

# Epistemic Rituals: How IRCAs Institutionalize Speculative Theories of Black Male Criminality in Canadian Sentencing

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## ABSTRACT

This article develops a philosophical account of Impact of Race and Culture Assessments (IRCAs) as epistemic rituals through which speculative theories about Black male criminality acquire legal authority in Canadian sentencing law. It argues that IRCAs function not merely as social context but epistemic rituals through institutional mechanisms—admissibility doctrine, expert testimony, and judicial repetition—that stabilize speculative theories of Black males as authoritative legal knowledge. Through doctrinal analysis and empirical falsification, the article shows that factual refutation has no destabilizing effect on this authority. The problem, it contends, is not factual error but epistemic immunity: IRCAs derive authority from speculative theory rather than evidential validation.

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KEYWORDS: *Epistemic Rituals, Impact of Race and Culture Assessments, Black Male Studies, Critical Race Theory, Africana Philosophy, Black Male Disposability, Anti-Black Misandry, Interest Convergence, Racial Domination, Ontological Violence.*

“For some years now, certain laboratories have been researching for a ‘denegrification’ serum. In all seriousness they have been rinsing out their test tubes and adjusting their scales and have begun research on how the wretched black man could whiten himself and thus rid himself of the burden of this bodily curse. Beneath the body schema I had created a historical-racial schema”—Frantz Fanon, 1952

“Legal rights, whether based on legislative enactments or judicial decisions, should be pursued, but cannot be relied on to either improve or protect the Black community.”—Derrick Bell, 1976

## I. INTRODUCTION

On August 7, 2025, *The Canadian Press* reported that Christopher Skeete, Quebec’s Minister Responsible for the Fight Against Racism, criticized a sentencing decision in which race was considered.<sup>1</sup> The case involved Frank Paris, a disabled Black man convicted of trafficking cannabis and hashish.<sup>2</sup> Although the Crown sought a four-year sentence, Justice Lepage, citing an Impact of Race and Culture Assessment (IRCA) submitted by his lawyer, released Paris due to a two-year credit for time already served and the impact of that detention on his health.<sup>3</sup> The IRCA described Paris as an intergenerational survivor of slavery.<sup>4</sup> This framing of Paris would lead Skeete to remark that this would cause Quebec courts to “formalize discrimination” in sentencing.<sup>5</sup>

Despite this framing by Skeete, in court, Justice Lepage, based on the expertise of three IRCA writers, explained that the IRCA sought to convey that part of Paris’s use of cannabis was a result of the car accident he

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<sup>1</sup> Miriam Lafontaine, “Quebec minister disappointed after race considered in reduced sentence for Black man”, *The Canadian Press* (7 August 2025), online: <thecanadianpressnews.ca> [perma.cc/W4VY-ZGPH].

<sup>2</sup> *R v Paris*, 2025 QCCQ at para 21.

<sup>3</sup> *Ibid* at para 125; Lafontaine, *supra* note 1.

<sup>4</sup> Lafontaine, *supra* note 1.

<sup>5</sup> *Ibid*.

survived that “profoundly impacted his mobility and mental well-being, forcing him to navigate the world as a Black man with a disability, a ‘double intersectionality.’”<sup>6</sup> The assessors had further noted that Paris’s mobility had since deteriorated due to limited access to physiotherapy in jail.<sup>7</sup>

Justice Lepage noted that while the assessors did not “provide diagnoses, the report includes references to research indicating that racially stressful events can trigger PTSD [post-traumatic stress disorder] and introduces the concept of ‘Post-Traumatic Slave Syndrome (PTSS), developed by Joy DeGruy, to offer a framework for understanding intergenerational trauma rooted in the history of slavery and its contemporary effects on Black individuals.”<sup>8</sup> PTSS, the assessors noted, examines intergenerational trauma (connected to slavery and oppression) which leads to maladaptive coping mechanisms and cultural mistrust in Black individuals.<sup>9</sup>

As such, Justice Lepage arrived at his verdict by taking into consideration, among other things, PTSS and Paris’s declining mobility while incarcerated.<sup>10</sup> Yet this was never part of the media controversy that emerged from the case. Nevertheless, this media controversy around *Paris* shows the contested role IRCAs play in contemporary Canadian sentencing of Black males in courts and the media.<sup>11</sup> Yet beyond the media sensationalism, an important question needs to be asked: What does it mean that IRCAs like the one used in *Paris* use the history of slavery and anti-Black racism to contextualize Black male offending by arguing that as a result of this history, Paris had developed PTSS as a “maladaptive coping mechanism”, as well as developing cultural mistrust?<sup>12</sup>

Before exploring this question in depth, the section below offers a road map for the rest of the article. In the sections that follow, I discuss the paper’s rationale, structure of the arguments, the method used, give a brief overview of the origins and current legal scholarship on IRCAs and proceed to the rest of the sections.

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<sup>6</sup> *R v Paris*, *supra* note 2 at paras 34, 59, 65.

<sup>7</sup> *Ibid* at para 65.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* at para 59.

<sup>10</sup> *Ibid* at para 44.

<sup>11</sup> Maria C Dugas, “Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders” (2020) 43:1 Dal LJ 103 at 105, n 2 [Dugas, “Committing to Justice”].

<sup>12</sup> *R v Paris*, *supra* note 2 at para 59. For a critique of this framing of Black men see Jeanette Covington, “The Violent Black Male: Conceptions of Race in Criminological Theories” in Darnell F Hawkins, ed, *Violent Crime: Assessing Race and Ethnic Differences* (Cambridge: Cambridge University Press, 2003) at 256.

### A. *Paper's Rationale*

First, this article does not question the reality of anti-Black racism in sentencing of Black males, nor the genuine injustice that motivated the creation of IRCAs. The concern this article raises is different and more specific: it is about the epistemic framework through which IRCAs pursue this redress. For instance, national court data reveals a persistent contradiction in the treatment of Black males compared to white males in Canadian courts. Data shows that Black males are less likely to be found guilty and more likely to have charges withdrawn.<sup>13</sup> Nevertheless, even when incarceration is avoided, Black males are more likely to be placed under probation rather than released with minimal sanction.<sup>14</sup> Furthermore, when convicted, Black males are more likely to receive custodial sentences and longer terms of incarceration.<sup>15</sup> This contradictory pattern suggests punishment is not driven solely by legal culpability but requires interpretive justification at sentencing of Black males.<sup>16</sup>

As such, this essay argues that in an effort to make sense of this contradictory pattern of treatment of Black males by the courts, IRCAs as pre-sentencing tools operate within this interpretive gap by providing speculative theories of Black male psychology and culture that translates structural racism into individualized pathology, thereby reconciling harsher punishment with claims of individualized justice. Furthermore, the article advances the claim that the social context evidence provided through IRCAs becomes pathologizing not because of the facts it presents, but because the epistemic framework governing its admissibility, interpretation, and repetition structurally transforms racial context into psychological pathology that gives courts a context for sentencing. To prove this claim, the article develops three interlocking arguments.

### B. *Structure of the Arguments*

The first argument is genealogical and advances the claim that the epistemic framework of IRCAs is grounded in speculative theories—subculture theory of violence, cool pose, vacant esteem, and PTSS—that are not empirical accounts of Black masculinity. Since subculture theory was

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<sup>13</sup> Charbel Saghbini & Lysiane Paquin-Marseille, *Black People in Criminal Courts in Canada: An Exploration Using the Relative Rate Index* (Ottawa: Department of Justice Canada, Research and Statistics Division, 2023) at 16–18.

<sup>14</sup> *Ibid* at 20.

<sup>15</sup> *Ibid* at 21–26.

<sup>16</sup> Akwasi Owusu-Bempah & Zilla Jones, *A Roadmap for Transformative Change: Canada's Black Justice Strategy* (Ottawa: Department of Justice, 2024) at 37, online: <justice.gc.ca> [perma.cc/3REX-B4NN].

the foundational speculative theory that was used in the creation of IRCAs, Section II offers a genealogy of the origins of subculture theory and its enduring influence in criminology.<sup>17</sup> Section III documents how two epistemic rituals embedded subculture theory in Halifax's 2008 public safety report and crime prevention program, CeaseFire Halifax, showing how this became the backdrop of courts in Halifax adopting IRCAs.

The second argument is doctrinal. Section IV focuses on doctrinal analysis of five judicial epistemic rituals found in *R v X*, *R v Gabriel*, *R v Morris* (trial and appeal), and *R v Anderson* (trial and appeal), showing how these cases introduced other speculative constructs—cool pose, vacant esteem, and PTSS—that have shaped how courts use IRCAs in sentencing of Black males.<sup>18</sup> The entry of these speculative theories, this essay argues, was made possible through specialized knowledge doctrine, as established in *R v Abbey*.<sup>19</sup>

In *Abbey*, courts established that the admittance of expert testimony (social sciences and humanities expert testimony), recognized as special or peculiar knowledge, does not require empirical scrutiny, stating,

Scientific validity is not a condition precedent to the admissibility of expert opinion evidence. Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated. To test the reliability of the opinion of these experts...using reliability factors referable to scientific validity is to attempt to place the proverbial square peg into the round hole.<sup>20</sup>

Nevertheless, to test the reliability of expert testimony under specialized knowledge courts have ruled that judges can ask nine questions when it comes to qualitative methods used in curating testimony.<sup>21</sup> Of those nine questions, a few specify that judges should ask what the methods of peer review are within the expertise field and whether the data collected through qualitative methods is accurate and available. Are the qualitative methods used to present evidence accepted practice in the experts' field of study? Is the data presented independently of the specific case?<sup>22</sup>

Despite the criteria developed for specialized knowledge, legal scholars have long noted that one of the recurring problems of specialized knowledge

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<sup>17</sup> *R v X*, 2014 NSPC 95 at para 185.

<sup>18</sup> *R v Gabriel*, 2017 NSSC 90; *R v Morris*, 2018 ONSC 5186 [*Morris SC*]; *R v Morris*, 2021 ONCA 680 [*Morris CA*]; *R v Anderson*, 2020 NSPC 10 [*Anderson PC*]; *R v Anderson*, 2021 NSCA 62 [*Anderson CA*].

<sup>19</sup> *R v Abbey*, 2009 ONCA 624.

<sup>20</sup> *Ibid* at para 109.

<sup>21</sup> *Ibid* at para 119.

<sup>22</sup> *Ibid*.

testimony is that courts have not always rigorously scrutinized specialized knowledge testimony, which often results in biases entering the court room.<sup>23</sup> To combat this, legal scholars have advanced that there is a need to revise existing criteria on specialized knowledge testimony to include empirical accounts.<sup>24</sup> This is important as recent scholarship has argued that courts can be attentive to the structural history of oppression in Canada without pathologizing racialized groups.<sup>25</sup>

Nevertheless, this essay defines this persistent process of admitting speculative theories of Black males in courts through IRCAs as epistemic rituals: the mechanism by which speculative theories of Black males from academic sources acquire legal authority through specialized knowledge experts (academics, social workers, anti-Black racism experts) and are stabilized through judicial repetition and become legally binding despite their empirically refuted status. Crucially, the article shows how factual refutation has no destabilizing effect on this authority. This is not error, it is epistemic immunity, and it requires explanation.

The third argument is empirical. In Section V, the article presents data on youth crime patterns in Nova Scotia, firearms epidemiology, firearm violence distribution across Canadian geographies and adverse childhood experiences among federal offenders that falsifies the empirical presuppositions embedded in IRCA frameworks. As Section IV shows, IRCAs presuppose that Black male offending is disproportionately firearm-centred, that firearm use reflects culturally transmitted norms within Black communities, and that Black males exhibit heightened criminogenic vulnerability relative to other populations. The data in Section V contradicts each of these presuppositions.

### *C. The Relationship between the Structural and Epistemic Arguments.*

Taking all three claims together, the article advances both a structural and an epistemic critique. The structural critique holds that IRCAs cannot advance racial justice because the carceral system is constitutively incapable of delivering it, which is to say a system built on racial subordination cannot remedy that subordination through therapeutic rehabilitation as established

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<sup>23</sup> Gary Edmond & Kent Roach, "A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence" (2011) 61:3 UTLJ 343 at 366-67. Jason M Chin, "Abbey Road: The (Ongoing) Journey to Reliable Expert Evidence" (2018) 96:3 Can Bar Rev 422 at 425.

<sup>24</sup> Edmond & Roach, *supra* note 23 at 395-97.

<sup>25</sup> Benjamin Ewing & Lisa Kerr, "Reconstructing Gladue" (2024) 74:2 UTLJ 156 at 170-84.

in *R v Anderson*.<sup>26</sup> The epistemic critique holds that the specific theories in IRCAs are empirically false and produce pathological accounts of Black males that legitimate rather than challenge carceral power.

These are distinct claims, but they are not competing ones. The structural argument explains why the epistemic failure persists. If courts required empirically validated theories, the pathological framework would eventually be displaced. But courts do not require this, the *Abbey* threshold for specialized knowledge expressly exempts expert testimony from empirical validation.<sup>27</sup> Furthermore, *Anderson* states that “it may amount to an error of law for a sentencing judge to ignore or fail to inquire into” the systemic and background factors described in an IRCA or otherwise provided or observed in the sentencing of African Nova Scotian offenders.<sup>28</sup> *Anderson* legally obligates courts to apply frameworks whose epistemic foundations are compromised. The result is epistemic closure: the structural conditions of the carceral system and the doctrinal conditions of sentencing law work together to immunize speculative theories against falsification.

#### D. *Method Section*

This essay employs a Black Male Studies (BMS) philosophical methodology as established by Africana philosopher Tommy Curry to interrogate the epistemic framework of IRCAs. BMS methodology is used for a specific reason that is worth making explicit.<sup>29</sup>

Existing critical scholarship on IRCAs, including important contributions from Danardo Jones, Andrea Anderson and Maria Dugas have analyzed IRCAs through the lens of Critical Race Theory (CRT) focusing on anti-Blackness and sentencing law.<sup>30</sup> This scholarship while noting IRCAs are a significant achievement, has cautioned against overstating their transformative potential.

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<sup>26</sup> *Anderson CA*, *supra* note 18 at para 120.

<sup>27</sup> *R v Abbey*, *supra* note 19 at para 109.

<sup>28</sup> *Anderson CA*, *supra* note 18 at para 118.

<sup>29</sup> For pioneer work in BMS see Tommy J Curry, *The Man-Not: Race, Class, Genre, and the Dilemmas of Black Manhood* (Philadelphia: Temple University Press, 2017). For BMS methodology see Tommy J Curry, “Must There Be an Empirical Basis for the Theorization of Racialized Subjects in Race-Gender Theory?” (2021) 121:1 *Proceedings Aristotelian Society* 21 [Curry, “Must There Be”].

<sup>30</sup> Andrea S Anderson, “Analysis: Considering Social Context Evidence in the Sentencing of Black Canadian Offenders” (2022) 45:6 *Man LJ* 152 at 153 [Anderson, “Analysis”]; Dugas, “Committing to Justice”, *supra* note 11; Danardo S Jones, “Paradoxical Race Visibility in Canadian Sentencing Law” (2024) 102:2 *Can Bar Rev* 419.

For example, Dugas observes that IRCAs allow the state to appear responsive to racism while avoiding accountability for structural inequities.<sup>31</sup> Similarly, Jones, in an assessment of 92 ICRA's (89 Black men, three Black women), identifies a "paradox of visibility": focusing on Blackness can either expose disadvantage or reinforce pathologizing narratives while ignoring its risk of perpetuating myths of neutrality.<sup>32</sup> For Jones, in practice, IRCAs often emphasize deprivation, poverty, and violence in ways that reproduce stereotypes of Black recalcitrance and criminality.<sup>33</sup>

Utilizing CRT, existing legal scholarship on IRCAs has developed sustained doctrinal critiques of IRCAs, and their racialized dimensions.<sup>34</sup> This article enters that conversation from philosophy, taking the doctrine itself as an epistemic object rather than as a legal artifact requiring reform. In doing so, this essay interrogates the specific epistemic mechanism through which pathological theories of Black males acquire legal authority in IRCAs by utilizing a BMS philosophical methodological approach.

BMS methodology is specifically designed to attend to the epistemological mechanisms through which Black males are constructed through theory as ontologically distinct, yet simultaneously threatening and pathological in ways that erase their empirical vulnerability to different societal violence in policy, race, gender and legal theory.<sup>35</sup>

As such, BMS work in legal philosophy has interrogated how contemporary law's reliance on racist, speculative and pathological theories of Black males' functions through historically sedimented assumptions such that Black males simultaneously appear as hyper-visible threats to society and invisible as rights-bearing subjects in Western societies.<sup>36</sup>

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<sup>31</sup> Maria Dugas, "Addressing Anti-Black Racism in Sentencing: A Critical Comparison of *R v Anderson*, and *R v Morris*" (2024) 102:3 Can Bar Rev 644 at 666 [Dugas, "Addressing Anti-Black Racism"].

<sup>32</sup> Jones, *supra* note 30 at 445-47.

<sup>33</sup> *Ibid.*

<sup>34</sup> See Dugas, "Committing to Justice", *supra* note 11 at 116-46; Jones, *supra* note 30 at 445-47.

<sup>35</sup> Curry, "Must there Be", *supra* note 29.

<sup>36</sup> Adebayo Oluwayomi, "The Man-Not and the Inapplicability of Intersectionality to the Dilemmas of Black Manhood" (2020) 28:2 J Men's Studies 183; Adebayo Oluwayomi, "The Fear of Black Men? A Fanonian Cartography of Anti-Black Misandry as Psycho-Sexual Pathology" (2022) 8:4 J Black Sexuality & Relationships 55; Dalitso Ruwe, "Eugenic Caricatures of Black Male Death from the Nineteenth- to Twenty-First Centuries" (2022) 25:3 Theory & Event 665 [Ruwe, "Eugenic Caricatures"]; Tommy J Curry, "Feminism as Racist Backlash: How Racism Drove the Development of

Building on this literature, this paper presents the first Canadian-focused engagement with BMS analysis of speculative theories of Black males in sentencing law. This essay draws on Curry's critique of intersectionality theory's indebtedness to subculture theory of violence and its theorizations of Black males as rapists as opposed to victims of sexual violence.<sup>37</sup> Briefly stated, subculture theory of violence was first proposed in 1958 by criminologist Marvin Wolfgang, who argued that Black males committed homicides at high rates due to cultural norms that show that Black males accept violence as a means of resolving personal conflict.<sup>38</sup> Building on Wolfgang's work, later theorists such as Menachem Amir in 1971, would argue that Black male rape was a result of an acceptable subculture of violence for Black males.<sup>39</sup>

Despite the empirical refutation of these subculture theory ideas, Curry's work demonstrates how they have persisted in intersectional and criminology theory, thereby showing that even seemingly progressive frameworks like intersectionality often replicate rather than disrupt pathological accounts of Black men.<sup>40</sup> While building on Curry's critique of subculture's influence on intersectionality, this essay through the concept epistemic rituals attends to speculative theories of Black males in sentencing law in Canada.

The concept of epistemic ritual is a BMS analytical tool that focuses on speculative theories of Black males in criminal law and not a descriptive label. Using the concept, a central finding of this article as shown in Sections II and VI is that the originators of the theories used in IRCAs—including subculture theory, cool pose, vacant esteem, and PTSS—explicitly

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Nineteenth- and Twentieth-Century Feminist Theory" in Ashwini Deshpande, ed, *Handbook on Economics of Discrimination and Affirmative Action* (Singapore: Springer Nature Singapore, 2023) 869; Tommy J Curry, "Pruriently Feared: Theoretical Erasure of the Disabled Black Male" in Shelley Lynn Tremain, ed, *The Bloomsbury Guide to Philosophy of Disability* (London: Bloomsbury, 2023) 72; Dalitso Ruwe, "Can Black males be subjects of human rights violations?" (2025) 29:1 Intl JHR 104. Dalitso Ruwe, "Black Male Disposability and the Dark Side of Canadian Multiculturalism" (2026) *Philosophy & Soc Criticism* (Articles in Press, February) 1 [Ruwe, "Black Male Disposability"].

<sup>37</sup> Tommy J Curry, "Decolonizing the Intersection: Black Male Studies as a Critique of Intersectionality's Indebtedness to Subculture of Violence Theory," in Robert Beshara, ed, *Critical Psychology Praxis* (London: Routledge, 2021) at 132–48 [Curry, "Decolonizing the Intersection"].

<sup>38</sup> Marvin E Wolfgang, *Patterns in Criminal Homicide* (Philadelphia, University of Pennsylvania, 1958) at 329.

<sup>39</sup> Curry, "Decolonizing the Intersection", *supra* note 37 at 140.

<sup>40</sup> *Ibid* at 132–48.

acknowledge their frameworks lack empirical grounding, a fact that underscores the need for a methodology attentive to the epistemic mechanisms through which speculative constructs of Black males acquire legal authority. Therefore, the article shifts attention from doctrinal fairness debates in existing literature on IRCAs to the epistemic mechanism (specialized knowledge doctrine) showing how racial and gender subordination of Black males operates through the law.<sup>41</sup>

This article does not propose reforms to sentencing doctrine or IRCA design. Its aim is diagnostic. The task is to identify the epistemic conditions under which speculative theories of Black males acquire legal authority and to show why those conditions cannot be remedied within the existing framework without dismantling the pathological narrative the framework structurally requires.

### E. *Origins of IRCAs*

IRCAs were created by Afro-Nova Scotian social worker Robert Wright in 2014 following expert testimony Wright gave in *R v X*, a case in which X, a sixteen-year-old Afro-Nova Scotian male, shot his cousin.<sup>42</sup> Wright is renowned for his advocacy work focused on incarcerated Black males and developing psychological models used in courts that show how racial, gender, and cultural issues afflict the racial and gender development of Black males in Halifax.<sup>43</sup>

Given his expertise in developing racial, gender and cultural assessments of Black males, Wright's testimony in *X* offered an assessment that situated X and Black males in Halifax as steeped in a culture where guns are an acceptable means of resolving personal conflict.<sup>44</sup> In the aftermath of the case, when asked by reporters what made his assessment of X different from that of the Crown's psychologist, Wright would note,

I found the person to be certainly impacted by having lived in a community that has been criminally affected, and so there are certain coping mechanisms and

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<sup>41</sup> For racial subordination and law see Constance Backhouse, *Reckoning with Racism: Police, Judges, and the RDS Case* (Vancouver: UBC Press, 2022); Richard Delgado, "Rotten Social Background: Should the Criminal Law Recognize a Defence of Severe Environmental Deprivation?" (1985) 3:1 Law & Ineq 9.

<sup>42</sup> *R v X*, *supra* note 17 at para 1.

<sup>43</sup> Robert S Wright, "R. v. 'X' and the Advent of Cultural Assessments in Criminal Court" (14 September 2016), online (pdf): <site-vnutjy3m.dewsecdn1.dotezcdn.com> [perma.cc/8JCL-LVS9].

<sup>44</sup> *R v X*, *supra* note 17 at para 185.

strategies that a person adopts to live in that circumstance, but I felt that was more of a coping mask than a status or disposition.<sup>45</sup>

Wright's assessment offered in *X* would lead to IRCAs being implemented by the federal government as pre-sentencing instruments that help judges understand how systemic anti-Black racism, adverse childhood experiences, and other socioeconomic factors impact Black Canadians before the court.<sup>46</sup> Despite this adoption of IRCAs by the federal government as useful tools for judges in cases invoking Black Canadians, this article will show that Wright's assertion that *X* was from a "criminally affected community" and developed "certain coping mechanism and strategies" laid the foundation for the epistemic frameworks of IRCAs to use speculative theories of Black masculinity to contextualize Black male offending.

Simply put, Wright's testimony was grounded in subculture theory of violence.<sup>47</sup> Consider that, following the qualifications of *voir dire*, Justice Derrick (as she was) would accept Wright as a specialized knowledge expert, noting that he "was shown to have acquired special or peculiar knowledge through both study and practical training and experience."<sup>48</sup>

Justice Derrick would go on to review two papers Wright submitted for his qualifications. One was a paper from May 2012, which he presented as part of discussions about a Public Safety Discussion in Halifax, entitled "Toward the Development and Implementation of a Violence Interruption Program in the Halifax Regional Municipality (HRM)."<sup>49</sup> The paper sought to advocate for the adoption in Halifax of a violence interruption program from Chicago called Ceasefire.<sup>50</sup> The paper was of interest to Justice Derrick, as she noted,

Mr. Wright makes a couple of points I will mention here: he notes that "When violence is 'Black on Black' it inevitably involves overlapping social and/or family ties between victim and perpetrator." He also observes that criminally identified African-Nova Scotians may be apt to have a violent response to "being disrespected."<sup>51</sup>

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<sup>45</sup> Jon Tattrie, "Colour of Justice Part 3: The Defence", *CBC News* (11 March 2015), online: <cbc.ca> [perma.cc/LZX6-TBLS].

<sup>46</sup> Owusu-Bempah & Jones, *supra* note 16 at 37.

<sup>47</sup> Wolfgang, *supra* note 38 at 329.

<sup>48</sup> *R v X*, *supra* note 17 at para 176.

<sup>49</sup> *Ibid* at para 173.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid* at para 174.

What Justice Derrick found interesting in Wright's paper, that "criminally identified African-Nova Scotians may be apt to have a violent response to 'being disrespected,'" is an assessment from subculture theory of violence.<sup>52</sup> While Wright was qualified as a specialized knowledge expert, the limits of his theoretical methods grounded in subculture theory of violence from his 2012 paper seems as if they were never raised.<sup>53</sup>

As such, in his testimony in X in 2014, Wright would rearticulate the idea from his 2012 paper that "criminally identified African-Nova Scotians may be apt to have a violent response to "being disrespected"" during his testimony.<sup>54</sup> In X, Wright did not present subculture theory of violence as controversial, exploratory, or contested theory about Black male offending; it was presented as social context evidence and a factual framework for understanding X's behaviour that became embedded in the framework of IRCAs.

For instance, consider that the epistemic framework Wright described in X—that X came from a "criminally affected community" that led him to develop certain coping mechanism and strategies<sup>55</sup>—is the same framing that was used to describe Paris in 2025 as suffering from PTSS, which was noted as a theory that "examines intergenerational traumas connected to slavery and oppression, leading to *maladaptive coping mechanisms and cultural mistrust*."<sup>56</sup>

Given this reality, this essay asks this question: What does it mean that when Black males appear before judges, IRCAs use speculative theories to construct Black males as the type of beings who, because of the history of slavery and anti-Black racism, have developed maladaptive coping mechanism and cultural mistrust that leads to them engaging in crime? The next section attends to this question through a genealogy of subculture theory of violence.

## II. GENEALOGY OF SUBCULTURE THEORY OF VIOLENCE AND THE EPISTEMIC PROBLEM.

Subculture theory of violence was first proposed by Wolfgang in his 1958 text *Patterns in Criminal Homicide*. The text was a study of criminal homicide and its variation between Black and white communities in

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<sup>52</sup> *Ibid*; Wolfgang, *supra* note 38 at 329.

<sup>53</sup> *R v Abbey*, *supra* note 19 at para 119.

<sup>54</sup> *R v X*, *supra* note 17 at para 174.

<sup>55</sup> *Ibid* at para 189.

<sup>56</sup> *R v Paris*, *supra* note 2 at para 59 [emphasis added].

Philadelphia. Wolfgang looked at criminal homicide data compiled by police, coroners, courts, and prisons between January 1, 1948, and December 31, 1952, and noted that Black males were the highest demographic of both perpetrators and victims of homicide.<sup>57</sup> In his assessment of why Black males perpetuate violence against other Black males, Wolfgang argued,

Intensive reading of the police files and of verbatim reports of interrogations...by the author suggest that the significance of a jostle, a slightly derogatory remark, or the appearance of a weapon in the hands of an adversary are stimuli differentially perceived and interpreted by Negroes and whites, males and females.<sup>58</sup>

While Wolfgang in this passage is listing the motives that led to violence as seen between the races and sexes, here he is also repeating an argument made earlier where he asserts "...individuals are socialized positively or negatively toward special objects, that the culture bound personality is by race, sex, age, social class, and other gross social attributes we may speak of significant race and sex preferences for weapons employed in criminal homicides."<sup>59</sup> This is significant because Wolfgang after looking at the overrepresentation of Black males in homicides advances the claim that "it is safe to assert that the difference in the frequency of criminal homicide is significantly greater between the races within each sex than the differences between the sexes with each race."<sup>60</sup> As such, given Wolfgang's belief that the use of objects in criminal homicides result from being "socialized positively or negatively towards objects," and can be seen as part of a "culture bound personality," whose differences are marked particularly between Black and white males.<sup>61</sup> Wolfgang, surmises that since stabbings by Black males were the highest forms of homicide in the data, this can be attributed to a cultural phenomenon in which "carrying a pocketknife or some other type of cutting or piercing instrument is believed to be a cultural tradition among lower-class Negroes. This belief is partly substantiated by the predilection of this race for such a weapon in committing homicide."<sup>62</sup>

Given this, Wolfgang concludes that carrying pocketknives and the perceived slight to one's manhood means that Black males in Philadelphia

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<sup>57</sup> Wolfgang, *supra* note 38 at 5, 66-67.

<sup>58</sup> *Ibid* at 188.

<sup>59</sup> *Ibid* at 83.

<sup>60</sup> *Ibid* at 32.

<sup>61</sup> *Ibid* at 86. On page 320 he notes, "However, there appears to be a cultural preference by race and sex for particular types of methods and weapons used to inflict death. Males, if negro, usually stab are stabbed to death; and if white, beat and are beaten to death."

<sup>62</sup> *Ibid* at 86.

have developed “a sub-culture of violence which does not define personal assaults as wrong or anti-social; in which quick to resort to physical aggression is a socially approved and expected concomitant of certain stimuli; and in which violence has become a familiar but often deadly partner in life’s struggle.”<sup>63</sup>

In 1967, Wolfgang coauthored the text *The Subculture of Violence* with psychologist Franco Ferracuti.<sup>64</sup> The authors sought to create an integrated theory of violence and homicide to be used for clinical criminologists. Using the Philadelphia study as their data, they argued,

If aggression in general is associated with age and sex, homicide, as an explicit behavioral form of aggression, is especially so. Almost universally it can be asserted that the highest incidence of assaultive crimes such as homicide is found among young offenders, most of whom are in their twenties, many of whom are in their late teens or early thirties. Males predominate everywhere.<sup>65</sup>

Wolfgang and Ferracuti argued that the highest form of aggression, homicide, was thought to be most prevalent among Black males because they commit more crime in the nation.<sup>66</sup> Referring to the Philadelphia data, they argued,

From the foregoing, it is obvious even to the casual observer that only a few males in their twenties commit homicide or other crimes of violence. Only a few of those who are in the lower social and economic class, who have below average IQs, whose families are disrupted, who live in poor neighborhoods, etc., kill others or even act aggressively.<sup>67</sup>

While Wolfgang had noted in his 1958 study that the carrying of pocketknives was a cultural tradition of Black males, in his collaboration with Ferracuti they asserted,

We are not prepared to account for the genesis of the subculture, but a thesis that points to the descriptive parameters of a phenomenon (the subculture of violence)

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<sup>63</sup> *Ibid* at 329. On page 330 he notes, “The high incidence of homicide among Negroes requires combined research by students of race and crime to fathom all the ramifications this consistent finding implies.... A biological explanation of the significant race differential is certainly not an implication of this study, although the door to future research in this area should not be closed any more than to the other avenues of objective research. However, more fruitful research seems at present to lie in analysis of the socio-psychological position of whites and negroes. Our data suggest that a subculture of violence exists among a certain portion of the lower socio-economic group—especially comprised of males and Negroes.”

<sup>64</sup> Marvin Wolfgang & Franco Ferracuti, *The Subculture of Violence: Towards an Integrated Theory in Criminology* (London: Tavistock Publications, 1967).

<sup>65</sup> *Ibid* at 258 [footnotes omitted].

<sup>66</sup> *Ibid* at 264.

<sup>67</sup> *Ibid* at 269.

theoretically presumed to be causally linked to another phenomenon (homicide and other crimes of violence) can provide a useful basis for social intervention, prevention, and treatment.<sup>68</sup>

This is the origin point of our problem: A theory that rested on observed correlation, not a causal mechanism, and had no empirical grounding became the basis of understanding Black male criminality in North America.<sup>69</sup> Courts would later inherit this theory not as speculation but as established fact.<sup>70</sup> The admission of uncertainty as voiced by Wolfgang and Ferracuti would disappear. What remained is the pathologizing framework. Nevertheless, in the absence of providing empirical analysis of the evidential origins of subculture theory of violence, Wolfgang and Ferracuti would go on to argue that any positive or negative stimuli in the environment can create a learned response to violence in Black males as a response to their social condition.<sup>71</sup>

This gap between the lack of empirical evidence of the genesis of subcultural norms and the assertion that violence in Black males is a learned response to both negative and positive stimuli in their environment has meant that criminologists influenced by Wolfgang and Ferracuti have argued that Black males have developed a cultural, genetic, neurogenetic distrust for police and that the structural impact of racism has resulted in Black males having a propensity for violence against other Black males as a learned response to both the negative and positive stimuli in their environment.<sup>72</sup>

Despite the popularity of the theory, empirical studies have refuted the validity of this Black subculture of violence.<sup>73</sup> Nevertheless, this theory has found resonance across Western nations, where criminologists have focused on Black and racialized young men as a criminogenic violent population. This has been no different in Canada, where subculture theory of violence

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<sup>68</sup> *Ibid* at 264.

<sup>69</sup> Robert D Crutchfield, "From Slavery to Social Class to Disadvantage: An Intellectual History of the Use of Class to Explain Racial Differences in Criminal Involvement" (2015) 44:1 *Crime & Justice* 1 at 3–33.

<sup>70</sup> See e.g. Eric A Stewart & Ronald L Simons, *The Code of the Street and African-American Adolescent Violence* (Washington, DC: US Department of Justice, National Institute of Justice, 2009), online: <govinfo.gov> [perma.cc/UA78-Z2RX].

<sup>71</sup> Wolfgang & Ferracuti, *supra* note 64 at 264.

<sup>72</sup> William Oliver, *The Violent Social World of Black Men* (Lanham, MD: Lexington Books, 1994) at 7.

<sup>73</sup> Liquan Cao, Anthony Adams & Vickie J Jensen, "A Test of the Black Subculture of Violence Thesis: A Research Note" (1997) 35:2 *Criminology* 367 at 369–74; Darnell F Hawkins, "Black and White Homicide Differentials: Alternatives to an Inadequate Theory" (1983) 10:4 *Crim Justice & Behavior* 407 at 413–35.

has been part of academic discussion about gun violence and Black gangs since the 1990s and would resurface in public policy documents in the 2000s in Halifax after local incidents of violence drew international attention.<sup>74</sup> As such, the next sections focuses on two epistemic rituals showing how subculture theory of violence was embedded in public safety documents and Ceasefire Halifax.

### III. INSTITUTIONAL EMBEDDING OF SUBCULTURE THEORY IN HALIFAX

The first epistemic ritual focuses on institutional embedding of subculture theory of violence in Halifax public policy documents. This is to say, between 2006 and 2008, following local and international attention to violence in Halifax, Halifax mayor, Peter Kelly would convene roundtables on Violence and Public Safety in the Halifax Regional Municipality (HRM).<sup>75</sup> In 2008, the recommendations from the roundtable resulted in *A Report to the Mayor as a Result of the Roundtable on Violence and Public Safety in Halifax Regional Municipality*, written by Don Clairmont, professor of criminology at Dalhousie University and director of the Atlantic Institute of Halifax. This report is crucial to understanding how epistemic rituals work through specialized knowledge at the governmental level because Clairmont's report did not discover Black male subculture but institutionalized it as official knowledge about Black males and teen swarming in Halifax.

#### *A. Teen Swarming and Black Male Subculture Construction.*

Amongst the different forms of violence that were reported to plague Halifax between 2006 and 2008 was teen swarming.<sup>76</sup> In defining the origins of teen swarming, Clairmont wrote that "sociologists refer to the modern origins of swarming in the inner cities of the USA where the desire to get

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<sup>74</sup> Marc Le Blanc & Nadine Lanctot, "Social and Psychological Characteristics of Gang Members According to the Gang Structure and Its Subcultural and Ethnic Makeup" (1998) 5:3 J Gang Research 15 at 21-23; Pierre Tremblay et al, *Le délinquant affilié: La sous-culture des gangs de rue haïtiens de Montréal* (Montréal: Liber, 2016) at 23-24.

<sup>75</sup> "Halifax stabbing prompts call for summit on violence", *CBC News* (6 November 2006), online: <cbc.ca> [perma.cc/MV9K-TYQT]; Don Clairmont, *Violence and Public Safety in the Halifax Regional Municipality: A Report to the Mayor as a Result of the Roundtable* (Halifax: Atlantic Institute of Criminology, 2008) at 6, online: <legacycontent.halifax.ca> [perma.cc/SJ6E-SRXY].

<sup>76</sup> Clairmont, *supra* note 75 at 7.

an expensive item such as top-grade running shoes (i.e., expensive sport paraphernalia) mixed with quasi-gang motives.”<sup>77</sup> Clairmont further elaborated that swarming is defined by the following fact:

It has an inner city, Black subculture identity which conventional street robberies do not have. Swarming, as found in HRM, would appear to be more motivated by these non-utilitarian considerations. There is often no material gain whatsoever and when there is, the assault seems “over the top” or gratuitous (a concept frequently used by police, prosecutors and judges in describing these actions).<sup>78</sup>

While Clairmont offers the genesis of swarming as an American phenomenon, no citation appears in the report for sociological studies of swarming originating as an inner-city Black subculture identity in the US.<sup>79</sup> Despite Clairmont’s designation of swarming as an inner-city Black subculture identity, anticolonial sociologist Tamari Kitossa has shown that swarming was first coined by sociologist Frederic Thrasher in his 1927 study of 1,313 gangs from different racial groups in Chicago.<sup>80</sup> In his study, Thrasher defined swarming the following way:

The beginnings of the gang can best be studied in the slums of the city where an inordinately large number of children are crowded into a limited area. On a warm summer evening children fairly swarm over areaways and sidewalks, vacant lots and rubbish dumps, streets and alleys. The buzzing chatter and constant motion remind one of insects which hover in a swarm yet ceaselessly dart hither and thither within the animated mass.<sup>81</sup>

Thrasher does not ascribe a racial designation to swarming, he only notes that it is a part of how youth form gangs in Chicago. In this way, this treatment of swarming by Clairmont exemplifies the mechanism of epistemic rituals operating in policy discourse. Clairmont selectively mobilizes sociological sources (erasing Thrasher’s original, unracialized definition from 1927), adds racialized content without citation, and presents the result as empirical observation of Black subculture identity.<sup>82</sup>

Importantly, outside the American context, the term swarming was first used in Toronto in 1988 by police to describe acts of vandalism by a group of 100 youth who stole designer track clothes, skiwear and polo shirts after

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<sup>77</sup> *Ibid* at 23.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> Tamari Kitossa, "Habitue and Rethinking the Discourse of Ghetto Youth, Gangs and Violence" in Chris Richardson & Hans Skott-Myhre, eds, *Habitue of the Hood* (Bristol: Intellect Press, 2012) at 130–31.

<sup>81</sup> Frederic M Thrasher, *The Gang: A Study of 1,313 Gangs in Chicago* (Chicago: University of Chicago Press, 1927) at 26.

<sup>82</sup> Clairmont, *supra* note 75 at 23.

they were kicked out of the Canadian National Exhibition.<sup>83</sup> In 1989, journalists and police increasingly began to describe swarming as random acts of violence by groups of skinheads and other youth gangs who would beat up and rob other youth and adults for their shoes, money, clothes, or jewellery.<sup>84</sup> It was not until 1995 that swarming was first described as a Black male phenomenon by a journalist.

After media reports of young Black males in their late teens and early 20s being rowdy in public spaces in Toronto, journalist Christie Blatchford would not only racialize swarming but assert with certainty that “it is also honest to report that in Toronto, such swarming’s - whether at movie theatres on Tuesdays or at the Ex or, as was the case here, after a dance club shut for the night - are a black phenomenon.”<sup>85</sup> Despite Blatchford’s assertions, in the late 1990s a few incidents of swarming made national news including one involving a majority white group of six female teenagers who beat up and murdered 14-year-old Indo-Canadian Reena Virk, and other incidents involving 15-year-old Dmitri Baranovski and 15-year-old Jonathan Wamback who were both attacked by other white teenagers.<sup>86</sup> These incidents among others in the 1990s would raise debates about the *Young Offenders Act* and how to charge violent assaults by groups of teenagers.<sup>87</sup>

Writing about these debates surrounding swarming and the *Young Offenders Act*, Karen Ortizo in 2000 noted one of the challenges of the legal landscape was that different courts had described swarming or applied the term to a variety of activities to mean the following:

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<sup>83</sup> Kevin Donovan & Don Dutton, “‘Swarming’ gang of 100 loots sports store as CNE”, *Toronto Star* (6 September 1988), online: <thestar.com> [perma.cc/37DZ-YU3K].

<sup>84</sup> Gwyn Thomas, “‘Swarming’ skinheads blamed in robberies,” *Toronto Star* (14, February 1989), online: <thestar.com> [perma.cc/CJW5-B7ZK]; Don Dutton & Tracey Tyler, “Metro police set up a crime unit to handle ‘swarming’ teen gangs”, *Toronto Star* (14<sup>th</sup> March 1989), online: <thestar.com> [perma.cc/5Y3M-ZMKJ].

<sup>85</sup> Christie Blatchford, “Facing the Truth: Fear has blocked honest discussion of who commits crime in Toronto”, *The Toronto Sun* (19 April 1995), online: <torontosun.com> [perma.cc/KF72-YH8N]. I’m grateful to Dr. Tamari Kitossa for bringing this article to my attention.

<sup>86</sup> Karen Ortizo, “Discussion on Group Assault or Swarming” (2000) Unif L Conf Proc under heading “Public opinion”, online: <coilink.org> [perma.cc/R7MF-XWLX]; CBC News, “Teen violence timeline”, *CBC News Online* (17 February 2006), online: <cbc.ca> [perma.cc/QYB3-LQNP]; Sheila Batachaya, “A Fair Trial: Race and the Retrial of Kelly Ellard” (2006) 25:1-2 *Canadian Woman Studies* 181 at 184 (this source mentions the racial characteristics of Reena Virk’s attackers).

<sup>87</sup> Bryan R Hogeveen, “‘If we are tough on crime, if we punish crime, then people get the message’: Constructing and governing the punishable young offender in Canada during the late 1990s” (2005) 7:1 *Punishment & Society* 73 at 75.

- I. Where victims are surrounded and their clothing or money torn from them by young gangs;
- II. A group attacking an individual for the purpose of stealing something from that individual;
- III. A group attacking an individual or group on account of a prior dispute;
- IV. An attack on an innocent stranger acting as a good Samaritan;
- V. Young persons demanding money or items of clothing and then beating the individual following refusal.<sup>88</sup>

As such, given the various uses of the term swarming by the courts, Ortizo noted, “although there may be a fair amount of overlap between these types of situations, there does not appear to be a consistent definition of swarming to date.”<sup>89</sup> Despite there not being a uniform definition of swarming used by courts, Ortizo noted that “a review of the case law relating to ‘swarming’, ‘group assault’ and ‘gang assault’ does not indicate that it is more difficult to prosecute or secure a conviction in the case of group assault as compared to single offender attacks.”<sup>90</sup>

For our discussion, the importance here is that the epistemic ritual in Clairmont’s report operates not only in the report positing that swarming is a Black male phenomenon that originated in the U.S. despite Thrasher’s definition stating otherwise, but also in the Canadian context. In the Canadian context, the report does not offer the chronology of the origins of swarming beginning with no racialized connotation of the 100 youth who robbed stores in 1988 in Toronto. Moreover, the report does not show that it was not until 1995 that Christie Blatchford, a journalist, asserted that swarming was a Black male phenomenon in Toronto.

Which is to say, no available evidence supports Clairmont’s assertion that swarming (as a definition and phenomenon) began in the U.S. as a Black male phenomenon. Moreover, while the report does note that there have been a few incidents of girls in Halifax participating in swarming,<sup>91</sup> the report nevertheless bypasses the history of how beginning in 1988 the term swarming was used in Canada by police reports, journalists, and courts to describe various incidents of youth vandalism and violence to nevertheless assert swarming is a transnational Black male subculture that emerged in

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<sup>88</sup> Ortizo, *supra* 86 under heading “What is a ‘swarming’?” [footnotes omitted].

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid* under heading “Current Legal Responses”.

<sup>91</sup> Clairmont, *supra* 75 at 24.

the U.S. and is replicated in Halifax with no way to trace its origins or its transmission across the U.S. and Halifax.<sup>92</sup>

This is to say, in the public safety document, the theory of swarming appears not as theory but as description—as Clairmont’s direct observation of what swarming is in the Halifax context. By the time it enters the public safety document authored by Clairmont, the theoretical origins and unracialized definition that were foundational to the theory are invisible. What remains is the naturalized assertion that swarming constitutes a Black male subculture phenomenon. This presents swarming as a Black male activity that threatens the public and requires consented effort by the city to address to keep the city safe.

Importantly, this logic follows that of Wolfgang, who argued that individuals are socialized towards objects and develop a culture-bound personality by race, evident here in his claim that weapon carrying constitutes a cultural tradition among Black males:<sup>93</sup>

Although we have rejected the idea that homicide rates are higher in the United States than in England because of easier access to firearms, it cannot be denied that a culture habit of carrying some deadly weapon is conducive to usage, and hence, homicide. A lower-class culture tradition, particularly among Negro males, of carrying switchable and other types of knives classified as deadly weapons, is undoubtedly related to the high number of stabbings recorded in the present study.<sup>94</sup>

But in 2008 in Halifax, the theory is no longer attributed to Wolfgang, it appears as Clairmont’s direct observation and a neutral fact and description of Black males in Halifax.

The notion that a subcultural pattern of swarming may have taken hold among socially disadvantaged Black youths, who themselves are usually routinely victimized in their everyday life, seems supported by the large number of such youths who have been identified...as quasi-gang members engaged in swarmings, and by the fact that older Black males, young adults, appear to be participants and role models.<sup>95</sup>

Here it is important to note that this passage performs a crucial epistemic ritual: it creates circular validation. Clairmont identifies a tripartite criminogenic construction of swarming: Black boys between the age of 12 and 17 are simultaneously victims, groomers, and perpetrators of violence in the community.<sup>96</sup> Which is to say the logic instantiates that in

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<sup>92</sup> *Ibid.*

<sup>93</sup> Wolfgang, *supra* note 38 at 86.

<sup>94</sup> *Ibid* at 332.

<sup>95</sup> Clairmont, *supra* note 75 at 24.

<sup>96</sup> *Ibid* at 73.

Halifax there exists a Black male cultural ritual of violence in which Black boys are victimized, groomed by older Black males, and therefore perpetrators of violence in the community.<sup>97</sup>

Once this logic of Black male cultural ritual of violence is institutionalized in public safety documents, the tripartite construction becomes the lens through which courts, the government, and police understand Black males as enmeshed in a subculture of violence that plagues the city. For instance, part of Clairmont's recommendation for dealing with teen swarming was the creation of speciality courts, saying they "may reduce street crime and disorder and assist in dealing with chronic minor offenders."<sup>98</sup>

Specialty courts, or Wellness Court Programs, as they are now referred to, "develop and administer a support plan that is unique to the needs of each individual participant."<sup>99</sup> The team can include "a crown prosecutor, a defence attorney from Nova Scotia Legal Aid, a probation officer, a social worker, a forensic nurse, an occupational therapist and an addictions social worker."<sup>100</sup> While there's no evidence of youth wellness courts for Black kids, what was evident was that Clairmont was arguing for therapeutic rehabilitation as a panacea to Black male subculture through specialty courts.<sup>101</sup> As such, these ideas would be reinforced in crime prevention programs focused on Black youth inspired by the Clairmont report and serve as the basis of the second epistemic ritual.

## B. *Subculture Theory in CeaseFire Halifax*

The second epistemic ritual focuses on how subculture theory was used to endorse Ceasefire Halifax. This is to say, the Clairmont report led to the creation of the Public Safety Strategy and Public Safety Office, which publishes annual reports on public safety strategy to deal with youth violence in the city.<sup>102</sup> Out of this report, the Public Safety Office developed crime prevention programs that focused, among other groups, on Black

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid* at 76.

<sup>99</sup> Nova Scotia Courts, *Nova Scotia's Wellness Courts: Progressing Justice: Celebrating the 10th Anniversary of the Nova Scotia Mental Health Court Program* (Halifax: Nova Scotia Courts, 2019) at 6, online: <courts.ns.ca> [perma.cc/PV3U-WN4B].

<sup>100</sup> *Ibid* at 10.

<sup>101</sup> Clairmont, *supra* note 75 at 76.

<sup>102</sup> Mayor Savage, Chair of Executive Standing Committee, *Violence and Public Safety - Clairmont Report* (Halifax, Halifax Regional Council, 2016) at 2-3, online (pdf): <cdn.halifax.ca> [perma.cc/PK59-PW8B].

males as a violent population.<sup>103</sup> For instance, as a response to 19 homicides and 75 shootings in 2011, HRM and the Nova Scotia Department of Justice, alongside the Public Safety Office, implemented a violence prevention program known as CeaseFire Halifax (officially called CeaseFire in the HRM), modelled after Ceasefire Chicago (now known as Cure Violence),<sup>104</sup> a public health effort that models its approach to dealing with Black male violence much like that of programs that seek to prevent the spread of infectious diseases.<sup>105</sup>

Importantly, Wright would champion CeaseFire Halifax and worked with the program as a consultant.<sup>106</sup> Recall that at the beginning of this article, I noted that Justice Derrick had stated that Wright presented a paper from May 2012 as part of the Public Safety Discussion in Halifax entitled “Toward the Development and Implementation of a Violence Interruption Program in the Halifax Regional Municipality (HRM).”<sup>107</sup> In this paper, Wright had argued “that criminally identified African-Nova Scotians may be apt to have a violent response to ‘being disrespected.’”<sup>108</sup>

Through Wright’s paper we see how subculture theory of violence was pivotal to endorsing the development of CeaseFire Halifax as a public health program. Furthermore, the *Project Theory of Change* that governed the program noted that violence is learned, such that “social norms, especially the expectations of an immediate peer group, are the greatest indicator of how an individual will respond to a given situation, including whether or not they will react violently when ‘feeling’ threatened, insulted, or wronged.”<sup>109</sup>

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<sup>103</sup> *R v X*, *supra* note 17 at para 173.

<sup>104</sup> Natsha Pace, “Ceasefire program works, says teen trying to turn his life around”, *Global News* (30 June 2015), online: <globalnews.ca> [perma.cc/386Q-LN4U]; Public Safety Canada, “Cure Violence (CeaseFire Chicago)” (14 May 2021), online: <publicsafety.gc.ca> [perma.cc/JD7B-QZ8A].

<sup>105</sup> Public Safety Canada, “Crime Prevention Projects 2013–2014” (22 December 2015), online: < securitepublique.gc.ca> [perma.cc/BQU3-QW5L?type=standard] [Public Safety Canada, “Crime Prevention”].

<sup>106</sup> Robert S Wright, “Keeping Sane While Doing Crazy Work - Ceasefire Training” (5 May 2014), online (pdf): <https://site-vnutj3m.dewsecdn1.dotezcdn.com/uploads/EE767067BEED94A6.pdf?v=220806012710> [perma.cc/3DRF-GK3B].

<sup>107</sup> See the text accompanying note 49.

<sup>108</sup> *R v X*, *supra* note 17 at para 174.

<sup>109</sup> Jacques Dubé, Chief Administrative Officer, *CeaseFire Halifax Funding Proposal* (Halifax: Halifax Regional Council, 2018) at 1, online (pdf): <halifax.ca> [perma.cc/MP4N-3F4Q].

This assertion follows that of Wolfgang and Ferracuti, who noted that violence is a learned response to positive and negative stimuli, leading Black males to be violent at the perceived slight of their character or insult.<sup>110</sup> Which is to say, subculture theory of violence was embedded in CeaseFire Halifax. This is significant as CeaseFire Halifax ran from October 2013 to March 2018 and sought to reach 120 Black men between 16 and 24 years of age, who were already involved, or at high risk of becoming involved, in gang violence.<sup>111</sup>

Ultimately, the program would engage 90 Black males in this age range.<sup>112</sup> At the end of the program, the evaluation would conclude that,

The first analysis measured the impact of CeaseFire Halifax on the incidents of charged violent crimes involving observed Black males under the age of 25.

It shows that the number of charged incidents across HRM decreased prior to the implementation of CeaseFire Halifax and continued to decrease following it. While the program may have had a modest impact on the existing downward trend, the findings were not statistically significant. It can be expected thus, that this downward trend in violent crime involving CeaseFire's Halifax's target population would have continued regardless of the implementation of CeaseFire Halifax.<sup>113</sup>

The failure of CeaseFire Halifax reveals the institutional mechanism through which epistemic rituals preserve discredited theories. If subculture theory were empirically sound, a public health intervention (CeaseFire Halifax) directly targeting the cultural and behavioural mechanism it posits should have reduced gun violence, yet the program generated no measurable impact, with violent crime declining before and after implementation of the program.<sup>114</sup> This is emblematic of how epistemic rituals work through specialized knowledge expertise focused on Black males as a criminogenic population.

Put differently, Wolfgang and Ferracuti at the inception of subculture theory of violence acknowledged they could not empirically prove the genesis or transmission of subculture theory of violence norms in Black males.<sup>115</sup> Yet, in the absence of empirical evidence about cultural transmission of violent norms in Black male behaviour, subculture theory of violence—grounded in speculation that violence in Black males is a

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<sup>110</sup> Wolfgang & Ferracuti, *supra* note 64 at 152–53.

<sup>111</sup> Dubé, Chief Administrative Officer, *supra* note 109 at 3, under heading “Target Group”.

<sup>112</sup> *Ibid* at 4.

<sup>113</sup> *Ibid* at 5.

<sup>114</sup> Covington, *supra* note 12 at 256.

<sup>115</sup> Wolfgang & Ferracuti, *supra* note 64 at 264.

learned response to their environment—became central to institutional knowledge of Black males not only in the field of criminology but in Halifax public policy documents and CeaseFire Halifax. Importantly, in Halifax the salience of subculture theory violence was validated through specialized knowledge to justify a localized approach to the perceived Black male subculture of violence plaguing the city through epistemic rituals.<sup>116</sup>

This is to say, the first epistemic ritual began when Clairmont, a Dalhousie criminology professor, institutionalized subculture theory of violence in an official government report and it underwent an epistemic transformation defining swarming as a Black male subcultural phenomenon, despite empirical evidence proving otherwise.<sup>117</sup>

Second, subculture theory migrated from academic margins to public safety documents, setting up conditions for the development of crime prevention programs targeting Black male subculture through the crime prevention program CeaseFire Halifax.<sup>118</sup> Third, Wright, in 2012, used his expertise to argue that criminally engaged Afro-Nova Scotian males use violence when disrespected, endorsing CeaseFire Halifax, and by the time Wright testifies in *X* he is no longer presenting a contested sociological theory, he is presenting settled official knowledge about Black males offending in Halifax that becomes accepted in courts in IRCAs despite the empirical evidence that later emerged from CeaseFire Halifax.<sup>119</sup>

As such, withstanding the empirical evidence before and after, subculture theory of violence has been laundered through institutional channels, from academic margins to government report to public safety program to expert witness testimony. At each stage, its status as speculation and not empirically founded has been obscured while retaining its pathological framing of Black males.

It is precisely this circulation of pathological theories of Black males that appear as progressive theories in academia that overdetermines theorization of Black males that has led Curry to argue that,

Because theory is the justification for ideology, I am arguing that racialized subjects—the traits they come to be represented by—are products not of actual *group* behaviours, attitudes or symbols, but rather the representations various theoretical projects need to justify their ideological programmes. Consequently, theory

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<sup>116</sup> Curry, “Must There Be”, *supra* note 29 at 25–26.

<sup>117</sup> Clairmont, *supra* note 75 at 24.

<sup>118</sup> Public Safety Canada, “Crime Prevention”, *supra* note 105.

<sup>119</sup> *R v X*, *supra* note 17 at para 173–74.

produces the racialized subjects *theory itself* desires, be they social, criminological, or academic.<sup>120</sup>

For Curry, the result of this circulation of speculative pathological theories of Black males across academic disciplines results in the creation of an idealized racialized subject who stands in for Black males as a population in race and gender theory work. The consequence of this as Curry notes, is this idealized racialized subject constructed by different theoretical apparatus in race and gender theory distorts empirical evidence of Black male vulnerability to structural violence because “race-gender theory proceeds from the assumption that the categories used to identify and name larger systems and patterns of domination historically can be used to predict the behaviours of individuals as well as to determine the basis of their social interactions and individual psychology.”<sup>121</sup>

Building on Curry’s insights, the next section will show that under speculative theories in IRCAs, individual Black male psychology is constructed as pathological given the historical realities of slavery, racism, and colonialism that these theories advance have shaped Black masculinity in North America.

Said differently, under speculative race and gender theories used in IRCAs, Black masculinity is constructed as a byproduct of history (slavery, racism, colonialism). A history that has created not only violent Black male subjects, but Black male subjectivity that has internalized violent values. What then becomes central to these speculative race and gender theories of Black males in IRCAs is to attend to the violent Black male and his values by addressing his psychology as a byproduct of history.

For instance, in X, the foundational IRCA was constructed to capture the following: Background of the Young Person, Community Background, Mental Health and Racial Trauma, Intergenerational Criminal Involvement, Bravado, Level of Criminal Sophistication, Increased Vulnerability, Susceptibility to Negative Peer Influence, Criminal Record, and Remorse.<sup>122</sup> Per the construction of the foundational IRCA in X, the epistemic framework of IRCAs, while locating the structural and societal milieu of the Black male, ultimately provides social context that illuminates the interiority, values, and psychology of the Black male as a subject vulnerable to criminogenic behaviour given the subject being entrapped in the history of slavery, racism, and colonialism.

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<sup>120</sup> Curry, “Must There Be”, *supra* note 29 at 25–26 [emphasis in original].

<sup>121</sup> *Ibid* at 26.

<sup>122</sup> *R v SB*, 2025 SCC 24 (Factum of the Intervener, African Nova Scotian Justice Institute at 7).

Having shown above how subculture theory was embedded in public policy documents and CeaseFire Halifax, the next section focuses on five juridical epistemic rituals showing how subculture theory of violence, cool pose, vacant esteem, and PTSS entered in IRCAs involving Black males in the courtroom.

#### IV. DOCTRINAL RITUALS: HOW COURTS INSTITUTIONALIZE AN ALREADY EMBEDDED SUBCULTURE THEORY OF VIOLENCE

##### A. *First Judicial Ritual: Specialized Knowledge Exemption Enables Subculture Entry*

The first judicial epistemic ritual began in X when subculture theory of violence entered the court through specialized knowledge doctrine.<sup>123</sup> The legal issue at hand in X was whether the presumption of diminished moral culpability under the *Youth Criminal Justice Act* (YCJA) Section 72(1) could be rebutted for a 16-year-old offender charged with attempted murder.<sup>124</sup> Section 72(1) provides that an adult sentence shall be imposed if the Youth Justice Court is satisfied of the following:

a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and (b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 [of the YCJA] would not be of sufficient length to hold the young person accountable for his or her offending behaviour.<sup>125</sup>

The Crown argued X should be sentenced as an adult and sought a sentence of life imprisonment with parole eligibility set at seven years.<sup>126</sup> The defence counsel argued that X should be sentenced as a young person to a custody and supervision order of not more than three years.<sup>127</sup> The issue at hand for Judge Derrick was how to balance accounting for diminished responsibility and accountability as defined in the YCJA.

Justice Derrick's review of the state's psychological assessment of X noted that the assessment painted X as "a highly anti-social, self-assured young man who is arrogant, has a sense of omnipotence and is typically indifferent to [the] welfare of others," which led the state to argue that X

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<sup>123</sup> *R v X*, *supra* note 17 at para 176.

<sup>124</sup> *Ibid* at para 11.

<sup>125</sup> *Ibid* at para 8; *Youth Criminal Justice Act*, SC 2002, c 1, s 72(1)(a)–(b).

<sup>126</sup> *R v X*, *supra* note 17 at para 4.

<sup>127</sup> *Ibid* at para 6.

should be sentenced as an adult.<sup>128</sup> To counter the state's evaluation, the defence counsel called on Wright to give a race and culture assessment of X's behaviour.<sup>129</sup> Judge Derrick, summarizing Wright's testimony, provided the following quote from the testimony:

These guns are being used in the context of personal conflict, not in terms of guns being used to enforce some kind of criminal enterprise but rather criminally engaged individuals who have guns using their guns to deal with personal matters...So we are talking about individuals who have access to guns because of their criminal activity, but to discharge their guns because someone has "dissed" them – disrespected them – or, hung with their girl or disrespected a member of their family or beat up their cousin or some other kind of personal kind of conflict.<sup>130</sup>

Wright's framing of Black male gun violence in Halifax as cultural is a direct repetition of subculture theory's pathologizing of Black male conflict resolution through weapons given a slight to one's character.<sup>131</sup> While the Crown's psychological assessment pathologized X as an innate sociopath, Wright reframed his violence as culturally patterned Black male identity. Nevertheless, Wright's culturally patterned assessment of X was thought to be helpful, as Judge Derrick affirmed:

I have asked myself what the evidence of Robert Wright contributes to the process of determining whether the presumption of "X's" diminished responsibility has been rebutted such that he is no longer entitled to its protection? I find it raises significant questions about the assessment of "X" as a criminally entrenched, sophisticated youth. It provides a more textured, multi-dimensional framework for understanding "X," his background and his behaviours. "X" has been both a perpetrator and a victim of violence in the context of his criminally-impacted community.<sup>132</sup>

Recall that subculture theory applied in public policy discourse in 2008 in Halifax asserted that young Black boys were being groomed and were both victims and perpetrators of violence in their community.<sup>133</sup> This logic is repeated here when Justice Derrick notes, "X has been both a perpetrator and a victim of violence in the context of his criminally-impacted community."<sup>134</sup> These "race and race models for coping in a criminally

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<sup>128</sup> *Ibid* at para 69 [brackets in original].

<sup>129</sup> *Ibid* at para 15.

<sup>130</sup> *Ibid* at para 185 [ellipses in original].

<sup>131</sup> Wolfgang, *supra* note 38 at 188.

<sup>132</sup> *R v X*, *supra* note 17 at para 198.

<sup>133</sup> Clairmont, *supra* note 75 at 24.

<sup>134</sup> *R v X*, *supra* note 17 at para 198.

affected community,”<sup>135</sup> rooted in the subculture theory of violence, were thought by Justice Derrick to “provide a more textured, multi-dimensional framework for understanding ‘X’, his background and his behaviours.”<sup>136</sup> What is striking is not that Justice Derrick did not scrutinize Wright’s framework, but that the legal infrastructure made such scrutiny structurally unlikely. Specialized knowledge expert testimony operates under a regime that accepts it without prior empirical validation.<sup>137</sup>

As such, Justice Derrick did not accept that X was treatment resistant or a sociopath, as the Crown had presented, nor did she think the Crown had rebutted diminished responsibility to impose an adult sentence on X.<sup>138</sup>

Despite the very serious offence committed by “X”, its grave violation of societal norms, and the harm caused to “Y” and their respective families, I am not satisfied that the Crown has rebutted the presumption of diminished responsibility in this case. I find that when “X” shot “Y” he was an immature, dependent 16 year old caught up in the dysfunctional dynamics of his community, dynamics that are relevant to my understanding of his context, background, and choices.<sup>139</sup>

In other words, subculture theory of violence served as a racial and cultural justification that situated X as a victim and perpetrator of violence because of how Black males cope with crime in their communities. This explanation was such that Justice Derrick would note,

In Mr. Wright’s assessment, “X”, a “deeply connected and well-loved grandson, son, brother, cousin and uncle” is “at war with the gun-toting hardened gangsta image that he has been cultivating in recent years.” Mr. Wright described how “X’s” “presentation and attitude,” which suggests a lack of remorse and anti-social attitudes, are likely to have been “influenced by race and race models for coping in a criminally-affected community.”<sup>140</sup>

By foregrounding X’s behaviour as being at “war” with the “race and race models for coping in a criminal-affected community,”<sup>141</sup> subculture theory of violence was grounded as the social context to understand that X “was a vulnerable young person with a reduced capacity for moral judgment,” given the impact of the gangsta image he cultivated and the

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<sup>135</sup> *Ibid* at para 248.

<sup>136</sup> *Ibid* at para 198.

<sup>137</sup> *R v Abbey*, *supra* note 19 at para 119.

<sup>138</sup> *R v X*, *supra* note 17 at paras 252–64.

<sup>139</sup> *Ibid* at para 252.

<sup>140</sup> *Ibid* at para 248.

<sup>141</sup> *Ibid*.

criminally affected community he grew up in.<sup>142</sup> Using this understanding of X as victim and perpetrator as a consequence of the “race and race models for coping in a criminal-affected community,”<sup>143</sup> Justice Derrick ordered custody and supervision for three years.<sup>144</sup>

Here it is important to note that while the verdict rebutted an adult sentence, concerns about diminished responsibility, through the lens of subculture theory of violence in this case, operated less as a recognition of structural injustice and more as epistemic rituals. These rituals normalized racialized and gendered accounts of Black male criminality by situating Black males as the type beings without the proper values necessary for a multicultural society, resulting from the way the criminal environment they are raised in impacts their growth given the “race and race models for coping in a criminally-affected community.”<sup>145</sup>

Moreover, the doctrinal innovation of *R v X* is that it did not merely contextualize sentencing; it embedded the circulation of subculture theory of violence in the epistemic framework of IRCAs that captures the “race and race models for coping in a criminally affected community” of Black males. This framework has been used in other cases. For example, in *R v Downey* the IRCA focused on:

The impact of historical and contemporary systemic racism; Impacts of community dislocation and fragmentation [poverty; low income outcomes]; The clinical/mental health implications to black male psychological and global function; Poor educational outcomes; The overrepresentation of African-Nova Scotians in the criminal justice system where the[ere] remains little to no culturally relevant programming.<sup>146</sup>

In *R v Perry*, the assessment argued that “Community displacement, ACEs [Adverse Childhood Experiences], ‘cultural’ codes of conduct and mental health considerations largely stem from the impacts of historical systemic racism.”<sup>147</sup> In *R v Steed*, the IRCA sought to establish that Steed was groomed into a Black male culture.<sup>148</sup>

The two Black men in Mr. Steed’s life, whose role it should have been to shape and mold him into a man that can be successful and be a loving husband and family man, failed him on all fronts. Instead they showed him the Black men beat

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<sup>142</sup> *Ibid* at para 250.

<sup>143</sup> *Ibid* at para 248.

<sup>144</sup> *Ibid* at paras 265–66.

<sup>145</sup> *Ibid* at para 248; Ruwe, “Black Male Disposability”, *supra* note 36 at 12–18.

<sup>146</sup> 2017 NSSC 302 at para 9.

<sup>147</sup> 2018 NSSC 16 at para 26.

<sup>148</sup> 2021 NSSC 71.

their women and children, don't take care of home, and that criminality is part of Black male culture.<sup>149</sup>

In *R v Smith*, the IRCA assessed how the accused was part of a "chronic criminogenic psychosocial subculture" within the ANS [African Nova Scotian] community and larger community. He has also been exposed to the vulnerable community features of black male identity development such as black men abandoning their children, abusing their family, selling drugs, stealing, committing or being murdered and going to jail."<sup>150</sup>

As shown above, subsequent cases citing and using the epistemic framework set in *X* point to Black male subculture as the basis of moulding Black males into a criminogenic population. Yet here it is important to dispute a few things from the above assessments of Black male subculture presented in the IRCAs. Empirical studies conducted in the US show that domestic violence in Black couples is often bidirectional, with women and men both engaging in violence.<sup>151</sup> Moreover, scholars have long noted Black men's Intimate Partner Violence (IPV) victimization experiences are rarely empirically accounted for in IPV studies, though they do experience IPV victimization.<sup>152</sup> This is concerning as multiple studies have shown "in intimate relationships, extremely high percentages of Black males report experiencing emotional and psychological abuse (which increases with diminished income)."<sup>153</sup>

Similarly, studies focused on differences in parental discipline styles show that Black fathers compared to Black mothers are least likely to use

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<sup>149</sup> *Ibid* at para 45.

<sup>150</sup> 2023 NSPC 65 at para 65.

<sup>151</sup> Rau Caetano, Suhasini Ramisetty-Mikler & Craig A Field, "Unidirectional and Bidirectional Intimate Partner Violence Among White, Black, and Hispanic Couples in the United States" (2005) 20:4 *Violence & Victims* 393 at 398-99. Jennifer Langhinrichsen-Rohling et al, "Rates of Bidirectional Versus Unidirectional Intimate Partner Violence Across Samples, Sexual Orientations, and Race/Ethnicities: A Comprehensive Review" (2012) 3:2 *Partner Abuse* 199 at 216.

<sup>152</sup> Megan A Stewart & Megan L Haselschwerdt, "Black men's intimate partner violence victimization and help-seeking experiences: Integrating and applying intersectionality and hegemonic masculinity" (2025) 17:4 *J Family Theory & Rev* 819 at 820; Emmanuel Rowlands, *Male Powerlessness: Men and Intimate Partner Violence* (Johannesburg: UJ Press, 2023).

<sup>153</sup> T Hasan Johnson, "Challenging the myth of Black male privilege" (2018) 6:2 *Spectrum: J on Black Men* 21 at 29. See also Linda P Rouse, "Abuse in Dating Relationships: A Comparison of Blacks, Whites, and Hispanics" (1988) *J College Student Development* 29:4 312 at 312-17; Carolyn M West, "A Thin Line Between Love and Hate? Black men as Victims and Perpetrators of Dating Violence" (2008) 16:3 *J Aggression, Maltreatment & Trauma* 238 at 241-42.

physical discipline against their children.<sup>154</sup> Furthermore, studies conducted with incarcerated Black fathers show that this group often develops strategies and notions of fatherhood that ensure that they maintain, develop, and retain relationships with their children to encourage them not to make choices that might result in them being incarcerated.<sup>155</sup> Other research suggests that Black incarcerated fathers have higher rates of coparenting relationships, which warrants further research to understand the differences of coparenting among other incarcerated racial and ethnic groups.<sup>156</sup> Such empirical research is missing from IRCAs when they make broad assessments of a supposed Black male subculture.<sup>157</sup>

Simply put, the epistemic framework in IRCAs grounded in subculture theory presented as social context of a “race and race models for coping in a criminally affected community” forecloses any other way of understanding Black males other than that being mired in a Black male subculture, where they are victims and perpetrators of violence in their communities. Nevertheless, IRCAs are accepted precisely because they provide judges with the social context (Black male subculture) to understand Black male violence and instruct them in how they can use the sentencing principles of deterrence, denunciation, and rehabilitation to deal with the supposed plague of Black male violence in society.<sup>158</sup> As I demonstrate in the next section, such social context has expanded from subculture theory of violence to speculative psychological constructs such as cool pose, vacant esteem, and PTSS that provide judges with the psychology of Black male subculture of violence.

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<sup>154</sup> Carla Adkison-Johnson et al, “African American Child Discipline: Differences Between Mothers and Fathers” (2016) 54:2 Fam Ct Rev 203 at 209–12; Carla Bradley, “The Disciplinary Practices of African American Fathers: A Closer Look” (2000) 5:1 J African American Men 43 at 49–52.

<sup>155</sup> Dara Lewis & Philip Young P Hong, “Incapacitated Fatherhood: The Impact of Mass Incarceration on Black Father Identity” (2020) 8:3 Qualitative Criminology (QC) 329 at 335–42; Alvin Thomas et al, “‘When She Says Daddy’: Black Fathers’ Recidivism following Re-entry from Jail” (2022) 19:6 Intl J Env’tl Research & Pub Health 3518 1 at 12–21.

<sup>156</sup> Eman Tadros, Jared A Durtschi & Natira Mullet, “Trajectories of incarcerated coparenting: Examining differences across race and ethnicity” (2023) 49:2 J Marital & Family Therapy 499 at 509–11.

<sup>157</sup> *R v Steed*, *supra* note 148 at para 45.

<sup>158</sup> *R v X*, *supra* note 17 at para 248.

**B. *Second Judicial Ritual: Speculative Psychological Constructs Becomes Diagnostic/Mandatory in R v Gabriel***

The second judicial epistemic ritual focuses on how in *R v Gabriel* the speculative psychological constructs of vacant esteem and cool pose entered IRCAs, presented as a learned response to the history of slavery and discrimination.

*Gabriel* appeared in Nova Scotia Supreme Court in 2017. The legal issue in this case was how systemic racism and cultural factors should inform sentencing for second-degree murder.<sup>159</sup> *Gabriel* was charged with second-degree murder, and the remaining issue was determining the period of parole ineligibility, between ten and 15 years. The judge decided on 13 years with life in prison.<sup>160</sup>

The judge in this case, Justice Jamie Campbell, found the IRCA written by social worker and antiracism expert Lana MacLean helpful for understanding the social conditions that shaped *Gabriel*. The IRCA had noted that *Gabriel*'s "racial identification, as an African Nova Scotian male has shaped his 'maturation, development, racial formulation, and gender identification.'"<sup>161</sup> *Gabriel*'s racial and gender development was said to have been impacted by violent traumatic events in the community.<sup>162</sup>

In contextualizing these events, MacLean noted that gun violence between Black males in Afro-Nova Scotian communities had become more prevalent over the previous 20 years.<sup>163</sup> To substantiate this, MacLean argued,

The focus of that violence has shifted from settling "beefs" or interpersonal disagreements involving fist fighting, to "manning up" in reaction to being "dissed". This means inflicting serious injury in response to challenges to one's manhood. "Dissing" are acts of disrespect in relation to one's manhood and they are seen as requiring a serious response.<sup>164</sup>

Again, this assertion repeats Wolfgang's assertion that Black male homicide is a violent response to a slight to one's character.<sup>165</sup> Nevertheless, this violence, MacLean argued, was a result of the maladaptive ways Black

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<sup>159</sup> *R v Gabriel*, *supra* note 18 at paras 1-2, 87-92.

<sup>160</sup> *Ibid* at para 3.

<sup>161</sup> *Ibid* at para 60.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid*.

<sup>164</sup> *Ibid*.

<sup>165</sup> Wolfgang, *supra* note 38 at 188.

males are forced to cope with poverty, gun violence, and generational internalized racism, which leads Black males to develop vacant esteem.<sup>166</sup> Here we see the epistemic framework that was first presented in *X* as “race and race models for coping in a criminally-affected community”<sup>167</sup> evolving into a framework explaining vacant esteem as a psychological *coping mechanism of that model*. MacLean defined the term this way:

“Vacant esteem” involves a pattern of behaviour known as “coolness” or the “cool pose”. It is a strategy that many black males use to cope or make sense of their daily lives. As a mask it may contribute to dropping out of school, sliding into drug or alcohol abuse, and being sucked into criminal street gangs.<sup>168</sup>

Vacant esteem and cool pose are two distinct psychological constructs that are believed to define the psychological condition Black males have developed from slavery. Here I will first discuss vacant esteem. Vacant esteem derives from the work of psychologist Dr. Joy DeGruy Leary, *Post Traumatic Slave Syndrome*.<sup>169</sup> The concept was coined from an encounter between Leary’s son and a group of young Black boys who she believed looked to be around 10 or 11 years old.<sup>170</sup> One of the boys said he was going to beat her son up for staring at him. Leary intervened, explaining to the boy that her son could have been staring at him because he wanted to invite him to play basketball or video games and told the boys to keep each other safe.

My belief is that the little boy does not hold the same anger towards white people because they do not know who he is, nor can they really see who he is. He was, however, mad at black people like my son, who can see the emptiness in him, his ‘vacant esteem.’ His question, “What you lookin’ at?” implied that whatever he thought that my son was lookin’ at was worthy of him beating Nadim bloody for it.<sup>171</sup>

Despite Leary’s assertion of the boy’s anger directed to her son, approaches to studying Black boys’ self-esteem such as vacant esteem have long been refuted by sociologists, given the “tangle of pathology approach,” which analyzes the self-esteem of members of the Black lower class by noting that “racial discrimination blocks economic opportunity for lower-class blacks. Poverty, in turn, leads to deterioration of family structure and

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<sup>166</sup> *R v Gabriel*, *supra* note 18 at paras 64–66.

<sup>167</sup> *R v X*, *supra* note 17 at para 248.

<sup>168</sup> *R v Gabriel*, *supra* note 18 at para 67.

<sup>169</sup> Joy DeGruy Leary, *Post Traumatic Slave Syndrome: America's Legacy of Enduring Injury and Healing* (Portland, OR: Uptone Press, 2005).

<sup>170</sup> *Ibid* at 7.

<sup>171</sup> *Ibid* at 9.

function. These economic and family problems result in ambivalence toward the child and thus to both inadequate socialization and unattractiveness of parental role models."<sup>172</sup>

Empirical studies contend that "the tangle-of-pathology orientation relies on either participant observation or more projective techniques based on small samples....Implicit in the tangle-of-pathology paradigm is the notion that the lower-class black environment is characterized by disorganized, unsupportive institutions and culture."<sup>173</sup> In other words, vacant esteem collapses structural issues into psychological issues in which Black boys are a repository of societal pathologies.<sup>174</sup>

With the expert on the case seemingly never revealing that vacant esteem has been contested empirically, it appears as an explanatory and neutral fact of Black male behaviour through expert testimony. For example, treating vacant esteem as a neutral fact, Judge Campbell stated,

These cognitive defences arise within the sub-culture of criminal activity within the African Nova Scotian communities. Previous traumatic experiences and tense environments in some communities have resulted in black men using "adaptive psychological practices as a defence mechanism". The example is that a man may carry a concealed gun as a result of his worldview. His adverse childhood experiences have taught him to carry a weapon, his "vacant esteem" encourages him to believe that he will inevitably encounter violence, and his "cool pose" requires him to be armed.<sup>175</sup>

The concept of the "cool pose" emerges from the collaborative work of psychologist Richard Majors and sociologist Janet Mancini Billson entitled *Cool Pose*,<sup>176</sup> which draws on Billson's six-year ethnographic study, *Pathways to Manhood*, of 60 Black male teenagers as they transitioned to adulthood in Boston.<sup>177</sup> In their collaborative work, Majors and Billson argued that the uniqueness of the cool pose is that it is used to mask the anger and frustration lower-class Black males have towards white society by acting cool and leading to violence.<sup>178</sup> They note:

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<sup>172</sup> Judith R Porter & Robert E Washington, "Black Identity and Self-Esteem: A Review of Studies of Black Self-Concept, 1968-1978" (1979) 5:1 Annual Rev Sociology 53 at 66.

<sup>173</sup> *Ibid* at 67.

<sup>174</sup> *Ibid* at 70.

<sup>175</sup> *R v Gabriel*, *supra* note 18 at para 70.

<sup>176</sup> Richard Majors & Janet Mancini Billson, *Cool Pose: The Dilemmas of Black Manhood in America* (New York: Lexington Books, 1992).

<sup>177</sup> *Ibid* at xv; Janet Mancini Billson, *Pathways to Manhood: Young Black Males Struggle for Identity* (New Brunswick, NJ: Transaction Publishers, 1996) at 160-90.

<sup>178</sup> Majors & Billson, *supra* note 176 at 2.

Of all the strategies embraced by black males to cope with oppression and marginality, the creation of the cool pose is perhaps the most unique. Presenting to the world an emotionless, fearless, and aloof front counters the low sense of inner control, lack of inner strength, absence of stability, damaged pride, shattered confidence, and fragile social competence that come from living on the edge of society. For some black males, cool pose represents a fundamental structuring of the psyche—the cool mask belies the rage held in check beneath the surface.<sup>179</sup>

As such, given the frustrations some of lower-class Black males have with white society, Majors and Billson argue this leads some lower-class Black males to develop compulsive masculinity.<sup>180</sup> They note that in compulsive masculinity “typical masculine values become a rigid prescription for toughness, sexual promiscuity, manipulation, thrill-seeking, and a willingness to use violence to resolve interpersonal conflict. These values perpetuated through male-to-male transmission in a tightly knit street culture, lead toward smoking, drug and alcohol abuse, fighting, sexual conquest, dominance, and crime.”<sup>181</sup>

It is important to note, despite these assertions about the cool pose, Majors and Billson, however, stated that “our hypothesis regarding the positive and negative aspects of being cool should be viewed as speculative and exploratory...of African American males and the special dilemmas they have faced for centuries.”<sup>182</sup> This admission by Majors and Billson that cool pose is speculative and exploratory is never raised in court. Instead, it is treated as neutral, which MacLean reinforces in the IRCA when she explains that “the ‘cool pose’ stance is often reinforced through mainstream movies and gangsta rap. They glorify the ability to remain undaunted in the face of gun violence, confrontations, money, substance abuse, and misogynistic behaviors.”<sup>183</sup>

When the speculative and exploratory origins of these theories are concealed and the theories are presented as neutral facts they become legitimized pathological accounts of Black males that assert Black males are violent misogynists who wantonly engage in gun violence.<sup>184</sup> Such assertions, rooted in speculative academic theories of Black males, speaks to Curry’s concern that “race-gender theories...are in actuality ad hoc accounts

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<sup>179</sup> *Ibid* at 8.

<sup>180</sup> *Ibid* at 34.

<sup>181</sup> *Ibid* at 34.

<sup>182</sup> *Ibid* at xi-xii.

<sup>183</sup> *R v Gabriel*, *supra* note 18 at para 68.

<sup>184</sup> This has been utilized in other cases involving Black males like *R v Simmonds*, 2021 NSSC 54 at para 49 and *R v Marsman*, 2025 NSSC 156 at para 51.

of group formation determined primarily by political ideology, not an actual account of empirical phenomena.”<sup>185</sup>

Interestingly, Judge Campbell noted that there are challenges with how to read IRCAs.<sup>186</sup>

The Cultural Assessment confronts the concern about crime generally and gun violence specifically in African Nova Scotian communities. It offers a sociological and historical explanation for troubled communities where some young men have adopted values and norms that frequently lead them to violent crime...does it mean that the rate of violent crime among young black men is greater than among other young men? Does that mean that young black men are more likely to be involved in violent crime? At what point does an explanation based on the shared experience of a racial or ethnic group feed the stereotypes that give rise to racist assumptions?<sup>187</sup>

Despite the difficulty of reading IRCAs, as affirmed by Justice Campbell, IRCAs emerged to provide cultural context for why young Black males use guns.<sup>188</sup> Yet, the problem highlighted by Justice Campbell is precisely what this article shows, is that speculative theories of Black males are embedded in the epistemic foundations of IRCAs which makes it difficult to situate Black male offending.

Which is to say, Judge Campbell picks up on the fact, the judge is caught in a bind. Either they must accept the racist theory of subculture embedded within the epistemic foundations of IRCAs that asserts that Black males have developed a criminal subculture to affirm a fair sentence or accept that the assumption assessed through subculture theory may not apply to the Black male appearing before the court but nevertheless highlights a problem in which Black males have developed a culture of violence in urban communities and must be sentenced. Nevertheless this bind, Justice Campbell noted, can be untangled by IRCAs.

Our common sense and our understanding of human nature are products of our own background and experiences. An individual judge's common sense and understanding of human nature may offer little insight into the actions of a young African Nova Scotian male. The Cultural Impact Assessment serves as a reminder of the fallibility of some assumptions based on an entirely different life experience.<sup>189</sup>

Justice Campbell noted that IRCAs can help a judge challenge their own fallible assumptions of a Black male life, because as a tool, IRCAs

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<sup>185</sup> Curry, “Must There Be”, *supra* note 29 at 22.

<sup>186</sup> *R v Gabriel*, *supra* note 18 at para 55.

<sup>187</sup> *Ibid* at paras 86, 88.

<sup>188</sup> *Ibid*.

<sup>189</sup> *Ibid* at para 57.

provide a “psycho-social cultural aetiology” of why Black males have a cultural propensity to carry and use guns.<sup>190</sup> Yet the judge, having not empirically scrutinized the limits of the racist, speculative, and exploratory theories in the IRCA, treats them as neutral legal facts that provide social context. As Judge Campbell noted,

The insights from the Cultural Assessment provide a better understanding of his behaviour. Acting in accordance with the norms of behaviour within a criminal subculture cannot be seen as a mitigating factor in sentencing....The refusal to relocate or to back down in the face of potential violence again is more understandable in light of the culture of male bravado of which he was a part.<sup>191</sup>

This doctrinal move here illustrates how IRCAs can function less as tools of remediation and more as tools that normalize Black male criminality as a psychological deficit in the psyche of Black males because of the history of slavery. In *Gabriel* Black male culture is constructed as a culture of male bravado and norms of behaviour that are not mitigating factors given the severity of this criminal subculture of violence in which Black males are psychologically damaged.

As such, while Judge Campbell acknowledged the danger, “At what point does an explanation based on the shared experience of a racial or ethnic group feed the stereotypes that give rise to racist assumptions?”<sup>192</sup> Yet in the same judgment, he treated vacant esteem and cool pose as established facts about Black male psychology, not as speculative frameworks, given the requirements under specialized knowledge doctrine.<sup>193</sup>

Said differently, while Majors and Billson themselves noted their hypothesis was “speculative and exploratory,” In *Gabriel*, Justice Campbell accepted an IRCA citing “vacant esteem,” and “cool pose”—psychological theories derived from contested and speculative exploratory sources treating these speculative constructs as legal facts through specialized knowledge doctrine.<sup>194</sup>

As such, building on the subculture framework established in *X*, in which the assessment created “race and race models for coping in a criminally-affected community.”<sup>195</sup> In *Gabriel*, this framework moved from speculation to diagnostic categories, thereby invoking speculative

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<sup>190</sup> *Ibid* at para 84.

<sup>191</sup> *Ibid* at para 101.

<sup>192</sup> *Ibid* at para 88.

<sup>193</sup> *Ibid*.

<sup>194</sup> *Ibid* at para 66–70, 84.

<sup>195</sup> *R v X*, *supra* note 17 at para 248.

psychological constructs as explanatory mechanisms of Black males' psychology in IRCAs.

By contextualizing Black male identity as criminogenic and the product of a subculture of violence, IRCAs have forced courts to not only determine how to balance sentencing principles but also to raise questions about the moral blameworthiness and culpability of Black males given the understanding of Black male subculture as the social context of offending. Such assertions were evident in *R v Morris*, where subculture theory of violence became contested based on how the judges used it to settle the case.

### ***C. Rituals Three and Four: Subculture Theory Becomes Sentencing Relevant in R v Morris (2018/2021)***

#### ***1. Third Judicial Ritual: Racism as a Mitigating Factor***

The third judicial epistemic ritual focuses on how subculture theory was no longer contextual but instead became operative in determining criminal responsibility by focusing on moral blameworthiness in *R v Morris* (2018). The case involved Morris, a Black male who was charged with carrying a firearm, discovered after a police chase, and appeared before the Ontario Superior Court.<sup>196</sup> The legal issue that would emerge is whether systemic racism diminishes moral culpability for serious gun offenses. The Crown sought a four-and-a-half-year prison sentence for Morris.<sup>197</sup> Justice Nakatsuru gave Morris a one-year sentence and eighteen-month probation to fit deterrence and denunciation, given that this was a first-time offense.<sup>198</sup>

Justice Nakatsuru arrived at this decision using two reports, the *Social History of Kevin Morris* and *Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto*, the latter of which was authored by Professor Akwasi Owusu-Bempah, Ms. Camisha Sibblis, and Professor Carl James, who were identified as experts in the fields of education, sociology, and anti-Black racism.<sup>199</sup> Ms. Sibblis was identified as the lead author of the former.<sup>200</sup>

It is important to note that the Crown objected to the admissibility of the report *Social History of Kevin Morris* and its reliability given it was the first of its kind Ms. Sibblis had authored.<sup>201</sup> Despite objections about the

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<sup>196</sup> *Morris* SC, *supra* note 18 at para 3.

<sup>197</sup> *Ibid* at para 6.

<sup>198</sup> *Ibid* at paras 48, 68, 98–99.

<sup>199</sup> *Ibid* at para 14–18.

<sup>200</sup> *Ibid* at paras 18.

<sup>201</sup> *Ibid* at para 23.

reliability of the report, Justice Nakatsuru accepted the report, noting that it would be helpful with sentencing, particularly in thinking through the question of proportionality.<sup>202</sup> The principle of proportionality “ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender.”<sup>203</sup>

Justice Nakatsuru noted that the report did not have to go through empirical scrutiny, arguing,

It is my view that such reports should not have to meet the strict requirements of the admissibility of “expert” evidence as the Crown argued, as it is set out in the legal cases. These reports serve a very different purpose. They provide personal, social, cultural, and historical context for the sentencing. In my opinion, to follow the type of exacting inquiry into their admissibility called for by the Crown would only serve as a systemic barrier to tackling the problem at hand. It will be yet another form of systemic racism.<sup>204</sup>

As seen above, Justice Nakatsuru noted specialized knowledge does not require empirical scrutiny, nevertheless, he did allow the Crown to cross-examine Ms. Sibblis, who answered questions centred around methods used to collect data and whether she had accessed his jail records and those of Ontario Works.<sup>205</sup> Ultimately Justice Nakatsuru noted that Ms. Sibblis’s methods were valid, as “she used the information she got to explain how the theory around anti-Black racism was relevant in Mr. Morris’s case.”<sup>206</sup>

Here I want to focus on the section in the *Expert Report* titled “Black Masculinities.”<sup>207</sup> This section shows how the “theory around anti-black racism” Justice Nakatsuru alludes to was used in both reports.<sup>208</sup> In the *Expert Report* the section, “Black Masculinities,” cites two subculture theory of violence texts to illuminate Black male subculture in Toronto: Elijah Anderson’s *Code of the Streets* and Majors and Billson’s *Cool Pose*.<sup>209</sup> Here I

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<sup>202</sup> *Ibid* at para 24.

<sup>203</sup> *R v Ipeelee*, 2012 SCC 13 at para 37 (quoted in *Morris CA*, *supra* 18 at para 63). For an important critique of proportionality in relation to anti-Black racism and IRCAs see Jones, *supra* note 30 at 450–55.

<sup>204</sup> *Morris SC*, *supra* note 18 at para 26.

<sup>205</sup> *Ibid* at para 33.

<sup>206</sup> *Ibid* at para 34.

<sup>207</sup> *R v Morris*, 2018 ONSC 5186 (Evidence, *Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario*, authored by Akwasi Owusu-Bempah, Camisha Sibblis & Carl James), online: <handbook.law.utoronto.ca> [perma.cc/SV8H-PHLU] [*Morris*, *Expert Report*].

<sup>208</sup> *Morris SC*, *supra* note 18 at para 34.

<sup>209</sup> *Morris*, *Expert Report*, *supra* note 207 at 3–4.

will focus on Anderson's work as used in the report. Drawing on Anderson's text, the *Expert Report on Crime* noted,

Youth subcultures tend to reinforce masculine characteristics associated with violence, dominance, and homophobia. These traits or characteristics may be overemphasized by Black males for whom acceptable means of displaying masculinity are blocked, and for whom experience racism is a daily reality... Anderson suggests that exerting violence and aggression, or at least exhibiting the potential for violence and aggression, is key to gaining respect within structurally disadvantaged communities.<sup>210</sup>

Anderson's *Code of the Streets* is an ethnographical study of how Germantown, a Black community in Philadelphia, copes with violence among Black males. Anderson noted that the failure on the part of police to intervene in Germantown resulted in Black males developing a code of the street: "A set of informal rules governing interpersonal public behaviour, particularly violence."<sup>211</sup> Anderson argued that the code of the street is tied to the distrust Black males have of police officers.

The code of the street is actually a cultural adaptation to a profound lack of faith in the police and the judicial system—and in others who would champion one's personal security. The police, for instance, are most often viewed as representing the dominant white society and as not caring to protect inner-city residents.<sup>212</sup>

This loss of faith in police means that the structural is reduced to the individual, "the code of the street thus emerges where the influence of the police ends and where personal responsibility for one's safety is felt to begin."<sup>213</sup> This line of reasoning from Anderson's work was replicated by Justice Nakatsuru who, in citing the *Social History of Kevin Morris* authored by Ms. Sibblis, noted,

Ms. Sibblis described the interactions between young Black men and the police in this same neighbourhood. It is not a good relationship. There is no trust. Young Black men developed negative feelings towards the police. You, yourself, believed from your own experiences that the police were out to get you. You have long felt targeted by the police due to your Blackness. You regarded the police as uncaring and untrustworthy. They were not there to help you.<sup>214</sup>

Contextualizing Morris's flight from police from a subculture position (policing as uncaring and untrustworthy), Justice Nakatsuru further argued,

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<sup>210</sup> *Ibid.*

<sup>211</sup> Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City* (New York: WW Norton, 1999) at 33 [Anderson, *Code of the Street*].

<sup>212</sup> *Ibid.* at 34.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Morris SC, supra* note 18 at para 41.

I appreciate that accused people should not flee from police. Especially carrying a loaded firearm. But it is understandable to me that you ran. It was not a coldly calculated act to escape but one based upon emotion and a state of mind that has been shaped both generally and specifically by the historical racism suffered by Blacks and by you. In other words, not every flight from the police should be treated the same. Here there is a connection in the evidence between your act of flight and the systemic factors.<sup>215</sup>

Justice Nakatsuru's assertion that Morris had "emotion and a state of mind that has been shaped both generally and specifically by the historical racism suffered by Blacks and by you"<sup>216</sup> replicated Wolfgang and Ferracuti's assertion that Black males in urban communities have developed a learned response to negative and positive stimuli for violence.<sup>217</sup> Moreover, recall that Anderson in his work argued that Black males arm themselves as a learned response to a history of racism and inability on the part of police to protect Black communities from violence.<sup>218</sup>

Given this reality of Morris's learned response to a historical and contemporary state violence shaped by oppression, Justice Nakatsuru argued that systemic racism is relevant to moral culpability and reduces blameworthiness for the specific crime of carrying a firearm.

When I look at it, especially your mental health condition that may have made you vulnerable to taking that gun, as influenced by the systemic factors that surrounded you and your life, I find it lessens the blameworthiness of your actions.<sup>219</sup>

Morris established that anti-Black racism can be used to determine moral blameworthiness. This is a significant development, given how subculture theory of violence enters the sentencing framework to advance that carrying a gun is a learned response to a history of racism and police inability to protect Black communities.<sup>220</sup> While in X subculture theory was used to advance that using guns for personal conflict is part of the race and race models for coping in a criminally-affected community and does not diminish responsibility, in *Morris* Justice Nakatsuru asserted that anti-Black racism shaped the "state of mind" of Morris and reduced his moral responsibility, thereby justifying leniency.

This is a doctrinal expansion in that IRCAs now affect substantive sentencing principles, not merely context. Systematic factors become

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<sup>215</sup> *Ibid* at para 66.

<sup>216</sup> *Ibid*.

<sup>217</sup> Wolfgang & Ferracuti, *supra* 64 at 264.

<sup>218</sup> Anderson, *Code of the Street*, *supra* note 211 at 34.

<sup>219</sup> *Morris* SC, *supra* note 18 at para 78.

<sup>220</sup> Anderson, *Code of the Street*, *supra* note 211 at 34.

culpability factors.<sup>221</sup> The epistemological innovation here is that subculture theory of violence becomes relevant to sentencing. Racism is made legible through subculture theory, and the theory is no longer contextual, instead becoming operative in determining criminal responsibility.<sup>222</sup> It is precisely this issue that would be raised by the Crown and the appellate judges who sought to constrain how to assess racism in the sentencing of Black males charged with gun offenses in 2021.

## *2. Fourth Judicial Ritual: The Appellate Constraint but with the Subculture Theory Still Applicable*

The fourth judicial epistemic ritual occurred when the appellate court reasserted proportionality and the seriousness of crimes to constrain the sentencing impact of systemic racism while preserving subculture theory as the mandatory framework for understanding Black male criminality.

In 2021 the Crown would appeal Justice Nakatsuru's ruling, noting that the "sentence is manifestly unfit and the trial judge made several material errors in his reasons, particularly in his treatment of the evidence led by Mr. Morris concerning the impact of overt and institutional anti-Black racism."<sup>223</sup> Justice Michal Fairburn, writing for the five judges at the Ontario Court of Appeal, would agree that anti-Black racism does not diminish the blameworthiness of Black male offenders, noting that doing so would diminish the seriousness of the crime.<sup>224</sup>

There must, however, be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other way to a determination of the appropriate sentence.<sup>225</sup>

Justice Fairburn sought to underscore that "it is important to preserve the distinction between factors relevant to the seriousness or gravity of the crime on the one hand, and factors relevant to the offender's degree of responsibility on the other. Unless the distinction is maintained, the proportionality principle may be misapplied."<sup>226</sup> As such, Justice Fairburn

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<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Morris CA*, *supra* note 18, at para 4.

<sup>224</sup> *Ibid* at para 76.

<sup>225</sup> *Ibid* at para 97.

<sup>226</sup> *Ibid* at para 77.

argued that anti-Black racism should be a factor in efforts to consider the offender's moral responsibility.

In other words, moral blameworthiness must be weighed with the gravity of the crime, and carrying a loaded gun is a serious crime, given that "a person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. Carrying a concealed, loaded handgun in a public place in Canada is antithetical to the Canadian concept of a free and ordered society."<sup>227</sup>

Justice Fairburn was advancing that evidence of anti-Black racism should help the judge understand how it enabled moral responsibility but does not diminish moral culpability in the case of serious crimes such that the judge can impose a sentence that affirms the principles of sentencing are sound.

The social context evidence can, however, provide a basis upon which a trial judge concludes that the fundamental purpose of sentencing, as outlined in s.718, is better served by a sentence which, while recognizing the seriousness of the offence, gives less weight to the specific deterrence of the offender and greater weight to the rehabilitation of the offender through a sentence that addresses the societal disadvantages caused to the offender by factors such as systemic racism.<sup>228</sup>

In establishing that systemic racism should be considered to affirm rehabilitation without overshadowing the fundamental principle of sentencing revolves around the seriousness of the case. The court would reject the claim by interveners that society and the state are complicit in perpetuating anti-Black racism and so should be considered during sentencing.

If society's complicity in institutional racism means denunciation and general deterrence should play a lesser role in sentencing for serious crimes, it will follow that Black offenders who commit those serious crimes, such as gun crimes, will receive shorter jail sentences than other similarly situated non-Black offenders. As pointed out in the "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario", Black communities experience a disproportionate share of serious violent crime in the Toronto area. Black youth in particular report higher levels of both violent victimization and violent offending than youth from other racial groups.<sup>229</sup>

The appellate constraint in *Morris* (2021) appears to limit the reach of IRCAs, but it perfects the epistemic ritual. Judge Fairburn's doctrinal move—distinguishing between the explanatory relevance of systemic racism and its sentencing impact—preserves subculture theory as the mandatory

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<sup>227</sup> *Ibid* at para 68.

<sup>228</sup> *Ibid* at para 79.

<sup>229</sup> *Ibid* at para 84–85.

framework through which courts come to understand Black male criminality, while also constraining its mitigating force.<sup>230</sup> Referencing Justice Nakatsuru's assessment of Morris's state of mind through subculture theory, Justice Fairburn notes,

That state of mind offered a mitigating explanation for Mr. Morris's possession of the loaded, concealed handgun. Looked at in this way, evidence of anti-Black racism, which played a role in generating the fear that helps explain why Mr. Morris had a loaded gun, is akin, for the purposes of sentencing, to evidence that Mr. Morris had been terrorized by somebody in the community and had armed himself because he genuinely feared that person. In either scenario, the offender offers an explanation for possessing a loaded gun...it must be stressed, however, that Mr. Morris's genuine fear, regardless of its cause, is only a limited mitigating factor. He still chose to arm himself in public with a concealed, loaded, deadly weapon. As indicated above, Mr. Morris's reasons for choosing to arm himself do not detract from the seriousness of the crime he committed.<sup>231</sup>

This is an epistemic victory disguised as doctrinal restraint. Fairburn's doctrinal move to separate crime gravity from offender culpability makes subculture theory mandatory as an interpretive framework even while constraining its sentencing force.<sup>232</sup> In other words, Judges must apply the theory to understand Black male psychology to arm themselves given that Black males fear and terrorize each other in the community but judges cannot let that understanding diminish the sentence of the seriousness of the gun crime.<sup>233</sup>

While scholars have noted the restricted nature of *Morris* to engage anti-Black racism and showed how the principle of proportionality reinforces anti-Black racism,<sup>234</sup> less discussed in the literature is how subculture theory of violence has evolved within the trajectory of cases involving Black males charged in gun offenses from *X* through *Morris*.

In *X*, the Nova Scotia Youth Court admitted Wright's race and culture assessment as social context evidence, inaugurating the prototype for IRCAs. Wright's testimony reframed the Crown's psychological pathologization of a young African Nova Scotian male into a cultural narrative of Black male conflict resolution, embedding Wolfgang and Ferracuti's subculture theory of violence into youth sentencing.<sup>235</sup> Justice

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<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid* at paras 100–101.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> Jones, *supra* note 30 at 450–55; Anderson, “Analysis”, *supra* note 30 at 166–71; Dugas, “Addressing Anti-Black Racism”, *supra* note 31 at 652–65.

<sup>235</sup> *R v X*, *supra* note 17 at para 248.

Derrick preserved the presumption of diminished responsibility, but in doing so affirmed the subculture theory as authoritative knowledge, situating Black male identity as both victim and offender within a criminogenic community.<sup>236</sup>

By contrast, *Morris* (2018/2021) extended the IRCA framework into serious adult gun offences. At trial, Justice Nakatsuru relied on two experts reports that invoked subculture theory to explain Black male violence as a learned response to systemic racism and blocked avenues of masculinity.<sup>237</sup> While Justice Nakatsuru used this reasoning to mitigate moral blameworthiness, the Ontario Court of Appeal in 2021 using the *Expert Report on Crime*, reasserted proportionality, distinguishing between the seriousness of the crime and the offender's responsibility. In this appellate move, systemic racism was acknowledged only insofar as it informed responsibility, not as a basis of diminished culpability.<sup>238</sup>

Subculture theory of violence remains the same in explaining that Black male violence is a learned response to oppression, but the legal consequences are constrained. Together, these two cases chart the evolution of the subculture theory in IRCAs: from youth sentencing, where subculture theory was a compassionate mitigation, to adult gun offences, where the same epistemic substrate was preserved but judicially constrained, reinforcing sentencing orthodoxy while continuing to normalize racialized accounts of Black male criminality. Importantly, subculture theory persists as an explanatory baseline even when its sentencing impact is limited.<sup>239</sup>

#### ***D. Fifth Judicial Ritual: Institutionalization of IRCA Epistemic Framework and Appellate Guidance***

The fifth judicial epistemic ritual occurred in *Anderson*, when the appellate court mandated that failure to consider IRCAs constitutes reversible error, legally institutionalizing speculative theories—despite their originator's acknowledgement of their speculative status. *Anderson* appeared before the Nova Scotia Provincial Court following a routine traffic stop in which a loaded firearm was found in Anderson's car.<sup>240</sup> The legal issue pertinent to this case centred around the appropriate sentence, especially with assessments offered in IRCAs.<sup>241</sup>

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<sup>236</sup> *Ibid.*

<sup>237</sup> *Morris SC*, *supra* note 18 at para 78.

<sup>238</sup> *Morris CA*, *supra* note 18 at para 84.

<sup>239</sup> *Ibid* at paras 100–101.

<sup>240</sup> *Anderson CA*, *supra* note 18 at para 15.

<sup>241</sup> *Ibid* at para 2.

The Crown initially sought two to three years in a federal prison,<sup>242</sup> but when the judge ordered a conditional sentence of two years' imprisonment and two years' probation,<sup>243</sup> the Crown appealed the "conditional sentence on the grounds the judge underemphasized denunciation and deterrence and imposed a sentence that was demonstrably unfit," and sought a sentence of actual incarceration.<sup>244</sup> The Crown would later accept the conditional sentence but sought guidance on how IRCAs and information about historic injustice and racial discrimination should inform the sentencing of African Nova Scotian offenders, particularly in gun-related cases.<sup>245</sup>

Justice Pamela S. Williams summarized the IRCA written by Wright and Natalie Hodgson, the latter of whom writing about the pattern of violence in Halifax, noted,

Many black males arm themselves with guns, not because they have plans to harm someone, but rather they feel the need to protect themselves *in case*. This *in case* mentality derives from affiliations with community members that have already been killed, have existing "beefs" or conflicts with peers that may result in violence.<sup>246</sup>

Whereas Wright in *X* linked gun violence as a cultural value to resolving personal conflict, in *Anderson*, Hodgson asserted it stems from a psychological condition to protect themselves from "beefs," reasserting subculture theory of violence.<sup>247</sup> What we see is that in *Anderson* subculture theory of violence gives a cultural and psychological explanation that asserts Black males carry guns as a learned response to witnessing the death of other Black males, which has resulted in a cultural propensity for Black males to be violent. The learned response has roots in slavery, as Wright would write in the IRCA:

In the Black community, trauma presents as Post Traumatic Slave Syndrome characterized by negative self-esteem issues along with feelings of hopelessness. There is an increased startle response and a perceived propensity for violence, all the while being under a "pervasive sense of threat". This is most acute when authority figures confront Blacks. There is also an internalized racism creating an aversion to one's own cultural group, customs and heritage.<sup>248</sup>

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<sup>242</sup> *Ibid* at para 23.

<sup>243</sup> *Ibid* at para 20.

<sup>244</sup> *Ibid* at para 164.

<sup>245</sup> *Ibid* at para 2.

<sup>246</sup> *Anderson* PC, *supra* note 18 at para 59 [emphasis in original].

<sup>247</sup> *Ibid*.

<sup>248</sup> *Ibid* at para 69.

Here it is important to note the definition of PTSS, as stated by Leary:

Post traumatic slave syndrome is a condition that exists when a population has experienced multigenerational trauma resulting from centuries of slavery and continues to experience oppression and institutionalized racism today. Added to this condition is a belief (real or imagined) that the benefits of the society in which they live are not accessible to them.<sup>249</sup>

Importantly, Leary states, “the direct relationship between the slave experience of African American and the current major social problems facing them is difficult to empirically substantiate.”<sup>250</sup> Three patterns emerge here about the epistemic framework of IRCAs. First, Wolfgang and Ferracuti explicitly admit their theory has no empirical basis—they cannot explain the genesis or transmission of the subculture of violence—yet courts treat it as fact.<sup>251</sup> Second, Majors and Billson describe cool pose as speculative and exploratory, yet courts institutionalize it as diagnostic.<sup>252</sup> Third, Leary herself notes that linking slavery to current problems is difficult to empirically substantiate, yet courts invoke PTSS as an explanatory framework.<sup>253</sup>

In each case, the theory’s originators acknowledge its speculative status yet courts, through specialized expert testimony, erase that acknowledgement and treat these speculative theories as neutral facts of Black male psychology and behaviour as a learned response to the history of slavery and anti-Black racism.

Despite these observations about the speculative nature of their theories, these theories enter the epistemic framework of IRCAs without the IRCA writer noting their speculative origins and without judges asking if there are empirical limits to these constructs. As such, in *Anderson* PTSS is used to assert that the legacy of slavery has resulted in Black males developing a “startle response and a perceived propensity for violence” under a “pervasive sense of threat.”<sup>254</sup> Said differently, the long history of Black males being whipped, lynched, and castrated under slavery has resulted in them internalizing that violence such that they take it out on other Black males.<sup>255</sup>

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<sup>249</sup> Leary, *supra* note 169 at 125.

<sup>250</sup> *Ibid* at 124.

<sup>251</sup> Wolfgang & Ferracuti, *supra* note 64 at 264.

<sup>252</sup> Majors & Billson, *supra* note 176 at xi–xii.

<sup>253</sup> Leary, *supra* note 169 at 124.

<sup>254</sup> *Anderson* PC, *supra* note 18 at para 69.

<sup>255</sup> Covington, *supra* note 12 at 256.

By invoking PTSS to contextualize Anderson's actions and asserting that slavery is an epigenetic condition that results in Black male criminality and violence, the concept is circulated in sentencing.<sup>256</sup> This creates a baseline in which historical trauma is linked to the need for cultural rehabilitation, as Justice William noted,

Mr. Anderson needs Afrocentric therapy interventions and an African Nova Scotia male mentor/role model. He needs substantial literacy and vocational interventions that are offered to African Nova Scotians specifically...As a result, I sentence Mr. Anderson to a jail term of two years less a day to be served in the community to be followed by two years probation.<sup>257</sup>

The evocation of PTSS in court transforms slavery into a psychological condition and a pathological condition of Black male criminality rather than a dehumanizing system that has resulted in structural injustice.<sup>258</sup> Here, much like *Gabriel*, the logic in *Anderson* asserts that Black male subculture of violence is a result of a psychological deficit from slavery linked to Black male identity today as inherently pathological and prone to crime. But pathology in *Anderson* does not excuse crime; it justifies rehabilitation as a sentencing goal.

Nevertheless, in 2021 the Crown would appeal and seek counsel on how to use IRCAs, particularly in gun offenses related to Black males in Nova Scotia. The Nova Scotia Court of Appeal in 2021 would note that "it may amount to an error of law for a sentencing judge to ignore or fail to inquire into" the "systemic and background factors detailed in an IRCA" or otherwise raised in the sentencing of an African Nova Scotian offender.<sup>259</sup>

In other words, the *Anderson* case established that the moral culpability of Afro-Nova Scotians should be determined considering historical and systematic racism and how rehabilitation can be factored in. As the Court of Appeal explained,

IRCAs should be employed to individualize sentences, taking account of factors that have previously been absent from the analysis. Sentence ranges will have to be re-evaluated as they have been developed without the benefit of a fully contextualized analysis....Sentencing judges will need to consider what an IRCA can tell them about the options available for the offender and the offender's openness to engage in community-based rehabilitation.<sup>260</sup>

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<sup>256</sup> *Anderson CA*, *supra* note 18 at paras 62, 102.

<sup>257</sup> *Anderson PC*, *supra* note 18 at paras 103, 107.

<sup>258</sup> *R v Beals*, 2019 NSPC 68 at para 24; *R v Sumaili*, 2023 MBPC 63 at para 28.

<sup>259</sup> *Anderson CA*, *supra* note 18 at para 118.

<sup>260</sup> *Ibid* at para 132.

While *Anderson* has been celebrated by legal scholars as a more progressive verdict than *Morris* because of its consideration of systemic racism, what has gone undertheorized is that *Anderson* affirmed rehabilitation as central to sentencing of Black Canadians in part by relying on PTSS, which is hard to empirically verify.<sup>261</sup> In *Morris*, subculture theory of violence was used to affirm that the seriousness of the crime could not be mitigated and social disadvantage should be considered within the framework of rehabilitation.<sup>262</sup> In *Anderson*, PTSS is used to affirm why Black males need state psychological intervention by affirming rehabilitation as a central goal of sentencing. In the words of the Court of Appeal,

IRCA's can support the use of rehabilitation in sentencing, "one of the objectives of Canadian criminal law..." and "one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world...". IRCA's can provide a foundation on which to build alternatives to incarceration for Black offenders and reduce the over-reliance on imprisonment.<sup>263</sup>

What began in *X*, grounded in subculture theory of violence as an explanation of "race and race models for coping in a criminally affected community," in *Anderson* becomes mandatory judicial doctrine without empirical scrutiny of the theories used to contextualize Black male offending. The judicial epistemic ritual reached its culmination. The Nova Scotia Court of Appeal established that failure to consider IRCA's and their frameworks constituted reversible error, creating conditions of epistemic closure: courts are now legally mandated to apply theories whose originators acknowledged them as speculative to affirm rehabilitation as a cardinal principle of sentencing.

The *Paris* case, with which this article opened, illustrates this perfectly. Judge LePage found PTSS was helpful to understand Paris's use of cannabis given his history of trauma.<sup>264</sup>

The court recognizes that the accused's past was shaped by social, professional, and personal difficulties related to his race, culture, and skin colour. The link, whether necessary or not, depending on the case law, is established in this case. Selling drugs became a way of survival from a very young age. After successfully integrating a healthier lifestyle, the car accident that left him essentially disabled, returned him to the lifestyle he knew.<sup>265</sup>

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<sup>261</sup> Dugas, "Addressing Anti-Black Racism", *supra* note 31 at 657.

<sup>262</sup> *Morris* SC, *supra* note 18 at paras 78–79.

<sup>263</sup> *Anderson* CA, *supra* note 18 at para 120 [ellipses in original].

<sup>264</sup> *R v Paris*, *supra* note 2 at para 65.

<sup>265</sup> *Ibid* at para 119.

Citing *Anderson*, Judge Lepage would assert, “As said in *Anderson*: IRCAs can provide a foundation on which to build alternatives to incarceration for Black offenders and reduce the over-reliance on imprisonment. The Cour[t] thinks we have that foundation here.”<sup>266</sup>

While *Paris* reads as a case of judicial compassion, Judge Lepage, through the concept of PTSS, invoked slavery, a system of state-sanctioned violence and dehumanization, to explain *Paris*’s drug trafficking, a charge itself tied to his disability-related desperation. In doing so, the court performed a remarkable sleight of hand. It acknowledged that centuries of slavery caused psychological damage so profound it persists across generations, shaping contemporary offending.

Yet it used this acknowledgement not to interrogate the state’s responsibility for perpetuating conditions rooted in slavery but to legitimize continued state incarceration as remediation.<sup>267</sup> The court appeared to take slavery seriously, seriously enough to invoke it in sentencing, while simultaneously using that invocation to justify why the state should intervene therapeutically in *Paris*’s life through the carceral system.<sup>268</sup> Slavery became an explanation rather than indictment. The state positions itself as responsive to historical injustice by sentencing *Paris* to community-based rehabilitation, even as it maintains the legal architecture that criminalizes Black males.<sup>269</sup> The central problem here, is the historical record of African insurrections, maroon sovereignty, and treaty-making between 1500 and 1900 in North and South America demonstrates that Black agency was grounded in African political traditions that has shaped a culture of resistance post slavery, rather than the pathological coping mechanism PTSS asserts.<sup>270</sup>

Having shown how speculative academic theories of Black males have entered courts through specialized knowledge doctrine and shaped how

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<sup>266</sup> *Ibid* at para 124.

<sup>267</sup> Dugas, “Addressing Anti-Black Racism”, *supra* note 31 at 666.

<sup>268</sup> This has roots in nineteenth century cases invoking Black males in Canadian courts. See Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: University of Toronto Press, 2010) at 87.

<sup>269</sup> Derrick A Bell Jr, “Racial Remediation: An Historical Perspective on Current Conditions” (1976) 52:1 Notre Dame L Rev 5 at 14; Frantz Fanon, *Black Skin, White Masks*, translated by Richard Philcox (New York: Grove Press, 2008) at 89–120.

<sup>270</sup> Afua Cooper, “Acts of Resistance: Black Men and Women Engage Slavery in Upper Canada, 1793–1803” (2007) 99:1 Ontario History 5; Dalitso Ruwe, “Ontological Sovereignty: Black Justifications for Violent Resistance to Slavery, 1500-1900” (2025) 6:2 J Modern Philosophy 1.

courts have settled how to use IRCAs, the next section engages the empirical evidence on Black males as a criminogenic population.

## V. EPISTEMIC IMMUNITY: WHEN INSTITUTIONAL KNOWLEDGE CONTRADICTS EMPIRICAL REALITY

The epistemic framework institutionalized through IRCAs rests on three empirical presuppositions about Black male offending that are rarely made explicit but are operative throughout the case law examined above. First, that Black male youth offending is disproportionately firearm-centred relative to other forms of youth crime.<sup>271</sup> Second, that Black male firearm possession reflects culturally transmitted norms as a learned subcultural response to oppression rather than a structural response to material conditions.<sup>272</sup> Third, that Black males exhibit heightened criminogenic trauma measured by exposure to adverse childhood experiences and other risk factors, relative to other populations.<sup>273</sup> Each of these presuppositions is testable. Importantly, what follows does not dispute that Black males carry guns, nor does it dispute the cases above that involved real firearm offences. Rather the section asks a narrower question: whether national data supports the step courts take from a gun in a Black male's possession to a supposed Black male subculture that teaches Black males to use it.

As such, despite national limitations in race-based data collection, the analysis below draws on the most current publicly available evidence. The data is used as an epistemic counterpoint to three assumptions in IRCAs, not as a positivist foundation. Where the observed patterns diverge from those the subculture framework predicts, the divergence is not incidental variation but epistemic falsification: evidence that the institutionalized framework no longer corresponds to the social reality it purports to explain and therefore cannot be attributed to empirical accuracy.<sup>274</sup>

In short, the problem is not factual error but epistemic immunity; which is to say IRCAs derive authority from speculative theory, stabilized by admissibility doctrine and judicial repetition that cannot be scrutinized empirically.

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<sup>271</sup> *R v X*, *supra* note 17 at para 185; see also Jones, *supra* 30 at 441.

<sup>272</sup> *R v X*, *supra* note 17 at para 185.

<sup>273</sup> *Ibid.*

<sup>274</sup> Tamari Kitossa, "Criminology as Epistemic Necropolitics" (2020) 8:2 Soc Transformations J Global South 89 at 102–103 [Kitossa, "Epistemic Necropolitics"].

### A. *Racialized Narratives of Black Male Youth Gun Violence in Nova Scotia*

Recall that in *X* in 2014 (*X* being 16 at the time), Wright's testimony sought to underscore that young Black males in Halifax have developed a cultural propensity for gun violence.<sup>275</sup> Yet this assertion is not substantiated by empirical evidence. A 2014 report from *Juristat* focused on youth between the ages 12 and 17 in Nova Scotia who encountered the criminal justice system found that

Nearly half (46%) of youth accused of crime in Nova Scotia in 2012/2013 were involved in property offences, a proportion which was slightly higher among female youth offenders than their male counterparts (48% versus 45%). These property offences mainly included theft or shoplifting of \$5,000 or less, mischief and breaking and entering. Nearly three in ten (27%) youth accused committed violent offences (29% of females and 26% of males).<sup>276</sup>

The data shows that youth crime is not solely relegated to activities by male youth, as female youth were slightly more representative in property offences and violent offences.<sup>277</sup> Of note here, violent offences that were prevalent among youth in Nova Scotia were common assault at 14%, major assault levels two and three at 3%, other physical assaults (including some firearm offences) at 1%, sexual offences at 2%, uttering threats at 4%, and other violent offences at 4%.<sup>278</sup>

If subculture theory accurately described Black male youth offending as firearm centred and culturally patterned, firearm-related offences would constitute a substantial share of youth crime. Instead, the data demonstrates that youth offending in Nova Scotia and across the country is overwhelmingly property based, with firearm involvement accounting for a marginal proportion of violent offences.<sup>279</sup> This empirical pattern directly contradicts the core claim that gun violence operates as a defining feature

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<sup>275</sup> *R v X*, *supra* note 17 at para 185.

<sup>276</sup> Dyna Ibrahim, *Youth re-contact with the Nova Scotia justice system, 2012/2013 to 2014/2015* (Ottawa: Canadian Centre for Justice Statistics, 2019) at 5, online (pdf): <publications.gc.ca> [perma.cc/ZD5H-QPSR] [footnotes omitted].

<sup>277</sup> It may be important to note that these statistics represent proportions and do not say anything about the real number of male and female youths that commit these crimes.

<sup>278</sup> Ibrahim, *supra* note 276 at 17.

<sup>279</sup> *Ibid* at 5; for recent national data showing property crime is still the highest crime for youth see Department of Justice Canada, *Police-reported youth crime statistics in Canada, 2023* (Ottawa: Just Facts, Research and Statistics Division, 2025) at 3, online (pdf): <justice.gc.ca> [perma.cc/62VP-5VZN].

of Black male youth culture rather than as a statistically rare phenomenon.<sup>280</sup>

Moreover, recall that Wolfgang and Ferracuti were explicit that they cannot explain empirically how subculture norms originated or are transmitted.<sup>281</sup> Without a mechanism of transmission, the claim that one percent of youth firearm offences among Black males reflects subcultural norms is merely assertion disguised as explanation.<sup>282</sup> Without identifying how subculture norms are transmitted, the theory becomes unfalsifiable; any Black male carrying a gun is evidence of subculture, any Black male without a gun is evidence of internalized norms.<sup>283</sup> The theory absorbs all outcomes. This is not explanation; it is a taxonomic system that pre-sorts behaviour into a predetermined narrative of Black male pathology.<sup>284</sup>

Moreover, the 2014 data from Nova Scotia matches recent national data from the 2024 Department of Justice report *The State of the Criminal Justice System* focused on youth 15 to 17.<sup>285</sup> Female youth aged 15 to 17 had higher self-reported victimization rates than male youth of the same age group.<sup>286</sup> This difference was more pronounced when looking specifically at violent victimization.<sup>287</sup>

*The State of the Criminal Justice System* in explaining the victimization of girls by other girls attributes this to adverse childhood experiences like physical and sexual abuse, harsh parenting, neglect, and witnessing family violence, not to any racial or cultural subculture.<sup>288</sup> The point here is that youth violence in Nova Scotia and across the nation is not confined to a Black male demographic, whether measured by victimization or by offending.<sup>289</sup> If subculture theory of violence accurately captured a race and

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<sup>280</sup> *R v X*, *supra* note 17 para 185.

<sup>281</sup> Wolfgang & Ferracuti, *supra* note 64 at 264.

<sup>282</sup> Covington *supra* note 12 at 256.

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> Department of Justice Canada, *State of the Criminal Justice System: A Focus on Youth* (Ottawa: Research and Statistics Division, 2024) at 18, online (pdf): <justice.gc.ca> [perma.cc/ZWK4-SRUG] [Justice Canada, *A Focus on Youth*].

<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> The point I'm making here is not that girls are more violent than males, but rather self-reporting on violent victimization shows that girls and boys in their respective sex groups victimize each other. There is no reason to believe for instance that violent victimization is solely a male phenomenon as subculture theory is applied to Black boys.

gender specific pattern of offending, the broader demographic profile of youth violence should track that.

Consider that while *The State of the Criminal Justice System* states that there is no available national data on Black youth offenders, provincial data from Nova Scotia, Alberta, and British Columbia shows Black male youth are overrepresented as a violent population in comparison to Black female youth in custody.<sup>290</sup> The data from 2014–2024 shows judicial discourse on Black males displaces empirical reality with speculative and racist theories. Courts, elevate firearms as symbolic markers of young Black male pathology, even when the statistical record demonstrates that youth crime is overwhelmingly property based and self-reports of violent victimization are not solely a male phenomenon.<sup>291</sup> Said differently, racialized and gendered narratives of Black males as a criminogenic and violent population fill the gap in the absence of empirical evidence.<sup>292</sup>

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Nevertheless, there has been a long-standing debate about how to understand reports of girls participating in crime, self-reports on girls victimizing other girls and what theoretical, policy and social services interventions might be appropriate that do not rely on gender essentialist assumptions modeled on boys and violence. See e.g. Debra Pepler & Farrokh Sedighdeilami, *Aggressive Girls in Canada* (Ottawa: Human Resources Development Canada, Applied Research Branch, 1998); Marge Reitsma-Street, “Justice for Canadian Girls: A 1990’s Update” (1999) 41:3 Can J Corr 335; Alan W Leschied et al, “Aggression in Adolescent Girls: Implications for Policy, Prevention, and Treatment” (2001) 42:3 Can Psychology 200; Jennifer Silcox, “Are Canadian Girls Becoming More Violent? An Examination of Integrated Criminal Court Survey Statistics” (2019) 30:3 Crim Justice Pol’y Rev 477; Sibylle Artz & Diana Nicholson, “Understanding Aggressive Girls in Canada: A Literature Review” (March 2001), online: <eric.ed.gov> [perma.cc/ES6L-CMM9]; Joan Sangster, *Girl Trouble: Female Delinquency in English Canada* (Toronto: Between the Lines, 2002).

<sup>290</sup> Justice Canada, *A Focus on Youth*, *supra* note 285 at 35–36.

<sup>291</sup> Another problem is data collection is limited and varies year by year which creates challenges for understanding rates of incidents of crime. For instance, State of Criminal Justice in their methodology note that not all indicator data are available at the same frequency (e.g., collection may be yearly or every five years) nor at the same time of year (e.g., fiscal year vs calendar year). Data collection for the Framework will occur over the course of the year. However, delays in entering the latest data available for some indicators may be possible. In cases where an indicator is not collected on a yearly basis but is considered essential in measuring the performance of the CJS, the last indicator value collected is used as a proxy until the next collection cycle data becomes available (i.e., no forecasting is conducted). The collection date is clearly indicated. Although the State of the Criminal Justice System Framework is national in scope, not all jurisdictions collect the same data. Certain indicators only provide a subset of the national data. See Department of Justice, *State of the Criminal Justice System: Methodology Report* (Ottawa: Department of Justice Canada, 2020) at 16, online (pdf): <justice.gc.ca> [perma.cc/F9WK-3MMB].

<sup>292</sup> Ruwe, “Eugenic Caricatures,” *supra* note 36 at 666.

Furthermore, this assessment of Black male criminality (as a population) because of vulnerability and exposure to trauma presented in IRCAs is contrary to studies conducted by Correctional Service Canada, which looked at federal offenders, 22,096 men and 1,264 women, between September 28, 2009, and October 8, 2015.<sup>293</sup> Measured for four adverse experiences—abuse or neglect, interpersonal violence/mother treated violently, substance misuse in household, and incarcerated/criminal family member—the studies found that across the four categories, 48.2% of white men reported abuse or neglect, 29.5% interpersonal violence/mother treated violently, 67.7% substance misuse in household, and 15.9% incarcerated/criminal family member; 70% of Indigenous men reported abuse or neglect, 59.5% interpersonal violence/mother treated violently, 88.8% substance misuse in household, and 36.1% incarcerated/criminal family member; and 34.2% of Black men reported abuse or neglect, 17.4% interpersonal violence/mother treated violently, 39.1% substance misuse in household, and 14.2% incarcerated/criminal family member.<sup>294</sup>

The adverse childhood experience data exposes the IRCA framework's fundamental problem: it presupposes what it cannot establish. The framework assumes a uniquely heightened criminogenic vulnerability specific to Black males, measured through exposure to adverse childhood experiences and related risk factors, and treats that vulnerability as the given fact requiring contextualization. But the available population level evidence does not justify this generalized assumption. Courts frame the inquiry around “why Black males offend?” taking heightened vulnerability as established yet the data does not support treating it as established.

This is to say, the epistemic framework of IRCAs is animated by an assertion that internal vulnerability and trauma explain Black male offending and presupposes that such vulnerability has been empirically demonstrated. Yet it has not. Once that presupposition is withdrawn, the question itself dissolves, and a different one becomes visible: “not what is wrong with Black males?” but “why a population for whom no unique heightened criminogenic vulnerability has been established is nonetheless subjected to a framework built on assuming one?”<sup>295</sup>

The first question results in pathologization because it requires IRCAs to locate something inside Black males' culture, psychology, trauma,

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<sup>293</sup> Chelsea Sheahan & Kaitlyn Wardrop, *The Adverse Childhood Experiences of Canadian Federal Offenders: Available Information and Correctional Outcomes* (Ottawa: Correctional Service of Canada, 2023) at iii, online(pdf): <publications.gc.ca> [perma.cc/LD76-HP3T].

<sup>294</sup> *Ibid* at 13.

<sup>295</sup> *Ibid* at 14.

community that explains their criminalization.<sup>296</sup> The second relocates the problem externally, to the discriminatory state practices that subject this population to harsher criminalization than the evidence of vulnerability would predict.<sup>297</sup> IRCAs cannot pose the second question because they individualize what is fundamentally structural, transforming “what is the state doing to Black males?” into “what is wrong with Black males?”<sup>298</sup>

The persistence of subculture theory in juridical discourse about Black males therefore cannot be explained by empirical reality. Rather, it reflects the migration of racist, speculative accounts of Black masculinity through specialized knowledge testimony into legal categories of offending.<sup>299</sup> The epistemic falsification above reveals how IRCAs ritualize racial and gender myths into authoritative judicial knowledge, transforming Black males into criminogenic subjects despite evidence to the contrary. For instance, consider epidemiology studies focused on firearms-related injuries and deaths in Nova Scotia between 2001–2020.

An annualized firearm injury rate of 4.44 per 100,000 was observed in Nova Scotia, with self-harm in middle-aged men accounting for the majority of injuries and deaths over a 19-year study period. Younger males tended to be victims of assault and homicide, and most patients died at the scene. Although no incidence trends were observed, regression analysis showed that urban residence and trauma team activation were associated with survival while increasing age...and self-harm were associated with greater odds of mortality.<sup>300</sup>

The epidemiological profile of firearm injury and death further undermines the subculture framework of IRCAs.<sup>301</sup> Where the theory predicts interpersonal gun violence as a culturally learned practice among young Black males, the data reveals that firearm mortality in Nova Scotia is driven primarily by self-harm among middle aged men, with no escalating incidence trend indicative of cultural transmission.<sup>302</sup> This pattern is incompatible with claims that firearm violence among Black males reflects a dynamic subcultural norm.<sup>303</sup> Instead, the data indicates that firearm

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<sup>296</sup> *R v X*, *supra* note 17 at para 198.

<sup>297</sup> *Ibid.*

<sup>298</sup> Covington, *supra* note 12 at 256.

<sup>299</sup> Ruwe, “Eugenic Caricatures,” *supra* note 36 at 668–79.

<sup>300</sup> Manolhas Karkada et al, “A population-based study on the epidemiology of firearm-related injury in Nova Scotia” (2022) 53:11 *Injury* 3673 at 3678.

<sup>301</sup> Nick Bennett et al, “Mandatory gunshot wound reporting in Nova Scotia: a pre-post-evaluation of firearm-related injury rates” (2022) *Can J Emergency Medicine* 439 at 441–43.

<sup>302</sup> Wolfgang & Ferracuti, *supra* note 64 at 264.

<sup>303</sup> *R v X*, *supra* note 17 at para 185.

mortality is fundamentally a health equity problem shaped by structural inequality, not a subcultural norm.<sup>304</sup>

Moreover, this empirical falsification of firearm violence is not geographically isolated to Halifax but can be also seen in Toronto. This is to say, if firearm violence were meaningfully explained by urban Black male subculture, we would expect its concentration in cities with significant Black populations. Yet national data shows firearm-related violent crime increasing most sharply in rural and northern regions with predominantly non-Black populations.<sup>305</sup> This geographic distribution further contradicts the racialized urban narrative embedded in sentencing discourse as seen in *Morris*.

### ***B. Racialized Gun Violence in Ontario***

Recall that Judge Michal Fairburn in *Morris* asserted that “if society’s complicity in institutional racism means denunciation and general deterrence should play a lesser role in sentencing for serious crimes, it will follow that Black offenders who commit those serious crimes, such as gun crimes, will receive shorter jail sentences than other similarly situated non-Black offenders.”<sup>306</sup> Yet this judicial framing that constructs firearm offending through a racialized urban lens sits uneasily alongside empirical evidence contradicting this claim.

National data from 2019–2020 reveals that the most significant increases in firearm-related violent crime occurred not in Toronto or other urban centres but in rural regions.

Between 2019 and 2020, notable increases in rates of firearm-related violent crime were reported in southern rural British Columbia (+34%), the northern rural part of Ontario (+32%), rural Alberta (+32% in the North and +31% in the South), the Northwest Territories (+23%) and Nova Scotia (+22%).<sup>307</sup>

This national pattern also requires one caveat specific to the jurisdictions at issue in this essay: in 2020, Nova Scotia, Ontario, and Prince Edward Island were the only provinces where urban firearm-related crime rates exceeded rural rates.<sup>308</sup> That distinction should be read cautiously, however, since Statistics Canada notes that “patterns in the ethnicity, Indigenous identity (with the exception of homicide data), and

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<sup>304</sup> Karkada et al, *supra* note 300 at 3678.

<sup>305</sup> Mary Allen, *Trends in firearm-related violent crime in Canada, 2009 to 2020* (Ottawa, Statistics Canada, 2022), at 3, online: <150.statcan.gc.ca> [perma.cc/LWD7-DY5C].

<sup>306</sup> *Morris* CA, *supra* note 18 at para 84.

<sup>307</sup> Allen, *supra* note 305 at 3.

<sup>308</sup> *Ibid.*

socioeconomic characteristics of both victims and persons accused of firearm-related violence are also unknown”<sup>309</sup>

This admitted gap in demographic data collection is a further, and more fundamental source of epistemic immunity than empirical falsification alone. Because Statistics Canada does not collect ethnicity, Indigenous identity, or socioeconomic data on firearm victims or persons accused, the racialized Black male cultural pattern, asserted across the IRCAs and case law examined is unfalsifiable in principle, since no national dataset exists that could confirm or refute the very Black male cultural pattern courts and IRCA writers claim to observe.<sup>310</sup> Nor does the 2020 urban/rural split rescue the racialized inference.<sup>311</sup> The sharper year-over-year growth already documented in rural Nova Scotia and northern Ontario, combined with the total absence of demographic data on those involved, means the higher urban rates in these two provinces cannot be attributed to a culturally specific Black male pattern. They are better explained by the same structural and geographic dynamics shown to govern firearm violence across the country.<sup>312</sup>

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<sup>309</sup> *Ibid* at 5.

<sup>310</sup> For the long-standing concern about the absence of race and crime statistics published in Canada and challenges to debunk speculative theories of race and crime in Canada see Thomas Gabor, “The suppression of crime statistics on race and ethnicity: The price of political correctness” (1994) 36:2 Can J Crim 153; Scot Wortley, “A Northern taboo: Research on race, crime, and criminal justice in Canada” (1999) 41:2 Can J Corr 261; Carmela Murdocca, “The Racial Profile: Governing Race Through Knowledge Production (Research Note)” (2004) 19:2 CJLS 153; Tamari Kitossa, “Authoritarian Criminology and the Racial Profiling Debate in Canada: Scientism as Epistemic Violence” (2014) 8:1 African J Crim & Justice Studies 63.

<sup>311</sup> It is also important to note that through the decades the few incidents of Black males using firearm in public spaces during commission of an offence in Toronto and Montreal that have caught national and international attention have brought about moral panics about Black male violence as a cultural phenomenon and have spurred on policy debates about stricter gun laws, tougher incarceration laws and need for courts to prosecute gun crimes. See HV Bonar Buffam, “‘Bright Lights and Dark Knights’: Racial Publics and the Juridical Mourning of Gun Violence in Toronto” (2009) 13:1 L, Text, Culture 55; Andrea Davis, “‘The Real Toronto’: Black Youth Experiences and the Narration of the Multicultural City” (2017) 51:3 J Can Studies 725; Wesley Crichlow, “Weaponization and Prisonization of Toronto’s Black Male Youth” (2014) 3:3 Intl J Crime Justice & Soc Democracy 113; Stephen D’Arcy, “The ‘Jamaican Criminal’ in Toronto, 1994: A Critical Ontology” (2007) 32:2 Can J Communication 241; Anne-Marie Livingstone, “Racial Tropes of ‘Street Gangs’ and the Aggressive Policing of Black Youth and Other Youth of Colour” (2026) 66:1 Brit J Crim 76; Ardavan Eizadirad, “Is it ‘bad’ kids or ‘bad’ places? Where is all the violence originating from? Youth violence in the City of Toronto” (2016) 38:2 Rev Education, Pedagogy & Cultural Studies 162.

<sup>312</sup> James Sheptycki, “Guns, Crime and Social Order: A Canadian Perspective” (2009) 9:3 Criminology & Criminal Justice 307.

Which is to say, this data suggests that firearm violence is not racially or culturally specific but structurally distributed across geography and class. This contrasts with *Morris*'s urban racialization of firearm offending, particularly as data points to a rural geography of firearm violence that is largely missing from judicial discourse.<sup>313</sup>

The most recent empirical data further exposes this epistemic falsification. Statistics Canada reported that in 2023, Toronto experienced a 9.2% decrease in firearm-related violent crime, with 157 fewer incidents than the previous year.<sup>314</sup> Toronto's rate of 40 incidents per 100,000 population ranked only 11<sup>th</sup> among Canadian metropolitan areas, substantially lower than Red Deer (80 per 100,000), Regina (79), and Winnipeg (54), cities with predominantly non-Black populations.<sup>315</sup>

This data reveals gun violence is concentrated in territories and rural areas, not urban centres. Yet courts have ritualized subculture theory of violence as an explanatory framework for Black male criminality in Toronto precisely as empirical evidence demonstrates the city's declining gun-related deaths and that firearms are more prevalent across predominately rural and northern geographies.

Furthermore, a recent public health report on gun violence in Toronto from the Centre for Research & Innovation for Black Homicide Victims found that eight of the neighbourhoods with the highest rates of firearms discharge are "designated by the City of Toronto as Neighbourhood Improvement Areas (NIAs). This designation is based on the Neighbourhood Equity Index which measures factors such as economic opportunity, social development, civic participation, physical environment, and health outcomes."<sup>316</sup> Researchers note that "efforts to prevent gun violence must be accompanied by initiatives that build skills, expand employment opportunities, and improve the equity scores of impacted neighbourhoods to address the structural and socioeconomic conditions that sustain violence."<sup>317</sup>

These empirical falsifications focused on structural issues underscore the epistemological stakes of sentencing law. *Morris* exemplifies law's selective recognition of systemic racism—foregrounding anti-Blackness in

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<sup>313</sup> *Morris* CA, *supra* note 18 at para 84.

<sup>314</sup> Statistics Canada, *Firearms and Violent Crime in Canada 2023* (Ottawa, Statistics Canada, 2025), at 3, online: <150.statcan.gc.ca> [perma.cc/H2T3-W3ME].

<sup>315</sup> *Ibid* at 2.

<sup>316</sup> Tanya L Sharpe & Nauman Aqil, *A Report on Gun Violence in Canada* (Toronto: The Centre for Research & Innovation for Black Survivors of Homicide Victims, 2025) at 13, online: <the-crib.org> [perma.cc/3DJX-9LCD].

<sup>317</sup> *Ibid* at 17 [emphasis omitted].

urban Ontario—while obscuring other racialized and geographic contexts, particularly the colonial legacies that shape firearm violence in rural and northern communities.<sup>318</sup> The result is a partial and situated legal knowledge: firearm crime is legally understood through the prism of the Black male urban experience, even as empirical data demonstrates its prevalence in rural contexts and its link to structural issues in Toronto.<sup>319</sup> Such selectivity reveals how IRCAs and sentencing jurisprudence function not as neutral instruments of justice but as sites where racial and gendered knowledge about Black males is produced and validated as legal facts.<sup>320</sup>

Taken together, these findings from Nova Scotia and Ontario constitute an epistemic falsification of the explanatory framework institutionalized through IRCAs. The empirical record does not support claims of firearm dominant youth violence, culturally transmitted gun norms, or heightened criminogenic vulnerability among Black males. This is not to argue that individual Black males do not commit firearm offences, nor the aggregate rarity disproves any case; individual cases may well involve firearms. The claim is narrower and more precise: the empirical record does not support the generalized inference, drawn repeatedly in the case law above, that a Black male's firearm offence expresses a culturally transmitted, racially specific subculture of violence. What the data falsifies is not the offence, but the cultural mechanism courts infer from it, and it is that inference, licensed by *Abbey* without empirical scrutiny, that constitutes the epistemic ritual.

The endurance of these theories within sentencing jurisprudence therefore cannot be attributed to their empirical accuracy.<sup>321</sup> Instead, it reflects their institutional function: translating structural inequality into individualized pathology compatible with carceral governance of Black males.<sup>322</sup>

## VI. CONCLUSION

This article has argued that IRCAs often function less as tools for mitigating anti-Black racism and more as epistemic rituals that convert speculative theories of Black male pathology into authoritative legal

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<sup>318</sup> David Lester & Antoon A Leenaars, "Is There a Regional Subculture of Firearm Violence in Canada?" (1998) 38:4 *Med Sci Law* 317 at 319.

<sup>319</sup> Morris CA, *supra* note 18 at para 84.

<sup>320</sup> Ruwe, "Eugenic Caricatures," *supra* note 36 at 668–79.

<sup>321</sup> Curry, "Must There Be", *supra* note 29 at 22.

<sup>322</sup> Kitossa, "Epistemic Necropolitics", *supra* note 274 at 104–107.

knowledge. This is done through the low threshold established in *Abbey* for specialized knowledge. As a result, courts have normalized constructs such as subculture theory of violence, cool pose, vacant esteem, and PTSS. These constructs, which originated in conjectural social science, have become embedded in sentencing as if they were empirically validated. As these constructs circulate across experts' narratives, trial courts, and appellate courts, their speculative status fades and their normative force grows, shaping judges' determinations as they reason through the sentencing principles focused on culpability, proportionality, and rehabilitation when confronted with Black males.<sup>323</sup>

Even when these constructs conflict with empirical evidence on youth crime, firearm violence, and adverse childhood experiences, they persist. Their persistence shows not specialized knowledge testimony accuracy but institutional need: IRCAs allow courts to acknowledge anti-Black racism while maintaining carceral authority by reframing structural inequality as individual pathology.<sup>324</sup>

The core challenge, then, is not how to refine IRCAs but whether a sentencing regime can meaningfully advance racial justice while relying on speculative constructs that pathologize the very population they claim to contextualize. Revolutionary psychiatrist Frantz Fanon warned about this tendency to assume that therapy without changing the basis of the structure of Western societies would work for Black males.

A society has race prejudice, or it has not. There are no degrees of prejudice. One cannot say that a given country is racist but that lynchings or extermination camps are not to be found there. The truth is that all that and still other things exist on the horizon. These virtualities, these latencies circulate, carried by the life-stream of psycho-affective, economic relations...Discovering the futility of his alienation, his progressive deprivation, the inferiorized individual, after this phase of deculturation, of extraneousness, comes back to his original positions.<sup>325</sup>

Fanon's point is that the dehumanization of Black males in Western societies is embedded in social structures such as that the carceral system is not the place where Black males can be treated humanely through therapeutic rehabilitation. Said, differently, courts reinforce Black male disposability without ever attending to the permanence of anti-Black misandry and its debilitating impact on Black males.<sup>326</sup>

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<sup>323</sup> Jones, *supra* note 30 at 445–46.

<sup>324</sup> Dugas, “Addressing Anti-Black Racism”, *supra* note 31 at 666.

<sup>325</sup> Frantz Fanon, *Toward the African Revolution*, translated by Haakon Chevalier (New York, Grove Press, 1967) at 41 [ellipses in original].

<sup>326</sup> Ruwe, “Black Male Disposability,” *supra* note 36 at 12–19.

Moreover, the same presumption that animates subculture theory of violence in the courtroom that reinforces that Black males constitute a criminogenic population whose behaviour signals latent violence structures how Black males are perceived as carceral subjects. For instance, the Office of the Correctional Investigator documents this parallel operation of utilizing speculative assumptions of Black males noting that Correctional Service Canada (CSC) staff designate Black male inmates as members of Security Threat Groups (STGs),<sup>327</sup> also stating that “while Black persons appear to be more statistically likely to be gang affiliated, similar to previous findings, many Black persons reported being labelled or treated like gang members by CSC staff despite not having an official STG affiliation on their file.”<sup>328</sup>

Designation of STG by Correctional staff can stem from the neighbourhood Black males come from, the way they walk or talk, colours they wear, their dialect, or handshakes.<sup>329</sup> These are not indicators of organized criminal activity; they are the surface markers of comportment, geography, and vernacular that the subculture framework has long coded as evidence of cultural transmission of violence. They are the same markers as *Gabriels* “cool pose” and *Morris’s* “code of the street” read as criminogenic by the prison system. However, courts and correctional staff are not operating from a shared doctrine. Nevertheless, they are drawing on a shared speculative archive about Black male pathology that circulates across institutional sites without empirical scrutiny in any of them.<sup>330</sup> As one Black male inmate noted,

It doesn’t matter if your criminal conviction has nothing to do with real or perceived STG membership, for about 95% of the cases that we know of, it’s after you get to prison that CSC, through information fabricated by security intelligence, sticks you with that status which you will then have a hard time getting rid of, with all the consequences imaginable for your stay in prison.<sup>331</sup>

The phrase “information fabricated by security intelligence” names the carceral analogue of *Abbey’s* specialized knowledge doctrine. Which is to say, whereas the courtrooms convert speculative criminology into admissible

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<sup>327</sup> Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries* (Ottawa, The Correctional Investigator Canada, 2013) at paras 42–44, online: <oci-bec.gc.ca> [perma.cc/AV38-4M7F].

<sup>328</sup> Office of the Correctional Investigator, *Annual Report (2021-2022)* at 54, online: <oci-bec.gc.ca> [https://perma.cc/L8E5-PQLD] [Correctional Investigator, *Annual Report*].

<sup>329</sup> *Ibid.*

<sup>330</sup> Ruwe, “Black Male Disposability,” *supra* note 36 at 14–18.

<sup>331</sup> Correctional Investigator, *Annual Report*, *supra* note 328 at 54.

expert testimony, CSC converts the same reading of Black male dialect, neighbourhood, and bodily comportment into security intelligence.

Both sites insulate conjecture assumptions of Black males from empirical scrutiny. As the Office of Correctional Investigator notes about while on the surface the criteria used to apply STG to Black male inmates appear objective, “in practice, some of these criteria are discretionary and prone to confirmation bias....Once applied, the validity and reliability of the gang label appear to be rarely questioned, particularly among those in operational positions.”<sup>332</sup>

The structural consequence of STG designation on Black males is such that it “makes it difficult to cascade to lower levels of security, obtain employment or garner support from a case management team to participate in other rehabilitative activities,” so that while the sentencing court invokes subculture theory to mitigate, CSC invokes the same framework to classify and the classification forecloses the rehabilitation the mitigation was meant to make possible.<sup>333</sup> This is to say, Black males are confronted with an institutional economy where speculative theories overdetermine how the courts and the carceral system perceives them as threats not only to civic society but even as carceral subjects.

Furthermore, while Canadian courts invoke slavery to contextualize Black male offending, the Canadian state recently abstained from voting at the United Nations to recognize the transatlantic slave trade as the gravest crime against humanity.<sup>334</sup> Both movements judicial and diplomatic, simultaneously invoke slavery’s reality while systematically denying the Canadian state responsibility for slavery’s on-going effect. The pattern repeats across institutional registers: acknowledge the harm, establish it as explanation, foreclose accountability.

This parallel is seen in courts where IRCAs have been restricted from making the state’s complicity in structural injustice a mitigating factor in the sentencing of Black males.<sup>335</sup> This restriction, however, renders “social

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<sup>332</sup> *Ibid* at 55.

<sup>333</sup> *Ibid* at 54.

<sup>334</sup> *Declaration of the Trafficking of Enslaved Africans and Racialized Chattel Enslavement of Africans as the Gravest Crime against Humanity*, UNGA, 80<sup>th</sup> Sess, UN Doc A/RES/80/250 (2026). Canada abstained, 123 states voted yes, three voted no (Argentina, Israel, United States), 52 abstained (see United Nations, “Declaration of the Trafficking of Enslaved Africans and Racialized Chattel Enslavement of Africans as the Gravest Crime against Humanity: resolution/adopted by the General Assembly” (2026), online: <digitallibrary.un.org> [perma.cc/DK7Y-TMBS]).

<sup>335</sup> See, for this point that was carried on in *Morris* and recent cases, *R v Jackson*, 2018 ONSC 2527 at paras 98–103; *R v Kyriakakos*, 2023 MBKB 150 at paras 28–29.

context” incoherent as a concept. Simply put, social context that excludes the state’s role in producing the very conditions being contextualized is not context; it is individualized pathology masquerading as structural understanding.<sup>336</sup> Without the capacity to interrogate how state action or inaction produced the harm being contextualized, IRCAs become mechanisms for acknowledging racism while denying state responsibility for racism.<sup>337</sup>

Consequently, reform of IRCAs cannot succeed because the problem is not the theories selected but the legal infrastructure that receives them. The *Abbey* specialized knowledge doctrine requires no empirical validation, meaning that substituting speculative theories with less pathological constructs leaves the epistemic mechanism intact. *Anderson* compounds this by noting “it may amount to an error of law for a sentencing judge to ignore or fail to inquire into” the “systemic and background factors detailed in an IRCA.”<sup>338</sup> *Anderson* legally obligates courts to apply a framework whose epistemic foundations are compromised.

Most fundamentally, IRCAs require Black male pathology narratives to justify rehabilitation as a sentencing goal as affirmed in *Anderson*. Remove the pathology and the rationale for leniency collapses, revealing that the framework structurally depends on the very problem it claims to remedy.

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<sup>336</sup> Nancy E Dowd, *Reimagining Equality: A New Deal for Children of Color* (New York: NYU Press, 2018) at 48; James H Johnson, Walter C Farrell Jr & Marty Sapp, “African American Males and Capital Murder: A Death Penalty Mitigation Strategy” (1997) 18:5 *Urban Geography* 403.

<sup>337</sup> Dugas, “Addressing Anti-Black Racism”, *supra* note 31 at 666.

<sup>338</sup> *Anderson* CA, *supra* note 18 at para 118.