

2020-21 CHAPTER THEME REPORT

SYSTEMIC RACISM IN CANADA'S CRIMINAL JUSTICE SYSTEM

Paper for Level by Jacqueline Eboh

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Jacqueline Eboh is a second-year law student at the University of Windsor. Jacqueline hopes to one day work within the criminal law sector and spent the summer working for the Legal Assistance of Windsor as a Summer Law Student. She is also currently a Research Assistant for the (former) Associate Dean at Windsor Law working on curriculum reform. She is interested in criminal law because of how criminal law affects various lives and communities within Canada. Jacqueline hopes to use her interest in criminal law to fight for justice and reformation in the current criminal legal system in place.

Before law school, Jacqueline graduated from McMaster University with a Bachelor of Honours in “Justice, Political Philosophy, and Law.” Then transitioned into working on the front lines with women and children who have been sexually exploited and human trafficked. She has had the opportunity to study and compare different legal systems, and how they deal with sexual exploitation and race. Currently, Jacqueline is the chair of the Sexual Assault Awareness committee at Windsor Law and works with a non-profit that works to end sexual exploitation in Canada, as a speaker and project coordinator, all while being an active member of the Black Law Students Association Windsor Chapter.

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1. Introduction: About Level and Systemic Racism Awareness

Level is a charitable organization on a mission to disrupt prejudice, build empathy, and advance human rights. We pursue our mission through youth outreach, research, advocacy, training, and mentorship. Through our Campus Chapter program, we develop and empower social justice leaders to fulfill their potential by creating opportunities for Canadian law students to engage in research, advocacy, and community education initiatives on their campuses. Each year, Level's Campus Chapters learn and educate their communities about a human rights theme. In past years, Level has explored topics such as human trafficking, refugee rights, children's rights, Indigenous rights, transitional justice, corporate social responsibility, and women's rights. This year, Level's Campus Chapters will focus on systemic racism in the Canadian criminal justice system.

Similarly, at the core of Level's mission is a commitment to work with people, particularly youth, on our mission to disrupt prejudice, build empathy, and advance human rights. Level recognizes that law and social policy do not exist in a vacuum; rather, they are tools that when placed in the right hands, can change the world for the betterment of all. This report does not intend to exhaustively cover all of the systemic racism issues facing communities living in Canada today. Rather, it aims to highlight some of the historical and emerging issues in Canada through a lens of systemic racism and the justice system and offers an opportunity for students and practitioners alike to engage in critical and productive conversations on how to drive forward and create change.

Systemic racism is an issue that is not discussed often in law schools or legal settings and this paper seeks to change that. To understand systemic racism today, is to understand its history, its involvement in many practices, and understand the people who it benefits and negatively affects. This paper is taken as an introduction, and not a comprehensive guide to the entirety of systemic racism within Canada. Understanding systemic racism in Canada means acknowledging the harsh reality of Canada's history from colonization to slavery and how these practices have lasting effects to this day.

This paper seeks to address systemic racism within the justice system, particularly towards Black people and Indigenous Peoples. Many experiences such as Black Immigrant and Muslim people, Black transgender and queer people, Indigenous LGBTQ+ Peoples, along with the experiences of Black and Indigenous women in Incarceration, are not explored in this paper despite their importance. This paper also focuses on contemporary issues primarily which are rooted in history of slavery and colonization, which are topics that also are not explored at length in this paper.

2. Glossary and Key Terms

KEY TERMS	DEFINITIONS
Racism	Racism is defined as an individual act or classified as an institutional practice that can perpetuate inequality, due to racial association. ¹
Institutionalized/ Systemic Racism	<p>Institutional racism: racial discrimination that derives from individuals carrying out the dictates of others who are prejudiced or of a prejudiced society.</p> <p>Systemic racism: inequalities rooted in the system-wide operation of a society that excludes substantial numbers of members of particular groups from significant participation in major social institution²</p>
Criminal Justice System	<p>“A criminal justice system is a set of legal and social institutions for enforcing the criminal law in accordance with a defined set of procedural rules and limitations.</p> <p>Criminal justice systems include several major subsystems, composed of one or more public institutions and their staffs: police and other law enforcement agencies; trial and appellate courts; prosecution and public defender offices; probation and parole agencies; custodial institutions (jails, prisons, reformatories, half-way houses, etc.); and departments of corrections (responsible for some or all probation, parole, and custodial functions).”³</p>
System	The “system” is made up of people (Personnel). Their attitudes and beliefs values, procedures, policies and informal rules (operating norms) - these elements continually affect one another over time. The totality of a system’s norms and processes and the actions of its personnel comprises its systemic practices. ⁴
Anti-black Racism	<p>Anti-Black Racism is defined here as policies and practices rooted in Canadian institutions such as, education, health care, and justice that mirror and reinforce beliefs, attitudes, prejudice, stereotyping and/or discrimination towards people of Black-African descent.</p> <p>The term ‘Anti-Black Racism’ was first expressed by Dr. Akua Benjamin, a Ryerson Social Work Professor. It seeks to highlight the unique nature of systemic racism on Black-Canadians and the history as well as experiences of slavery and colonization of people of Black-African descent in Canada.⁵</p>

¹ Adam Lake, “Criminalization of minority youth in the youth justice system in Canada” (2019) CJUR 1.

²“Forms of racism” (Last visited: 22 August 2020), online: Alberta Civil Liberty Research Centre <<http://www.aclrc.com/forms-of-racism>>.

³ “What is the criminal Justice System?” (Last visited 03 August 2020), online: T University Libraries <<https://guides.temple.edu/criminaljustice>>.

⁴ David P. Cole, Greg Ioannou & Margaret Gittens, Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: The Commission, 1995).

⁵“Anti-Black Racism” (last visited: 15 August 2020), online: Black Health Alliance <<https://blackhealthalliance.ca/home/antiblack-racism/>>

Racial Profiling	Racial profiling is when law enforcement officials target racialized, marginalized, and low-income civilians for suspicion of crime. The practice of racial profiling completed by individuals within the justice system is typically covered up, as it relies on individual discrimination, stereotypes, and prejudice in order to protect communities Racial profiling is the status quo for many minorities within Canada 6
Social Systems	Social systems are the processes in which services are delivered. These social systems include institutions such as police, courts and prisons. These systems may be divided into smaller systems, and they may be combined to create bigger systems. If looked at broadly “every organized process in a society is a sub-system of the societal system and may also be part of a global system.”7

3. What is Systemic Racism?

Systemic racism is a system of racial inequality that is built and maintained through unjust laws, policies, institutions and behaviours. Built on the idea that racial inequality is natural and inherent to society⁸, these policies and practices are deeply rooted in the system maintaining and supporting a white supremacist culture. Canada was created through colonization and founded through the principles of racism and exclusion. The very fabric of this country was built upon the idea that European colonizers were superior to the Indigenous populations that had been living on Turtle Island for time immemorial. In Canada’s justice system, systemic racism is created by a combination of racialization of offenders, norms and personnel, (judges, police officers, elected officials etc.), each of which are a product of a system that upholds white supremacy and marginalizes racialized groups.

Racialization is the process of creating racial differences and using them as a perceived or real group signifiers and giving them meaning in the context of white supremacy. This is often done by using benign biological traits, such as skin colour, and giving them meaning as well as creating other kinds of biological myths about certain races. It essentially defines a group of people by their race, usually their identities are given racial meaning, in particular in how they relate to social structures and institutional systems.⁹ An example of this is looking at a racialized person and referring to their human characteristics to prove a racial difference.¹⁰ Another example is attributing certain traits and behaviors to people classified as members of a particular race, or using race to seek to understand socially significant differences among people.¹¹ Racialization requires racial inequality within social systems and any form of racism in an institution signifies the reality of racialization that exists throughout the institution which is already grounded in racist systems.

⁶ Racism and racial discrimination: Systemic discrimination (fact sheet)” (last visited 12 August 2020), online: Ontario Human Rights Commission <www.ohrc.on.ca/en/racism-and-racial-discrimination-systemic-discrimination-fact-sheet>

⁷ Supra note 4 at 45.

⁸ Supra note 4 at 39.

⁹ Supra note 4 at 39.

¹⁰ Supra note 4 at 40.

¹¹ Supra note 4 at 40.

Another facet of systemic racism are the operating norms, processes and service delivery of social systems.¹² These operating norms are the values, procedures and informal rules within the system.¹³ These may be explicit such as policies and law, or they may be implicit such as the accepted ways of doing things.¹⁴ These operating norms set out “inherently biased” standards for decision making which directly transmits racism into a system.¹⁵ These norms do not just tolerate racism, they require racism.

The final facet of systemic racism is personnel. Those who work, act or make decisions for social systems, an example being judges, lawyers and police officers. Personnel play an important role within systemic racism and they also add their values and beliefs to this process.¹⁶ People engaging in racism in institutions, is a tell-tale sign that signifies that racism already exists in these institutions and broader society. Personnel can worsen the already racist climate, by acting out through their own racist beliefs. The climate which has been created allows personnel to act on racist beliefs, because of the requirement already in place within institutions. Institutionalized racism on the other hand is the policies, patterns of behavior or practices that are a part of a systems structure that create disadvantages for racialized groups.¹⁷ While it is clear that systemic racism is present and active in all social systems, it is important to look at how systemic racism affects the lives of those within the criminal justice system.¹⁸ The harm of racial injustice includes overincarceration and constant policing and surveillance, such as racial profiling of racialized communities.¹⁹ These practices increase the psychological and physical harm, isolation and alienation of targeted communities, while creating, or signifying a real and rightful distrust of the criminal justice system.

In sum, institutionalized racism can be defined as “those patterns, procedures, practices, and policies that operate within social institutions so as to consistently penalize, disadvantage, and exploit individuals who are members of non-white racial/ethnic groups.”²⁰ Systemic racism is the inequalities rooted in the system-wide operation of a society that excludes substantial numbers of members of particular groups from significant participation in major social institutions.²¹

4. Systemic Racism in Canada

Systemic racism has existed since the creation of what we now call Canada, when European colonizers entered onto land that was, and continues to be, the home of many Indigenous Nations. Canada was born through the practices of genocide, colonialism and theft of land all of which are woven into the very fabric of Canada today. This coupled with the history of slavery in Canada and the disposition of Black people from their homelands has built and maintained a country that is white supremacist in its creation and existence.

In Canada, the reality of systemic racism is often masked by claims of benevolence and arguments around multiculturalism or policies such as the Canadian Charter of Rights and Freedoms (1982). Systemic racism is so embedded in Canadian social institutions, attitudes and beliefs, including those in power, that

¹² Supra note 4 at 40.

¹³ Supra note 4 at 45.

¹⁴ Supra note 4 at 50.

¹⁵ Supra note 4 at 54.

¹⁶ Supra note 4 at 45.

¹⁷ Supra note 6.

¹⁸ Tanovich, David M.. "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) Volume: 40 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference at 661.

¹⁹ Ibid.

²⁰ Shirley Jean Better, *Institutional Racism: A Primer on Theory and Strategies for Social Change* (Landham, Maryland: Rowan & Littlefield, 2002)

²¹ Ibid.

sometimes it can go completely unnoticed, often by those who benefit the most from it. To fully understand systemic racism within the criminal justice system, it is important to acknowledge how systemic racism plays a role within every institution as these connections support and maintain a system of white supremacy.

Much needed history:

There is a connection between colonialism and slavery to how Black people and Indigenous peoples are treated today. In 1628, what is now called "Quebec" was where the first Black enslaved person landed. At this time Indigenous peoples were already enslaved by the French in Canada. Within New France (a colonized area of Canada by the French in 1535), there was the buying and selling of Black men, women and children, along with forced, unpaid labour from approximately four thousand Indigenous and Black enslaved people. Those who were enslaved forcefully helped build "infrastructure and wealth for white settlers during the seventeenth and eighteenth century." Within New France it was normal to sell Black and Indigenous peoples side by side with livestock at slave auctions. The conditions that French settlers imposed on slaves were inhumane.²² Slaves were beaten with chains and rods as a form of punishment. Many slaves died before the age of 20 because of the brutality against them.²³ Along with slavery often times came sexual violence in New France, white slave owners commonly raped and sexually exploited Black female and male slaves. Rape was not recognized as rape when done to Black people, since Black people in general were seen as chattel. This same sexual violence also effected Indigenous peoples. When Britain won the war in 1763 and the French lost control of Canadian colonies, slave ownership was still approved by England and "all existing owners retained the right to their human chattel."²⁴

4.1 Systemic Racism in the Economy

Systemic racism touches all institutions in Canada, including the economy, education and the justice system. Canada's economic system developed from the colonization of Canada, and genocidal practices directed towards Indigenous peoples as well as land theft, and the transatlantic slave trade and enslavement of Black people. The removal of Indigenous peoples from their ancestral land, allowed European settlers to profit from the farmland that they purchased for very little, or took by force, in which the consequences of such acts are still seen today.²⁵ Wealthy groups in Canada have also profited from racism and the existence and maintenance of slavery.²⁶ Black people enslaved in Canada created many economic possibilities for European colonizers through forced and unpaid labour that allowed industries to flourish to their benefit. Due to the Canadian climate, Canada could not maintain the slavery model of large plantations adopted by the American South.²⁷ However, this does not negate the practice of state supported slavery within Canada.²⁸ White settlers still in fact profited heavily from owning enslaved Black and Indigenous peoples.

Important to note:

The economic value that unpaid Black labour created for Canada was significant. The economic system within Canada also benefitted from the Atlantic slave trade. As Robyn Maynard pointed out in her book

²² Robyn Maynard, *Policing Black Lives*, (Winnipeg, MB: Fernwood Publishing, 2017) at 21.

²³ *Ibid.*

²⁴ *Ibid* at 22.

²⁵ *Supra* note 24 at 228.

²⁶ *Ibid* at 228.

²⁷ *Ibid* at 20.

²⁸ *Ibid* at 20.

Policing Black Lives “The settlements of Quebec City, Montreal and Halifax were transatlantic network ports that frequently received ships containing enslaved Black men and women arriving from the Caribbean. Further, white settlers in these colonies were deeply economically implicated in the trade of commodities produced by enslaved people, including sugar, rum and molasses.”²⁹

Black unpaid labour was crucial for economic growth of Ontario, Quebec and the Atlantic provinces. While also being of economic value Black people often were used as a fashion statement and a status symbol. It is important to recognize that the violence, brutality and domination of Black people was seen as fashion and highlights the economically and culturally significant roles Black confinement and dehumanization played for white settlers, which still can be seen today.

4.2 Systemic Racism in Education

Another area where systemic racism exists in Canada is education. Education is legislated in Canada as a “fundamental social good.”³⁰ The goal of publicly funded schools in Canada is to create a space in which young minds can learn how to advance in society and they are used for the socialization of youth.³¹ Despite this, for many Black, Indigenous, and racialized communities, the school system is a place of violence, harm and degradation. A case study of Black students in Alberta found that there were multiple factors at play that were contributing to systemic racism in the education system. Factors such as “anti-black racism in the form of bullying from peers, being victims to negative racial stereotyping, being subject to a Eurocentric curriculum, low expectations from teachers, and an alienating school environment.”³² In Ontario, the Toronto District School Board conducted a study on systemic racism in education. They found that Black students make up 12% of the population overall, yet 31% of students suspended are Black.³³

These same issues exist for Indigenous youth in the Canadian education system. In the 1830’s, the Canadian government famously set out to fix the “Indian problem” through the implementation of residential schools.³⁴ Residential schooling was a policy where Indigenous children and youth were separated from their families and violated for their Indigenous identity. The Canadian government used education as a tool for cultural genocide destroying many Indigenous peoples’ knowledge and connection to their ancestral traditions and culture. The Residential School system has left a significant mark on Indigenous communities most notably in the passing down of this trauma from one generation to the next. In the book *Ipperwash* the author points out that systemic racism in education for Indigenous peoples looks like “continuing cycles of emotional, physical and sexual abuse, as well as addiction, suicide and other markers of intergenerational trauma, within Aboriginal communities, which are residual effects of the residential school experiences.”³⁵ Education was used as a tool for white supremacy by attempting to eliminate Indigenous identity, culture and community in Canada.

²⁹ Supra note 25 at 24.

³⁰ Supra note 25 at 209.

³¹ Supra note 25 at 209.

³² Henry M Codjoe, “Fighting a ‘Public Enemy’ of Black Academic Achievement - The persistence of racism and the schooling experiences of Black Students in Canada” (2001) 4 *Race Ethnicity and Education* at 360.

³³ Mullings, D., Morgan, A., & Quelleng, H. (2016). *Canada the Great White North where Anti-Black Racism Thrives: Kicking Down the Doors and Exposing the Realities*. *Phylon* (1960-), 53(1), 20-41. Retrieved August 14, 2020.

³⁴ Supra note 24 at 431.

³⁵ Supra note 24 at 431.

Among social justice academics it is virtually undisputed that systemic racism touches multiple social institutions and continues to prevail within Canadian systems.³⁶ Within the education system in Canada, there has been a deliberate erasure of Black and Indigenous peoples' history.

4.3 Systemic Racism in Employment

The employment sector is another example of a Canadian social system in which systemic racism has had far reaching implications. The existence of systemic racism in employment is evident when looking at the unemployment rate of Black people. In 2016 Statistics Canada reported that the employment rate of Black men was 78.1% and 71.0% for Black women, compared to 82.6% and 75.5% for their white counterparts.³⁷ For Indigenous peoples colonialism meant it was not possible for them to participate in the economy.³⁸ Suzanne Mills and Louise Clarke wrote in the article *We will go side-by-side with you, labour union engagement with Aboriginal peoples in Canada*, that "Aboriginal people are both underrepresented in the wage labour force, continuing to have a lower employment rate than settlers, and segregated into types of work that tend to be lower paid and less stable."³⁹ Indigenous peoples have many systems created barriers as to why unemployment rates are so high, such as lack of education, cultural differences, and systemic racism.

In the past Canada has tried to implement policies that combat systemic racism within the Canadian employment sector. For example, in 1986 the Canadian government enacted the Federal Employment Equity Act. This act requires that all federally regulated employers with 100 employees or more identify and completely remove any barriers that may exist, to make room for employment equity.⁴⁰ This act, although a step in the right direction, did not fully address the issue of systemic racism because it did not cover Canadian federal public service, such as the RCMP and the military.⁴¹ Taken together, systemic racism in the economy, education and employment creates a system that benefits white Canadians and reinforces the oppression of racialized groups.

5. Systemic Racism in the Criminal Justice System

Signals of how endemic systemic racism is in the criminal justice system, is evidenced by the recognition of racism by the judiciary. In *R v Parks*, Justice Doherty J.A of the Ontario Court of Appeal said "Racism is and in particular anti-black racism is a part of our community's psyche much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil."⁴² In *R v Gladue*, Justice Cory and Iacobucci JJ said "Aboriginal people are overrepresented in virtually all aspects of the [criminal justice] system." And also, that "the unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources... [including] bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders."⁴³

³⁶ Supra note 24 at 431.

³⁷ "Canada's Black population: Education, labour and resilience" (25 February 2020), online: Statistics Canada <<https://www150.statcan.gc.ca/n1/pub/89-657-x/89-657-x2020002-eng.htm>>.

³⁸ Ibid.

³⁹ Suzanne E. Mills, "We will go side-by-side with you." Labour union engagement with Aboriginal peoples in Canada (18 August 2009), online: (pdf) Research Gate. <https://www.researchgate.net/publication/248433926_We_will_go_side-by-side_with_you_Labour_union_engagement_with_Aboriginal_peoples_in_Canada?>.

⁴⁰ Philomina Okeke-Ihejirika, *The African Diaspora in Canada: Negotiating Identity & Belonging* (Calgary:University of Calgary Press, 2005) at 97.

⁴¹ Ibid.

⁴² *R v Parks*, [1993] Canlii 3383, 15 OR (3d) 324.

⁴³ *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385.

5.1 Policing

To appreciate the impact systemic racism has in the criminal justice system, it is important to look at policing, which includes the judiciary and the penal system.⁴⁴ Indigenous peoples and Black people are more likely to be charged after an arrest which reflects racism in the discretionary power of those who charge, mainly police.⁴⁵ To understand the statistic, close observation should be made to the underrepresentation of Indigenous peoples within the police force. In Ontario there are 19 Indigenous police officers, of the 12,093 that exist.⁴⁶ Yet the presence of Indigenous, Black and racialized police has not helped curb systemic racism in policing. In the annual report of the Federal Office of the Correctional Investigator, it noted that the rate of incarceration of Black Canadians is approximately three times their proportion of the general Canadian population.⁴⁷ Despite this, it is not proven that Black people are more likely to commit a crime than any other racial group. Black Canadians are typically looked at as “violent,” “dangerous,” and “criminal”⁴⁸ and these prejudices impact the way they are treated at the hands of the police. Incarceration rates alone provide a descriptive picture of Indigenous and Black people being grossly overrepresented in prison.

The history of jurisprudence acknowledges the over-policing of Black and Indigenous communities. In *R v Golden*, a young Black man was strip searched at a Subway restaurant in downtown Toronto.⁴⁹ After he was patted down he was taken to the top of the basement stairwell.⁵⁰ The police officers then decided to look down his pants and pull down his underwear. When a clear bag with white substance was seen from his buttocks.⁵¹ The police bent Golden over and tried to retrieve the little bag from his buttocks, but they were unsuccessful.⁵² The police officer attempted again but Golden accidentally defecated.⁵³ While the police officers had Golden lying flat on the floor with his legs being held, they took a dishwashing glove and removed the package, which had 10.1 grams of crack cocaine in it.⁵⁴ It is important to note that this happened in a public area, whilst the police station was a two minute drive-away, and once at the police station Golden was then strip searched again.⁵⁵ It is important to note that this is one of the many ways Black men experience sexual violence at the hand of the police. Such acts were born out slavery, where Black men were sexually violated, particularly when Black men were put on display for whiter people to view their naked bodies and genitalia. In *R v Golden* the Supreme Court of Canada found that the strip search was unconstitutional, and that “racialized groups are over-policed and that constitutional standards need to be developed to address this situation.”⁵⁶

Violence against Indigenous communities at the hands of the police is a common occurrence in Canada as well. Between 2007 and 2017, Indigenous peoples made up one-third of those shot to death by the RCMP.⁵⁷ There are numerous examples that highlight how problematic police violence toward

⁴⁴ Jennifer Roy, “Racism in the Justice System (fact Sheet)” (Last visited 12 August 2020), online: Canadian Race Relations Foundation <https://www.crrf-fcrr.ca/images/stories/pdf/ePubFaShRacJusSys.pdf?fbclid=IwAR2_OIYbr4v3wO3lnpZcG_hxELiAGDYSJ-HKdIXyOvDQD6Jlrt3mnCPPG4w>

⁴⁵ Wendy Jillis & Jim Rankin “Nearly 20 times as likely to be shot dead. Six times more likely to be taken down by a police dog. Inside a landmark report on the ‘disproportionate’ use of force on Black Torontonians”, *The Star* (17 August 2020).

⁴⁶ *Ibid.*

⁴⁷ Darren Thorne, “Systemic racism is a Canadian problem, too” (12 June 2020), online (blog): tvo50 <<https://www.tvo.org/article/systemic-racism-is-a-canadian-problem-too?fbclid=IwAR34LC2BChYejBVZXokwYsLZLLuz-B5XcC2BUIP9LYxFt4-0Khk34GzNUc4>>.

⁴⁸ David M. Tanovich, “The Colour of Justice: Policing Race in Canada” (Toronto: Irwin Law, 2006) at 57

⁴⁹ 2001 SCC 83.

⁵⁰ *R v Golden* 2001 SCC 83.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Supra* note 52 at 125.

⁵⁶ *Supra* note 52 at 125.

⁵⁷ “Police Brutality in Canada: A Symptom of Structural Racism and Colonial Violence” (15 July 2020), online: Yellowhead Institute <<https://yellowheadinstitute.org/2020/07/15/police-brutality-in-canada-a-symptom-of-structural-racism-and-colonial-violence/>>

Indigenous peoples is. For instance, the case of Chantel Moore who was killed by a police officer conducting a wellness check at her home. There is still no explanation for her death and little accountability from the RCMP or the officer who shot her.⁵⁸ This year alone, there have been several high-profile cases of police violence against Inuit recently as well. For example, in June a 31-year-old Inuk man was shot to death by the RCMP.⁵⁹ This incident is representative of a broader system of police violence in Nunavut. In a survey conducted with Inuit in Nunavut, participants said that police treatment of Inuit is racialized. Those surveyed felt that police officers' encounters with Inuit are based on racialized assumptions and colonial legacies which make Inuit fearful of police⁶⁰.

It is important to note that overincarceration of Indigenous peoples does not stem solely from the police. As Pam Palmater, a prominent Indigenous lawyer and professor, notes, "the entire system works against Native people"⁶¹. There have been numerous inquiries and commissions that have demonstrated the ways in which the justice system blatantly discriminates against Indigenous peoples. For example, prosecutors often request longer sentences for Indigenous defendants and once an Indigenous person is incarcerated, they have less access to parole than non-Indigenous prisoners. The prevalence of police brutality in Indigenous communities speaks to the issue of systemic racism in the justice system more broadly and it is impossible to view this violence as separate from the system as a whole.

5.2 Case Study

In *R v S(RD)* ("RDS") a white police officer arrested RDS, a Black 15-year-old who allegedly interfered with the arrest of another youth. The police officers received word that there was a pursuit of a stolen van and the occupants were described as non-white youth.⁶² When the two officers got to a designated area, which was a predominantly black neighborhood, they saw two black youth running.⁶³ One youth was arrested. RDS was in the area visiting his grandmother, when he heard that his cousin had been arrested. He asked the police officers what was going on and when he continued to ask what was happening to his cousin, he was put in a chokehold and arrested.⁶⁴ The police officer accused RDS of running into his legs with a bike, yelling and pushing him.⁶⁵ The accused was charged with unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting him in the lawful execution of his duty. The trial judge Justice Corrine Sparks, the only black judge in Nova Scotia at the time, acquitted RDS of all charges. While Justice Sparks delivered her judgement, she answered a rhetorical question posed by the Crown of, "why would the officer lie?" Justice Sparks identified that police officers were known to mislead the court, and that they had been known to overreact, particularly when it came to non-white groups.⁶⁶ This judgement was immediately appealed and made its way up to the Supreme Court of Canada. The Supreme Court discussed and recognized the history of racism within the Halifax police department.⁶⁷ Justice Cory recognized that there is a history of racial tension between visible

⁵⁸ Ibid.

⁵⁹ Thomas Rohner "RCMP violence against Inuit happening because few are stopping systemic racism, Indigenous leaders say", CBC (10 June 2020) <<https://www.cbc.ca/news/canada/north/rcmp-violence-inuit-stopping-it-1.5604874>>

⁶⁰ Dr. Elizabeth Comack and Pauktuutit Inuit Women Canada, "Addressing Gendered Violence against Inuit Women: A review of police policies and practices in Inuit Nunangat (January 31 2020), online: (pdf) Pauktuutit Inuit Women Canada. <https://www.pauktuutit.ca/wp-content/uploads/Pauktuutit_Addressing-Gendered-Violence_English_Full-Report-1.pdf>

⁶¹ Supra note 59.

⁶² Supra note 52 at 125.

⁶³ Supra note 52 at 126.

⁶⁴ Supra note 52 at 126

⁶⁵ Supra note 52 at 126.

⁶⁶ *R v S(RD)*, [1997] 3 SCR 484, 151 DLR(4th) 193.

⁶⁷ Supra note 52 at 128.

minorities and police officers, he also stated that this history “suggests that there is a reasonable possibility that the actions taken by the police in their relations with visible minorities demonstrate both prejudice and discrimination.”⁶⁸ He also acknowledged that “in some cases, racism may have been exhibited by police officers in arresting young black males.”⁶⁹ Although one of the main issues outlined in this case was about policing, it was also a major case that outlined how the judicial system understands and responds to Black people, particularly when Black people take the risk of naming their realities in a place such as the criminal justice system.

5.3 Lawyering

Race and systemic racism are also relevant when considering the conduct of lawyers with racialized clients. For example, in litigation lawyers do not often raise the issue of race.⁷⁰ This is clearly seen when looking at the few racial profiling cases that are brought before the courts.⁷¹ The question is why lawyers are not raising race in their arguments before the court? This can happen because race may not be something a lawyer thinks about, especially if they themselves benefit from white privilege. Not being able to understand or see racism harms other individuals, because of the inability to understand how privilege protects lawyers from maltreatment from police. Therefore the unspoken conclusion might be that such treatment by police may have been invited or provoked.⁷² Other reasons lawyers may not bring up race in a court is because they are uncomfortable discussing race before the courts.⁷³ While other lawyers may think that race is a weaker argument, in comparison to others they may have before them.⁷⁴ The reality is that a lot of people do not understand what racism is and how it functions. Specifically, across law schools in Canada, there is very little education on this subject, or on how to engage in arguments related to race. By not educating future lawyers about race and how to bring racial arguments before the courts, law schools are unknowingly maintaining the status quo. This clearly demonstrates how systemic racism in education reinforces systemic racism in the justice system.

5.4 Penal System

Another area where systemic racism is present is in Canada’s penal system which is made up of the Canadian prison system, bail, pre-trial detention and sentencing.⁷⁵ Black and Indigenous peoples are more likely to be detained and denied bail, and to have much longer sentencing than their white counterparts for the same crime.⁷⁶ In Ontario in 1994, “the rate of pre-trial detention for Black people charged with trafficking and importing drugs was twenty-seven times higher than for whites, for drug possession it was fifteen times higher.”⁷⁷ Through the commission on systemic racism in Ontario a study was conducted that showed “racial differences exist in the application of institutional discipline.”⁷⁸ The data collected suggested that there was an over-representation of Black people among prisoners who were charged with misconduct. In comparison to white prisoners, more Black prisoners were charged with misconduct. On which correctional officers have the ability to exercise greater subjective judgement.⁷⁹

⁶⁸ Supra note 6.

⁶⁹ Supra note 6.

⁷⁰ Supra note 20 at 84.

⁷¹ Supra note 20 at 84.

⁷² Supra note 20 at 84.

⁷³ Supra note 20 at 84.

⁷⁴ Supra note 20 at 84.

⁷⁵ Supra note 30 at 107.

⁷⁶ Supra note 30 at 107.

⁷⁷ Supra note 30 at 107.

⁷⁸ Supra note 4 at 8

⁷⁹ Supra note 4 at 8.

Black, Indigenous, and racialized people face different treatment through the penal system. For example, they often receive worse jobs while in prison, are more likely to be held in remand and denied bail⁸⁰ This leads to something called “racial imbalance” in the penal system which is “existent when the percentage of individuals from a specific racial group is greater than the amount of other racial groups, in the general population.”⁸¹

6. How current systems disproportionately affect Black/Indigenous Youth: case studies in Black/Indigenous youth overrepresentation in the Criminal Justice System

The existence of systemic racism disproportionately affects Black and Indigenous peoples all over Canada. This section focuses on how systemic racism affects Black and Indigenous youth in particular. Within the criminal justice system there has been research done with evidence that suggests that there are a disproportionate number of visible minority youth per person in different parts of the criminal justice system.⁸² For example research that was done on cases in a probation office shows evidence that youth that are visible minorities are consistently overrepresented in the Canadian criminal justice system, these youth often were within the lower half of the socio-economic status group.⁸³ As this study developed the results were clear that visible minority youth are more likely to be charged when they violate probation, than their non-visible minority counterparts.⁸⁴

6.1 Indigenous Youth

The Department of Justice did research called a “One-Day Snapshot of Aboriginal Youth in Custody.” Which revealed that the incarceration rate in Canada for Indigenous youth in particular was 64.5 per 10,000 population while incarceration for non- Indigenous youth was 8.2 per 10,000 population.⁸⁵ This shows that Indigenous youth are almost eight times more likely to be arrested and detained compared to their non-Indigenous counterparts.⁸⁶ Higher incarceration rates for Indigenous youth were reported in every jurisdiction except for Prince Edward Island. In Saskatchewan, the rate of incarceration for Indigenous youth was even higher than other jurisdictions. Here, Indigenous youth are thirty times more likely to be incarcerated compared to non- Indigenous youth.⁸⁷

In their ‘One-Day Snapshot’, The Department of Justice laid out other worrying statistics that show how the current system affects Indigenous youth. For example, the average time an Indigenous young person spent in custody was 212 days while non-Indigenous youth spent an average of 182 days.⁸⁸ It is important to note that this does not take into account criminal history and how severe the offences were. Indigenous youth tend to have longer sentences for less serious offences such as “driving and drug possessions.”⁸⁹ This report showed that “39% of Indigenous youth in custody were involved with child

⁸⁰ Supra note 1 at 1.

⁸¹ Patricia Soong, “Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity” (2011) 6 *Morthwestern LJ & Social Policy* 428 at 433.

⁸² Jeff Latimer, *Criminalizing Adolescence? Understanding Probation and Probation Violations in the Canadian Youth Criminal Justice System* (PHD, University of Ottawa, 2011) [unpublished] at 40.

⁸³ *Ibid* at 121.

⁸⁴ Supra note 80 at 122.

⁸⁵ Latimer, J., and L.C. Foss. (2004). *A One-Day Snapshot of Aboriginal Youth in Custody: Phase II*. Ottawa, ON: Research and Statistics Division, Department of Justice Canada.

⁸⁶ *Ibid* at 4.

⁸⁷ *Ibid* at 4.

⁸⁸ *Ibid* at 9.

⁸⁹ *Ibid* at 9.

protection agencies, 16% were wards of the state and 23% had an active file.⁹⁰ Almost half of Indigenous youth in custody (47%) lived with a family that received social assistance as their primary income.⁹¹ Out of every ten Indigenous youth, it was suspected that eight of them had a substance abuse problem, 57% had a confirmed problem, while 24% were only suspected to have a problem.⁹² This clearly demonstrates the ways in which systemic racism has an effect on every aspect of a community – the economy, education and the justice system all play a part in maintaining white supremacist institutions.

When asked about the criminal justice system, Indigenous youth expressed consistently that the system was “overtly racist,” and legal professionals were “unfair” to them because of the fact that they were Indigenous.⁹³ Those who participated in the qualitative analysis by way of a sharing circle said:

“They won’t allow natives to hang together, because we are suspected of being in a gang.”⁹⁴

“They just treat Aboriginals like dirt... we are not treated with respect.”⁹⁵

It is important to note that the Indigenous population is younger than non-Indigenous populations. In 2006 the average age of the Indigenous population was 27 years old, compared to the average age being 40 in non-Indigenous populations. That being said, youth 24 years and younger make up 48% of all Indigenous youth in Canada, in comparison to the 31% of non-Indigenous youth.⁹⁶ Indigenous peoples are seen within the criminal justice system as “problem people.”⁹⁷

The alarming statistics above show how deeply systemic racism in the criminal justice system affects Indigenous youth. The overrepresentation of Indigenous peoples in prisons, poverty and issues with substance abuse are often used as justifications for the over policing of Indigenous youth.⁹⁸ This in turn traps Indigenous youth in a cycle of detention, arrests and incarcerations.⁹⁹

6.2 Black Youth

Criminal activity exists in every community, race, culture and class. However, it is overreported in certain communities because of systemic racism.¹⁰⁰ A study done in Ontario prisons indicated that for the period observed, “the majority of prisoners are white, but black men, women and male youths are over-represented.”¹⁰¹ Despite the various studies available on adult prisons and correctional facilities, youth detention centers, where most Canadian youth convicted of crime reside, remain under researched.¹⁰² As Adam Lake in the article *Criminalization of minority youth in the youth justice system in Canada* notes, “The juvenile justice system is known for violent juvenile offenders, who become and remain habitual offenders. The juvenile justice system then faces questioning for creating professional criminals instead of focusing on effective rehabilitation.”¹⁰³

⁹⁰ Ibid at 11.

⁹¹ Ibid at 11.

⁹² Ibid at 11.

⁹³ Ibid at 15.

⁹⁴ Ibid at 15.

⁹⁵ Ibid at 15.

⁹⁶ Supra note 24 at 19.

⁹⁷ Supra note 24 at 235.

⁹⁸ Supra note 24 at 235.

⁹⁹ Supra note 24 at 235.

¹⁰⁰ Supra note 4.

¹⁰¹ Supra note 4 at 3.

¹⁰² Supra note 1 at 1.

¹⁰³ Ibid.

When racial disparities are ignored and not analyzed properly “negro domination” on law breaking is presumed. Negro domination is “a term coined by white supremacists in the early 1900s, in order to preserve whiteness. It is a term used in order to suppress the upward mobility of the Black population, in order to allow whites to maintain superiority within society.”¹⁰⁴ One of the anti-Black myths is that Black people are overrepresented because they commit more crime and because of the overwhelming disproportionate number of Black youth within the juvenile detention centers. However, this disproportionate number is actually a consequence of systemic racism within the criminal justice system.¹⁰⁵

Systemic racism plays a significant role in the over representation of Black youth in the criminal justice system. As Adam Lake in the article *Criminalization of minority youth in the youth justice system in Canada* discussed “Racialized youth within Canada face higher rates of unemployment, community violence, family challenges, and poverty compared to their white counterparts.”¹⁰⁶ In an article entitled Unequal justice: Aboriginal and black inmates disproportionately fill Ontario jails, Rankin and Winsa discussed that when it comes to young Black men in Canada they tend to face racism, poverty, lack of opportunity, social isolation, violence in their neighborhoods, family challenges and unemployment.¹⁰⁷ Once these men are on the radar to police the systemic issues that exist with the criminal justice system is already stacked against them.¹⁰⁸ In a study on combating racial differences within juvenile systems, Maureen Kishna said, “There is an imbalance in our nation’s juvenile justice system that is not a secret known only within communities of color. The painful reality that many families have perceived and grappled with is that Black and Indigenous youth are more likely to be arrested than their white peers. This has been well documented over the years. Black youth are less likely to be diverted, more likely to be sentenced to secure facilities and even more likely to be transferred to the adult system.”¹⁰⁹

7. Historical exclusion of Black/Indigenous peoples from participation in the legal system

In addition to being overrepresented at every stage of the justice system, Black and Indigenous peoples have also been underrepresented in administering justice. A study done between April 2012 and May 2014, observed that there were 107 racialized judges in Canada who were federally appointed, out of roughly 1,204 federally appointed judges.¹¹⁰ It is not only important, but it is a necessity to have judges on the bench who reflect the multiculturalism of the country in which they rule over.¹¹¹ Diversity on the judicial bench “enhances judicial partiality as well as public confidence in the administration of justice.”¹¹² Recognition of this issue is expressed by members of the highest levels of the Canadian courts. In 2012, Chief Justice Beverley McLachlin of the Supreme Court of Canada spoke about the issue of the lack of diversity on the judicial bench in which she said, “Understanding impartiality begins with the recognition that judges are human beings... they arrive at the bench shaped by their experiences and by the perspectives of the communities from which they come. As human beings, they cannot help but to bring

¹⁰⁴ Supra note 1.

¹⁰⁵ Supra note 1.

¹⁰⁶ Supra note 1.

¹⁰⁷ Jim Rankin & Patty Winsa “Unequal justice: Aboriginal and black inmates disproportionately fill Ontario jails,” The Star (01 March 2013) Online:

[¹⁰⁸ Ibid.](http://www.thestar.com/news/insight/2013/03/01/unequal_justice_aboriginal_and_black_inmates_disproportionately_fill_ontario_jails.html#:~:text=Unequal%20justice%3A%20Aboriginal%20and%20black%20inmate%20disproportionately%20fill%20Ontario%20jails,-By%20Jim%20Rankin&text=Blacks%20and%20aboriginal%20people%20are,of%20blacks%20in%20American%20jails.&text=For%20black%20boys%2C%20the%20proportion,admissions%20is%20four%20times%20higher.></p></div><div data-bbox=)

¹⁰⁹ Supra note 1.

¹¹⁰ “Speaker’s Corner: Why judicial diversity matters” (2015), online: Law Times <www.lawtimesnews.com/archive/speakers-corner-why-judicial-diversity-matters/261585>.

¹¹¹ Ibid.

¹¹² Ibid.

these ‘leanings of the mind’ to the act of judging.”¹¹³ The idea of having diversity on the bench, is that it introduces various experiences and perspectives when it comes to the interpretation and application of the law.¹¹⁴ Due to the history of marginalization and the perspectives that come with it, it is important to have visible minorities sitting on the bench.¹¹⁵ This is especially important because visible minorities are able to understand “assumptions and stereotypes” as the foundation of some legal doctrine and overlooked interpretations, analyses and approaches.¹¹⁶

The Law Society of Ontario is the largest self-governing legal body in Canada, there are more than 55,000 lawyers and 9,000 paralegals as members. Only 19.3% of Ontario’s lawyers in 2016 identified as racialized, which is 10 points lower than the population.¹¹⁷ In 2016 the LSO reported 63 black lawyers in Ontario who were partners at law firms of all sizes.¹¹⁸ That equals about 6% of black lawyers being partners, while 18% of white lawyers were partners.¹¹⁹ In the Magazine of Policy Options just 1% of Canada’s 2,160 judges in Nova Scotia’s superior and lower courts are Aboriginal while 3% are racial minorities.¹²⁰ Marilyn Poitras, a Métis lawyer and Professor at the College of Law at the University of Saskatchewan said that the fact that “there are only two Indigenous judges out of 101, in a province where 16% of the population is Aboriginal is unacceptable. The country is losing out on the opportunity to gain from Indigenous perspectives on everything from sentencing to the factors that lead to crime...When you start to incorporate Indigenous thinking into the justice model, you start talking a lot more about preventative measures and that is where we should be taking things.”¹²¹ In Halifax, in the lower courts there were only 52 visible minority judges and 19 Indigenous judges among the 1,132 that exist in that city.¹²² In Quebec, there are only three visible minority judges out of 500 sitting judges.¹²³ In Ontario lower courts, there are 24 visible minority judges out of 334, even though 25% of Ontario’s overall population identifies as a visible minority.¹²⁴

When comparing the number of visible minority judges to the number of visible minorities accused of crimes in Canada, we see a great imbalance. This injustice undermines public confidence in the criminal justice system. A social worker out of Ontario, Robert Wright, said, “The core issues of today include unrepresented litigants, an over-representation of aboriginal and black accused, a recognition of historical racial discrimination in the courts. These things must be perceived as the most pressing issues in jurisprudence in Canada today.”¹²⁵

7. 1 Historically

Systemic racism in Canada’s education system limited the number of both Black and Indigenous youth from attending law schools in Canada.¹²⁶ The first Black Canadian lawyer, Robert Sutherland, was

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Christine Dobby, “Why are there still so few Black lawyers on Bay?” (2020), online: The Globe and Mail <www.theglobeandmail.com/business/article-why-are-there-still-so-few-black-lawyers-on-bay-street/>.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Michael Tutton, “Canada’s shortage of non-white judges creates an ‘obvious gap’ (2016), online: CBC <www.cbc.ca/news/canada/nova-scotia/canada-shortage-of-non-white-judges-creates-an-obvious-gap-1.3685026>.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Charles C Smith, “Tuition fee increases and the history of racial exclusion in Canadian legal education” (2004), online: Ontario Human Rights Commission <www.ohrc.on.ca/en/race-policy-dialogue-papers/tuition-fee-increases-and-history-racial-exclusion-canadian-legal-education>.

not called to the Ontario bar until 1855.¹²⁷ This was followed by the next Black Canadian lawyer, Delos Rogest Davis, in 1885 which ended up being a special act of the Ontario Legislature to which the Law Society of Upper Canada protested.¹²⁸ “Chinese, South Asian and Aboriginal people were prohibited from becoming members of the Law Society of British Columbia until 1947 and 1948 for people of Japanese descent.”¹²⁹

Before the amendments in 1951, the Indian Act required that Indigenous peoples give up their status if they were to pursue higher education.¹³⁰ This stopped many Indigenous peoples from entering post-secondary education and considering a law degree.¹³¹ These historical exclusions prevented both Black and Indigenous youth from participating in the legal system and becoming victims in the cycle of systemic racism. This is still the reality today across law schools in Canada where it is not uncommon to look around and see no Black or Indigenous students in the classroom. In *Why we need more Black Students in Canadian Law Schools*, Windsor Law alumni Kayla Smith discusses the lack of Black representation in law school, she notes that in classes of 60+ students she was sometimes the only Black person in the classroom.

8. Solutions: What is next

To combat systemic racism in Canada, widespread acknowledgement of its presence is required. Part of this acknowledgement must include a close examination of Canada’s history which reveals a long line of anti-Black racism and injustices against Indigenous peoples. Without an acknowledgement of racism being deeply entrenched in Canadian systems, then systemic racism will continue to affect Black and Indigenous youth at alarming rates.¹³² “Anti-black racism cannot be tackled on one front; instead, it requires an approach that considers the many layers of structural violence that inform Black and Indigenous peoples experience. Indeed, the various institutions of structural violence are intricately interwoven and feed each other, it is thereby imprudent to attempt to apprehend any one of these institutions separately without acknowledging the influence that they may exert on each other.”¹³³

It is not as clear cut as offering solutions to the endemic problem that is systemic racism, we must also ask much needed questions such as: given how deeply entrenched anti-Black and Indigenous racism is in the criminal justice system and other Canadian systems, what role do criminal justice actors play in dismantling anti-Black racism and what could that practically look like? In the *Charter of Whiteness: Twenty-five years of maintaining Racial Injustice In the Canadian Criminal Justice System*, Professor David Tanovich, wrote “the system needs anti-racist training for all criminal justice actors, the creation of monitoring systems, the creation of more anti-racist actors such as Gladue workers, the appointment of more Aboriginal and racialized judges, greater funding for community programs, community mobilization and political lobbying. I think these are core and substantial things that need to be out in place. Include a section on investing in communities in order to uproot the well-researched roots of youth violence. Invest in underserved communities; interrupt the school to prison pipeline for Black and Indigenous youth.”¹³⁴ Although these are great first steps, there is still a lot to be done because there have been many “solutions,” that have in fact kept Canada stagnant in perpetuating and supporting racist institutions.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid,

¹³¹ Ibid.

¹³² Supra note 1.

¹³³ Danardo S. Jones, *Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing* (Master of Laws, Osgoode Hall Law School of York University, 2019) [unpublished].

¹³⁴ Supra note 20 at 662.

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