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## African Nova Scotian Restorative Justice: A Change Has Gotta Come

Michelle Y. Williams  
*Dalhousie University*

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Michelle Y. Williams\*

African Nova Scotian Restorative Justice:  
A Change Has Gotta Come

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*Anti-Black racism in the criminal justice system is a concern for people of African descent throughout the diaspora, including Nova Scotia—a province shaped by slavery and segregation. A relational theory of restorative justice suggests that a restorative approach to criminal harms could yield transformational results within and beyond the criminal justice system. Using a critical race analysis, this paper demonstrates that despite the theoretical promise, restorative justice practice in Nova Scotia has not met the needs of African Nova Scotians nor fundamentally transformed structural racism within the system. The author concludes that a culturally specific, community-led African Nova Scotian justice strategy is required and provides recommendations based on the prior analysis to set priorities for future directions.*

*Le racisme contre les Noirs dans le système de justice pénale est une source d'inquiétude pour tous les descendants d'Africains de la diaspora, y compris en Nouvelle-Écosse, province façonnée par l'esclavage et la ségrégation. Une théorie relationnelle de la justice réparatrice suggère qu'une approche réparatrice des préjudices criminels pourrait amener des résultats transformationnels à l'intérieur et au-delà du système de justice pénale. Faisant appel à une analyse critique de la race, l'auteure de l'article démontre que malgré la promesse théorique, la pratique de la justice réparatrice en Nouvelle-Écosse n'a ni satisfait aux besoins des Néo-Écossais d'origine africaine ni transformé fondamentalement le racisme structurel à l'intérieur du système. Elle conclut qu'une stratégie adaptée à la culture et dirigée par la collectivité africaine néo-écossaise s'impose, et elle formule des recommandations fondées sur son analyse pour établir les priorités concernant les orientations futures.*

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\* Michelle Y Williams, BSW, LLB, LLM, Director, Indigenous Blacks & Mi'kmaq Initiative, Schulich School of Law. Many thanks to my colleagues Profs. Jennifer Llewellyn and Bruce Archibald and the other NSRJ-CURA researchers and community partners, and to former students who assisted with this project: Charys Payne, Ryan Brothers, David Curry Jr, Andrew Mccombe, Misty Morrison, and Starla Sheppard. The views expressed herein are entirely my own. This article is dedicated to freedom fighters who have passed on including Derrick Bell Jr, Dr. Carrie Best, April Burey and Dr. Burnley (Rocky) Jones.

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*Introduction*

The Province of Nova Scotia polity was built on racist laws, policy, and practices, including slavery and segregation, that structured and continue to limit access to power, opportunities, and resources based on race. The criminal justice system has played an integral role in maintaining the relative economic, educational, political, and social segregation and marginalization of African Nova Scotians and Mi'kmaq.

In light of these grueling realities, restorative justice theory offers a lens through which we might glimpse, if not completely understand, the complex root causes of crime and the racialized contexts in which myriad forms of wrongdoing occurs. At its best, restorative justice offers a transformative response to the oppressive dimensions of the criminal justice system. The relational nature of restorative justice requires attention to context and experience as central to the enterprise of justice.<sup>1</sup>

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1. Jennifer J Llewellyn, “Restorative Justice: Thinking Relationally about Justice” in Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Toronto: UBC Press, 2011) 89.

In some of its less idealized forms, the practice of restorative justice has not always achieved the theory's potential. For example, the Nova Scotia Restorative Justice Program (NSRJ) as currently implemented has not made significant headway in dismantling the racialized laws, policy, and practices manifest in Nova Scotia, despite the concerted and sincere efforts of those working within the program. The practice of restorative justice in Nova Scotia does not systematically include the critical transformative dimension of restorative justice that is required to fully achieve justice for African Nova Scotians collectively, despite notable individual efforts and ambitious but under-resourced Africentric projects.<sup>2</sup> Changes need to be made at the macro and micro level of the NSRJ to avoid perpetuating racial and intersecting forms of inequality. More pointedly, a broader African Nova Scotian Justice Strategy would give effect to an African Nova Scotian concept of justice and fulfill the promise of restorative justice theory, although it is not clear whether any state controlled justice program could ever countenance a truly liberatory African Nova Scotian restorative justice movement.

In exploring the central question of the responsiveness of restorative justice to African Nova Scotian concerns, this paper describes the critical race approach that framed my research, sets out the African Nova Scotian context against which restorative justice theory and practice were analyzed and measured, examines the promise of restorative justice theory and its limitations in practice, and concludes with recommendations for change.

#### *A critical race approach to restorative justice*

Critical race theory has informed the design, conduct, and expression of this restorative justice research. The theory began as a movement of legal scholars and practitioners who interrogated the role that law plays in constituting and perpetuating racial oppression.<sup>3</sup> The theory posits as a starting point that racialization, racism, and white privilege are constitutive elements of Canadian life, including the Canadian legal system. That is, they are part of the air we breathe and are interwoven throughout our

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2. See for example, the Africentric Pilot Project developed by Yvonne Atwell, Executive Director of the Halifax Community Justice Society, and evaluated by Carol Aylward, *Review of the African Nova Scotian Restorative Justice Pilot Project* (29 May 2007) [Aylward, *Review*] (report on file with author).

3. Kimberlé Crenshaw et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement*, (New York: The New Press, 1995); Mari J Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993) at 3-6.

legal structures and system.<sup>4</sup> While the early critical race legal scholarship emerged in the United States, we have a history of similar scholarship across many disciplines in Canada reflecting the lived reality of African Canadians.<sup>5</sup>

Arguably the key defining aspect of anti-Black racism in Canadian is the denial that it exists.<sup>6</sup> Critical race theory starts with an inversion of that false assumption as a means of challenging its veracity. In order to understand the law's role in perpetuating racial oppression, critical race theory focuses on the history, lived experiences, and epistemologies<sup>7</sup> of racialized peoples, in this case African Nova Scotians. In this sense, critical race theory parallels Africentric theory more generally.<sup>8</sup> It further draws upon interdisciplinary insights to contextualize the law and make visible racialized dimensions often hidden by purported concepts of neutrality, objectivity, and meritocracy.<sup>9</sup> These latter concepts are reinforced by a colour-blind approach to legal issues that obfuscates and minimizes the law's role in perpetuating white supremacy, racial hierarchies, and

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4. "[C]rits argued that law does not passively adjudicate questions of social power; rather, the law is an active instance of the very power politics it purports to avoid and stand above... Laws [produce] racial power not simply through narrowing the scope of, say, anti-discrimination remedies, nor through racially-biased decision-making, but instead, through myriad legal rules, many of them having nothing to do with the rules against discrimination, that continued to reproduce structures and practices of racial domination": Cornell West, "Foreword" in Crenshaw, *ibid*.

5. George Elliot Clarke, *Directions Home: Approaches to African-Canadian Literature* (Toronto: University of Toronto Press, 2012); George Dei, "The Denial of Difference: reframing anti-racist praxis" (1999) 2:1 *Race, Ethnicity and Education* 17; Joanne St Lewis, *Racism and the judicial decision-making process*, in Carl James, ed, *Perspectives on racism and the Human Services Sector: A Case for Change* (Toronto: University of Toronto Press, 1994); Esmeralda Thornhill, "Regard sur le racisme: perspectives juridiques a partir d'un vecu noir" ["Focus on Racism: Legal Perspectives from a Black Experience"] (1993) 6:1 *CJWL* 1; Rinaldo Walcott, *Black Like Who?* 2d ed (Toronto: Insomniac Press, 2003).

6. As Carol Aylward notes in her book, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999) [Aylward, *Canadian Critical Race Theory*] at 40:

In one respect, however, Canada's history of racism presented more serious problems than that of the United States. In the U.S., most observers would acknowledge that racism exists; the controversy is over the role that law plays in its maintenance and perpetuation. In Canada, it is hard even to reach this issue because of pervasive denial of the very existence of racism in Canadian society.

7. Patricia Hill Collins, "Rethinking Black Women's Activism" in *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Boston: Unwin Hyman, 1990) 201.

8. For a comprehensive comparison of critical race theory, anti-Black racism, and afrocentrism in the Canadian context, see Remi Warner, "Theoretical Framework for the Racism, Violence and Health Project: A Working Paper" (2006), online: Dalhousie University <<http://rvh.socialwork.dal.ca>>.

9. Matsuda, *supra* note 3 at 6.

resulting subordination.<sup>10</sup> In response, critical race theory calls for a race-conscious approach to examining law and the legal system.<sup>11</sup>

The final and perhaps most important element of a critical race approach is its purpose. Engaging in a critical race analysis is part of a race-conscious act of liberation and change, thereby carrying on the freedom-fighting tradition of our ancestors. Although perhaps not always identified as such, African Canadians, Aboriginal Peoples, and other racialized people and their allies have always engaged in what we now might label “critical-race-based” resistance to oppression, or “critical race praxis.”<sup>12</sup> Following that tradition, critical race theorists and practitioners unapologetically and explicitly seek to deconstruct and transform the role of law in perpetuating racism, white privilege, and other forms of oppression. I join that tradition as an African Nova Scotian woman concerned about justice.

#### *Research methodology*

In accordance with this principled orientation, I grounded my research in the premise that racism and white privilege are constitutive elements of Nova Scotian society, including its legal system. My main research question focused on how African Nova Scotians experience restorative justice, thereby centering them as subjects. I engaged in an interdisciplinary literature review designed to understand African Nova Scotian historical and contemporary experiences with the criminal justice and restorative justice systems, and from there developed questions specific to the African Nova Scotian experience that were designed to uncover potentially hidden racial dimensions of restorative justice in practice. These questions were explored through a range of research instruments including focus groups and interviews with African Nova Scotians. In the end, the ultimate goal of the research was and is to move beyond the documentation and analysis of the findings to the generation of recommendations and actions.

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10. See Neil Gotanda, “A Critique of ‘Our Constitution is Color-Blind’” (1991) 44 *Stan L Rev* 1.

11. Gary Peller, “Race Consciousness” [1990]:4 *Duke LJ* 758; Kimberlé Williams Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law” (1988) 101:7 *Harv L Rev* 1388; Aylward, *supra* note 6.

12. See Aylward, *Canadian Critical Race Theory*, *ibid* at 134-174. See generally Gerald P Lopez, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (Boulder: Westview Press, 1992).

I. *African Nova Scotian justice*

*Sankofa—a return to the source: it is not taboo to go back and fetch what you forgot.*<sup>13</sup>

*“[Restorative justice] is only a band-aid solution and does not look at the underbelly of the societal problems and structures that affect Black people, in particular, Black men.”*<sup>14</sup>

African Nova Scotian Restorative Justice is a broad holistic concept that encompasses how we think about the idea of justice and the implications for effecting justice. That is, it considers what justice would look like if it were informed by African Nova Scotian knowledge, custom, and experience—thereby opening up the space to conceptually interrogate what justice means and requires. For example, African Nova Scotian traditional world views might help us think differently about what constitutes justice and how justice is done. In terms of the implications for doing justice, conceptualizing African Nova Scotian Restorative Justice helps to illuminate the impact of historic, structural, and systemic deficiencies (injustices) in the cumulative practice of justice and provides a lens to examine the specific practice of restorative justice in Nova Scotia. Finally, the concept also encompasses how African Nova Scotians may conceptualize and practice justice within and among their own cultural communities, for example through the use of family (community) meetings.

1. *Racism and “justice” in Nova Scotia*

African Nova Scotians seek both a just criminal system and justice in a broader sense. The history and contemporary experience of African Nova Scotians must inform any meaningful attempt to articulate what a fulsome concept of justice means for us. I begin this section by positing a working definition of African Nova Scotians, with reference to our history and recognition of our diversity and potential future growth patterns. For the purposes of this exploration, African Nova Scotians encompass Black people of African descent who are living within the Province of Nova Scotia or who have a substantial connection to a historically Black community in the province.<sup>15</sup> I include therein the descendants of enslaved

13. Sylvia D Hamilton, “When and Where I Enter: History, Film and Memory” (2012) XLI:2 *Acadiensis* 3 at 3, citing Christel N Temple, “The Emergence of Sankofa Practice in the United States” (2010) 41 *Journal of Black Studies* 127, online: <<http://jbs.sagepub.com/content/41/1/127.full.pdf>>.

14. Don Clairmont, *Examining the Delivery of Extra Judicial Sanctions Program in a Complex Urban Community: An Assessment of the Nova Scotia Restorative Justice Initiative in Metropolitan Halifax* (Halifax: Dalhousie University Atlantic Institute of Criminology, 2006) at 31.

15. There are many more African Nova Scotians living outside of the province.

people of African descent under the French and British rule of the region, Black Loyalists who fought on the side of the British in the American War of Independence in exchange for the freedom and promise of land and provisions in Nova Scotia, and the enslaved African Americans who forcibly joined their White Loyalist “owners” in coming to Nova Scotia. I also include the descendants of the Jamaican Maroons, African American refugees/freedom fighters of the War of 1812, descendants of Caribbean immigrants many of whom joined the industrialized workforce in Cape Breton in the early 1800s and the working and professional classes in later years, and more recent immigrants who have come to Nova Scotia from various African countries and other parts of the African diaspora. We have different experiences and histories as African Nova Scotians. We also have differing levels of access to power and resources by virtue of the conditions through which we came to Nova Scotia and related class and economic status; and by virtue of our gender, sexual orientation, religion, and physical abilities.<sup>16</sup> Despite our diversity, I think it is safe to claim that we share a common interest in African Nova Scotian justice, even if only in relation to what that concept potentially means for the life chances of our children.

African Nova Scotians, and African Canadians more generally, are among the founding settler societies of the country we now know as Canada.<sup>17</sup> Our presence and contributions are usually summarily erased by virtue of our subjugated legal and “conventional” status during most of our four hundred-year presence in this country, but that in no way diminishes our actual existence and contributions.<sup>18</sup> The common thread throughout African Nova Scotian history and contemporary experience is the denial of our basic human rights and freedoms on an individual and collective basis. Here I do not limit the notion of freedom to that legally circumscribed by human rights statutes, the equality provisions of the Charter, or related

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16. For example, African Nova Scotian women’s experience will be informed by their unique identity as being both Black and female. See Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43:6 *Stan L. Rev.* 1241.

17. I refer here to settler societies, recognizing that the Mi’kmaq are the First Peoples in the region with a rich history that dates back thousands of years.

18. Our imposed marginalized status and largely unexplored connection to the Mi’kmaq and other First Nations through “marriage” creates a unique political relationship with the true “founding” First Nations, and I do not seek to posit a claim to being an equal “dominant” settler society. Rather, I want to illustrate that an African Nova Scotian concept of justice encompasses recognition of our individual and collective presence, contributions and humanity in the part of that First Nation territory that we now call Nova Scotia.



jurisprudence.<sup>19</sup> Rather I posit a notion of freedom grounded in a Pan African understanding of the global oppression of peoples of African descent on the African continent and throughout the African diaspora; a freedom that encompasses the ability to self-actualize in an individual and collective way reflective of our rich and diverse histories, culture, identities, and contributions.

African Nova Scotian justice reflects Africentricity insofar as it centres the history and experience of African Nova Scotians. In the broadest sense, African Nova Scotian justice would include reparations for the centuries of unpaid and underpaid work of enslaved and free African Nova Scotians who helped to build this province, and for the unfulfilled promises by the British Crown for land grants and provisions, recognizing the complicating but no less important factor that the land that we know as Nova Scotia has been part of First Nation Mi'kmaq territory for thousands of years.<sup>20</sup> Justice would include reparations for environmental racism, and for the developmental encroachment in our historical Black communities through unscrupulous, unethical, and possibly illegal means.<sup>21</sup> Justice would include reparations for years of *de facto* and *de jure* segregation in education, employment, social, cultural, economic, and political life, and for the refusal to extend basic public services to our communities and basic decency to individuals entering predominantly White public and private spaces. Justice would also include recognition and reparation for the fact that this centuries-old system of white supremacy was enforced by terrorism and violence.

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19. The Canadian anti-discrimination legal framework is quite formidable on its face, but has not resulted in substantive equality for African Canadians. See Michelle Y. Williams, "Sisyphus's Ongoing Journey: Anti-Black Racism and the Myth of Racial Equality in Canada" in David Divine, ed, *Multiple Lenses: Voices from the Diaspora* (Newcastle, UK: Cambridge Scholars Press, 2007) 383.

20. See Hilary McD Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (Jamaica: University of West Indies Press, 2012); Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Penguin Putnam, 2001); Fernne Brennan & John Packer, eds, *Colonialism, Slavery, Reparations and Trade: Remediating the Past* (New York: Routledge, 2012); Michelle Y Williams, "The African Diaspora" (Conference Presentation delivered at Racism and The Black World Response Symposium, Dalhousie University, Halifax, 5-10 August 2001) (Halifax: New Media Communications, 2004).

21. The razing of the African Nova Scotian community of Africville is one example of the erasure of an entire community, reparations for which were recommended by the UN Special Rapporteur on Racism: Commission on Human Rights *Report of the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, UN Doc E/CN.4/2004/18/Add.2 (1 March 2004) at 3 [hereinafter *Report of the Special Rapporteur*].

*Slavery is Canada's best-kept secret, locked within the national closet.*  
—Dr. Afua Cooper<sup>22</sup>

*"Slavery...is the mother of racism"*  
—Dr. Carrie Best<sup>23</sup>

In Nova Scotia, people of African descent were subjected to legalized slavery, segregation, and other forms of oppression countenanced by law. The African Nova Scotian experience reflects similar practices across the country, in the United States, and elsewhere in the world, as Canadian White settler societies were slaveholding societies. Neither the practice of slavery, nor the white supremacist ideology that informed it, stopped at our borders, despite the Canadian myth of the underground railroad leading to the northern land of the (racism) free.<sup>24</sup>

The enslavement of African Nova Scotians was widespread in Nova Scotia under French and British rule. People of African descent were first enslaved by the French in Ile Royale.<sup>25</sup> Following the Seven Years War between France and Great Britain, France surrendered the territory now known as Nova Scotia to Great Britain. The terms of that surrender included article of capitulation number 47 of the Treaty of Paris, later incorporated in the Treaty of Peace, which guaranteed the French the right to continue to enslave African and Aboriginal Peoples.<sup>26</sup> Further, the Imperial Act of 1790 allowed the "importation" to Nova Scotia and other parts of British North America of any "Negroes, household furniture, utensils of husbandry or cloathing...free of duty."<sup>27</sup> Barrington Walker suggests that

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22. Afua Cooper, *The Hanging of Angélique: The Untold Story of Canadian Slavery and the Burning of Old Montréal* (Toronto: HarperCollins, 2006) at 68.

23. Quoted by Chief Justice T Alexander Hickman (Chair), *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol 7 (Halifax: Province of Nova Scotia, 1988) at 94.

24. The first underground railroad actually ran from north to south, from Canada to the northern free states of the United States of America. See Dorothy W Williams, *The Road to Now: A History of Blacks in Montreal* (Montreal: Véhicule Press, 1997) at 24-25.

25. Kenneth Donovan, "Slaves and their Owners in Ile Royale, 1713-1760" (1995) XXV:1 *Acadiensis* 3; "A Nominal List of Slaves and Their Owners in Ile Royale, 1713-1760" (1996) 16:1 *Nova Scotia Historical Review* 151.

26. Robin W Winks, *The Blacks in Canada: A History*, 2d ed (Montreal: McGill-Queen's University Press, 1997) at 24; the text of the article reads:

The Negroes and Panis of both sexes shall remain, in their quality of slaves, in the possession of the French and Canadians to whom they belong; they shall be at liberty to keep them in their service in the colony or sell them; and they may also continue to bring them up in the Roman religion.

Cooper, *supra* note 22 at 81, citing Sigmund Samuel, *The Seven Years War in Canada, 1756-1763* (Toronto: Ryerson Press, 1934) at 202.

27. Winks, *ibid* at 26; Samuel James Watson, *The Constitutional History of Canada*, vol 1 (Toronto: Adam, Stevenson and Company, 1874) at 135. *An Act for Encouraging New settlers in His Majesty's Colonies and Plantations in America*, 30 George III, 1790, c 27.

this Act is a stark example of how the law constructed African Canadians as property.<sup>28</sup> He states:

Slavery was a significant institution in New France, Ile Royale, and late British North America because the very existence of the institution laid bare the racialized nature of these settler colonial societies. And for people of African descent in Canada, their relationship with these colonial states and their legal institutions during slavery greatly affected their social status in the post-emancipation period.<sup>29</sup>

Colonization and slavery constructed contemporary Nova Scotian society and the current conditions and life chances of Mi'kmaq and African Nova Scotians. It also structured access to power, resources, and opportunities for the majority White Nova Scotians. African Nova Scotians were enslaved for over 120 years, but not primarily through explicit legislation or decree. Rather, slavery was largely customarily enforced, with the courts being sites for both maintaining and challenging its legality.<sup>30</sup> A further complicating factor is that not all African Nova Scotians were enslaved, so free Blacks lived alongside their enslaved brothers and sisters with considerable uncertainty about their own legal status.<sup>31</sup> In sum, Black–White relations in Nova Scotia were built on slavery. As Harvey Amani Whitfield points out:

...the historic corollary of the vagueness of the legal basis for slavery, and slavery's slow erosion, was the emergence of deeply entrenched and widespread racism. This racism infected the attitude of [W]hites within the region toward [B]lack people, and they were seen as nothing better than cheap labour...Indeed, the function and result of slavery in the Maritimes was to create race – that is, to define in a reified fashion the place and status of people of African descent.<sup>32</sup>

While the Nova Scotian courts sometimes assisted African Nova Scotians in claiming freedom from slavery, they did not declare a wholesale

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28. Barrington Walker, "Introduction" in Barrington Walker, ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto Press, 2012) at 4.

29. *Ibid* at 7.

30. Barry Cahill, "Slavery and the Judges of Loyalist Nova Scotia" (1994) 43 UNBLJ 73 at 79. Cahill explains that "Black slavery was presumed implicitly to be lawful until adjudged or legislated to be explicitly illegal." Cahill makes a similar point in "*Habeus Corpus* and Slavery in Nova Scotia: *R v Hecht ex parte Rachel*, 1798" (1995) 44 UNBLJ 179 at 199.

31. James W St G Walker, *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone* (Toronto: University of Toronto Press, 1999 (reprint)) at 40-57.

32. Harvey Amani Whitfield, "The Struggle over Slavery in the Maritime Colonies" (2012) XII:2 *Acadiensis* at para 5. Not only has the impact of slavery not been repaired or undone, the role of slavery in Nova Scotia has been barely acknowledged.

prohibition on the practice.<sup>33</sup> In other cases Nova Scotian courts upheld the enslavement of African Nova Scotians.<sup>34</sup>

The law was used in other punitive ways to keep African Nova Scotians “in our place.” As Whitfield notes, African Nova Scotians were more likely than their White counterparts to be publicly whipped as punishment for committing an offence, and that these “whippings continued into the 1820s.”<sup>35</sup> Further, laws governing jury selection “effectively excluded African Nova Scotians” from jury service from 1890 until 1943,<sup>36</sup> and curfews were used to exclude Blacks from White communities after dark reflecting widespread spatial and temporal segregation.<sup>37</sup> Moreover, African Canadians were sentenced to hang in disproportionate numbers under Canada’s capital punishment provisions.<sup>38</sup> Historian James St. G. Walker summarizes the law’s constraint on Black freedom as follows:

Black freedom was, obviously, constrained... by white discrimination. Despite the existence of the English law guaranteeing full equality, numerous disabilities were imposed on them quite apart from the economic exploitation already described. Blacks were denied the vote, could not serve on juries or claim a jury trial, and were prevented from holding public office. One of their more prominent recreational practices, the Saturday night “Frolick,” was banned in Shelburne... Court records from the 1780’s and 90’s reveal that Blacks were punished far more harshly than whites for committing the same crimes. For the typical Black loyalist, the encounter with white society provoked physical suffering, humiliation and insecurity.<sup>39</sup>

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33. Cahill, *supra* note 30 at 82-83. See generally, DG Bell, Barry Cahill & Harvey Amani Whitfield, “Slavery and Slave Law in the Maritimes” in Walker, *supra* note 28 at 363.

34. Cahill, *supra* note 30 at 88.

35. Whitfield, *supra* note 32 at paras 19 and 20. Whitfield further notes that “sometimes slaves would be punished by the judicial system for crimes committed against their owners.”

36. David Steeves, “Maniacal Murderer or Death Dealing Car: The Case of Daniel Perry Sampson, 1933–1935” in Walker, *supra* note 28 at 224-225.

37. The modern manifestation of such forms of segregation is racial profiling of Blacks in predominantly white areas or spaces. Such profiling occurs in a range of spaces. See Nova Scotia Human Rights Commission, *Working Together to Better Serve all Nova Scotians: A Report on Consumer Racial Profiling in Nova Scotia* (Nova Scotia: Human Rights Commission, 2013).

38. Barrington Walker, *Race on Trial: Black Defendants in Ontario’s Criminal Courts, 1858–1958* (Toronto: University of Toronto Press, 2010) at 11. Walker analyzes how Canada’s unique form of anti-Black racism influenced discretionary decisions to commute death sentences, at 45-89. See also George Elliott Clarke, *supra* note 5 at 81, wherein he states: “[O]nly 23 percent of all persons convicted in capital cases were hanged in Canada, but 50 percent of all [B]lacks so convicted were hanged.”

39. James W St G Walker, “The Black Identity in Nova Scotia: Community and Institutions in Historical Perspective” (Lecture presented at the Second Anniversary celebration of the Black Cultural Centre for Nova Scotia, Black Cultural Centre for Nova Scotia, Halifax, 17 September 1985). See also James W St G Walker, *supra* note 31 at 55-56.

As Ida Greaves noted in 1930, “[t]he Negro has exactly the same rights as anybody else until he tries to exercise them, then he can be quite legally restrained.”<sup>40</sup> The case of Viola Desmond illustrates how the full force of the law would be brought to bear on those who sought to assert their equality rights in the face of the oft “unwritten rules” of racial hierarchy.<sup>41</sup>

African Nova Scotians did not enjoy the equal benefit or protection of the law nor participate in its administration, and sometimes the outcomes were lethal. For example, in more recent times the Black United Front undertook a study into five chilling cases that appeared to involve racism in the justice system.<sup>42</sup> That is perhaps why one of the “important rules for moral development” imparted in African Nova Scotian families was to “avoid trouble with white people.”<sup>43</sup> The case of African Nova Scotian Graham Jarvis who was shot and left to die by a White man in Weymouth Falls continues to haunt the African Nova Scotian community in Digby County today.<sup>44</sup>

The pervasive, entrenched anti-Black racism was enforced and perpetuated through the legal system, including the criminal justice system. Just as enslavement in the interests of Whites was justified by an ideology of white supremacy and the corresponding belief that Blacks were inherently inferior, the same ideology linked Blackness with criminality. Both reflect a dehumanizing view of African peoples based on the social construction of races as different from one another.

The law’s tendency to support anti-Black racism and social segregation in Canada served as pillars of Canada’s version of “Jim-Crow”; it also played this role in its unequal treatment of Blacks in the criminal justice system. While criminal law was formally neutral in procedure and rules, its practice was a social creation and thus both reflected and reinforced Blacks’ marginal status.<sup>45</sup>

40. Ida Greaves, *The Negro in Canada* (Orillia: Packet-Times Press, 1930) at 63.

41. Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999) at 226-272.

42. BA (Rocky) Jones, Contributor, Consultative Conference, *Royal Commission on the Donald Marshall, Jr., Prosecution*, *supra* note 23 at 61-62.

43. Peter J Paris, “The Spirituality of African Peoples in Canada and Beyond” in Divine, *supra* note 19, 108 at 118.

44. *Royal Commission on the Donald Marshall, Jr., Prosecution*, *supra* note 23 at 62. Mr. Jarvis was shot and killed in 1985. African Nova Scotians mobilized in response to the killing, the acquittal of the shooter, and the role of the justice system. See further reference in Maureen Moynagh, “Mapping Africadia’s Imaginary Geography: An Interview with George Elliott Clarke” (October 1996) 27:4 ARIEL: A Review of International English Literature 71 at 72, 80, and corresponding notes; and Herb Wylie, “We Have to Recover their Bodies: George Elliot Clarke” in *Speaking in the Past Tense: Canadian Novelists on Writing Historical Fiction* (Waterloo: Wilfred Laurier University, 2007) at 136-138.

45. Walker, *supra* note 28 at 28.

Arguably mass scale formal incarceration was not necessary to maintain racialized power in the past because legally sanctioned racist violence and control, and conventional restrictions on African Nova Scotian freedom were sufficient to “keep us in our place” and to maintain White privilege.<sup>46</sup> It is with increased integration that we seem to see a rise in incarceration of African Nova Scotians, perhaps as a modern form of “keeping us in our place.”

The challenge is that we are now facing a new variation of criminal justice related harms that are affecting our communities and families, including the overrepresentation of African Nova Scotians in state custody. African Nova Scotians represent 2% of Nova Scotia’s population, yet in 2011–2012, 18% of youth on remand and 14% of youth in sentenced custody were African Nova Scotian.<sup>47</sup> African Nova Scotians represented as much as 24% of the youth in sentenced custody in 2004–2005, even while the overall number of youth in custody had declined significantly between 2000 and 2005.<sup>48</sup> The number of African Nova Scotian youth is also over-represented in probation ranging from 8% in 2000–2001 to 11.9% in 2003–2004.<sup>49</sup> The numbers are similar for African Nova Scotian adults who represented 14% of the remand and sentence custody populations in 2011–2012 and the statistics reflect a national, North American, and global trend. African Canadians represent 9% of adults incarcerated in Canada, while comprising only 2.5% of the population.<sup>50</sup> The federal changes to criminal law are likely to result in even higher rates of incarceration.<sup>51</sup> The dramatic increase in the number of African Canadians incarcerated in

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46. For example, Whitfield has documented official state whippings that occurred throughout Nova Scotia, and as late as 1820. Whitfield, *supra* note 32 at para 20.

47. Nova Scotian Department of Justice Policy and Planning. Currently there are 19,225 African Nova Scotians in the province, comprising 2% of the population of Nova Scotia, although there is reason to believe that African Nova Scotians are undercounted and the number does not include African Nova Scotians who have moved across the country and continent: Statistics Canada “Visible minority population, by province and territory” (2006), online: Statcan <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cs101/demo52a-eng.htm>>.

48. Nova Scotian Department of Justice Policy and Planning, reproduced from Don Clairmont, *Violence and Public Safety in the Halifax Regional Municipality* (Halifax: Halifax Regional Municipality, 2008) at 18.

49. *Ibid.*

50. Office of the Correctional Investigator, *Annual Report 2011–2012*, online: Office of the Correctional Investigator <<http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20112012-eng.aspx>>.

51. Among other problems, the *Safe Streets and Communities Act*, SC 2012, c 1, provides for increased incarceration for minor offences. See generally, Canadian Bar Association, “Submission on Bill C-10 Safe Streets and Communities Act,” (October 2011), online: Canadian Bar Association <<http://www.cba.org/CBA/submissions/PDF/11-45-eng.pdf/>>.

federal institutions prompted the Office of the Correctional Investigator of Canada to launch an inquiry.<sup>52</sup>

It is important to be clear that I do not wish to stigmatize or stereotype African Nova Scotian youth or adults further by talking about “Black on Black crime.” In fact, the majority of crime is committed by Whites<sup>53</sup> and the vast majority of African Nova Scotian youth are *not* involved in the criminal justice system. Yet, we have to take seriously the fact that African Nova Scotian youth are under the control of the criminal justice system in greater numbers than would be expected, and that this reflects a Canadian and North American trend. We also know that due to the small size of our communities and interrelationships among and between families and communities, criminal harms, including violence, damage our interconnected systems in unique ways. One lost young person is one too many.

My research did not yield any definitive conclusions regarding the reason for the current disproportionate incarceration of African Nova Scotian youth (and adults), as that was not the focus of the investigations, but racism in the criminal justice system is no doubt a factor. That anti-Black racism is a problem in the justice system in Canada has been recognized by our courts:

Racism and in particular anti-black racism, is part of our community’s psyche....A significant segment of our community holds overtly racist

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52. *Supra* note 50. The Office has reported that in the previous decade the number of federally incarcerated African Canadians had increased by over 40% (from 766 inmates in 2000–2001 to 1,294 in 2010–2011), with most of this increase occurring in the last five years. In August 2012 the Office of the Correctional Investigator of Canada reported they were working on a systemic investigation of Black inmates in federal penitentiaries. The objectives of this review are to:

1. Provide an overall profile of federally incarcerated Black offenders in federal custody;
2. Gather information about the experiences of Black inmates in federal penitentiaries; and
3. Assess and review the actions taken by CSC to respond to the needs of this growing segment of the prison population. A further statistical resource, is published annually by Public Safety Canada entitled, *Corrections and Conditional Release Statistical Overview*, online: Public Safety Canada <<http://www.publicsafety.gc.ca/res/cor/rep/2011-ccrso-eng.aspx>>. See also Alison Crawford, “Prison watchdog probes spike in number of black inmates” (2011), online: CBC News<<http://www.cbc.ca/news/politics/story/2011/12/14/crawford-black-prison-html>>.

The Correctional Investigator will report their findings publicly, including a profile of Black inmates, when completed. Interestingly, visible minority offenders “tend to be younger and less often single than Caucasian offenders. Furthermore, they are more educated and more often employed upon admission to a federal correctional facility.” They “have less extensive criminal histories” and are “less often to have failed in various areas, such as community supervision, segregation, escape and conditional release”: S Treveltham & CJ Rastin, *A Profile of Visible Minority Offenders in the Federal Canadian Correctional System*, No R-144 (Ottawa: Correctional Services Canada, 2004).

53. Treveltham & Rastin, *ibid* at 23–24.

views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.<sup>54</sup>

The majority of African Canadians live in Ontario and a range of research has documented the existence of anti-Black racism in the Ontario criminal justice system, including the comprehensive *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*.<sup>55</sup>

Racism in Nova Scotia has also been judicially recognized. Justices of the Supreme Court of Canada have stated:

The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia. In *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91 (Fam. Ct.), it was stated at p. 108:

[Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. *Royal Commission on the Donald Marshall, Jr., Prosecution*). A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally.<sup>56</sup>

As posited by Michelle Alexander in *The New Jim Crow: Mass Incarceration in an Age of Colorblindness*,<sup>57</sup> it is incumbent upon us to at least consider how the criminal justice system may work to replicate the type of racial caste system that existed during slavery and segregation. Such a structural effect need not be the product of individual actors—although they play a role—but rather can operate systemically as detailed

54. *R v Parks*, [1993] OJ No 2157, 84 CCC (3d) 353 at 369 (Ont CA), Doherty JA.

55. (Toronto: Queen's Printer for Ontario, 1995) [*Report on Systemic Racism*]. For example, at iv the findings indicate that "white accused were more likely to be released by police and less likely to be detained after a bail hearing... and were treated more favourably even though they were more likely than black accused to have a criminal record and to have a more serious criminal record." See also the work of Scot Wortley, including Julian Tanner & Scot Wortley, "Discrimination or 'Good' Policing? The Racial Profiling Debate in Canada" (2004) 1 *Our Diverse Cities* 197. The authors report at 199 that:

34% of the Black students who had not engaged in any type of criminal activity still reported that they had been stopped by the police on two or more occasions in the past two years, compared to only 4% of White students in the same behavioural category. Similarly, 23% of Black students with no deviant behaviour reported that they had been searched by the police, compared to only 5% of Whites who reported no deviance.

56. *R v S(RD)*, [1997] 3 SCR 484 at para 47.

57. Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (New York: The New Press, 2001).



in the *Report on Systemic Racism*, the Report of the *Royal Commission on the Donald Marshall, Jr., Prosecution* (Marshall Inquiry Report), and other reports.<sup>58</sup> Indeed, if more of the recommendations of the Marshall Inquiry Report had been implemented, African Nova Scotians might not be facing the current crisis in Nova Scotia.<sup>59</sup>

Moreover, the concern about African Canadians and the criminal justice system has been recognized internationally. In 2003, following the official country visit to Canada, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance reported that:

38. The case of Africville is emblematic of the past condition of people of African descent in Nova Scotia. The Black community in Nova Scotia faces numerous challenges, including, the overrepresentation in prisons, a dependence on the welfare system, and increase of representation in low-income housing and other problems in the criminal justice system.<sup>60</sup>

The UN Special Rapporteur recommended an assessment of the African Canadians' condition be undertaken and a specific programme of action developed in response.<sup>61</sup> Moreover, the United Nations Committee on the Elimination of Racial Discrimination subsequently called upon

58. *Royal Commission on the Donald Marshall, Jr., Prosecution*, *supra* note 23; *Report on Systemic Racism*, *supra* note 55.

59. For example, among the many recommendations from the Report that would assist African Nova Scotians is recommendation number 18 calling for the establishment of appropriate diversion programs for Blacks, in close cooperation with Black communities, *supra* note 23, vol 1 at 160. Moreover, important recommendations regarding support for community programming arising from the recent Halifax Mayor's *Roundtable on Violence and Public Safety* have not been implemented. Recommendation 3 of that report, under the Heading "Race Relations" states at 73:

The municipality should encourage the recommended actions noted elsewhere for a more in-depth delivery of the restorative justice program for repeat Black young offenders, the use of occasional sentencing circles in some Black communities, and collaborate with federal and provincial authorities in developing effective offender reintegration programs (e.g., municipal engagement in section 84 release plans and funding for a greater municipality role from Corrections Services Canada).

See, online: <<http://www.halifax.ca/POLICE/PUBLICSAFETY/documents/ViolenceandPublicSafetyinHRMMainReport.pdf>>.

60. *Report of the Special Rapporteur*, *supra* note 21 at 3.

61. *Ibid.* The report states at 25:

(h) The Government should conduct an overall assessment of the situation of the Afro-Canadian community, in the areas of employment, habitat, health and education. The cultural and linguistic diversity of the community must be fully taken into account in the preparation of a specific programme of action.

The UN Special Rapporteur also recommended at 25:

(n) In consultation with communities of African origin or their descendants, the Government of Nova Scotia should re-examine the conditions of their relocation, particularly from Africville, taking particular account of their situation regarding human rights and economic and social conditions with a view to granting them repatriation.

Canada to provide statistical data on treatment of African Canadians in the criminal justice system and to conduct a study on the root causes of the overrepresentation of Africans Canadians in the system of criminal justice.<sup>62</sup> This work has not been undertaken by the Federal Government.

There are a range of other factors that may be at play in the crisis of overrepresentation, and which require further investigation. They include: (1) the failure of the education system to embrace, encourage, and educate our children thereby feeding a pipeline directly to the criminal justice system<sup>63</sup>; and (2) the concomitant lack of access to meaningful

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62. UNCERD, 80th Sess, UN Doc CERD/C/CAN/CO/19-20 (2012). The Report states at 3: The Committee is concerned at reports that African Canadians, in particular in Toronto, are being subjected to racial profiling and harsher treatment by police and judicial officers with respect to arrests, stops, searches, releases, investigations and rates of incarceration than the rest of the population, thereby contributing to the overrepresentation of African Canadians in the system of criminal justice of Canada (arts. 2 and 5). Recalling its general recommendation No 34 (2011) on racial discrimination against people of African descent and in light of its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee reminds the State party that racial profiling should be prevented at all stages of criminal procedure. The Committee recommends that the State party:

- (a) Take necessary steps to prevent arrests, stops, searches and investigations and over-incarceration targeting different groups, particularly African Canadians, on the basis of their ethnicity;
- (b) Investigate and punish the practice of racial profiling;
- (c) Train prosecutors, judges, lawyers, other judicial and police officers in the criminal justice system on the principles of the Convention;
- (d) Provide the Committee with statistical data on treatment of African Canadians in the criminal justice system;
- (e) Conduct a study on the root causes of the overrepresentation of Africans Canadians in the system of criminal justice

63. The pipeline from school to the criminal justice system is facilitated in part by increased interaction between police and school officials and the corresponding systemic racism embedded in both systems. As a result, disparate and selective enforcement of school discipline policies can lead to increased involvement of the criminal justice system in matters that used to be handled solely within the education system. The matter has received some study in Ontario. See Ken Bhattacharjee, *The Ontario Safe Schools Act: School discipline and discrimination* (Ontario Human Rights Commission, 2003), which found that “in the Greater Toronto Area (GTA) and other parts of Ontario there is a strong perception, which is supported by some independent evidence, that the *Act* and school board policies are having a disproportionate impact on racial minority students, particularly Black students, and students with disabilities.” Online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/ontario-safe-schools-act-school-discipline-and-discrimination>>.

The Ontario Report also noted the Nova Scotia situation online: The Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/ontario-safe-schools-act-school-discipline-and-discrimination/vi-disproportionate-impact-other-jurisdictions>>:

Nova Scotia seems to be the only province in Canada where there has been some collection and analysis of school board statistics on race and the application of discipline. The Black Learners Advisory Committee was able to access data from the Halifax Regional School Board from 1987 to 1992, which showed that Black students were being disproportionately impacted by the application of suspensions.

See *BLAC Report on Education: Redressing Inequity—Empowering Black Learners*, vol 3 (Halifax: Black Learners Advisory Committee, 1994) at 20.

employment in increasingly difficult economic times. Both of these factors have racialized dimensions. Further, (3) the ability of African Nova Scotian youth to respond to the pressures of their environment may be hindered by the erosion of our geographic communities through encroaching development and other factors. As a result, fewer of us physically live together in insulated and isolated communities, and our institutions including our churches, have been unable to fully sustain or recreate all of the positive and restorative elements that have been lost by that physical separation. In addition, (4) with increased integration has come an increase in the number of biracial/multiracial children who are viewed as Black by society and within the criminal justice system, but who may have difficulty connecting to an African Nova Scotian community in a way that creates a positive self-identity. The challenges are compounded (5) for young people within the child welfare system and who are struggling with mental health and addiction issues. Finally (6) our communities and individuals therein have yet to be able to fully heal from generational trauma arising from the impact of slavery, segregation, and contemporary forms of violent and virulent racism.

## 2. *African Nova Scotian agency and resistance*

Despite the myriad forms of severe and violent oppression that African Nova Scotians endured, we did not and do not characterize ourselves as victims or objects merely being acted upon. African Nova Scotians have always actively resisted our oppression, worked collectively, and built community organizations including educational organizations.<sup>64</sup>

In light of the historically unsafe and unjust criminal system, rooted in white supremacy, African Nova Scotians maintained our own justice practices and traditions reflective of restorative justice principles. Many restorative approaches embedded in our original African culture have survived and were sustained within our geographically and culturally distinct African Nova Scotian communities. As described by the lead researchers in the groundbreaking national study on racism, violence, and health:

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64. These groups include the Africville Genealogy Society (1983), African Canadian Services Division Nova Scotia Department of Education (1996), African United Baptist Association (1854), Black Business Initiative (1996), Black Cultural Centre (1983), Black Educators Association (1969), Black Loyalist Heritage Society (1989), Council on African Canadian Education (1996), Glace Bay Universal Negro Improvement Association (UNIA) (1918), Health Association of African Canadians (2000), Indigenous Blacks & Mi'kmaq Initiative, Dalhousie Schulich School of Law (1989), NS Association of Black Social Workers (1979), NS Home for Coloured Children (1921), Office of African Nova Scotian Affairs (2003), Transition Year Program, Dalhousie University (1968), and the Valley African Nova Scotian Development Association (2000).

In the face of racism, people of African descent have traditionally looked to four key systems of socialization as sources of hope and healing: church, faith, or spirituality; family; education; and community.<sup>65</sup>

Community “family meetings” were called to respond to crises. As one leader noted, “if there was a dispute in the community, the dispute was handled in the community.”<sup>66</sup> Dispute resolution was often led by the church, which has been the central African Nova Scotian institution.<sup>67</sup>

Interestingly, we do not seem to have a strong tradition of African Nova Scotian criminal justice related organizations designed to help individuals who are involved in the criminal justice system.<sup>68</sup> There are probably a number of reasons for this absence. The first is that we are traditionally a law-abiding community, although like all other communities some of our members engage in criminal harms. Given the lack of protection provided by state law enforcement, communities largely had to “police” and respond to such matters on their own. A related cultural dynamic is the tendency to “keep your business to yourself,” and so there may be resistance to disclosing criminal justice related private matters to people beyond one’s immediate family.<sup>69</sup> That being said, arguably the Black United Front (BUF) and the many efforts that preceded it were designed to address justice for African Nova Scotians in the broadest sense—including addressing injustice occasioned by the criminal system.<sup>70</sup> Further, churches and various programs sought to provide support to our brothers and sisters who were incarcerated and to help them transition back into society.

Another reason for the absence of criminal justice related community institutions may be that African Nova Scotians had been effectively

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65. Carl James et al, *Race & Well-Being: The Lives, Hopes and Activism of African Canadians* (Black Point: Fernwood Publishing, 2010) at 158. The researchers are clear that each of these systems also has limitations and that it is important to reassess and revision the positive role that each can play.

66. *Royal Commission on the Donald Marshall, Jr., Prosecution*, *supra* note 23 at 60.

67. Here I am referring to the network of Baptist churches falling under the umbrella of the African United Baptist Association established by Rev Richard Preston in 1854. See online: African United Baptist Association of Nova Scotia <<http://www.auba.ca>>. See Pearleen Oliver, *A Brief History of the Colored Baptists of Nova Scotia, 1782–1953* (Published In Commemoration of Centennial Celebrations of the African United Baptist Association of Nova Scotia).

68. The closest examples might be various projects over the years designed to support prisoners, but most have been project-related.

69. As Dr. Brenda Wade and Brenda Lane Richardson state: “During slavery, keeping secrets could mean the difference between life and death, bondage and freedom” in *What Mama Couldn’t Tell Us about Love: Healing the Emotional Legacy of Slavery by Celebrating our Light* (New York: HarperCollins, 1999) at 80.

70. The Black United Front of Nova Scotia was formed in 1968 following an African Nova Scotian family meeting of over 400 representatives from across the province. It was originally modelled after the Black Panther organizational structure and was designed to facilitate collective action against anti-Black racism. The work of BUF continued until 1996.

excluded from participating as criminal justice professionals.<sup>71</sup> It is only relatively recently through programs like the Indigenous Blacks & Mi'kmaq (IB&M) Initiative and other efforts to diversify the criminal justice system that we have participated therein in any great numbers. In light of our increasing numbers, efforts at more formal organizing have begun.<sup>72</sup>

In conclusion, an African Nova Scotian concept of justice must surely include community-led liberation from the contemporary chains of racism and White privilege that remain firmly linked to our historical structural oppression through systemic and individual racism, and the denial of reparations.

## II. *Restorative justice theory*

### 1. *Restorative justice as a relational justice theory*

While some might argue that the eclectic menu of criminal justice theory and related sentencing principles underlying Canadian criminal law affords a great deal of flexibility for individually tailored (and thereby more effective) criminal justice responses, a significant segment of practitioners, academics, participants, and the general public have concluded that the criminal system is failing and in need of a fundamental “paradigm” shift.<sup>73</sup> Enter restorative justice. Is it new wine in an old bottle as far as African Nova Scotians are concerned, or does it hold liberatory promise?<sup>74</sup>

As a theory of justice, it is suggested that restorative justice is superior to the traditional justice theories that currently undergird our criminal

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71. As a result of focused recruiting efforts and programs in the last twenty-years or so, there are now more African Nova Scotian police, probation and correctional officers, lawyers, and restorative justice professionals, many of whom try to work collectively to address systemic challenges for African Nova Scotians, although these efforts have not yet been formalized and institutionalized. No doubt part of the increase in numbers has come as a result of the *Royal Commission on the Donald Marshall, Jr., Prosecution*, *supra* note 23.

72. The Indigenous Blacks & Mi'kmaq Initiative is an affirmative action program designed to recruit and support African Nova Scotian and Mi'kmaq in obtaining a legal education. Its overall mandate is to reduce systemic and structural discrimination by increasing the representation of Black and Aboriginal lawyers. See online: Indigenous Blacks & Mi'kmaq Initiative <<http://ibandm.law.dal.ca>>. For additional history and perspectives on the IB&M Initiative, see Carol Aylward, “Adding Colour—A Critique of: ‘An Essay on Institutional Responsibility: the Indigenous Blacks and Micmac Programme at Dalhousie Law School’” (1995) 8 CJWL 470; and Richard F Devlin & A Wayne MacKay, “An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School” (1991) 14 Dal LJ 296.

73. Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990).

74. Daniel W Van Ness asked a similar question in “New wine and old wineskins: Four challenges of restorative justice” (1993) 4:2 Crim LJ 251.

system.<sup>75</sup> Consequently, I consider whether restorative justice theory could ground an adequate response to the contemporary challenges facing African Nova Scotians in addressing criminal justice issues. I begin this section by articulating my understanding of restorative justice, including its African and Indigenous origins, and then examining how it could encompass an African Nova Scotian concept of justice.

It is important to note at the outset that the concept of restorative justice is not new, but would appear to be reflected in most Indigenous societies, including those of African origin. The African concept of *ubuntu* generally means “people are people through other people” denoting a relational approach to identity and world view.<sup>76</sup> Interestingly, the “other people” referred to within the concept include ancestors as part of the extended family.<sup>77</sup> *Ubuntu* has further been explained as “a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources.”<sup>78</sup> Both the ancestral connection and group solidarity aspects of *ubuntu* are cultural dimensions that have carried through to African Nova Scotian communities.

The starting point for my understanding of restorative justice as a theory of justice within the Canadian context, and as a foundation for how it is practiced here in Nova Scotia, is the work of Llewellyn and

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75. Restorative justice as a theory of justice is comprehensively developed by Jennifer J Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework* (Law Commission of Canada, 1998). Therein the authors explain that the effectiveness of utilitarian approaches that emphasize deterrence and rehabilitation has been discredited by social science evidence. The instrumentalism at the core of utilitarian theories has also been criticized as a form of social engineering whereby the freedom of the individual from state coercion through incarceration, rehabilitation, and so on, is crudely weighed against the benefits to society of such state control. Retributivism, while perhaps a more coherent theory on its face, has also been found to have its shortcomings. Retributivism is based on the premise that punishment is justified by the individual's own choice to have engaged a criminal act, as defined by the state of which that individual is a member. The person's choice to do wrong is counteracted by an appropriate and proportional punishment by the state such that the punishment equals the harm, bringing us back to collective equilibrium. The protection of the public is an additional goal interwoven within these central criminal justice aims, all of which are reflected in varying degrees within the statutory sentencing provisions and common law.

76. Dirk Louv, “The African concept of *ubuntu* and restorative justice” in Sullivan & Tiff, eds, *Handbook of Restorative Justice* (New York: Routledge, 2006) at 161; Ann Skelton, “Regional Reviews: Africa” in Gerry Johnston & Daniel W Van Ness, eds, *Handbook of Restorative Justice* (Portland: Willan Publishing, 2007); See also JL Gibbs, Jr, “Two Forms of Dispute Settlement among the Kpelle of West Africa” in D Black & M Mileski, eds, *The Social Organization of Law* (New York: Seminar Press, 1973); O Oko Elechi, Sherill VC Morris & Edward J Schauer, “Restoring Justice (Ubuntu): An African Perspective” (2010) 20:1 Int'l Crim Jus Rev 73; and Morris Jenkins, “Gullah Island Dispute Resolution: An Example of Afrocentric Restorative Justice” (2006) 37 Journal of Black Studies 299.

77. Louv, *ibid* at 166.

78. AM Anderson, *Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution* (Pretoria, South Africa: University of South Africa School of Law, 2003) at 9, citing South African Justice Mokgoro in *S v Makwanyane* 1995 at 308.

Howse who describe restorative justice as “restoring social relationships... to ones in which each person’s right to equal dignity, concern and respect are satisfied.”<sup>79</sup> Understanding that restorative justice “seeks to restore the social equality in relationships that have been harmed by wrongdoing,”<sup>80</sup> the promise of restorative justice for me is in the potential for transformation. A relational theory of restorative justice seeks to delve beneath the discrete wrong in question to consider the root causes and context in which the wrongdoing occurred, and it holds transformational—maybe even liberatory—promise:

in taking the social dimension seriously, restorative justice captures an idea of transformation, of orientation towards the future. While the beginning point of restorative justice is a state of wrong that has disturbed the relationship between the wrongdoer and the sufferer of wrongdoing, its endpoint may be quite different than the status quo ante.<sup>81</sup>

If, as I have described in the previous sections, the pre-existing context or “status quo” is itself comprised of deeply entrenched racialized and related structural inequalities, then unlike the traditional criminal justice theories of retributivism and utilitarianism, restorative justice theory contemplates and arguably requires racial and other forms of inequality to be explored.<sup>82</sup> It goes further to anticipate that as a result of the restorative justice process, relationships—and the people engaged in them—would not be restored to their “proper (marginalized) place.” Instead, the process could—and presumably would—yield new more equitable relationships and thereby rupture and transform the status quo in some way.<sup>83</sup> It might even be fairly said that such a contextual and transformative outcome is inherent in every restorative justice encounter as contemplated by the theory. Moreover, it would appear that restorative justice theory as conceptualized by Llewellyn, Howse, and others includes, as part of the

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79. Llewellyn & Howse, *supra* note 75 at 1.

80. *Ibid* at 15.

81. *Ibid* at 2; Llewellyn, *supra* note 1 at 102.

82. Llewellyn, *ibid* at 97-98.

83. Kay Harris elaborates on the transformative potential of restorative justice. M Kay Harris, “Transformative justice: the transformation of restorative justice” in Sullivan & Tift, *supra* note 76 at 555.

deliberative process, an examination of the wrongdoing within a racialized context that accounts for related and intersecting forms of oppression.<sup>84</sup>

Llewellyn's more recent work articulates a relational theory of justice that responds to collective harms that may arise from structural inequality as well as notions of individual wrongdoing.<sup>85</sup>

Justice understood relationally is concerned with the nature of the connections between and among people, groups, communities, and even nations. Justice aims at realizing the conditions of relationship required for well-being and flourishing. It identifies as wrong those acts or circumstances that prevent or harm such conditions. With respect to this relational understanding, the goal of justice—either in response to specific wrongful acts or existing states of injustice—is the establishment of relationships that enable and promote the well-being and flourishing of the parties involved. Justice conceived relationally seeks... “equality of relationship.”<sup>86</sup>

Thus, this robust relational theory of justice provides a solid foundation for restorative practices that would take into account any pre-existing inequality of relationships and attend to the context of the wrongdoing through a process that would yield more equitable relationships. Moreover, the relational approach to justice as elaborated by Llewellyn is concerned with injustice of all kinds, not merely those that are currently defined as criminal harms.<sup>87</sup> As such, the theory provides the scope for linking African Nova Scotian individual experiences with the criminal justice system to the broader movement for liberatory justice.

A relational theory of restorative justice is, therefore, consonant with an Africentric theory of restorative justice insofar as an Africentrism eschews Eurocentric or liberal individualistic approaches to defining well-being and equality, in favour of contextualized, culturally-specific approaches. What we might label as “western” restorative justice practice has been criticized

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84. Other scholars in the area of restorative justice also embrace a theoretical approach that would appear to respond to and facilitate an African Nova Scotian concept of justice. Adrienne Christie, “Restorative Injustice?: The Boundaries of Restorative Justice at Intersections of Gender, Race, and Class: A Canadian Focus” (Ottawa: MA Thesis, Carleton University, 2000) at 90; Barbara Hudson, “Beyond White Man’s Justice: Race, Gender and Justice in Late Modernity” in Lynn Chancer & Eugene McLaughlin, eds, *Theoretical Criminology* (London: Sage Publications, 2006) 29. Kathleen Daly & Julie Stubbs, “Feminist theory, feminist and anti-racist politics, and restorative justice” in Johnstone & Van Ness, *supra* note 76 at 149.

85. Llewellyn, *supra* note 1 at 97: “A relational conception of justice must be concerned not only with inequality resulting from specific wrongdoing but also with the general state of inequality in social relations.”

86. *Ibid* at 91.

87. *Ibid* at 104.



as being Eurocentric and unduly trapped within the liberal tradition.<sup>88</sup> It is largely individualized and incident or encounter-driven—even where the encounter involves relationships and community dimensions. Even shared concepts of human nature, harmony, and relationships themselves may be constrained by unexamined assumptions grounded in western approaches as Val Napoleon has explored.<sup>89</sup>

Among other contributions, Morris Jenkins contrasts a Eurocentric approach with an African-centred approach to restorative justice and suggests that the latter includes liberation of the [African Nova Scotian] community as its primary concern.<sup>90</sup> He suggests that we use Africentric theory to inform restorative justice practice with people of African descent.<sup>91</sup> At base, Africentrism<sup>92</sup> centres the history, experiences and perspectives of African peoples, although it is important to understand that:

The Afrocentric perspective does not aim to replace Eurocentricity as a universal perspective. Indeed, Afrocentricity recognizes the validity of other non-hegemonic perspectives—Asia-centred, America-centred, and even European-centred in its non-hegemonic form. It would allow for a pluriversal perspective...looking at the world from different centres rather than from a single angle is necessary if we are to have a better understanding of this diversified and multicultural universe.<sup>93</sup>

An African Nova Scotian concept of justice, as discussed above, is arguably a specific manifestation of Africentric practice and has as its root equality—not replacing one racialized power (White) with another (African/Black).

88. Morris Jenkins states that, “[r]estorative justice theory is Eurocentric as opposed to Africentric or Indigenous in its cosmology (worldview), axiology (values), ontology (nature of people) and epistemology (source of knowing)”: Morris Jenkins, “How do Culture, Class and Gender Affect the Practice of Restorative Justice?” in Howard Zehr & Barb Toews, eds, *Critical Issues in Restorative Justice* (New York: Willan Publishing, 2004) 311 at 318.

89. Val Napoleon, “By Whom, And By What Processes, Is Restorative Justice Defined, And What Bias Might This Introduce?” in Zehr & Toews, *ibid* at 33.

90. Jenkins, *supra* note 88 at 318.

91. *Ibid.* See also Aylward, *Review, supra* note 2 at 25-27.

92. See generally the work of Molefi Asante. See also Cecil Gray, *Afrocentric Thought and Praxis: An Intellectual History* (Trenton, NJ: African World Press, 2001). For Canadian sources, see George Dei, *Anti-racism education: Theory and practice* (Halifax: Fernwood, 1996) and David Este & Wanda Thomas-Bernard, “Social work practice with African Canadians: An examination of the African Nova Scotian community” in A Al-Krenawi & JR Graham eds, *Multicultural Social Work in Canada: Working with Diverse Ethnic Racial Communities* (Toronto: Oxford University Press, 2003) at 306-337.

93. In this sense, Africentrism is understood as part of an enlargement of the mind as contemplated by Jennifer Nedelsky in the context of judging. Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill LJ 91.

2. *Translating theory into practice: the promise of restorative justice*

Ideally, the practice of restorative justice involves the parties affected by the wrongdoing, including community representatives, coming together to understand each other's experiences and to collectively determine how to achieve equality of relationships on a forward-looking basis.<sup>94</sup> While the result may include responding to a discrete wrongdoing, it is difficult to predetermine the outcome of any given restorative justice encounter because that will depend in large part upon how the participants engage in the process of deliberative justice and the context within which the original wrongdoing or systemic harm occurred.

My hope in the promise of restorative justice was strengthened by the work of Jenkins in the United States, and the local efforts of the Halifax Community Justice Society and others to implement an Africentric approach to restorative justice.<sup>95</sup> For example, Jenkins maintains that *part* of the matrix of causes of wrongdoing by Black youth is that they operate within a daily environment infused with racial and other forms of inequality:

The crux of Afrocentric theories about Black criminality is that structural pressures, combined with dysfunctional Eurocentric cultural adaptation to those pressures, play out as unacceptable behaviour in African American communities...

An Africentric approach involves the implementation of "culturally-specific restorative justice process" to guide the interventions with African Nova Scotian youth.<sup>96</sup> That approach would centre their experience as African youth within a Eurocentric culture, thereby potentially reframing how the causes of the wrongdoing are understood and drawing upon culturally-specific responses and resources as part of the process.

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94. Llewellyn, *supra* note 1 at 98-99.

95. Aylward, *Review, supra* note 2.

96. Jenkins, *supra* note 88 at 317 suggests that the culturally specific approach includes: (1) Use of culturally specific theories to explain crime and social harms and develop a culturally specific response to the harm; (2) Redefinition of community; (3) Assurances that the "State" is not a dominant participant in the process; (4) Education and training on issues of race and racism that include alternative theories; and (5) Active research on this issue using non-European methodologies.

Other scholars have maintained that there is an important role for the state in restorative justice. For example, the state can set positive standards to ensure that local restorative justice programs do not devolve into vigilantism, while providing enough room for local communities to develop approaches that meet their unique needs. See for example, Bruce Archibald & Jennifer J Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2006) 29 Dal LJ 297.

Marrying Jenkins' insights on how to draw upon culturally-specific theories to explain social harm with the elements of a restorative approach to reparations adds yet another dimension to the promise of restorative justice for African Nova Scotians.<sup>97</sup> Specifically, the use of restorative justice in transitional contexts holds promise for using a restorative approach as part of a broader emancipatory and reparative process in keeping with a global reparations movement. For example, a truth and reconciliation process for African Nova Scotians would go a long way to repairing the centuries of structural inequality and resulting harm caused by slavery, segregation, and virulent racism in Nova Scotia.<sup>98</sup> The combination of a culturally-specific restorative justice approach linked to a comprehensive truth and reconciliation process could be life changing for African Nova Scotian youth, families and communities, and the province as a whole.

If we accept that restorative justice is theoretically consonant with African Nova Scotian justice, I turn now to examine whether it is meeting the needs and aspirations of African Nova Scotians in practice. If restorative justice practice does not consciously and proactively incorporate anti-racist dimensions and a fulsome concept of African Nova Scotian justice, then it will likely reinforce or reconfigure systems of racism and racialization. Indeed the risk of retrenchment of anti-Black racism is arguably greater within "colour-blind" restorative processes, because the informal and private dimensions of the process can shield it from scrutiny.<sup>99</sup>

### 3. *Restorative justice practice in Nova Scotia*

In this section, I further explore how the structure and function of the current Nova Scotia Restorative Justice Program may inhibit the realization of African Nova Scotian justice, then make recommendations on how to apply a race-conscious or African Nova Scotian critical race approach to restorative justice vision and practice that would make it truly responsive to the needs, concerns, and aspirations of African Nova Scotians.

The current Nova Scotia Restorative Justice Program (NSRJ) is open to youths age 12-17 for certain offences.<sup>100</sup> Youth may be referred: (1) at the pre-charge stage by a police officer; (2) at the post-charge stage by a Crown Attorney; (3) at the post-conviction and pre-sentence stage by a judge; or (4) at the post-conviction stage by a correctional staff person. The young person must take responsibility for their actions and thereafter,

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97. See, generally, *supra* note 20.

98. See Jennifer J Llewellyn, "Truth commissions and restorative justice" in Johnstone & Van Ness, *supra* note 76 at 351.

99. See generally, Delgado et al, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" [1985] Wis L Rev 1359.

100. See Archibald & Llewellyn, *supra* note 96.

with the assistance of a caseworker and facilitator, would participate in a meeting with the victim, community members, and others who may have been impacted by the wrongdoing in an effort to examine the harm caused and explore ways in which the relationships could be restored. The outcome would generally include an agreement involving action to be taken by the young person to repair the harm caused.

My research involved completing a literature review; helping to develop project-related questions for agency directors' and program surveys<sup>101</sup>; conducting focus groups with restorative justice agency staff and criminal justice personnel, and African Nova Scotian youth who had been through the restorative justice process in the Halifax Regional Municipality (HRM); and conducting focus groups and interviews with African Nova Scotian criminal justice personnel and community leaders in Halifax and Digby, Nova Scotia.

Based on the research, I have concluded that restorative justice as structured and practiced in Nova Scotia has fallen short of the transformative potential contemplated by the very promising aspects of theory outlined above, despite the earnest and often tireless efforts of people working within the system. I have categorized my critiques into the three general areas of concern: (1) conceptual limitations within the structure of the Nova Scotia Restorative Justice Program; (2) procedural and due process concerns; and (3) practice issues.

a. *Conceptual limitations of the Nova Scotia restorative justice program*

My first set of observations relate to what I call conceptual limitations reflected in the design, structure, and function of the NSRJ. The main limitations are (1) insufficient operational mechanisms to address the root causes of wrongdoing; and (2) the inability to alter what is defined as criminal wrongdoing under Canadian law.

The failure of restorative justice practice to examine the root causes and contexts within which wrongdoing occurs echoed throughout my research. Restorative justice was viewed as falling short of addressing the fundamental structural, institutional, systemic, and individual anti-Black racism that exists in Nova Scotia. So while the relational foundation for restorative justice yields promise, it has been challenging to operationalize.

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101. Diane Crocker & Rebecca Craig, "Results from a Survey of Staff, Board and Volunteers of the Nova Scotia Restorative Justice Program" (Unpublished report produced for the Nova Scotia Restorative Justice-Community University Research Alliance (NSRJ-CURA), Halifax, 2011) online: <[www.nsrjcura.ca](http://www.nsrjcura.ca)>. Diane Crocker is an Associate Professor, Criminology Department, at St. Mary's University who designed the data collection tools in consultation with NSRJ-CURA partners. I developed questionnaire items relating to my research project in collaboration with Diane Crocker who conducted the data analysis.

Restorative justice practice often involves a limiting two-dimensional relational exchange against a backdrop of deeply entrenched racial and social inequality. By two-dimensional, I mean not that there are only two parties, but rather that the significant third dimension of relative power among and between the parties remains unacknowledged. That third dimension includes racial inequality and other relative power differences. For example, an African Nova Scotian youth and his or her parents generally enter a restorative process with less relative power than a teacher, principal, or police officer.

It bears listening to some of those voices:

There are situations where Black youth are sent to RJ as offenders for responding to racial slurs and the White youth “victim” is not held accountable in the RJ process. These “offenders” have to return to school and are made to feel that justice was not deserved for them. They feel punished for a matter that they felt had to be taken into their own hands because schools aren’t protecting them from racism. In this way, schools are contributing to perpetuating racism by not dealing with it.<sup>102</sup>

The RJ process can be a barrier to effectively dealing with race issues because you have to offer consequences to the offender’s crime. You have to get the entire circle to agree on what the real issue is and how to deal with it. In situations where the offender has a valid reason for his misconduct RJ cannot always provide justice to the offender as well.<sup>103</sup>

One criminal lawyer recalled a case where a young man was charged with three counts of assault:

The judge did a report and found out that the young man was taunted daily at school because of his race. If the judge didn’t dig further into the story behind the incident, the young man would have been jailed and the racist behaviour of the other students would have gone unchecked.<sup>104</sup>

Perhaps more profoundly, it appears that if even the power imbalances are attended to within the restorative justice process, it is not a given that the outcome of that process will in any way disrupt pre-existing structural and systemic oppression.<sup>105</sup> To give full effect to that aspect of the transformative potential of restorative justice requires shifting the practice of restorative justice through systematically empowering the oppressed

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102. Restorative justice focus group participant, transcript on file. It is interesting to note that African Nova Scotian children and youth have always dealt with virulent and violent bullying in the form of racism. It is not a new phenomenon for us.

103. Restorative justice focus group participant, transcript on file with author.

104. Restorative justice focus group participant, transcript on file with author.

105. David G Gil, “Toward a ‘radical’ paradigm of restorative justice” in Sullivan & Tift, *supra* note 76 at 499; Christie, *supra* note 84 at 64.

group—in this case African Nova Scotians—as a whole. This involves operating conceptually through an anti-racist lens, in the Zehr sense, and then operationalizing approaches to ensure that the new vision has a practical impact.<sup>106</sup>

A related conceptual limitation of current restorative justice practice is that the NSRJ is not designed to question whether certain behaviours currently labelled as wrong or criminal, should be so defined, nor is it designed to add to the list of wrongs currently labelled as criminal harms under our Canadian law. The NSRJ accepts the Canadian criminal law as it exists, and is actually a creature of that law. An action that is deemed to be wrong within pre-existing state rules is the “trigger” or starting point for restorative justice as it is currently practiced. Consequently, there is no systematic mechanism through the NSRJ to question whether increasingly harsh laws against marijuana use for example, are just. Similarly, there is no device through NSRJ to critique the creation of new harms through provincial or federal legislation. Moreover, the NSRJ does not provide a process for questioning why certain acts of racial discrimination and harassment are *not* criminalized. Yet, criminal behaviours, like assault, may be precipitated by racial harassment.<sup>107</sup> The work of the NSRJ could be vastly improved through institutionalizing a “feedback loop” that could influence the legislative process in this regard.

b. *Procedural and due process concerns*

There are a range of procedural and due process concerns that are raised by restorative justice practice. First, the NSRJ is largely unable to address issues of selective enforcement of law, and is unable to monitor and control related problems of net-widening and gate keeping. Second, the interplay between the criminal justice system and restorative justice practice raises questions of whether participation in the NSRJ is truly voluntary. Finally, the extent of the procedural protections available to restorative justice participants is unclear, raising due process concerns. All of these limitations make it difficult to engage in a truly liberatory restorative approach in keeping with an African Nova Scotian concept of justice.

First, the NSRJ does not systematically address the issue of differential or selective enforcement of the law based on race, socioeconomic, and other

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106. See Zehr, *supra* note 73.

107. See Peggy C Davis, “Law as Microaggression” (1988–1989) 98 Yale LJ 1559; Patricia J Williams, “Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism” (1987–1988) 42 U Miami L Rev 127; Matsuda, *supra* note 3; For discussion of the impact of racism on health see James et al, *supra* note 65; and Kathryn Freeman, “Diagnosing Discrimination: Stress from Perceived Racism and the Mental and Physical Effects” (2013) 8:1 Sociological Inquiry 55.

intersecting factors. For example, racial profiling of African Canadians is a concern across this country<sup>108</sup> and was identified as a problem by research participants. One African Nova Scotian research participant from Digby stated “there is a lot of racial profiling and other forms of police harassment.” Similar concerns expressed by African Nova Scotian youth are reflected in the following statement: “The police are not taking the time to distinguish between who is doing the crimes and who is not... They charge people in a clump.”<sup>109</sup> The NSRJ does not build in a mechanism to address these types of concerns on a systemic or macro level.<sup>110</sup> Further, on an individual basis, having a matter resolved through the restorative justice process, may effectively prohibit a legal challenge to an incident of racial profiling that could have been undertaken through the formal criminal justice system.

Related dimensions of selective enforcement are net-widening and gate keeping, which are two sides of the same racialized coin. That is, selective surveillance and enforcement may result in a disproportionately high number of African Nova Scotians being investigated by police in the first place. Net widening and gate keeping relate to how police exercise their discretion in response to the wrongdoing they have identified as a result of their over-surveillance.<sup>111</sup> Net-widening involves unduly referring young people to restorative justice when lesser measures like a warning would be more appropriate. For example, at one point the Halifax restorative justice agency experienced a spike in referrals of African Nova Scotians youth for not wearing bicycle helmets.<sup>112</sup>

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108. Judge Corrine Sparks, “Judicial Recognition and Remediation of Racial Profiling by Canadian Courts” in Divine, *supra* note 19 at 346; *Kirk Johnson v Michael Sanford and Halifax Regional Police* (2003), summary online: Nova Scotia Human Rights Commission <<http://humanrights.gov.ns.ca/sites/default/files/files/boi-decisions/BOI-Decision-Procedure-15-Johnson.pdf>>; David M Tanovich, *The Colour of Justice: Policing Race in Canada*, (Toronto: Irwin Law, 2006); Charles Smith, *Conflict, Crisis, and Accountability Racial Profiling and Law Enforcement in Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2007); Maureen Brown, *In Their Own Voices*, (Toronto: African Canadian Community Coalition on Racial Profiling, March 2004); Ontario Human Rights Commission, *Paying the Price: the Human Cost of Racial Profiling* (Toronto: Queen’s Printer for Ontario, 2005); Scot Wortley & Julian Tanner, “Data, Denials and Confusion: the Racial Profiling Debate in Toronto” (2003) 43 Can J Criminology & Crim Jus 367.

109. African Nova Scotian focus group participant, transcript on file with author.

110. Individual relationships between restorative justice workers and police representatives may allow for such conversations.

111. The Supreme Court of Canada has recognized unconscious racism: *R v Williams*, [1998] 1 SCR 1128. See also, CR Lawrence III, “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism” (1987) 39 Stan L Rev 317.

112. Presumably a more appropriate response to ticketing the youth and referring them to a restorative justice program, would be to provide a warning and perhaps alert community organizations who could help in providing bike helmets to families in need.

Gate keeping, the other side of the coin, is when racialization results in youth who are eligible for restorative justice being denied access to the NSRJ. Clairmont's research indicates that police emphasis on the "swagger factor" or perceived "bad attitude" of African Nova Scotian youth, is a form of racialization that could impact the discretion of a police officer:

Given that swagger and style of relationship between police and youth has been shown to vary by race or ethnicity and socio-economic status, it is clear that, as argued in the report of the Marshall Inquiry, unintentional discrimination or "adverse effects" is a factor in criminal justice and, by extrapolation to the concerns here, could affect access to restorative justice, especially for Blacks (given a long legacy of negative Police-Black relationships in Nova Scotia) and repeat offenders at the pre-charge level. Evidence from the metropolitan Halifax area court during the launching years indicated that Black youth were disproportionately prosecuted there, and were especially over-represented among multiple repeat offenders, constituting twenty-six per cent of the female multiple repeaters and thirty-four per cent of the male equivalents, while they were four to six per cent of the youth population.<sup>113</sup>

The comment of one Digby focus group member reflected the general concern of the African Nova Scotian community there: "...for three years... not one Black youth has come through the [RJ] program. What seems to happen is that many Black youth are excessively charged so that they don't fit the criteria."<sup>114</sup> Restorative justice statistics seem to bear out this observation. For example, the Tri-County Restorative Justice Society reported that as of August 2011 only eight of eight-six (9%) referrals from the Digby area in the previous five years were of African Nova Scotian youth. Yet, community members report that a significant number of African Nova Scotian youth in the area are under some form of criminal state control.<sup>115</sup> African Nova Scotians have a long history of resisting anti-Black racism in the Digby area and restorative justice responses would have to link with those macro community efforts in order to be meaningful.<sup>116</sup> Clairmont's research further indicates that criminal justice

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113. Don Clairmont & Ethan Kim, "Getting Past the Gatekeepers: The Reception of Restorative Justice in the Nova Scotian Criminal Justice System" (2013) 36 Dal LJ 359 at 370.

114. Digby, Nova Scotia Focus Group, transcript on file with author.

115. Further statistics documenting the number of African Nova Scotian youth under some form of state control would be required to complete the picture.

116. Some of Digby's unique challenges are likely explained by the history of slavery, segregation, and other forms of racism in the region. The African Nova Scotian community in Digby has been fighting against racism in education for decades having filed a class action suit in 1978. See also *BLAC Report on Education: Redressing Inequity-Empowering Black Learners*, vol 2 (Nova Scotia: Black Learners Advisory Committee, 1994) at 34-35. See also the settlement in the 2005 suit filed by Brendan Clarke against the RCMP: Sherri Borden Colley, "Police assault victim settles," *The Chronicle Herald* (19 June 2013) A7.



system actors are most comfortable with restorative justice referrals for minor offences, although over time Crown Prosecutors seem more comfortable with referring for repeat and more serious offences.<sup>117</sup>

In addition to the concern that African Nova Scotians may be adversely affected by discretionary decision-making, the overall number of referrals to restorative justice has significantly decreased over the past decade.<sup>118</sup> Consequently, an African Nova Scotian restorative justice intervention that does not address the broader criminal justice system issues will only have a limited impact.

The close structural interplay between the criminal justice system and the restorative justice system also raises questions about whether participation in the NSRJ is truly voluntary. For example, the young person may feel pressure to become involved with the restorative justice process and to meet the victims/mediators' demands. Youth understand that if they do not participate in the restorative justice process, they could end up with a criminal record. Many youth reported feeling like they did not have much power in negotiating an agreement or in adhering to its terms, in light of the ever hovering possibility of being sent back into the criminal justice system if they failed to successfully complete the NSRJ. Avoiding a record was often the main reason why youth accepted the referral, and was the primary aspect of the restorative justice process that they remembered. Youth also expressed a sense of helplessness about being able to address the context in which they were charged with an offence through the NSRJ process. These observations again suggest that while a restorative justice process may bring people together in a new two dimensional shape (circle), it may not necessarily alter the third dimension of power that each participant brings to the circle. That power dimension includes racialized power. Consequently, a huge and critical aspect of the root causes and context of the wrongdoing may be left unexamined leaving little possibility for a truly transformative outcome.

A related category of concerns is the lack of procedural protections within the criminal justice—restorative justice interface and within the restorative justice process itself. Early critiques by Delgado<sup>119</sup> and Brown<sup>120</sup> raised some of these concerns in the context of mediation in the United States and they are being explored in the Canadian context by

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117. Clairmont & Kim, *supra* note 113 at 379-380.

118. *Ibid* at 377.

119. Delgado et al, *supra* note 99.

120. Jennifer G Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique" (1994) 43 Emory LJ 1247.

Bruce Archibald.<sup>121</sup> Specifically, if a restorative justice referral is made by a police officer at the pre-charge stage, the youth may not consult with a lawyer about the merits of the case. Even an early referral at the post-charge stage of the process may mean that the youth lacks information about the likely outcome of the case if she or he were to proceed to trial on the charge. The amount of information will depend on, among other things, the degree of disclosure available at the time of the referral, and access to counsel. These concerns beg the question of whether the youth's consent to restorative justice truly constitutes informed consent.

The concern about informed consent appears to diminish if restorative justice is considered at a later stage in the process. Research suggests that as a result of the increased reception of restorative justice into the Nova Scotia criminal justice system and an increasing number of referrals by Crown prosecutors, that restorative justice has become an integral part of the role of the Crown and Defence counsel and their negotiations.<sup>122</sup> Further questions arise, however, about due process within the restorative justice process. Moreover, it is not clear whether evidence identified as a result of the restorative process would be admissible if the restorative process were to break down and the matter referred back to the criminal justice process, or what appeal or review rights arise within the restorative justice context.<sup>123</sup>

Finally, at a broader level, having a matter dealt through a restorative justice process erases the public dimension of criminal prosecution insofar as the matter becomes publicized within the media. As Delgado points out in the American context, “[RJ encounters] atomize disputes, so that patterns such as police abuse or the overcharging of [B]lack men do not stand out readily.”<sup>124</sup> While Delgado's critiques are somewhat dated and directed toward more narrow and individualized alternative dispute resolution (ADR) practices, one aspect of his concern remains. That is, restorative justice happens outside of a public trial (although a public dimension is maintained through the range of participants involved). In light of the history of injustice that African Nova Scotians have experienced, it may be that certain matters are better dealt with in open court and broadly publicized, particularly as a matter of pursuing the liberatory aim of

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121. Bruce Archibald, “Restorative Justice and the Rule of Law: Rethinking Due Process Through a Relational Theory of Rights” (2013), online: NSRJ-CURA <<http://www.nsrj-cura.ca/publications>>.

122. Clairmont & Kim, *supra* 113 at 384.

123. Archibald, *supra* note 121.

124. Richard Delgado, “Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice” (2000) 52 *Stan L Rev* 751 at 769 [Delgado, “Goodbye to Hammurabi”].

African Nova Scotian justice.<sup>125</sup> Delgado's direction to African Nova Scotian individuals would be to "examine both systems carefully before opting for one or the other"<sup>126</sup> while addressing the inequalities in both systems. He believes that this would:

effectively force dialogue and competition between the two systems...by challenging the conventional system and the emerging one, reminding each other of its myths and values, and demanding that each equal or exceed the other in pursuit of the common goal of racial and social justice.<sup>127</sup>

c. *Restorative justice practice: challenges*

Moving from the criminal justice system and its interface with the NSRJ, I examined how restorative justice practice within the NSRJ itself responded to African Nova Scotians and reflected an African Nova Scotian concept of justice. What I found was that race issues were not systematically addressed or incorporated despite the committed, caring practitioners and volunteers involved in the system. That being said, there were very innovative approaches being taken by the HRM Community Justice Society, including Africentric pilot projects.<sup>128</sup> The impact of the work of that agency is potentially quite profound for African Nova Scotians because the majority of African Nova Scotian youth live in the HRM area and are, therefore, served by the Community Justice Society. The challenge is the lack of resources to fully give effect to an African Nova Scotian restorative justice strategy.

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125. We need only think about the impact of the Kirk Johnson matter in the human rights context. Had that been settled quietly, we would not have been left with a strong precedent and the empowering effect on the African Nova Scotian community. See the case of Kirk Johnson, *supra* 107.

126. Delgado, "Goodbye to Hammurabi," *supra* note 124 at 773. In this context the role of facilitators and selection of "community representatives" in a restorative justice conference become critical.

127. *Ibid* at 774-775.

128. The majority of African Nova Scotians live within the Halifax Regional Municipality (HRM) of Nova Scotia, which is Nova Scotia's largest urban area. The HRM Africentric Pilot project was designed to ensure that African Nova Scotian youth had full access to restorative justice. The project involved using a "flexible casework approach led by African Nova Scotian caseworkers...designed to meet the unique needs of Black youth in predominately Black communities": Aylward, *Review*, *supra* note 2 at 16-18. The project was developed in response to the disproportionate number of African Nova Scotian youth coming into contact with the justice system. See Aylward, *ibid* at 14 citing Don Clairmont, *A Pre-Implementation Report* (Halifax: Nova Scotia Department of Justice, 1999); *The Nova Scotia Restorative Justice Initiative: Year One Report* (Ottawa: Crime Prevention Centre, Department of Justice, 2001); *The Nova Scotia Restorative Justice Initiative, Year Two, 2001, Core Process Report* (Ottawa: Crime Prevention Centre, Department of Justice, 2002); Clairmont et al, *Restorative Justice Interim Outcome Analysis Report Year Three* (May 2002); Clairmont et al, *Restorative Justice Final Process Analysis Report: Year Three* (May 2003).

My research revealed a general ambivalence among NSRJ personnel about whether race is a problem within the restorative justice and criminal justice systems. This finding is perhaps not surprising in light of the pervasive denial among non-racialized people that racism is prevalent. For example, 63% of restorative justice agencies in Nova Scotia said that they had dealt with cases involving race issues and 56% agree that racial issues often arise in restorative justice cases involving African Nova Scotians.<sup>129</sup> So there was some level of recognition that cases involving African Nova Scotians may involve race issues. A smaller proportion of practitioners (41%) agreed that systemic racism affects restorative justice or knew of some measures in place to ensure equity for African Nova Scotians (41%). The findings also suggest that even if there was some recognition that systemic racism may affect restorative justice, the overall belief was that appropriate responses were in place. For example, 64% of respondents felt that measures in place to ensure equity for African Nova Scotians were somewhat adequate and 30% felt the measures were very adequate. 89% of respondents thought that the needs of African Nova Scotians were being met by the NSRJ.

Interestingly, the views of African Nova Scotian and non-African Nova Scotian respondents differed across a number of dimensions:

- A higher proportion of African Nova Scotian respondents in Halifax agreed that systemic racism affects restorative justice in Nova Scotia;
- A higher proportion of African Nova Scotians agreed that African Nova Scotian restorative justice participants are treated differently than other racialized groups;
- A higher proportion of African Nova Scotian participants in Halifax rated spirituality as important, compared to non-African-Nova Scotians;
- A higher proportion of African Nova Scotian participants in Halifax rated the importance of getting at the root cause of the crime as important, compared to non-African Nova Scotians;
- A higher proportion of non-African Nova Scotians agreed that African Nova Scotians are treated fairly in restorative justice processes; and
- A higher proportion of non-African Nova Scotians agreed that the restorative justice program meets the needs of African Nova Scotians.

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129. It may be as noted above, that many cases involving African Nova Scotian youth are not being referred.

Moving beyond the views of workers and volunteers within the system, my findings yielded quantitative and qualitative indicators that race is not systematically addressed through restorative justice policy or practice. First, there were limited and inconsistent system-wide policies and standards of practice addressing race issues.

- Only 38% of restorative justice agencies had anti-racism policies in place;
- Only 38% of restorative justice agencies had policies that address power imbalances among participants in the restorative justice process<sup>130</sup>;
- Only 38% of restorative justice agencies indicated that they consider race when choosing an appropriate facilitator for a RJ conference;
- Only 13% of restorative justice agencies had an employment equity policy; and
- No restorative justice agencies had an affirmative action policy.

In addition to the lack of policies, race was not consistently identified as a relevant issue through the screening process, despite at least some recognition as noted above that race issues arise in the context of restorative justice cases. First, the wrongdoer's racial identity was not consistently identified. It was reported that "'unknown' often gets checked under the race category and that restorative justice workers have been wary of asking participants to self-identify..." It may be that the reluctance to ask participants about their racial identity is reflective of a broader discomfort that people have in talking about race altogether. Not all people who identify as African Nova Scotian boast distinct African or Black phenotypical features. Our identity is constituted by a wide range of factors, including our family connections and surnames, and community of origin and connection. Our families include Mi'kmaq and other non-Black members, and so it is imperative that participants self-identify. As one focus-group participant noted, the restorative justice intake checklist "may provide the race of the offender, but not their parents." Thereby multiracial children who do not "look Black" may be overlooked. It is difficult to meet the needs of African Nova Scotian youth, if you do not know that they are African Nova Scotian.

If racial identity is not even explored, then it is certainly harder for relevant race issues to be identified, which can have ripple effects throughout the remainder of the process. For example, as one participant

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130. The matter of power imbalances is addressed in the NSRJ Practice Standards, so it may be that agencies have not needed to develop additional policies.

noted, “where the caseworker has not identified race as an issue, many volunteers are railroaded with this issue at the time of the [restorative justice] session.”

Even if the racial identity of the client and race issues are identified as part of the initial encounter, an African Nova Scotian caseworker or other person with culturally specific training may not be automatically involved in the restorative justice process.<sup>131</sup> Such a void in expertise makes it difficult to ensure that issues of racism are dealt with in a safe, sensitive, and empowering way that engages with a broader anti-racism movement. Surprisingly, even where an African Nova Scotian worker or volunteer is involved, it may still be difficult to address the racial dimensions of the initial encounter as part of the restorative justice process itself.<sup>132</sup> One worker noted, “there is no formal or procedural way to broach the issue though, it is really up to the facilitator,” and another said, “we had race issues come through our processes but we didn’t really know how to deal with them.” Even if an African Nova Scotian participant self-identifies and race issues are appropriately raised by a trained worker in preparation for a session, non-African Nova Scotian participants often withdraw from the process. As one interview participant observed, “I’m not aware of any case in which a police officer has come to a restorative circle when a Black youth has assaulted police...people are not willing to voluntarily talk about race.”

Other dimensions of the current NSRJ are not fully conducive to an African Nova Scotian culturally specific response and as such fall short of a full realization of a restorative theory of justice. For example, “community” participation in the restorative justice process is not necessarily conceived of as African Nova Scotian community participation. Yet having an African Nova Scotian worker, facilitator or community representative would be a systematic link between the youth and a broader liberatory movement toward African Nova Scotian justice goals. One focus group participant said:

...Restorative Justice assumes that youth can identify and understand their own communities and cultural identities. For instance, most of the African Nova Scotian youth who go through RJ are youth in care. They

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131. One agency, the Halifax Community Justice Society (CJS), is required by their Collective Agreement to have African Canadians on staff. The CJS also has a policy that all restorative sessions involving African Nova Scotians must include an African Canadian facilitator or community representative, and African Canadians comprise 25% of all of CJS volunteers.

132. Krista Smith, “Dissolving The Divide: Cross-Racial Communication In The Restorative Justice Process” (2006) 15 Dal J Leg Studies 168; Barbara E Raye, “How do Culture, Class and Gender Affect the Practice of Restorative Justice?” in Zehr & Toews, *supra* note 88 at 329.

have been taken out of their own communities and placed in another where they are not represented at all. The major problem that this poses for RJ is to identify a “community” which is central to the process.<sup>133</sup>

A related concern is that agreements or restorative activities or efforts are done primarily in the geographical community of harm, not necessarily in or with African Nova Scotian communities or organizations. If agreements were to be carried out in concert with African Nova Scotian organizations, the youth would have a connection that would help to empower them, facilitate a sense of belonging, identity and self-esteem and potentially link them to the broader justice efforts. Youth seem to be craving this connection. When asked whether restorative justice should continue, one African Nova Scotian youth replied, “yes, but make it more interesting, have more activities, have community hours worked in our own community...” These types of concerns reflect a broader critique of the NSRJ, which is that there is no systematic link between African Nova Scotian youth, history, identity and broader campaigns of liberation, despite the success of Africentric projects designed to make such connections.

The church needs to be involved. Many African Nova Scotian youth are not involved in community. Many youth of mixed race background don’t know their Black identity and culture but society is treating them as Black. RJ from an Africentric perspective could be a good tool for them because they will learn about themselves and how to combat the stigma and racism that they will face. Black youth have cultural esteem issues, not generic self-esteem issues. The premise of Africentricity is to bridge the cultural disconnect within Black youth. If they are given cultural self-esteem they will be successful in society.<sup>134</sup>

### III. *Conclusion & recommendations*

Based on my research, there is a real need for African Nova Scotians to tread cautiously toward a full embrace of restorative justice as currently practiced. That being said, despite its current shortcomings for African Nova Scotians, it is in many ways a more holistic and preferable alternative to the current criminal justice system. With the appropriate theoretical foundation, policy framework, and procedural and practice safeguards and enhancements, its potential could be realized within its own terms. Without adequate resources to allow for the broader liberatory movement to be led by the African Nova Scotian community in conjunction with

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133. Restorative justice focus group participant, transcript on file with author.

134. Restorative justice focus group participant, transcript on file with author.

individual restorative justice practice, however, the NSRJ is unlikely to ever be able to fully meet the needs of African Nova Scotians.

African Nova Scotians have survived by “making something out of nothing” and “a way out of no way” and critical race theory and praxis is infused with a spirit of hope.<sup>135</sup> I make the following recommendations in that spirit of positive change so that the real transformative potential of restorative justice can be realized. More research and scholarship is needed to explore how restorative justice practice and processes can truly transform racialized and other entrenched hierarchies of power; and to examine whether procedural protections are adequate. Such research requires the consistent capturing of race-based disaggregated statistics.<sup>136</sup> The first five recommendations are necessary and if properly resourced, could be sufficient steps toward achieving justice for African Nova Scotians. The latter five steps are necessary for improved service to African Nova Scotians within the current terms of the NSRJ, but not sufficient to achieve justice for African Nova Scotians. Many of the recommendations echo those made in the Africentric Pilot Project report evaluated by Carol Aylward and the two sets of recommendations should be implemented together.<sup>137</sup>

1. My primary recommendation is the development of a critical-race or race-conscious restorative justice approach through a culturally-specific, African Nova Scotian community controlled and led justice strategy that also informs the broader practice of restorative justice. The culturally specific approach would embody an African Nova Scotian concept of justice and, therefore, be part of a larger movement to redress the legacy of centuries of structural racial and intersecting forms of oppression. The approach would build on the Africentric approach advocated by the work of Jenkins and the Africentric practice that has already been undertaken in Nova Scotia.

2. Build on decades of existing knowledge and work. There is no need to reinvent the wheel with a new study. A comprehensive literature review could easily catalogue the existing studies, reports and related documents

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135. James et al, *supra* note 65 at 159.

136. The use of disaggregated statistics has been an ongoing recommendation by the United Nations Committee overseeing the implementation of the *International Convention on the Elimination of all Forms of Racism*, *supra* note 62 at 2.

137. Aylward, *Review*, *supra* note 2 at 79.



to distill common themes and recommendations.<sup>138</sup> An easily accessible discussion document highlighting priority recommendations could be generated out of the literature review. It could also canvass potential models for an African Nova Scotian Truth and Reconciliation Commission. The document could then form the basis of community discussions across the province.

3. The ultimate strategy must have the mandate and resources to engage in broad-based advocacy and programming that will contribute to the emancipation and empowerment of the group (African Nova Scotians)—and any programming should reflect Africentrism in that it includes spirituality and the development of the individual's identity in relation to their community.

4. The strategy must embrace a holistic approach that includes addressing the education system, and related mental health, addictions, child welfare and other systems as necessary. The approach should be trauma-informed and include a spiritual dimension.<sup>139</sup>

5. It is imperative that the design, implementation and monitoring of the strategy and programming be led by African Nova Scotians in order to give effect to the transformative potential of restorative justice. A useful model for such a community led approach to direct service in the criminal justice system is the Mi'kmaq Legal Support Network.<sup>140</sup>

6. In practical terms, an African Nova Scotian justice strategy should inform existing restorative justice practice within the NSRJ. System-wide race and equity policies should be developed and implemented, and

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138. In practical terms, the strategy would involve reviewing and implementing as appropriate recommendations 9 to 19 (Visible Minorities in the Criminal Justice System) and 31 to 34 (Blacks in the Criminal Justice System) of the Marshall Inquiry Report volume. For example, one recommendation from the Marshall Inquiry calls upon the province, in close cooperation with Black communities to "formulate proposal for the establishment of appropriate diversion programs for...Blacks, and that the Province actively recommend such programs to the Federal Government with proposals for any necessary amendments to the *Criminal Code*," *supra* note 23.

139. Restorative approaches are increasingly being implemented within the Nova Scotian education system and the Nova Scotian Human Rights Commission processes. See for example, online: Tri-County Restorative Justice <<http://www.tricountyrestorativejustice.com/rjschools.html>>; and online: Nova Scotia Human Rights Commission <<http://humanrights.gov.ns.ca/resolution>>. On trauma-informed restorative justice, see Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36 Dal LJ 501.

140. As described in its promotional material the Mi'kmaq Legal Support Network (MLSN) "exists as a justice support system for Aboriginal people who are involved in the criminal justice system in Nova Scotia." Its services include the Mi'kmaq Court Worker and Mi'kmaq Customary Law Programs. A comprehensive review of the MLSN was completed by Don Clairmont & Jane McMillan, *Directions in Mi'kmaq Justice: Notes on the Assessment of the Mi'kmaq Legal Support Network* (Halifax: Atlantic Institute of Criminology, Dalhousie University, 2006) online: Dalhousie University <<http://www.gov.ns.ca/just/publications/docs/TFexesum.pdf>>.

race-based statistics should be kept in order to monitor the experiences of racialized (African Nova Scotian) participants and modify policies and programs accordingly.

7. A race-conscious approach must infuse existing restorative justice practice within the NSRJ. Colour-blindness is not restorative insofar as it erases a critical dimension of individual and collective identity and relationships.

8. African Nova Scotians should be involved at every level of restorative practice including as staff, volunteers, and board members and there should be an ongoing system research, collaboration and consultation.

9. Restorative justice professionals and volunteers should receive specialized training—and demonstrate a willingness to raise and address race issues which is linked to their evaluation and promotion. Expert facilitators on African Nova Scotian issues should be used throughout the system.

10. There must be a sustained and systematic linking of individual encounters to broader anti-racism/emancipatory efforts as part of the restorative justice process.<sup>141</sup> For example, there must be a coordinated approach to addressing the racialized dimensions of the school-criminal justice system interface.

This piece was written for anyone interested in the issue of race and restorative justice, but I hope it particularly resonates with my African Nova Scotian brothers and sisters. We have the knowledge, wisdom, skills, and commitment, borne on our ancestors' wings, to lead a renewed restorative campaign for justice that could help to heal centuries of injustice, hurt, and pain; build on centuries of resilience, creativity and joy; and be driven by a spiritual connection that has sustained us. I urge us to join with allies in continuing the journey begun by our ancestors so long ago, and I invite allies to join us on that path.

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141. Gil, *supra* note 105 at 499 suggests that, “in order to move social life in greater congruence with social equality, more restorative justice professionals must implement new radical strategies”; David Dyck, “Reaching toward a structurally responsive training and practice of restorative justice” in Sullivan & Tift, *supra* note 76 at 527.

