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Anchoring Lifeline Criminal Jurisprudence: Making the Leap from Theory to Critical Race-Inspired Jurisprudence

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This article takes as a starting point the claim that anti-Black racism permeates Canadian society and finds expression in our institutions, most notably the criminal justice system. Indeed, anti-Black racism in criminal justice and its impact on Black lives are not credibly in dispute. Thus, what should concern legal scholars is the staying power or permanence of racism. In other words, should Canadian legal scholars 'get real' about the intractability of race? Or can anti-Black racism be effectively confronted by developing legal and evidentiary tools designed to fix, rather than dismantle, the current system? Put another way, this article aims to move from describing a well-known phenomenon—the existence of anti-Black racism in the criminal justice system—to identifying radical approaches to confront and subvert it. In that vein, this article will explore a critical question: how can we make the leap from CRT to CRT-inspired, lifeline criminal jurisprudence?

Cet article prend comme point de départ l'affirmation selon laquelle le racisme anti-Noir imprègne la société canadienne et trouve son expression dans nos institutions, plus particulièrement dans le système de justice pénale. En effet, le racisme anti-Noir dans la justice pénale et son impact sur la vie des Noirs ne sont pas contestés de manière crédible. Par conséquent, ce qui devrait préoccuper les juristes, c'est le caractère durable ou permanent du racisme. En d'autres termes, les juristes canadiens doivent-ils se rendre à l'évidence que la race est un problème insoluble? Ou bien peut-on lutter efficacement contre le racisme anti-Noir en élaborant des outils juridiques et probatoires conçus pour réparer, plutôt que démanteler, le système actuel? En d'autres termes, cet article vise à passer de la description d'un phénomène bien connu—l'existence du racisme anti-Noir dans le système de justice pénale—à l'identification d'approches radicales pour le combattre et le subvertir. Dans cette veine, cet article explorera une question critique : comment faire le saut de la TRC à une jurisprudence pénale inspirée de la TRC, qui soit une ligne de vie?

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Introduction

A growing number of legal scholars employ critical race theory (CRT) to analyze race, racism, and law in the Canadian context.[1] Some Canadian law schools have also begun to offer CRT courses.[2] But, what is CRT? And more importantly, is it needed in Canada? These are not rhetorical questions but rather an urgent call for clarity. Given the growing public discourse and hysteria around CRT in the United States of America

1. CRT has a long history in Canadian legal scholarship. See e.g. Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999); Faisal Bhabha, "Islands of Empowerment: Anti-Discrimination Law and the Question of Racial Emancipation" (2013) 31:2 Windsor YB Access Just 65, DOI: <10.22329/wyaj.v31i2.4412>; Adrian A Smith, "Racialized in Justice: The Legal and Extra-Legal Struggles of Migrant Agricultural Workers in Canada" (2013) 31:2 Windsor YB Access Just 15, DOI: <10.22329/wyaj.v31i2.4410>; Shanthi Elizabeth Senthe & Sujith Xavier, "Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada" (2013) 31:2 Windsor YB Access Just 1, DOI: <10.22329/wyaj.v31i2.4407>. For more recent Canadian CRT scholarship see Adelle Blackett, "Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively, at McGill" (2017) 62:4 McGill LJ 1251, onine: <ssrn.com/abstract=3525584> [perma.cc/3YUD-DSCM]; Vincent Wong, "Ethno-racial Legal Clinics and the Praxis of Critical Race Theory in Canada" (2020) 16:1 JL & Equality 63, online: <jps.library.utoronto.ca/index.php/utjle/article/view/32758> [perma.cc/9ERD-6EHZ]; Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Constitutional Forum 53, DOI: <10.21991/cf29422>.

2. See e.g. Nancy Simms, "Critical Race Theory (LAW412H1S)" online: *University of Toronto Faculty of Law* <law.utoronto.ca> [perma.cc/4FJ4-8S8D]; Sonia Lawrence, "Law & Social Change: Critical Race Theory (2750X.03)" online: *Osgoode Hall Law School* <osgoode.yorku.ca> [perma.cc/7GT7-RZXP]. See also Doug Beazley, "Using critical race theory to form lawyers" (3 August 2021), online (blog): *National Magazine* <nationalmagazine.ca> [perma.cc/X2BY-WP5Y].

(US),[3] Canadian legal scholars must aim to clarify and demarcate CRT's explanatory and transformative dimensions and the theory's power when deployed to effectively address systemic anti-Black racism in Canadian legal institutions, most notably the criminal justice system.[4] We risk similar hysteria[5] and, worse, a firmer embracing of the Canadian exceptionalism myth[6] if CRT is construed as the uncritical importation of a US-based theory of race relations.

CRT had its intellectual genesis in the US legal academy in the 1970s as a critique of liberal discourses of race and inequality.[7] Since then, CRT has gained widespread cross-border and cross-disciplinary appeal and has been deployed to examine structural racism in education, child welfare, criminal justice, immigration, and other disciplines.[8] While developed and deployed explicitly in the US context, CRT provides Canadian legal scholars, activists, law students, and practitioners with much-needed theoretical insight into Canada's home-grown variety of anti-Black racism.[9] Moreover, Canada's distinct historical and current racial landscape provides substantial methodological, ontological, and epistemological support for applying CRT's core claims within the Canadian context.[10]

This article takes as a starting point the claim that anti-Black racism permeates Canadian society and finds expression in our institutions. It will use the criminal justice system as a case study for systemic anti-Black racism and explain that these dynamics are already well-known and

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3. See e.g. Spencer Bokat-Lindell, "Why Is the Country Panicking About Critical Race Theory?," *The New York Times* (13 July 2021), online: <www.nytimes.com> [perma.cc/HP5S-YXTH]; Kimberlé Crenshaw, "The panic over critical race theory is an attempt to whitewash U.S. history," *The Washington Post* (2 July 2021), online: <www.washingtonpost.com> [perma.cc/2BMX-GJPG].

4. Several recent court decisions have implicitly adopted and relied on core CRT insights in their analyses of race and criminal law. See e.g. *R v Le*, 2019 SCC 34 at para 94 [*Le*]; *R v Anderson*, 2021 NSCA 62 [*Anderson*].

5. There is some suggestion that this hysteria is already here. See e.g. Jula Hughes, "Critical Race Theory in Legal Education" (15 June 2021), online (blog): *Slaw* <www.slaw.com> [perma.cc/3ND9-QARG].

6. See e.g. Laura J Kwak, "Problematizing Canadian Exceptionalism: A Study of Right-Populism, White Nationalism and Conservative Political Parties" (2019) 10:6 Oñati Socio-Legal Series 1166, DOI: <10.35295/osls.iisl/0000-0000-0000-1127>.

7. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 3rd ed (New York: New York University Press, 2017) at 4 [Delgado & Stefancic, *CRT: An Introduction*]. See also Richard Delgado, "Liberal McCarthyism and the Origins of Critical Race Theory" in Richard Delgado & Jean Stefancic, eds, *Critical Race Theory: The Cutting Edge*, 3rd ed (Philadelphia, PA: Temple University Press, 2013) at 38 [Delgado & Stefancic, *CRT Cutting Edge*]; Kimberlé Crenshaw et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement* (New York: New Press, 1995).

8. See Delgado & Stefancic, *CRT: An Introduction*, *supra* note 7 at xiv.

9. *Ibid*.

10. See generally Robyn Maynard, *Policing Black Lives State Violence in Canada from Slavery to the Present* (Halifax: Fernwood, 2017).

well-documented in the Canadian context.[11] Indeed, anti-Black racism in Canada and its impact on Black lives are not credibly in dispute. Thus, what should concern legal scholars is the staying power or permanence of racism.[12] In other words, should Canadian legal scholars "*get real*" about the intractability of race? Or can anti-Black racism be effectively confronted by developing legal and evidentiary tools designed to fix, rather than dismantle, the current system? Put another way, this article aims to move from describing a well-known phenomenon—the existence of anti-Black racism in the criminal justice system—to identifying radical approaches to confront and subvert it. In that vein, this article will explore a critical question: how can we make the leap from CRT to CRT-inspired, lifeline criminal jurisprudence?[13]

But what does CRT-inspired or lifeline criminal jurisprudence, even look like? More importantly, if CRT suggests we need a radical rupture, but case law and legislation are still produced by the entrenched powers that structure a white supremacist system, is such a radical rupture possible if we engage with the system?[14] Indeed, if CRT was developed in the US, by the recognition of the fact that the 'civil rights revolution' did relatively little to exchange the material conditions of African Americans,[15] then can a CRT-informed assessment of Canadian criminal law jurisprudence[16] suggest a way of litigating and deciding criminal cases that will have more

11. See *R v Morris*, 2021 ONCA 680 at para 1 [*Morris*]; Ontario Human Rights Commission, *A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service Profiling* (Toronto: OHRC, 2020); Scot Wortley, Akwasi Owusu-Bempah & Huibin Lin, "Race and Criminal Injustice: An examination of public perceptions of and experiences with the Ontario criminal justice system" (10 February 2021), online (pdf): *Canadian Association of Black Lawyers* <www.cabl.ca> [perma.cc/6TLD-YE6W].

12. See Derrick Bell, "The Permanence of Racism" (1993) 22:4 Sw L Rev 1103 [Bell, "Permanence of Racism"].

13. Lifeline jurisprudence seeks to work within and accepts the criminal system's inherently racist constraints but nonetheless works to develop creative, resistive strategies and tools aimed at mitigating some of the damaging impacts on those people currently before the criminal system. Thus, lifeline jurisprudence aims at harm reduction as opposed to radical structural changes like abolition. It also recognizes that the two approaches are neither mutually exclusive nor antagonistic.

14. See e.g. Paul Butler, "The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform" (2016) 104:6 Geo LJ 1419, online: <scholarship.law.uc.edu/fcj/vol2019/iss1/6/> [perma.cc/X65U-6F5X].

15. See Delgado, *supra* note 7 at 40. See for e.g. Derrick A Bell Jr, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation" in Crenshaw et al, *supra* note 7.

16. For discussions on CRT-informed jurisprudence, see e.g. Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30 Const Forum Const 53; David M Tanovich, "Ignoring the Golden Principle of Charter Interpretation?" (2008) 42 SCLR 441 [Tanovich, "Golden Principle"], online: <digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/14/> [perma.cc/E3K8-FG38]; David M Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 145 [Tanovich, "Racial Profiling"], onine: <digitalcommons.osgoode.yorku.ca/ohlj/vol40/iss2/2/> [perma.cc/B7QM-VHVG].

than a glancing impact on systemic anti-Black racism, or is the project of focusing on rights and legality itself the problem?[17]

In recent years, we have witnessed a modest acknowledgement and tacit adoption by Canadian courts of one of the central tenets of CRT, i.e. the embeddedness of anti-Black racism. For example, in *R v Le*, the Supreme Court of Canada grounded its detention analysis in a keen recognition of how racialized individuals may experience police interactions.[18] By accepting and validating the numerous reliable sources of social science evidence that confirm their experiences, particularly concerning the police, the *Le* Court made it clear that the reasonable person must be presumed to understand the unique characteristics of a marginalized and racialized individual.[19] In *R v Morris*, the Court of Appeal for Ontario (ONCA) acknowledged the existence and persistence of systemic anti-Black racism in the criminal justice system, particularly how that recognition should be considered by a judge tasked with sentencing a Black offender.[20] The Nova Scotia Court of Appeal went even further than the ONCA in *R v Anderson* by holding that it may be a reversible error if a sentencing judge fails to inquire into or ignores "[a Black] offender's background and circumstances in relation to the systemic factors of racism and marginalization."[21] These gains, while modest, are not insignificant.[22] However, to build on them, we must first address and clarify two fundamental questions: what is CRT, and why is CRT needed to analyze, confront, and subvert Canadian criminal law? Without clarity, decisions like *Morris*, *Le*, and *Anderson* may not deliver on their promises.[23] Indeed, clarification is necessary lest we risk the erosion of these decisions to the point of obsolescence.[24]

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17. Some commentators argue that community or cause lawyers should not adhere to blind fidelity to the law, but rather "community lawyers should consider the 'morality and practicalities' of a client's or community's situation." See Anthony V Alfieri, "Fidelity to Community: A Defense of Community Lawyering" (2012) 90:3 Texas L Rev 635 at 654, online: <repository.law.miami.edu/fac_articles/7/> [perma.cc/8FAJ-PEWP]. However, critical race scholar Patricia Williams argues that "[w]hile rights may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks." See Patricia J Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" in Delgado & Stefancic, *CRT Cutting Edge*, *supra* note 7 at 101.
18. *Supra* note 4 at para 94.
19. *Ibid* at paras 73, 75. See also Amar Khoday, "Ending the Erasure?: Writing Race into the Story of Psychological Detentions—Examining R. v. Le" (2021) 100 SCLR 165, online: <digitalcommons.osgoode.yorku.ca/sclr/vol100/iss1/7> [perma.cc/PX8V-NU4C].
20. *Morris*, *supra* note 11 at para 1.
21. *Anderson*, *supra* note 4 at para 118.
22. Danardo S Jones, "*Morris:* A Modest Step Forward and a Call to Action" (2022) 75 CR (7th) 29 [Jones, "Morris"].
23. See Danardo S Jones, "Lifting the Judicial Embargo on Race-Based Charter Litigation: A Comment on *R. v. Le*" (2019) 67:1-2 CLQ 42 [Jones, "Judicial Embargo"]
24. *Ibid*.

While the ONCA and the Supreme Court of Canada have expressly acknowledged the existence and insidious impact of anti-Black racism in our criminal justice system, they remain reluctant to centre race in criminal jurisprudence.[25] As a result, these decisions fail to provide clear standards or processes to confront and eradicate anti-Black racism in the criminal justice system.[26] Indeed, there is no coherent theory, much less an overarching commitment to addressing anti-Black racism as a *structural problem*. Professor David Tanovich, for example, has written extensively about the judicial reticence to adopt appropriate critical race standards in the criminal jurisprudence on policing.[27] Tanovich's earlier critical race scholarship examines the judicial erasure of race, but given the recent racial turn in the criminal jurisprudence, have these critiques lost their appeal?[28] Or are we simply witnessing what Reva Siegel refers to as "preservation-through-transformation"—that is, "efforts to reform a status regime do bring about change—but not always the kind of change advocates seek."[29] Indeed, like Tanovich, I would argue that CRT has not had a more significant impact on criminal law jurisprudence because Canadian criminal courts tacitly endorse the exceptionalism myth and often race to assert white "innocence."[30] However, this critique should not breed inaction and despair, but instead read as a call to action.[31] In what follows, I explore how CRT scholars and lawyers can diligently build on these recent jurisprudential gains by clearly articulating how and why CRT provides an appropriate and powerful lens for examining and confronting anti-Blackness in the criminal justice system.

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25. See e.g. *R v Desjourdy*, 2013 ONCJ 170 [*Desjourdy*]; *R v Theriault*, 2020 ONSC 3317, aff'd 2021 ONCA 517, leave to appeal to SCC refused, 2021 CarswellOnt 19240 [*Theriault*].

26. The decisions acknowledge the problem but fail, or perhaps are incapable, to go any further. As Barnes J, asserted "[w]e have not yet reached the promised land. However, Canadian jurisprudence continues to evolve in its efforts to identify and acknowledge instances of systemic racism and to develop well-informed jurisprudence aimed at ensuring an effective, equal, fair and just application of the law for all": *R v Odle*, 2020 ONSC 3991 at para 59.

27. See e.g. David Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR 655 [Tanovich, "Charter of Whiteness"], online: <digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/21> [perma.cc/Y3NT-RZEN].

28. See e.g. Tanovich, "Golden Principle," *supra* note 16; Tanovich, "Racial Profiling," *supra* note 16.

29. Reva B Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105:8 Yale LJ 2117 at 2119, online: <hdl.handle.net/20.500.13051/288> [perma.ca/TG95-WZM5].

30. See generally Tanovich, "Charter of Whiteness," *supra* note 27. See also Danardo Jones & Elizabeth Sheehy, "*R v Desjourdy*: A Narrative of White Innocence and Racialized Danger" (2021) 99:3 Can Bar Rev 611, online: <cbr.cba.org/index.php/cbr/article/view/4714> [perma.cc/TY92-J5GA]; *Desjourdy*, *supra* note 25; *R v Montsion*, 2020 ONCJ 464; *Theriault*, *supra* note 25.

31. See generally Jones, "Morris," *supra* note 22.

The first section of the article will advance through personal narratives and critical race scholarship how CRT analyses can productively explain the criminal justice system's pathologies, demonstrate its inadequacy, and, ultimately, the paradoxicality of tackling anti-Black racism in the system by making Blackness more or less visible. The second section provides a brief overview of the central tenets of CRT. It also addresses what CRT is and, more importantly, is not. In that sense, section two serves as a restatement of CRT's central theoretical insights. The third section will explore anti-Blackness in Canada, particularly its expression in the criminal justice system, and explore why the deployment of CRT is powerful and distinctive in the Canadian context to highlight the criminal justice system's pathologies, paradoxes, and tensions. Finally, in the fourth section, the article discusses the potentialities of CRT insights on developing "lifeline jurisprudence."

I. *Three Black men walk into a courtroom: A story of acceptance and resistance*

CRT has gained mainstream acceptance in the US legal academy. However, there is a need for more CRT scholarship in the Canadian legal academy,[32] particularly on criminal justice, where the scholarly tradition is still relatively nascent, and there is a very significant problem of institutionalized anti-Black racism that requires serious critique and analysis. From a methodological perspective, CRT goes beyond doctrinal analysis and utilizes social science methods, ranging from law and geography to social psychology and economics.[33] CRT counters and challenges the more doctrinally focused method of conducting race and criminal law research. As Gomez argues, "CRT provides us with methodological guideposts that challenge mainstream assumptions about research and interpretation."[34] Indeed, it facilitates the development of a radical structural critique of the criminal system. The radical structural critique suggests that "criminal law is racist because…it is an instrument of white supremacy."[35] However, few

32. See generally *supra* note 1.

33. See e.g. Osagie K Obasogie, "Foreword: Critical Race Theory and Empirical Methods" (2013) 3:2 UC Irvine L Rev 183, online: <scholarship.law.uci.edu/ucilr/vol3/iss2/3/> [perma.cc/8P7P-VPCC]; Michelle Christian, Louise Seamster & Victor Ray, "Critical Race Theory and Empirical Sociology" (2019) 65:8 American Behavioral Scientist 1019, DOI: <10.1177/0002764219859646>; Devon W Carbado & Daria Roithmayr, "Critical Race Theory Meets Social Science" (2014) 10 Annual Rev L Soc Science 149, DOI: <10.1146/annurev-lawsocsci-110413-030928>; Laura E Gomez, "Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field" (2010) 6 Annual Rev L Soc Science 487, DOI: <10.1146/annurev.lawsocsci.093008.131508>.

34. Christian, Seamster & Ray, *supra* note 33 at 1023.

35. Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System" (1995) 105:3 Yale LJ 677 at 693, onlinr: <hdl.handle.et/20.500.13051/8929> [perma.cc/65YM-55Y8].

Canadian legal scholars have assessed whether our system is vulnerable to analogous critiques.[36] Canadian legal scholars must aim to fill this lacuna.

Legal scholars with a critical race lens may face resistance when developing a uniquely Canadian liberation/radical scholarship. Indeed, they may confront ethical and practical conundrums and critiques when they break free from traditional conceptions of lawyering and scholarship.[37] For example, as a Black scholar and lawyer studying the impacts of racial injustice in the criminal justice system, I worry about acknowledging my social location and the experiences that animate and ground me. While I do not believe that an exhaustive exposition of my positionalities is warranted, except insofar as they construct my research agenda, I must, however, account for them and be transparent about the biases that inevitably flow from them and how they inform the central themes and questions that I explore. In that vein, I agree with critical race scholars that it is vital for "[B]lack and [B]rown writers to recount their own experiences with racism and the legal system and to apply their own unique perspectives to assess law's master narratives."[38] However, race scholars often face unfounded criticism, alleging that their work lacks scholarly empiricism.[39] This phenomenon is a larger methodological concern that warrants investigation before advancing any critical analysis of race and criminal justice in Canada. Again, I acknowledge that I must account for my positionality. I face difficulty, however, determining "what part of me do I leave out?"[40]

I am a Black male tenure-track law professor and criminal justice scholar who practiced criminal defence law for several years. However, I also embody the more stereotypical Black experiences: fatherlessness, youthful criminality, high school underachievement, poverty, teenage parenthood, and first-generation migration. As a Black man, lawyer, and

36. Tanovich is perhaps the most notable criminal law scholar to challenge the anti-Black interpretation of the criminal law and the negative impacts such interpretations continue to have on Black lives. See Tanovich, "Golden Principle," *supra* note 16; Tanovich, "Racial Profiling," *supra* note 16; Tanovich, "Charter of Whiteness," *supra* note 27. See also Sonia N Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56:4 UTLJ 285, online: <www.jstor.org/stable/4491698> [perma.cc/2YWP-JRZT].

37. See e.g. Daniel A Farber & Suzanna Sherry, "Telling Stories Out of School: An Essay on Legal Narratives" (1993) 45:4 Stan L Rev 807, DOI: <10.2307/1229198>; Alfieri, *supra* note 17. See generally Mario L Barnes, "Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology" (2016) 2016:3 Wis L Rev 443, online: <digitalcommons.law.uw.edu/faculty-articles/570/> [perma.cc/9FGH-AS6D].

38. Delgado & Stefancic, *CRT: An Introduction, supra* note 7 at 11.

39. See Farber & Sherry, *supra* note 37; Barnes, *supra* note 37.

40. See Jennifer Lavia & Pat Sikes, "'What Part of Me Do I Leave Out?': In Pursuit of Decolonising Practice" (2010) 2:1 Power & Education 85, DOI: <10.2304/power.2010.2.1.85>.

criminal law scholar, I aim to express how I feel researching Canadian criminal justice as far as words can convey. I will be blunt: I feel enraged—not engaged. As Fanon explained, "[t]he Negro is a toy in the white man's hands; so, in order to shatter the hellish cycle, he explodes."[41] There is no intellectual stimulation—just a tightness in the chest, coupled with uneasiness in my gut caused by my deployment of oppressive epistemologies to analyze Black experiences. While I am viscerally aware of my intellectual unfreedom—my epistemic chains, I nonetheless persist. I fear getting it wrong—not for scholarship's sake—but because I know that Black dignity is at stake. Nothing that my research unearths surprises me—I am only surprised by the disbelieving faces when I report my findings or have the audacity to speak my truth—a truth that is not hidden but purposely made opaque and only made visible in its most tragic light.

As a racialized scholar, I walk this epistemic tightrope: attempting to confront systemic racism by utilizing well-worn discursive approaches while remaining faithful to radical traditions. So how do I walk this epistemic tightrope: balancing scholarly rigour while remaining faithful to the truth—my truth? This epistemological straitjacket may result in some Black scholars muting or eliding their perspectives on race, racism, and law. So how do we extricate ourselves from this epistemic state of unfreedom? I only ask that my readers grant me the indulgence to write, read, walk, breathe, speak, and seek my truth.[42]

1. *Between M, me, and the law*

Several years ago, a childhood friend, M, asked me to represent him in court. It was alleged that he recklessly drove his car into another motorist and failed to remain at the accident scene. He explained how fearful he was when the police were chasing his vehicle. So, he turned off the main road, came out of his car, ran, and hid between houses to evade detection. However, his parked vehicle was identified, and the next day the police contacted him and asked that he turn himself in to the local police station. He was questioned, arrested, and criminally charged with several driving offences when he arrived. After listening to his version of the incident, I told him that I would be happy to assist him. I asked him for more details and told him what possible options we could pursue. He abruptly said, "*You know what, man*, *I don't think I am going to have you represent me*." Before I could ask him for his reasons, he laughed and said: "*Can you imagine our two black asses going before a white judge—that won't look*

41. Frantz Fanon, *Black Skin, White Masks* (London, UK: Pluto Press, 1986) at 140.
42. See generally Danielle Elliott & Dara Culhane, eds, *A Different Kind of Ethnography: Imaginative Practices and Creative Methodologies* (Toronto: University of Toronto Press, 2017).

good." My face grimaced momentarily; then, I managed to fake a smile and joined M in his guffaw. After enjoying a laugh at my expense, M decided to retain a white lawyer.

A few years after my encounter with M, I appeared in a Toronto bail court (on Zoom) as a criminal duty counsel.[43] That day, the crown prosecutor was a tall, large-built, no-nonsense, bearded Black man. The presiding jurist was a charming, esoteric, older Black man. It took several cases before I realized what was evident to the court staff and my clients: three Black men were running the court. I had never experienced this dynamic in my years of legal practice. Yet, for a brief moment—one that felt staged, unreal, imagined—I experienced belongingness. I imagined myself no longer being perceived as an accused person clothed in lawyer's garbs—so I laid my burden at the door and got down to the business of practicing law. With my tumultuous and noisy thoughts suppressed, I discovered something: I am a decent lawyer. And with that realization, I managed to beat back, albeit for a short time, the agonizing and disquieting feelings of self-doubt and imposter syndrome that conspire to confine and rob me of my dignity and self-worth. Paradoxically, I found a rejuvenated sense of value in a vista that continues to destroy Black lives.

What I entered was a new frontier that rendered me dazed and confused—disassociated. I would describe the feeling as serene discomfort: knowing that what was occurring was aberrational but still savouring the moment of peace. A peace that I associated with white masculinity over my years of practice. Never could I have imagined serenity in a courtroom—a vista that, even before earning my robes (licence to practice law), provoked crippling anxiety. I see courtrooms as modern auction blocks where shackled Black bodies are paraded before white eyes for dissection, valuation, and destruction. Law continues to destroy Black lives—it strips Black peoples of culture, dignity, or a sense of identity. The misfortunes are intergenerational—the woes perpetual. My life force is rendered inert by law's stifling grip. The law, or so the story goes, has brought me a long way from slavery and lynching to equality.

But I am a stubborn unbeliever. In its genocidal fervour, the law has brought more death and misfortune to Black lives than any natural disaster. Law has drowned millions of Africans in the middle passage and enslaved millions more on stolen lands. The law saw value in a corporate charter but none in an African. Indeed, Black value is still a hotly debated legal issue. Yet, paradoxically, we seek to restore value to Black lives through a system that continues to erode their value. It seems that self-worth and

43. Due to the Covid-19 pandemic, most criminal proceedings in Ontario have moved online.

value are codified in statutes, the common law, and other legal instruments. Thus, Black dignity relies on the passions of judges and legislators—the same philosophers and kings who, in their infinite wisdom, supported the inhumane treatment of Black bodies before, during, and after slavery.[44]

Strangely, in that courtroom, on that day, before that jurist and standing beside that crown, I dared to imagine the law's liberatory possibilities—not simply as a "supple tool of power" for the powerful and ignoble.[45] Before that day, law and liberation existed as mutually exclusive concepts—never to be spoken unless in parody. But in my dream-like reality, I found no levity in law's ideals; I took law's claims seriously. That esoteric, charming jurist and that burly crown prosecutor had shifted my perception of law. They made me a cautious believer. I was frightened but emboldened by the liberatory potential of the dynamic. But like all things deemed too good to be true, reality swooped in and abruptly awoke me to face the fragility and fleetingness of the moment. It ended before it truly began. When the court adjourned, I stayed online, hoping to drift away, for even another minute, back into the dream-like reality before being thrust into the despairing and prevailing dynamic that awaited me in my scholarship and criminal defence practice. So, perhaps in violation of section 136 of the *Courts of Justice Act*, I captured the moment through a screenshot of the three of us to remind myself that it was real, despite its duration and brittleness.[46] I remind myself daily that it happened—I have the picture to prove it! At that moment, I could not help but wonder if my friend M would have had any trepidations about our "*black asses*" appearing before that court.

2. *Are we seeking the elusive? The paradox of visibility*

When I reflect on the above experiences, it appears that both M and I harbour, consciously or unconsciously, a profound mistrust of the criminal justice system but implicit hope that change is possible. For M, that hope resided in a white lawyer's ability to successfully deploy a race-based *Charter* argument.[47] For me, it was the possibility, perhaps the audacity, to imagine that my rare experience could become the norm.[48] M was most

44. See e.g. Barry Cahill, "Slavery and Judges of Loyalist Nova Scotia" (1994) 43 UNBLJ 73, online: <journals.lib.unb.ca/index.php/unblj/article/view/29646/1882524829> [parma.cc/4KQ3-N2EF].

45. Oliver Wendell Holmes is quoted as saying that his epitaph should be "Here lies a supple tool of power." See Sanford Levinson & JM Balkin, "The 'Bad Man,' The Good, and The Self-Reliant" (1998) 78:3 BUL Rev 885 at 902, DOI: <20.500.13051/1942>.

46. *Courts of Justice Act*, RSO 1990, c C-43, s 136 (prohibits electronic recordings of court hearings, subject to exceptions).

47. *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 [*Charter*].

48. Having the audacity to imagine a court where the judge and both lawyers are Black

likely the victim of racial profiling, but that defence, coupled with our mutual Blackness, was more risk than he wanted to undertake. He never told me about the case's outcome, but I will never forget how the experience left me feeling. On the one hand, I understood his apprehension because I would have done or at least thought the same had I been in his position. However, on the other hand, I was convinced that he was wrong. But was he wrong? Or was I simply embarrassed or upset by his decision? Perhaps he merely chose the most effective means to get the best trial outcome. Though I would have made the same arguments as M's white lawyer, for M, it would seem the risk to his liberty did not reside in the argument per se, but rather his lawyer: me!

For M, the amplification of his race—defended by a Black lawyer, coupled with a race-based defence—would preclude him from receiving a favourable outcome. Therefore, he found it strategically advantageous to mute his race in a bid to avoid the ire of a white judge that may have taken exception to both our "*black asses*" making a race-based *Charter* argument. M feared revealing himself in a well-known hostile vista for Black Canadians.[49] He instead, and perhaps naively, sought invisibility by shrouding himself in the aura of his white lawyer's privilege of belonging. M's manoeuvre is reminiscent of Frantz Fanon's existential crisis when he encountered his own Blackness. Fanon asserted: "…I slip into corners, I remain silent, I strive for anonymity, for invisibility. Look, I will accept the lot, as long as no one notices me! …My Blackness was there, dark and unarguable. And it tormented me, pursued me, disturbed me, angered me."[50]

I coined the term "paradox of visibility" to describe this specific identity crisis plaguing many Black Canadians.[51] The paradox of visibility

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reveals for us the absurdity of a court where they are all white. See Richard Delgado, "Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law" (1993) 45:4 Stan L Rev 1133 at 1143, online: >scholarship.law.ua.edu/fac_essays/57/> [perma.cc/XM84-4KJ3]. See also Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987). As Ruha Benjamin asserted: "Toward that end, the late critical race scholar, Harvard professor Derrick A Bell, encouraged a radical assessment of reality through creative methods and racial reversals, insisting that to see things as they really are, you must imagine them for what they might be." Ruha Benjamin, "The New Jim Code? Race, Carceral Technoscience, and Liberatory Imagination" (19 October 2019) at 00h:42m:24s, online (video): *Othering & Belonging Institute* <belonging.berkeley.edu> [perma.cc/U9QG-AMY3].

49. See e.g. Wortley, Owusu-Bempah & Lin, *supra* note 11. See generally Scot Wortley & Akwasi Owusu-Bempah, "Race, Ethnicity, Crime and Criminal Justice in Canada" in Anita Kalunta-Crumpton, ed, *Race, Ethnicity, Crime and Criminal Justice in the Americas* (New York: Palgrave Macmillan, 2012).

50. Fanon, *supra* note 41 at 116-117.

51. See Danardo S Jones, *Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing* (LLM Thesis, York University, Osgoode Hall Law School, 2019) [unpublished].

concept seeks to understand and (re)conceptualize how introducing race consciousness in the criminal process can act as a double-edged sword. As early as 1987, Professor Martha Minow examined a similar concern in the American context. She argued that: "[f]ocusing on differences poses the risk of re-creating them. …Yet denying those differences undermines the value they may have to those who cherish them as part of their own identity."[52] She characterized this as the dilemma of difference. However, the paradox of visibility recognizes that, for Black people, 'denying difference' is not even on the table as an option: Black people are read as Black and subjected to so much explicit and implicit bias that claims about "colour-blindness" are often disingenuous or naïve.

Blackness becomes even more prominent under the gaze of whiteness.[53] Under this gaze, Blackness is transformed—mutated into something alien. In those moments, the Black body reconfigures in both meaning and identity. The identity on display and under scrutiny is that of the pathologized, dehumanized, and undignified Black body, which is not a Black creation, but despite its origins, Black people are viscerally aware of the Blackness engrafted on them. It is now their burden to bear. Ralph Ellison aptly describes the paradoxicality of race visibility in the *Invisible Man* when he writes:

> I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.[54]

Indeed, Black people who strive for visibility—as persons in our society who are seen as individuals and not as ciphers or placeholders onto which we project a standardized set of characteristics—are, in the eyes of whiteness, paradoxically rendered invisible. In *Black Skin, White Masks*, Frantz Fanon explained that when he undertook to construct his own "…historico-racial schema. The elements that I used had been provided for me not by 'residual sensations and perceptions primarily of a tactile, vestibular, kinesthetic, and visual character,' but by the other, the white man, who had woven me out of a thousand details, anecdotes, stories."[55]

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52. Martha Minow, "Foreword: Justice Engendered" (1987) 101:1 Harv L Rev 10 at 12, DOI: <10.2307/1341224>.
53. See Sherene H Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998).
54. Ralph Ellison, *Invisible Man* (New York: Random House, 1947) at para 1 of the Prologue.
55. Fanon, *supra* note 41 at 111.

This ontological dismemberment and epistemic violence is an ongoing psychic crisis that shapes Black self-perception: Yearning for existence but met with only nonexistence. Fanon puts it best when he asserts, "[t]o state reality is a wearing task. But, when one has taken it into one's head to try to express existence, one runs the risk of finding only the nonexistent."[56]

Black people are harmed by the fiction of colour blindness that elides attention to Blackness and the vulnerability to anti-Black racism that comes with an express focus on Blackness. On this account, Black Canadians, it would seem, are caught in a veritable "racial catch-22." Indeed, there is no "outrunning" one's Blackness as racism is woven into our institutions' fabric and frames the terms of reference for racial ordering in society. [57] As Fanon asserted, "I cannot go to a film without seeing myself. I wait for me. In the interval, just before the film starts, I wait for me. The people in the theater are watching me, examining me, waiting for me. A Negro groom is going to appear."[58] The Black "self" that Fanon describes as "unalterable, …dark, and unarguable" lay in wait to capture perceptions contemplating escape.[59] W.E.B. Du Bois asserted over a century ago that Black people exist in "a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world."[60] For Du Bois, Blacks embody "two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder."[61]

In the criminal justice context, the concern with this duality is that a particular type of Blackness—one that is tragic and pathological—is provided as the lens through which to analyze Black people's conduct. Dismantling these misleading racial epistemologies is complex and requires getting real about race and the difficulties we face in imagining transformation without utilizing white epistemologies (e.g. rights discourse)—Black people, arguably, remain discursively shackled.[62]

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56. *Ibid* at 137. See also "Toni Morrison Reads 'English and the African Writer' by Chinua Achebe" (26 February 2008), online (podcast): PEN America <pen.org> [perma.cc/B5FB-BKYQ]: "The function, the very serious function of racism is distraction. It keeps you from doing your work. It keeps you explaining, over and over again, your reason for being. Somebody says you have no language and you spend twenty years proving that you do. Somebody says your head isn't shaped properly so you have scientists working on the fact that it is. Somebody says you have no art, so you dredge that up. Somebody says you have no kingdoms, so you dredge that up. None of this is necessary. There will always be one more thing."
57. Delgado & Stefancic, *CRT: An Introduction*, *supra* note 7 at 7.
58. Fanon, *supra* note 41 at 140.
59. *Ibid* at 117.
60. WEB Du Bois, *The Souls of Black Folk* (Chicago: Blue Heron Press, 1903) at 2.
61. *Ibid*.
62. See e.g. Kristie Dotson, "Accumulating Epistemic Power: A Problem with Epistemology"

Indeed, epistemologies have power. They have the power not only to transform worlds, but to create them. And the worlds that they create can be better or worse. For many people, the worlds they create are predictably and reliably deadly.[63] Patricia Williams argues that:

> [t]he black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding oneself.[64]

How can Black Canadians discover themselves through rights rhetoric that has been deployed historically to deny them visibility and only make them visible in the most tragic light? According to Williams, "[t]he vocabulary of rights speaks to an establishment that values the guise of stability and from which social change for the better must come (whether it is given, taken, or smuggled)."[65] I would add that we should intentionally attend to Black ways of being and knowing *on its own terms*.[66] Indeed, we should eschew well-worn discursive practices, ontologies, and epistemologies and focus on seeing Black lives in terms of radical possibilities. We must aim to see Black lives outside of white supremacist descriptive categories. Williams refers to this as a "slippage of perception."[67] To bring about the slippage, she argues, "…requires listening at a very deep level to the uncensored voices of others."[68] However, it may be impossible to abandon the discursive practices and episteme developed by colonial white supremacist society. That said, arguably, within the realm of Black thought lie resistance, liberation, and dignity-restoring strategies. We must begin to imagine the impossible, the fantastical, the unimaginable, and the non-white. As Fanon aptly stated, "[since] the other hesitate[s] to recognize me, there remain[s] only one solution: to make myself known."[69]

The allegorical introduction to Patricia Williams' *The Alchemy of Race and Rights* helps further illuminate the paradox of visibility. Williams tells

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(2018) 46:1 Philosophical Topics 129, online: <www.jstor.org/stable/26529454> [perma.cc/72ZE-52FC]. See generally Nora Berenstain et al, "Epistemic Oppression, Resistance, and Resurgence" (2021) 21 Contemporary Political Theory 283, DOI: <10.1057/s41296-021-00483-z>.

63. Berenstain et al, *supra* note 62.
64. P Williams, *supra* note 17 at 102.
65. *Ibid* at 101.
66. See James Joseph Scheurich & Michelle D Young, "Coloring Epistemologies: Are Our Research Epistemologies Racially Biased?" (1997) 26:4 Educational Researcher 4, DOI: <10.2307/1176879>.
67. P Williams, *supra* note 17 at 101.
68. *Ibid* at 101.
69. Fanon, *supra* note 41 at 115.

the story of the priest-gods who grew tired of their "superstanding." So, they decided to set out in boats to the Deep Blue Sea to wander. When they reached a point far beyond the heavens, they dropped their anchors and experienced godhood once more: "At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far overhead, which they thought were lifelines meant for them."[70] Are my and M's hopes, indeed the hopes of all those seeking visibility and harbouring the audacity to confront and eradicate systemic anti-Black racism in the criminal justice system, real examples of those mortals hopelessly reaching for elusive lifelines? More importantly, can CRT-inspired criminal litigation generate 'lifeline jurisprudence' that can reach the people at the bottom or is that concept itself just a paradox?[71]

II. *If you don't know, now you know: A primer on CRT*

The above narrative and discussion are inspired by my understanding of CRT, particularly its power to give space and voice to radical and oppositional voices. It aimed to address why CRT is a powerful tool for examining race in the criminal justice system. Before I further explore "why CRT," I will briefly discuss what CRT is. However, while restating CRT's central precepts may clarify the theory's assumptions about race, law, and power, it does not tell us why, and perhaps more importantly, if CRT is a helpful lens for examining systemic anti-Black racism in the criminal justice system.

CRT was developed by American law professors who were critical of the rights revolution during the civil rights era.[72] These mostly racialized scholars, Black and Latinx, challenged the rights orthodoxy that permeated the American legal academy.[73] CRT scholarship shares some similarities with Critical Legal Studies (CLS).[74] CLS scholars challenged notions that promoted law as apolitical, neutral, and value-free.[75] An important CLS insight is the principle of legal indeterminacy: A rejection "that law is a

70. Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991) at ii.

71. *Ibid* at 8 (for P Williams, theoretical understanding and social transformation need not be oxymoronic).

72. See Delgado, *supra* note 7 at 40.

73. See generally Crenshaw et al, *supra* note 7. See also Delgado & Stefancic, *CRT: An Introduction*, *supra* note 7.

74. See Crenshaw et al, *supra* note 7 at xiii. For a comprehensive history of CLS, see e.g. Roberto Mangabeira Unger, "The Critical Legal Studies Movement" (1983) 96:3 Harv L Rev 561, DOI: <10.2307/1341032>.

75. See e.g. Alan Hunt, "The Theory of Critical Legal Studies" (1986) 6:1 Oxford J Leg Stud 1, DOI: <10.1093/ojls/6.1.1>.

system or is able to resolve every conceivable problem."[76] However, CLS failed to develop a comprehensive and critical account of how "race and racial power are constructed and represented" in society.[77] Thus, CRT's primary intervention in critical scholarship was placing race at the core of legal analysis. It shifted race and its intersecting realities (e.g. gender, class) from the periphery of legal scholarship and made it the focus of sustained legal analysis about racial inequality. CRT was designed to analyze how the law and power/politics converge to produce predictable racial outcomes.[78] That said, critical race theorists are not merely concerned with studying the "[relationship] between law and racial power but to change it."[79] In that sense, CRT embodies an activist dimension.[80]

CRT scholars reject notions of neutrality and objectivity in legal scholarship about race and power. Kimberlé Crenshaw posits that there exists "no scholarly perch outside the social dynamics of racial power from which merely to observe and analyze."[81] Scholarship is inherently political.[82] No scholarly tradition is insulated from this observation. Arguably, we tell stories through our scholarship. There are, however, different methodological and epistemological dimensions to these tales.[83] CRT scholars accept that CRT is not "neutral" but recognize that the same is true of other forms of scholarship.[84] All scholarly work reflects or expresses the author's paradigm, whether implicitly or explicitly—and to the extent that some scholarship registers as "neutral" it is not because that scholarship is, in fact, more objective or pure, but rather because the scholar who produced it is privileged enough to be in the mainstream.[85]

CRT is organized around six core tenets. First is the ordinariness of racism: racism is woven into the fabric of our institutions and frames the

76. Raymond Wacks, *Philosophy of Law: A Very Short Introduction*, 1st ed (Oxford, UK: Oxford University Press, 2006) at 96.
77. Crenshaw et al, *supra* note 7 at xiii.
78. *Ibid* at xiii.
79. *Ibid*.
80. *Ibid* at xiii. See generally Colette Cann & Eric DeMeulenaere, *The Activist Academic: Engaged Scholarship for Resistance, Hope and Social Change* (Gorham, ME: Myers Education Press, 2020).
81. Crenshaw et al, *supra* note 7 at xiii.
82. *Ibid*.
83. Laurence Parker & Marvin Lynn, "What's Race Got to Do With It? Critical Race Theory's Conflicts with and Connections to Qualitative Research Methodology and Epistemology" (2002) 8:1 Qualitative Inquiry 7, DOI: <10.1177/107780040200800102>.
84. Crenshaw et al, *supra* note 7 at xiii.
85. See e.g. Frances Henry et al, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (Vancouver: UBC Press, 2017). See also Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87:8 Mich L Rev 2411, online: <repository.law.umich.edu/mlr/vol87/iss8/10/> [perma.cc/555M-4AJM].

terms of reference for racial ordering in society.[86] Second, racial realism, which is related to the intractability of race concept, recognizes that "Black people will never achieve racial equality…[e]ven those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance."[87]

The third tenet is the critique of liberalism. According to Delgado and Stefancic, "critical race theory is marked by a deep discontent with liberalism, a system of civil rights litigation and activism characterized by incrementalism, a faith in the legal system, and hope for progress, among other things."[88] Indeed, CRT scholars were concerned that hard-won civil rights gained in the 1960s had stagnated and, in some cases, were being "rolled back."[89] "New theories and strategies" became necessary to explicate and combat newer forms of structural racism, which were subtler than the earlier, more explicit "variety."[90]

The fourth is the "social construction thesis," which understands that "race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient."[91] Framed this way, race takes on pseudo-scientific legitimacy despite having no basis in biology.[92] According to Crenshaw, although race is a social construct, "race was nonetheless 'real' in the sense that there is a material dimension and weight to the experience of being 'raced' in American society, a materiality that in significant ways has been produced and sustained by law."[93]

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86. Delgado & Stefancic, *CRT: An Introduction, supra* note 7 at 8.
87. Derrick Bell, "Racial Realism" (1992) 24:2 Conn L Rev 363 at 373. See also Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (New York: Basic Books, 1992) [Bell, *Bottom of the Well*]. Bell's thesis is not without its critics, see e.g. Willie Abrams, "A Reply to Derrick Bell's *Racial Realism*" (1992) 24:2 Conn L Rev 517. But it enjoys wide support, see e.g. Jess M Otto, "Derrick Bell's Paradigm of Racial Realism: An Overlooked and Underappreciated Theorist" (2017) 20:2 Radical Philosophy Rev 243, DOI: <10.5840/radphilrev201712066>.
88. Delgado & Stefancic, *CRT Cutting Edge, supra* note 7 at 7.
89. *Ibid* at 40.
90. *Ibid* at 2.
91. Delgado & Stefancic, *CRT: An Introduction, supra* note 7 at 9.
92. See Cheryl I Harris, "Whiteness as Property" in Crenshaw et al, *supra* note 7 at 283. See also Theodore W Allen, *The Invention of the White Race, Volume 1: Racial Oppression and Social Control*, 2nd ed (London, UK: Verso, 1997). Some authors suggest that biological race and social constructivism is not incompatible, see e.g. Robin O Andreasen, "Race: Biological Reality or Social Construct?" (2000) 67:S3 Philosophy of Science 653, online: <www.jstor.org/stable/188702> [perma.cc/GW85-7Z68].
93. Crenshaw et al, *supra* note 7 at xxvi.

The fifth tenet is intersectionality, which broadens CRT's theoretical reach by inviting scholars to explore the significance of race at various intersecting points of vulnerabilities.[94] CRT scholars, most notably Kimberlé Crenshaw, adopt an intersectional framework that analyzes how multiple sources of oppression can "intersect" to create an axis of vulnerability that is more than just the sum of its parts. Hence, it is not enough for us to sequentially analyze each locus of oppression; rather, the intersection must be apprehended on its own terms.[95] Finally, the voice of colour thesis appreciates "…that because of their different histories and experiences with oppression black, [Indian], Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know. Minority status, in other words, brings with it a presumed competence to speak about race and racism."[96] This dimension of CRT scholarship has come under criticism by scholars for lacking methodological rigour.[97] Admittedly, the voice-of-colour thesis co-exists in an uneasy tension with anti-essentialism and intersectionality insofar as it ascribes a higher degree of competency to engage in race talk to people of colour. Delgado and Stefancic assert that "[t]he 'legal storytelling' movement urges black and brown writers to recount their experiences with racism and the legal system and to apply their own unique perspectives to assess law's master narratives."[98]

III. *Et tu, Canada: The Black experience in Canada*

So, what does CRT reveal about the Black experience in Canada? While slavery existed in Canada, "[t]he study of slavery…is not a significant part of the Canadian historical narrative."[99] This less-examined history is crucial, for as Afua Cooper aptly observed, "slavery was the context in

94. See e.g. Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43:6 Stan L Rev 1241, DOI: <10.2307/1229039>; Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 Stan L Rev 581, DOI: <10.2307/12288886>; Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989 U of Chicago Legal F 139, online: <chicagounbound.uchicago.edu/uclf/vol1989/iss1/8/> [perma.cc/AE6Z-THUW].

95. *Ibid*.

96. Delgado & Stefancic, *CRT: An Introduction*, *supra* note 7 at 10. See generally Alex M Johnson Jr, "Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship" (1994) 79:4 Iowa L Rev 803.

97. See e.g. Johnson Jr, *supra* note 96. See generally *supra* note 35.

98. Delgado & Stefancic, *CRT: An Introduction, supra* note 7 at 10.

99. Ken Donovan, "Slavery and Freedom in Atlantic Canada's African Diaspora: Introduction" (2014) 43:1 Acadiensis 109 at 110, online: <www.jstor.org/stable/24329578> [perma.cc/BYB2-6CGQ]. See also Robin W Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1997) at 142-143.

which current race relations were created."[100] Indeed, current attitudes and stereotypes about Black Canadians, for example, their alleged propensity for laziness, criminality, and violence, found their genesis in the crucible of slavery.[101] Long gone are the days of slavery, but its contemporary legacies are equally as virulent and destructive to the bodies of Black Canadians.[102] Given the strikingly similar conditions Black people face in both the US and Canada, Canadian scholars and activists can gain critical insights from a closer examination of CRT's central precepts. Like the US Black experience, anti-Black racism has not abated in Canada despite adopting legal standards that guarantee substantive equality.[103] Indeed, we continue to witness an alarming proliferation of anti-Black racism in Canada. Racism does not abate but mutates in the face of opposition. Thus, inoculating against one strain of racism is futile, given the near-certainty of a mutated and potentially more resistant strain.

Structural anti-Black racism is expressed through various interrelated methods and institutions.[104] For example, both Michelle Alexander, writing in the US context, and Robyn Maynard writing in the Canadian context, agree that post-slavery, the over-criminalization of Black Canadians became a conspicuous method of controlling Black bodies.[105] There is ample evidence that the criminal justice system is infected with systemic anti-Black racism and continues to have devastating impacts on Black lives.[106] However, while courts have acknowledged this fact,[107] this

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100. Joshua Ostroff, "Colonial Canada Had Slavery For More Than 200 Years. And Yes, It Still Matters Today" (2 December 2017), online (blog): *HuffPost* <huffpost.com> [perma.cc/ZW8Z-LLUD]. See Afua Cooper, "Acts of resistance: Black men and women engage slavery in Upper Canada, 1793-1803" (2007) 99:1 Ontario History. See also Kenneth Morgan, *A Short History of Transatlantic Slavery* (London, UK: IB Tauris, 2016).

101. See James W St G Walker*, Racial Discrimination in Canada: The Black Experience* (Ottawa: The Canadian Historical Association, 1985) at 8.

102. See Maynard, *supra* note 10.

103. *Charter*, *supra* note 47. See Canadian Human Rights Commission, *The Evolution of Human Rights in Canada*, by Dominique Clément, Will Silver & Daniel Trottier, (Ottawa: Minister of Public Works and Government Services, 2012).

104. See e.g. Carl James & Tana Turner, "Towards Race Equity in Education: The Schooling of Black Students in the Greater Toronto Area" (2017), online (pdf): *York University* <edu.yorku.ca> [perma.cc/ GZZ6-F9F7]; Ontario Association of Children's Aid Societies, "One Vision One Voice: Changing the Ontario Child Welfare System to Better Serve African Canadians" (2016), online (pdf): *OACAS* <oacas.org> [perma.cc/ N4HX-F8BN].

105. See Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (New York: New Press, 2010); Maynard, *supra* note 10.

106. See e.g. Ontario Human Rights Commission, *supra* note 11; Nova Scotia Human Rights Commission, *Halifax, Nova Scotia: Street Checks Report*, by Scot Wortley, (Halifax: NSHRC, 2019); Wortley, Owusu-Bempah & Lin, *supra* note 11.

107. See e.g. *R v Parks* (1993), 63 OR (3d) 417, 8 CR (6th) 203 (ONCA); *R v Williams*, [1998] 1 SCR 1128, 15 CR (5th) 227; *R v Golden*, 2001 SCC 83; *R v Spence*, 2005 SCC 71; *R v Grant*, 2009 SCC 32; *Le*, *supra* note 4; *Morris*, *supra* note 11; *R v Borde*, [2003] 63 OR (3d) 417, 168 OAC 317 (ONCA);

recognition has not translated into any radical, structural changes to the system.[108] Some scholars, notably Professor Tanovich, have criticized both lawyers and judges for failing to challenge and eliminate the embedded presumptions of the criminal justice system by their reluctance to engage in *Charter*-based litigation.[109] Tanovich argues that the *Charter* has had minimal impact on racial injustice in Canada since its inception. Racial justice, he asserts, "has not had a chance to grow because of trial and appellate lawyers' failure to engage in race talk in the courts and a failure of the judiciary to adopt appropriate critical race standards when invited to do so."[110] But as Harry Glasbeek remarked, "[t]he…criminal justice system…start[s] off from the assumption that [it]…is a neutral system. Equality before, according to and under the law, are considered the norm. Law is assumed not to be racist."[111] Arguably, the criminal justice system manufactures "truths" about Black bodies as bounded by risk, violence, and dangerousness, then harnesses these to justify the harsh and degrading treatment imposed on Black Canadians.[112] Put another way, the criminal justice system not only acts upon stereotypical notions about Black Canadians; it is also instrumental in their creation.

To the extent that Black Canadians are stereotyped as "dangerous," "violent," and "criminal," they are disproportionately likely to attract scrutiny and harsh treatment from criminal justice actors like police, prosecutors, and judges.[113] A predictable result is the overrepresentation of

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R v Hamilton, (2004), 241 DLR (4th) 490, 72 OR (3d) 1 (ONCA); *Anderson*, *supra* note 4.

108. Instead, what we have witnessed are small, incremental steps towards what one can hope is radical, structural change at some point in the future. See generally Jones, "Judicial Embargo," *supra* note 23.

109. See generally Tanovich, "Charter of Whiteness," *supra* note 27.

110. *Ibid* at 656-657.

111. HJ Glasbeek, *A Report on Attorney-General's Files, Prosecutions and Coroners Inquests Arising Out of Police Shootings in Ontario to the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Commission on Systemic Racism in Ontario Criminal Justice System, 1993).

112. See generally Jones & Sheehy, *supra* note 30. For a historical analysis see e.g. Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts 1858-1958* (Toronto: University of Toronto Press, 2010); Camisha Sibblis, "Expulsion Programs as Colonizing Spaces of Exception" (2014) 21:1 Race, Gender & Class 64 at 75, online: <www.jstor.org/stable/43496960> [perma.cc/F5QM-5RBG], citing Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008). Professor Sibblis relies on Sherene Razack's idea that risk is read on the Body and argues that "Dominant ideology about the black body belies how behaviours are interpreted and used to gauge propensity for harmful behaviours and predict future harm, particularly because black bodies are believed to be innately savage and violent."

113. David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); Akwasi Owusu-Bempah, "Race and Policing in Historical Context: Dehumanization and the Policing of Black People in the 21st Century" (2017) 21:1 Theoretical Criminology 23, DOI: <10.1177/1362480616677493>; Toni Williams, "Sentencing Black Offenders in the Ontario Criminal Justice System" in Julian V Roberts and David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 200; Akwasi Owusu-Bempah, "Race, Crime, and Criminal Justice

Black Canadians among criminally accused persons and offenders. That overrepresentation, in turn, serves to validate the unfavourable stereotypes about Black Canadians that it helps to produce. In essence, the risk coded on Black bodies becomes self-reinforcing through a negative feedback loop: as more Black people are criminally punished, more Black people are regarded as deserving of criminal punishment, and vice versa.

However, despite widespread recognition of the overwhelming evidence of the role that anti-Black racism plays in the criminal justice system, and widespread agreement on the need to redress it, Black Canadians continue to receive unfair treatment at all stages of the criminal justice process.[114] Does accepting the danger and intractability of racism provide opportunities for resistance?[115] But how can acknowledgment of complicity in systemic anti-Black racism and a commitment to its eradication co-exist?[116] This dilemma reveals the inherent paradoxes we confront when addressing anti-Black racism in the criminal justice system.

IV. *Anchoring lifeline jurisprudence?*

Having acknowledged the criminal justice system's anti-Blackness, do we persist with 'insider' responses like jurisprudential reform efforts, test cases, and legislative endeavours? Or do we instead imagine what a clean break or a rejection of law might look like and insist on a more ambitious agenda, considering past failures of incremental responses that reproduce systemic problems?[117] Phrased another way, can we confront anti-Blackness in the criminal justice system by utilizing existing structures (i.e. jurisprudential and legislative reforms) and remain faithful to radical traditions (i.e. abolitionism, critical race theory) that seek to disrupt or, in some cases, dismantle these very structures?[118]

Is seeking change in a hostile system undesirable or, worse, impossible? CRT scholars argue that racial subordination is entrenched within our legal paradigms and has set the terms of reference for criminal justice discourses of race and crime. This entrenched hostility creates a

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in Canada" in Sandra M Bucerius and Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford, UK: Oxford University Press, 2014); Julian V Roberts & Anthony N Doob, "Race, Ethnicity, and Criminal Justice in Canada" (1997) 21 Crime & Justice 469, DOI: <10.1086/449256>.

114. See Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report* (Ottawa: Office of the Correctional Investigator, 2013).

115. Bell, "Permanance of Racism," *supra* note 12 at 1106-1108.

116. See e.g. *Morris, supra* note 11 at para 1.

117. See Bell, *Faces at the Bottom of the Well*, *supra* note 87 at 3; Bell, "Permanance of Racism," *supra* note 12 at 1106.

118. See e.g. Alfieri, *supra* note 17.

closed-loop system of oppression—what critical race scholars refer to as structural determinism: systems, as a result of their structures and language, cannot rectify particular kinds of injustices.[119] Arguably, we must accept the inherent limitation of doctrinal analysis in understanding and, indeed, remedying structural racism in the administration of criminal justice.[120] In the face of this racial realism, we must, nonetheless, promote a degree of instrumentalism, as a sort of harm-reduction strategy, in light of the fact that real people are caught up in the system at this very moment, and there is an urgent need to reduce the harms experienced by these individuals.[121] This harm-reduction stratagem requires forming an uneasy alliance with a hostile system—a type of jurisprudential détente. We have witnessed this détente in recent appellate and Supreme Court of Canada decisions.[122]

Admittedly, these jurisprudential shifts may seem modest, but they are not insignificant and have the potential to positively impact the lives of Black Canadians currently before the criminal system. Indeed, as Jack Balkin puts it, "[r]ecourse to law forces the powerful to talk in terms in which the powerless can also participate and can also make claims."[123] Williams pointedly observed that:

> "Rights" feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate reconstructing (deconstruction is too awful to think about!) at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no-power. The concept of rights, both positive and negative, is a marker of our citizenship, our participatoriness, our relation to others.[124]

There are inherent risks in using rights talk. But we can both claim and contest the rights that we claim.[125] As Balkin argues:

> Law may offer an unjust and unwieldy system for apprehending, incarcerating, and destroying human beings. It may also offer important elements of procedural fairness, equality, and human dignity. It does both

119. See Delgado & Stefancic, *CRT: An Introduction*, *supra* note 7 at 31. See generally Butler, *supra* note 14.
120. Tanovich, "Golden Principle," *supra* note 16 at 658.
121. See e.g. Eve Tuck and K Wayne Yang, "Decolonization is Not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1 at 21-22, online: <jps.librar.utoronto.ca/index.php/des/article/view/18630> [perma.cc/L8JD-63X5]. See generally Vincent Wong, "Ethno-racial Legal Clinics and the Praxis of Critical Race Theory in Canada" (2020) 16:1 JL & Equality 63.
122. *Le*, *supra* note 4; *Morris*, *supra* note 11; *Anderson*, *supra* note 4.
123. Jack M Balkin, "Critical Legal Theory Today" in Francis J Mootz III (ed), *On Philosophy in American Law* (Cambridge, UK: Cambridge University Press, 2009) 64 at 67.
124. P Williams, *supra* note 17 at 104.
125. Balkin, *supra* note 123 at 65.

> of these things simultaneously, and it may be difficult to fully separate its harmful and beneficial aspects in practice.[126]

Accepting law's ambivalence does not necessitate a retreat from a commitment to radical structural change. However, there must be an explicit focus on the practical and ethical questions that arise when one mounts a total, radical critique of interconnected systems while engaged in and committed to harm reduction critical race-inspired litigation.[127] When we assess *how* and *why* the system has evolved to this point and acknowledge its intrinsic anti-Blackness, we face a conundrum: do we attempt reform from clear-eyed, informed incrementalism? Or do we regard incrementalism as, at best, doomed to fail and, at worst, a fig leaf that helps perpetuate racial inequalities? On the other hand, are there latent strategic possibilities within the system to achieve radical transformative changes? Moreover, should we pursue a radically enlightened and reimagined form of incrementalism as a realistic path forward to achieve racial justice?[128]

A critical race lawyer or scholar can pursue incrementalism while remaining committed to radical, structural change.[129] Indeed, as someone who has worked in strategic litigation and anti-racism advocacy,[130] I am familiar with the impulse to focus on "big picture goals"—sometimes at the expense of individuals whose cases are rejected because they have "bad facts" and are not good candidates for advancing litigation strategies that have the potential to bring about sustained legal change that would benefit many. Both approaches are problematic in some ways and laudable in others. The late critical race scholar, Derrick Bell, discussed this dilemma in the context of school desegregation litigation. He found that civil rights lawyers were attempting to serve two masters—the client on the one hand and the promotion of a progressive agenda on the other.[131] In the context of litigation work on behalf of Black people who are involved with the criminal justice system, both approaches measure their success in roughly the same way: does the strategy help to diminish mass criminalization and mass incarceration—whether for an individual client or in terms of the statistical averages for Black people in Canada.

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126. *Ibid*.
127. See generally Tanovich, "Charter of Whiteness," *supra* note 27.
128. See Amna A Akbar, "Toward a Radical Imagination of Law" (2018) 93:3 NYUL Rev 405, online: <nyulawreview.org/wp-content/uploads/2018/06/NYULaw-93-3-Akbar.pdf>.
129. *Ibid.* See e.g. Allegra M McLeod, "Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives" (2012-2013) 8 Unbound: Harvard J Leg Left 109, online: <legalleft.org/wp-content/uploads/sites/11/2014/07/McLeod.pdf> [perma.cc/LA84-R88Z].
130. I was the Director of Legal Services at the African Canadian Legal Clinic.
131. See generally Bell Jr, *supra* note 15.

These measures are important, but they are also incomplete insofar as they do not pay sufficient regard to how Black people—as individuals and as diverse community members—measure success; and it certainly does not pay sufficient attention to how they calculate costs, including costs to their individual and collective dignity.[132] Indeed, the creation of lifeline jurisprudence must focus on the cost to Black dignity.[133] As Anthony Alfieri asserts in his defence of community lawyering:

> [f]undamental to that break [from traditional conceptions of lawyering] is the incorporation of difference-based community voices and stories into the lawyering process. From critical theories of race, [we] also might interweave the values of community participation and civic dialogue, especially between majority and minority communities. Only from dialogue will come a moral recognition of common cross-racial interests in economic justice and social solidarity.[134]

Therefore, critical race lawyers must listen to the voices at the bottom of the well[135] or the Deep Blue Sea.[136] Arguably, a society's justness is measurable by its treatment of those at the bottom. Indeed, when viewed solely from the dominant class's perspective, the criminal justice crisis may not seem as acute.[137] As James Baldwin asserts: "if one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected—those, precisely, who need the law's protection most!—and listens to their testimony."[138] However, how do we locate, shape, create, or amplify power in historically powerless discourses? How can we create an oppositional, counter-hegemonic jurisprudence that challenges prevailing narratives around criminal justice and race? What does effective action look like from the perspective of those at the bottom?

Arguably, "[i]n human history there is always something beyond the reach of dominating systems, no matter how deeply they saturate society, and this is what makes change possible…"[139] Critical race lawyers must decentre white voices on Black experiences and tell the stories of

132. See Alfieri, *supra* note 17 at 655-656.
133. *Ibid*.
134. *Ibid* at 655.
135. See Bell, *Bottom of the Well*, *supra* note 87.
136. See P Williams, *supra* note 70 at ii.
137. See Alfieri, *supra* note 17 at 655.
138. James Baldwin, *No Name in the Street* (New York: Vintage Books, 1972) at 149.
139. Edward W Said, *The World, The Text and The Critic* (Cambridge, MA: Harvard University Press, 1983) at 246-247.

the primary targets of the criminal justice system.[140] For example, they must seek to understand and highlight how anti-Black racism shapes criminal law discourses and provides an accurate predictor of criminal trial and sentencing outcomes. There is power in Black discourses that can be utilized to shatter white supremacy—not merely to describe or highlight its contours.[141] According to Katherine McKittrick, "[b]lack embodied knowledge radically overturns the normalizing workings of white supremacy by enunciating, demanding, and asserting black agency and humanity."[142] Indeed, "[a] story [i.e. Black embodied knowledge] can touch what has never been touched; it can bring into relief what never come into the field of vision; and, it can oppose what never has been opposed. A story can be resistive, subversive and transformative, especially when it weaves a counter-narrative to settled understandings, interpretations and worldviews."[143]

Conclusion

This article interrogated whether CRT-inspired litigation can usher in lifeline criminal jurisprudence. It highlighted several tensions and paradoxes inherent in criminal justice discourses on Blackness without necessarily resolving them. It was posited that adopting a CRT lens, which centres Black voices in criminal justice discourses, will promote Black dignity and help pursue ethical harm-reduction strategies to mitigate the devastating consequences of systemic anti-Black racism for those Black Canadians currently interfacing with the system. This approach is not antithetical to radical structural reform; instead, it recognizes the need to adopt a racial realist approach to racial justice initiatives—one that integrates CRT theory and praxis that is alive to 'on the ground realities' facing Black Canadians. Like Williams, I have also "…learned that the best way to give voice to those whose voice had been suppressed was to argue that they had no voice."[144] This argument is not simply about judicial recognition of systemic anti-Black racism; instead, it is about deploying race-talk through the prism of rights in hostile vistas. The aim is not merely to seek acquittals, which is paramount, but to restore dignity

140. See generally Mahmud Tayyab, "Foreword: What's Next? Counter-stories and Theorizing Resistance" (2018) 16:3 Seattle J Soc Justice 607, online: <digitalcomons.law.seattleu.edu/sjsj/vol16/iss3/6/> [perma.cc/TU4H-245G]; Howard S Becker, "Whose Side Are We On?" (1967) 14:3 Soc Problems 239, DOI: <10.2307/799147>.

141. See e.g. Alfieri, *supra* note 17 at 655.

142. Katherine McKittrick, *Dear Science and Other Stories* (Durham, NC: Duke University Press, 2021) at 127.

143. Tayyab, *supra* note 140 at 617-618.

144. P Williams, *supra* note 17 at 103.

and affirm visibility in terms native to Black imaginaries. Indeed, lifeline jurisprudence represents the removal of discursive shackles, recognizing Black lives in radical possibilities outside of white supremacist descriptive frames and transforming or at minimum calming hostile waters into seas of hope.