCC 1995 at para 60.
[76] *R. v. Lavallee*, [1990] 1 SCR 852 at p. 882.
[77] NSACSW, *supra* note 36 at 20.
[78] E. Fry – Halpern Interview.

criminal justice system: the lack of adequate cultural assessments of the accused, the lack of ANS actors working in the legal sector and, for white actors, the lack of sufficient formal cultural competency requirements.[79] In order for our criminal justice system to adequately address the overcriminalization of ANS and the erasure of women victims, those holding discretionary roles must take notice of their duty to adhere to the Canadian Charter of Human Rights. A failure to do so will further reinforce the racial and gendered oppression continuing to permeate our institutions, as images continue to shape the treatment of those in the ANS community.

Section 52(1) of the Charter creates a positive obligation on bodies entrusted with the authority to deliberate on questions of law to do so in a manner that is consistent with the Constitution.[80] These bodies – the legislature, federal and provincial governments[81], and those acting as advocates in the interests of the Crown – are all compelled to take well into consideration the gravity of their power over citizens in holding their position.

The discretionary powers of the Crown influence patterns of treatment within the criminal justice system, not only for the individuals moving through it but for communities disproportionately affected.[82] The Crown maintains discretionary powers like decision-making on whether to dismiss or accept charges brought by police, length and nature of sentencing, and referral of a case to alternative or restorative justice programs.[83] Those making these decisions should be mindful of their authority over others given their capacity to violate individual

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[79] Moria Donovan, "Cultural assessments alone will not improve Nova Scotia justice, says social worker" (Last updated: 26 May 2016) online: *CBC* < https://www.cbc.ca/news/canada/nova-scotia/cultural-assessments-social-worker-1.3601904>.
[80] The Canadian Charter of Rights and Freedoms, "Section 52(1) – The supremacy clause" (Date modified: 2019-06-17) online: *Department of Justice* <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art521.html>.
[81] *Constitution Act*, 1982 at s. 32(1)(a-b).
[82] Joan Jacoby & Edward Ratledge, "The power of the prosecutor: gatekeepers of the criminal justice system" (2016) at 8.
[83] *Ibid*.

fundamental rights and freedoms, including that of racialized and vulnerable communities. They should, therefore, be cognizant of the biases rooted in their own consciousness and guided by social influence of intergenerational discrimination.

It indicates in the final report on the review of Canada's criminal justice system that the Department of Justice is committing to developing a performance monitoring framework to ensure the necessary data is made accessible so as to ascertain the quality of its operation.[84] There is no direct reference to the treatment of race or other substantive equality rights in the proposal. This framework should require in its review of those working in the capacity of the state, like Judges and Crown prosecutors with discretionary powers, explicit cultural competency requirements informed by the recent UN Working Group's report on ANS as a distinct people per their duty to the Charter. In particular, these requirements must look to ensure actors consider the circumstances and trauma of the accused in terms of how it influences not only their actions, but their capacity to seek external resources offered by the state.

Confidence in our criminal justice system among ANS remains low, as there is a well-founded sense of distrust in its ability to serve and protect them in the same way it does other Nova Scotians given the treatment they receive.[85] Developing a culture where a broader understanding of this reality informs the administration of judicial processes could help improve treatment of marginalized individuals moving through the system. Further, this knowledge could have the effect of improving the state's relationship with the ANS community in terms of their ability to view it as a valid and competent institution when dealing with their lives, so long as the appropriate factors

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[84] Transforming the Criminal Justice System, "Final report on the review of Canada's criminal justice system" (Date modified: 2019-08-26), online: Department of Justice < https://www.justice.gc.ca/eng/cj-jp/tcjs-tsjp/fr-rf/p6.html>.
[85] Canada, *Department of Justice State of the Criminal Justice System – 2019 Report Justice Canada* (Ottawa: 2019).

are considered seriously. Where key intersectional factors fail to be adequately considered in areas where discretion is permitted in their role, the individual failing to meet this standard should be subject to performance review as a matter of incompetence. One should not be considered qualified to serve the public as a legal professional in this capacity if unwilling to take on considerations that have distinct influence on the shaping of ANS lives.

Conclusion

The historically rooted and damaging images culturally and institutionally assigned to ANS women continue to restrict the ability of battered victims in accessing justice and, for others, meaningful due process. The nature of the treatment experienced by Black women demonstrates how the perception of their femininity has remained static and, in its evolution, has led to assumptions that still risk the legal status of individuals (i.e. incarceration). Ms. Ritch was a victim of both physical and sexual abuse at the hands of her co-accused, with the court entirely glossing over the fact that she continued to endure his threats throughout the months of this proceeding. This case shows it is crucial to consider the effects of stereotyping imagery in understanding the failure of the court to contextualize the whole of ANS experiences and identity.

Ultimately, the current orientation of our criminal justice system is ill-equipped to incorporate consideration of social factors that would work to combat the influence of biases. As a result, our system will continue to perpetuate similar historical abuses within the ANS community, particularly in our criminal justice system, without reform. Further exploration into the development of institutional measures that would create opportunities to contextualize individuals would be the first step in helping to provide recourse for those affected by institutionalized racism.

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