# HUMANITY, RACE, AND INDIGENEITY IN CRIMINAL SENTENCING: SOCIAL CHANGE IN AMERICA, CANADA, EUROPE, AUSTRALIA, AND NEW ZEALAND

MUGAMBI JOUET∞

ABSTRACT

*The role of systemic racism in criminal justice is a growing matter of debate in modern Western democracies. The United States has garnered the most attention given the salience of its racial issues and the disproportionate attention that American society garners around the world. This has obscured major developments in Canadian society with great relevance to increasingly diverse Western democracies where racial and ethnic minorities are vastly over-incarcerated. In recent years, the landmark* Anderson *and* Morris *decisions recognized that the systemic racism that Black people face in Canada should be considered as mitigation at sentencing. These historic decisions partly stem from Canada's recognition of social-context evidence as mitigation for Indigenous defendants under a groundbreaking 1996 legislative reform that remains little known outside Canada's borders. While Australia and New Zealand have also recognized certain mitigation principles for Indigenous defendants, Canada is arguably the country that is now making the most concerted effort to tackle systemic racism in criminal punishment.*

*Conversely, the U.S. Supreme Court rejected this approach in* McCleskey v. Kemp*, an influential 1987 precedent holding that statistical proof of systemic racism is essentially irrelevant to sentencing. In fact, Canadian law has adopted remedies to racial disparities that American experts and activists have advocated to no avail for decades. The situation might someday change in America, as suggested by the Washington State Supreme Court's 2018 abolition of the death penalty in* State v. Gregory*, which deviated from* McCleskey *in finding evidence of systemic racism persuasive. However,* Gregory *was only decided under state law and it is too early to tell whether more American states will inch toward the developments occurring in Canada.*

*These ongoing shifts should be situated in a wider historical context, as they do not merely reflect modern debates about systemic racism or Canada-specific matters. This Article captures how they may be the next step in the long-term, incremental evolution of criminal punishment in the Western world since the*

∞ Associate Professor, USC Gould School of Law. I am grateful to Thalia Anthony, Matthew Fletcher, Trevor Gardner, Anthony Hopkins, Felipe Jimenez, Lisa Kerr, Marie Manikis, Erin Miller, Jeesoo Nam, James C. Oleson, Marcela Prieto, and Lauren van Schilfgaarde for their thoughtful feedback.

*Enlightenment. For generations, the principles of individualization and proportionality have enabled judges to assess mitigation by considering a defendant's social circumstances. Considering evidence of systemic racism or social inequality as mitigation at sentencing is a logical extension of these principles. The age-old aspiration toward humanity in criminal justice may prove a stepping stone toward tackling the over-incarceration of minorities in modern Western democracies.*

## INTRODUCTION

**"We agree with the Court of Appeals, and every other court that has considered such a challenge, that this claim must fail."**[1]
***McCleskey v. Kemp*, Supreme Court of the United States, 1987**

**"Anti-Black racism must be acknowledged, confronted, mitigated and, ultimately, erased. This appeal requires the court to consider how trial judges should take evidence of anti-Black racism into account on sentencing."**[2]
***R. v. Morris*, Ontario Court of Appeal, 2021**

Recent landmark Canadian cases have recognized that evidence of systemic racism should be considered as mitigation in criminal sentencing, whereas American law has resisted such a shift for decades. The quotation above stems from the opening paragraph of *Morris*, a remarkable 2021 decision by the Ontario Court of Appeal. The province's highest court, one of the most influential courts

1. McCleskey v. Kemp, 481 U.S. 279, 292 (1987).
2. R. v. Morris, 2021 ONCA 680, para. 1 (Can. Ont.) (per curiam) [hereinafter *Morris* (ONCA)].

in Canada,[3] immediately signaled that the fundamental question was not whether systemic racism was relevant at sentencing, but how it should be taken into consideration. In another key 2021 decision, *Anderson*, the Nova Scotia Court of Appeal similarly ruled that sentencing judges must consider the history of racism and marginalization experienced by the Black community.[4] In fact, "[i]t may amount to an error of law" to ignore pre-sentencing reports on the impact of race and culture on the defendant.[5] The Canadian government has supported this growing jurisprudence by investing in the nationwide implementation of Impact of Race and Culture Assessments ("IRCA") at sentencing, committing 6.64 million Canadian dollars over five years beginning in 2021, followed by 1.6 million annually.[6] These events reflected a wider evolution in the history of criminal punishment.

The role of systemic racism in criminal justice is a growing matter of debate in modern Western democracies.[7] The United States' situation has garnered the most scrutiny given the salience of its racial issues[8] and the disproportionate attention that American society garners around the world.[9] This has obscured major developments in Canada with great relevance for the future of criminal sentencing in the United States, Europe, Australia, New Zealand, and other

3. Provincial high courts, such as the Ontario Court of Appeal and Nova Scotia Court of Appeal, are the equivalent of state supreme courts in the United States. *See* PATRICK MALCOLMSON & RICHARD MYERS, THE CANADIAN REGIME: AN INTRODUCTION TO PARLIAMENTARY GOVERNMENT IN CANADA 156–57 (6th ed. 2016) (comparing the United States' dual court system to Canada's integrated judicial system). Regarding similarities and differences between federalism in Canada and the United States, see *id.* at 58–64, 146–49.

4. R. v. Anderson 2021 NSCA 62, para. 118 (Can. N.S.) [hereinafter *Anderson* (NSCA)].

5. *Id.*

6. *Pre-Sentencing Impact of Race and Culture Assessments Receive Government of Canada Funding*, DEP'T JUST. CAN. (Aug. 13, 2021), https://www.canada.ca/en/department-justice/news/2021/08/pre-sentencing-impact-of-race-and-culture-assessments-receive-government-of-canada-funding.html [https://perma.cc/R7U2-F2SC] [hereinafter *IRCA Pre-Sentencing Reports*, DEP'T JUST. CAN.].

7. *See* AKWASI OWUSU-BEMPAH & SHAUN L. GABBIDON, RACE, ETHNICITY, CRIME, AND JUSTICE: AN INTERNATIONAL DILEMMA 23 (2d ed. 2021).

8. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (1st ed. 2017); MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015); R.J. MARATEA, KILLING WITH PREJUDICE: INSTITUTIONALIZED RACISM IN AMERICAN CAPITAL PUNISHMENT (2019); ROBERT SAMUELS & TOLUSE OLORUNNIPA, HIS NAME IS GEORGE FLOYD: ONE MAN'S LIFE AND THE STRUGGLE FOR RACIAL JUSTICE (2022); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020); Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371 (2022).

9. *See generally* Jacob Poushter, *Many People in Other Countries Closely Follow News About the U.S.*, PEW RSCH. CTR. (Jan. 16, 2018), https://www.pewresearch.org/fact-tank/2018/01/16/many-people-in-other-countries-closely-follow-news-about-the-u-s/ [https://perma.cc/9X88-VZDT].

societies where racial or ethnic minorities are disproportionately incarcerated. As Canadian reformers are succeeding where American reformers have failed for decades,[10] it is especially striking that these important events remain unknown in the United States.[11]

*Morris* and *Anderson* are cornerstones of a growing Canadian jurisprudence recognizing that the systemic racism and social circumstances that Black people face in Canada may be considered as mitigation at sentencing.[12] This recent jurisprudence builds upon previous efforts to consider historical and social circumstances as mitigation for Indigenous defendants. In 1996, the Canadian Parliament enacted Section 718.2(e) of the nation's Criminal Code to specify that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."[13] This groundbreaking legislation came to be known as the *Gladue* principles, based on the name of the Supreme Court decision that first interpreted its language.[14] "*Gladue* reports" are thus used at sentencing to take into account systemic racism, including the legacy of colonialism, as mitigation in the cases of Indigenous persons, who are severely

10. *See infra* Section V.A.

11. The Westlaw database of law reviews and journals indicates that no U.S. article had addressed *R. v. Morris* as of July 20, 2024. Moreover, according to Westlaw, only two U.S. articles had addressed *R. v. Anderson*. *See* Kylee Gomez, *Walking A Mile in Their Shoes Before Judging: Optimizing Judicial Empathy in the Criminal Sentencing of Black Americans with "Impact of Race and Culture Assessments"*, 91 UMKC L. REV. 171, 190 (2022); Julian V. Roberts, Gabrielle Watson & Rhys Hester, *Sentencing Members of Minority Groups: Problems and Prospects for Improvement in Four Countries*, 52 CRIME & JUST. 343, 366–67 (2023).

12. *See generally* Maria C. Dugas, *Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders*, 43 DALHOUSIE L.J. 103 (2020); Wayne K. Gorman, *The Impact of Anti-Black Racism on the Sentencing of 'Black Offenders' in Canada: What Is the Correct Approach?*, 58 CT. REV. 42 (2022).

13. Act to amend the Criminal Code (sentencing), S.C. 1995, c 22 (Can.). The section's language has since then been slightly amended to state: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." Canada Criminal Code, R.S.C. 1985, c. C-46 § 718.2(e).

14. *See* R. v. Gladue, [1999] 1 S.C.R. 688 (Can.) [hereinafter *Gladue* (Can.)]; *see also* Benjamin Ewing & Lisa Kerr, *Reconstructing* Gladue, U. TORONTO L.J. (2023), https://utpjournals.press/doi/pdf/10.3138/utlj-2023-0017 [https://perma.cc/VC4K-RDVR] (discussing the evolution of the *Gladue* principles).

overrepresented among Canadian prisoners.[15] Simply put, Canadian criminal courts are obligated to take judicial notice of Indigeneity and its relationship to social inequality.[16] Despite their apparent promise, these steps have largely failed to reduce the Indigenous prisoner population.[17] It therefore remains to be seen whether expanding this approach will reduce the over-incarceration of Black Canadians, thereby offering lessons for other societies whose penal systems grapple with discrimination and inequality. Canada still deserves closer attention as the country that may have made the most concerted effort to address systemic racism in its penal system.[18]

America has taken a sharply different position for decades. The epigraph heading this Article stems from *McCleskey v. Kemp* (1987), a controversial, 5-4 decision where the U.S. Supreme Court held that statistical evidence of systemic racism in the administration of capital punishment is essentially irrelevant.[19] *McCleskey*'s impact extended beyond the death penalty, as it impeded constitutional challenges to systemic or structural racism in criminal sentencing

15. *See* R. v. Ipeelee, 2012 SCC 13, para. 60 (Can.) [hereinafter *Ipeelee* (Can.)]. While a *Gladue* report is not the same thing as an ordinary pre-sentencing report, it can be understood as a supplementary pre-sentencing report on questions of Indigeneity. Reforms have also encompassed the creation of "*Gladue* Courts" for some defendants, namely plea and resolution courts where diversion is a possible outcome. The first *Gladue* Court was created in Toronto in 2001 and they have since expanded to various other jurisdictions. Defendants must plead guilty before a case is heard in a *Gladue* Court, as opposed to an ordinary criminal court, where the *Gladue* principles should still be considered at sentencing following a guilty plea or trial conviction. DEP'T JUST. CAN., OVERREPRESENTATION OF INDIGENOUS PEOPLE IN THE CANADIAN CRIMINAL JUSTICE SYSTEM: CAUSES AND RESPONSES § 5.2 (2019), https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf [https://perma.cc/VK3S-V9BG] [hereinafter DEP'T JUST. CAN., OVERREPRESENTATION OF INDIGENOUS PEOPLE IN THE CANADIAN CRIMINAL JUSTICE SYSTEM].

16. "To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples." *Ipeelee* (Can.), *supra* note 15, para. 60.

17. *See generally* DEP'T JUST. CAN., OVERREPRESENTATION OF INDIGENOUS PEOPLE IN THE CANADIAN CRIMINAL JUSTICE SYSTEM, *supra* note 15. For a discussion of data on this issue, see also *infra* note 288 and accompanying text.

18. *See Government of Canada Takes Steps to Address Overrepresentation of Indigenous, Black, and Racialized People in the Criminal Justice System*, PUB. SAFETY CAN. (Mar. 21, 2023), https://www.canada.ca/en/public-safety-canada/news/2023/03/government-of-canada-takes-steps-to-address-overrepresentation-of-indigenous-black-and-racialized-people-in-the-criminal-justice-system.html [https://perma.cc/6HXE-PC2L] [hereinafter *Overrepresentation of Indigenous and Black Prisoners*, PUB. SAFETY CAN.].

19. McCleskey v. Kemp, 481 U.S. 279 (1987); *see infra* Section V.A.

per se.[20] The situation might someday change in America, at least at the state level, as suggested by Washington State's abolition of the death penalty in *Gregory*—a landmark 2018 decision that deviated from *McCleskey* in accepting evidence of systemic racism.[21] Yet the Washington State Supreme Court only reached its conclusion under state law, plausibly because *McCleskey* would have proved an insurmountable obstacle under U.S. constitutional law.[22] *McCleskey* and its logic will likely last for years given that the U.S. Supreme Court currently has a 6-3, superconservative supermajority.[23]

This divergence does not merely stem from the fact that Canada, which abolished the death penalty in 1976,[24] has shown far more restraint than the United States in its use of imprisonment.[25] Divergence also reflects a choice by the Canadian government to recognize acute disparities as a social problem requiring a legal remedy. The Canadian Parliament has acted in this area since 1996, as social change has not solely originated in the courts.[26] American legislators at the federal or state level have done comparatively little to address racial disparities or inequalities in sentencing,[27] despite the *McCleskey* majority's reasoning that such challenges "are best presented to the legislative bodies."[28]

While *McCleskey* and the Canadian jurisprudence may be distinguished in other ways,[29] the difference does not stem from a lack of debate about these matters in American society. Many Americans have long called for both the end of mass incarceration and racial inequities in sentencing, from intentional

---

20. The *McCleskey* standard "not only preserved the death penalty, it also made it very difficult for capital defendants to bring race-based constitutional claims in the future." JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 163 (2015). *McCleskey*'s broad holding likewise impeded such challenges against imprisonment. *See infra* note 451 and accompanying text.

21. State v. Gregory, 427 P.3d 621 (Wash. 2018).

22. *See* Carol S. Steiker & Jordan M. Steiker, *Little* Furmans *Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1679-80 (2022), https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2023/01/Steiker-Steiker-final.pdf [https://perma.cc/B5K2-JYSK].

23. *See* Adam Liptak & Alicia Parlapiano, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html [https://perma.cc/5XBT-V3YF] (analyzing data on the Court's rightward evolution).

24. Mugambi Jouet, *The Day Canada Said No to the Death Penalty in the United States: Innocence, Dignity, and the Evolution of Abolitionism*, 55 UBC L. REV. 439, 441 (2022), https://www.canlii.org/w/canlii/2022CanLIIDocs4352.pdf [https://perma.cc/HH2K-EVE7] [hereinafter Jouet, *The Day Canada Said No to the Death Penalty in the United States*].

25. *See* Cheryl M. Webster & Anthony Doob, *Penal Optimism: Understanding American Mass Imprisonment from a Canadian Perspective*, *in* AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT 121 (Kevin R. Reitz ed., 2017).

26. *See supra* note 13 and accompanying text; *see also infra* Section III.D.

27. *See* Doris Marie Provine, *Sentencing Policy and Racial Justice*, *in* SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 483 (Cyrus Tata & Neil Hutton eds., 2016).

28. McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

29. Section V.A. offers a closer comparison of *McCleskey* and the Canadian jurisprudence.

discrimination to unconscious bias and systemic racism.[30] Although various federal and state governments have addressed racial disparities, including the Obama and Biden administrations, official efforts have had limited impact so far.[31] U.S. imprisonment levels remain exceptionally high, notwithstanding an encouraging decline since approximately the 2010s.[32] America no longer has the world's highest incarceration rate but remains in sixth place.[33] The advent of mass incarceration in the United States has led to a colossal gap with peer Western democracies, whose penal systems are not remotely as harsh.[34] The United States additionally stands out as the only Western democracy to retain capital punishment, which more than two-thirds of all countries worldwide have abolished in law or practice.[35] Life without parole—the death penalty through

30. *See, e.g.*, Provine, *supra* note 27, at 484 ("The US experience demonstrates that eliminating racial disadvantage in criminal justice requires more than neutral laws and elimination of broad judicial discretion to set sentences."); *see also supra* note 8 and accompanying text.

31. *See generally* President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [https://perma.cc/2BV3-4637]; *Advancing Equity and Racial Justice Through the Federal Government*, WHITE HOUSE, https://www.whitehouse.gov/equity/#criminal-justice [https://perma.cc/CN6M-E9QF] (last visited Jan. 30, 2024) (outlining the Biden Administration's racial justice initiatives); Colleen V. Chien, W. David Ball & William A. Sundstrom, *Proving Actionable Racial Disparity Under the California Racial Justice Act*, 75 U.C. L.J. 1, 3-4, 11-15 (2023) (discussing the very limited impact of separate "Racial Justice Acts" adopted by state legislatures in California (2020), Kentucky (1998), and North Carolina (2009 but repealed in 2013)); Roberts, Watson & Hester, *supra* note 11, at 348-56 (describing declining racial disparities in incarceration from 2000 to 2020, although African Americans remain sharply overrepresented among prisoners).

32. *United States of America*, WORLD PRISON BRIEF, https://www.prisonstudies.org/country/united-states-america [https://perma.cc/C2Z2-YDPN] (last visited July 7, 2024). "By year end 2021, the U.S. prison population had declined 25% since reaching its peak in 2009. Still, the 1.2 million people imprisoned in 2021 were nearly six times the prison population 50 years ago, before the prison population began its dramatic growth." NAZGOL GHANDNOOSH, SENT'G PROJECT, ENDING 50 YEARS OF MASS INCARCERATION: URGENT REFORM NEEDED TO PROTECT FUTURE GENERATIONS 1 (2023), https://www.sentencingproject.org/app/uploads/2023/02/Ending-50-Years-of-Mass-Incarceration-Urgent-Reform-Needed-to-Protect-Future-Generations.pdf [https://perma.cc/9SRH-72XL].

33. As of July 2024, El Salvador, Cuba, Rwanda, Turkmenistan, and American Samoa had higher incarceration rates than the United States. *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [https://perma.cc/PD6L-DT3H] (last visited July 27, 2024).

34. *See infra* Table 3.

35. *See* AMNESTY INT'L, *Abolitionist and Retentionist Countries as of December 2022* (May 2023), https://www.amnesty.org/en/documents/act50/6591/2023/en/ [https://perma.cc/NX3H-M74N].

time—has further been abolished in continental Europe[36] and Canada,[37] even as it is routinely imposed in America.[38]

If the death penalty and mass incarceration are peculiar American features in the modern Western world, systemic racism is not. Racial and ethnic minorities tend to be highly over-incarcerated in other Western democracies,[39] namely in Canada, Europe, Australia, and New Zealand.[40] That does not mean that the concept of "race" as employed in the United States is universal or that racial issues take the same form everywhere.[41] Race has generally played a distinctive role in American history, partly because the United States has historically been the Western democracy with the highest proportion of racial and ethnic minorities.[42] Still, the growing demographic diversity of other Western societies, partly due to immigration from former colonies, has made discrimination and inequality more salient issues there.[43]

---

36. Vinter v. United Kingdom, 2013-III Eur. Ct. H.R. 317, https://hudoc.echr.coe.int/eng?i=001-122664 [https://perma.cc/E86G-MU8Q] [hereinafter *Vinter* (ECtHR)]. As the United Kingdom has refused to follow *Vinter*, the case can be said to have abolished life without parole in continental Europe so far. *See* Mugambi Jouet, *The Abolition and Retention of Life Without Parole in Europe: A Comparative and Historical Perspective*, 4 EUR. CONVENTION HUM. RTS. L. REV. 306 (2023), https://brill.com/view/journals/eclr/4/3/article-p306_006.xml [https://perma.cc/5A3J-TB8E] [hereinafter Jouet, *The Abolition and Retention of Life Without Parole in Europe*]. On the *Vinter* jurisprudence, see also *infra* note 405 and accompanying text.

37. R. v. Bissonnette, 2022 SCC 23 (Can.) [hereinafter *Bissonnette* (Can.)]. On *Bissonnette*, see also note 410 and accompanying text.

38. *See generally* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

39. *See generally* SUSAN J. TERRIO, JUDGING MOHAMMED: JUVENILE DELINQUENCY, IMMIGRATION, AND EXCLUSION AT THE PARIS PALACE OF JUSTICE (2009); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 79 (2003); Harry Blagg & Thalia Anthony, *'Stone Walls Do Not a Prison Make': Bare Life and the Carceral Archipelago in Colonial and Postcolonial Societies*, *in* HUMAN RIGHTS AND INCARCERATION: CRITICAL EXPLORATIONS 257 (Elizabeth Stanley ed., 2018); Elizabeth Stanley & Riki Mihaere, *Challenging Māori Imprisonment and Human Rights Ritualism*, *in* HUMAN RIGHTS AND INCARCERATION, *supra* note 39, at 79.

40. The "West" is less a geographic area than a sociopolitical construct. Its understanding and boundaries have shifted over time but is usually defined as the United States, Canada, Australia, New Zealand, and European nations, except Russia and states in its sphere of influence like Belarus. *See, e.g.*, Benjamin Herborth & Gunther Hellmann, *Introduction*, *in* USES OF 'THE WEST' 1, 1 (Benjamin Herborth & Gunther Hellmann eds., 2017).

41. *See, e.g.*, HENRY LOUIS GATES, JR., BLACK IN LATIN AMERICA 10 (2011) (describing how Latin American societies differ from the United States in their conceptions of race and ethnicity); CAROLE REYNAUD-PALIGOT, DE L'IDENTITÉ NATIONALE: SCIENCE, RACE ET POLITIQUE EN EUROPE ET AUX ÉTATS-UNIS XIX$^{E}$-XX$^{E}$ SIÈCLE (2011) (comparing America and France's historical approach to race); Gillian Stevens, Hiromi Ishizawa & Douglas Grbic, *Measuring Race and Ethnicity in the Censuses of Australia, Canada, and the United States: Parallels and Paradoxes*, 42 CAN. STUD. POPULATION 13, 14–18 (2015) (discussing historical shifts and debates regarding the collection of census data on "race" in America, Canada, and Australia).

42. *See* MUGAMBI JOUET, EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER 12–13, 186, 191 (2017) [hereinafter JOUET, EXCEPTIONAL AMERICA].

43. *Id.*

New questions raised by modern immigration are compounded by age-old questions of discrimination against Indigenous peoples in Canada, Australia, and New Zealand, which are analogous to the situation of both Indigenous peoples and African Americans in the United States. Indigenous peoples represent a huge proportion of the penal population in Canada, Australia, and New Zealand.[44] Even though Indigenous peoples are a smaller proportion of the overall U.S. population and consequently prisoner population,[45] they are disproportionately incarcerated and in a dire predicament.[46] A parallel may be drawn between the situation of Native Americans and African Americans, who are among the peoples who have been in the United States the longest. Many Black Americans have ancestors who were enslaved and brought from Africa before the United States reached independence.[47] Long-term factors have thus contributed to the disproportionate incarceration of both Indigenous peoples and African Americans.

The predicament of other minorities, such as Asian Americans and Latinos,[48] equally deserves attention in light of historical and social hardships that have influenced the life paths of prisoners from multiple groups.[49] Weighing evidence of systemic racism as mitigation should not be treated as a zero-sum game where the circumstances of some individuals or communities are considered to the exclusion of others. By the same token, this process does not amount to disregarding socioeconomic disadvantages or other hardships faced by many white defendants, which are also relevant at sentencing.

How should one understand the role of systemic racism as mitigation at sentencing? At one end of the political spectrum, some oppose such reforms on the ground that they create a new type of penal system resting on preferential treatment for minorities—a misconception reflecting skepticism about the existence of systemic racism and a misunderstanding of how Canadian courts treat

---

44. *See infra* Tables 1 and 2.

45. *Id.*

46. Jeffery T. Ulmer & Mindy S. Bradley, *Criminal Justice in Indian Country: A Theoretical and Empirical Agenda*, 2 ANN. REV. CRIMINOLOGY 337, 338 (2019); Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POL'Y INITIATIVE (Oct. 8, 2021), https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/ [https://perma.cc/N3LD-5RNA].

47. J. David Hacker, *From '20. and Odd' to 10 Million: The Growth of the Slave Population in the United States*, 41 SLAVERY & ABOLITION 840, 843–44 (2020). At the same time, over eight in ten slaves who lived in the United States after independence were born or brought to the United States in the nineteenth century. *Id.* at 850.

48. *See, e.g.*, FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (2006); ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943 (2002).

49. *See generally* BEHIND BARS: LATINO/AS AND PRISON IN THE UNITED STATES (Suzanne Oboler ed., 2009); OTHER: AN ASIAN & PACIFIC ISLANDER PRISONERS' ANTHOLOGY (Eddy Zheng ed., 2007); Angela E. Oh & Karen Umemoto, *Asian Americans and Pacific Islanders: From Incarceration to Re-Entry*, 31 AMERASIA J. 43 (2005).

this evidence.[50] At the other end of the political spectrum, some may see such reforms as a prelude to the abolition of police and prisons due to irremediable systemic racism[51]—an implausible revolution considering that penal systems in various forms exist throughout the modern world.[52] Even the least repressive and most social-democratic countries are not heading toward the abolition of their penal systems.[53] Yet these societies show that it is possible to develop alternatives to incarceration and exercise restraint in imprisonment, including for murder and other grave crimes, while adopting rehabilitative sentencing models.[54]

In the end, a tension may always remain between rehabilitation and imprisonment,[55] just as one exists between the rights of offenders and their victims.[56] Liberal democracies can mend these tensions by embracing a

50. For example, Pierrette Venne, a Canadian legislator and member of the Bloc Québécois party, expressed the following objections during a 1994 legislative debate: "Why should an Aboriginal convicted of murder, rape, assault or of uttering threats not be liable to imprisonment like any other citizen of this country? Can we replace all this with a parallel justice, an ethnic justice, a cultural justice? Where would it stop? Where does this horror come from?" *Ipeelee* (Can.), *supra* note 15, para. 70 (Can.) (quoting House of Commons Debates, 35-1, No. 93 (Sept. 20, 1994) at 5876).

51. *See, e.g.*, *Introduction*, 132 HARV. L. REV. 1568 (2019) (introducing issue on prison and police abolition); *see also* Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245 (2023) (analyzing debates over prison abolition in modern America).

52. The World Prison Brief tallies data on imprisonment in over two-hundred jurisdictions. As of 2024, the country with the highest incarceration rate was El Salvador with 1,086 prisoners per 100,000 residents, whereas the microstate of Liechtenstein was 223rd with a rate of 15 prisoners per 100,000 residents. *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, *supra* note 33.

53. *See, e.g.*, SCANDINAVIAN PENAL HISTORY, CULTURE AND PRISON PRACTICE (Peter Scharff Smith & Thomas Ugelvik eds, 2017) (exploring the evolution of criminal justice in Scandinavian nations).

54. *See id.*

55. The European Prison Rules issued by the Council of Europe—the most important body for the protection of human rights in Europe—notably focus on rehabilitation in view of social reentry. The Rules openly acknowledge the "unavoidable, built-in contradiction between society's motives for locking away a person and the desire to, at the same time, rehabilitate him to a normal life. Prison shall therefore be formed so as to promote an inmate's readjustment to society and to work against the harmful effects of the deprivation of liberty." COUNCIL OF EUR., EUROPEAN PRISON RULES 109 (2006) (quoting the Swedish Prison and Probation Service); *see also* Mugambi Jouet, *Foucault, Prison, and Human Rights: A Dialectic of Theory and Criminal Justice Reform*, 26 THEORETICAL CRIMINOLOGY 202 (2022) (analyzing the historical debate over imprisonment, rehabilitation, and human rights).

56. Émile Durkheim, the renowned French sociologist, addressed this inherent tension in his theory of punishment: "[T]here is a veritable and irremediable contradiction in avenging the human dignity offended in the person of the victim, by violating it in the person of the culprit. The only way, not to end the contradiction (because it is rather not erasable), but to soften it, is to soften the punishment as much as possible." Émile Durkheim, *Deux lois de l'évolution pénale*, 4 ANNÉE SOCIOLOGIQUE 65, 90 (1900) (my translation). Under this theory, the offender and the victim draw closer to one another at a human level because the sentence recognizes the victim's humanity without dehumanizing the offender. *See* Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 729–30 (2019) (applying Durkheim's theory to modern sentencing) [hereinafter Jouet, *Mass Incarceration Paradigm Shift*].

humanistic and rehabilitative approach to criminal justice. Most Western democracies are already moving in this direction. Recall that they have all categorically abolished the death penalty, with the exception of the United States.[57] Canada and continental Europe have further abolished life without parole.[58] But in addition to eliminating merciless punishments, liberal democracies must better address structural inequalities that lead both minorities and the poor to disproportionately end behind bars.

Once situated in a wider historical context, the major developments analyzed in this Article do not only reflect contemporary debates about systemic racism. Rather, these developments may be understood within the long-term historical evolution of criminal punishment in the Western world. Over generations, Western democracies have developed the principle that a criminal sentence should be individualized and proportional to a defendant's culpability.[59] This intricate evolution has diverse origins but is largely traceable to the gradual humanization of criminal punishment since the Enlightenment.[60] Individualization and proportionality can indeed prevent sentences from being excessive or degrading, such as by failing to consider mitigation, reducing defendants to their worse act or barring social reentry based on rehabilitation.[61] Considering evidence of systemic racism or social inequality at sentencing is a means of fulfilling these age-old sentencing principles by better assessing a defendant's circumstances.

Such mitigation can be understood as a new form of social-context evidence—a type of evidence that has long been found in pre-sentencing reports prepared by court personnel or in submissions by defense counsel.[62] Throughout Western democracies, social-context evidence has encompassed information aiming to shed light on a defendant's moral culpability and prospects for

57. *See* AMNESTY INT'L, *supra* note 35.

58. *See* Jouet, *The Abolition and Retention of Life Without Parole in Europe*, *supra* note 36, at 307, 309–10.

59. *See generally* THOMAS O'MALLEY, SENTENCING LAW AND PRACTICE ch. 4 (3d. ed. 2016).

60. *See generally* Mugambi Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, 71 AM. J. COMP. L. 46 (2023) [hereinafter Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*].

61. *See generally* O'MALLEY, *supra* note 59, ch. 4.

62. *See, e.g.*, AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE 18-5.4 (3d ed. 1994) ("A full presentence report may contain [among other factors]: . . . A description of personal characteristics of an individual offender, even though not material to the offender's culpability, that may be taken into account in determination of the sentence"); Emad H. Atiq & Erin L. Miller, *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 AM. J. CRIM. L. 167 (2018) (analyzing the use of evidence of severe environmental deprivation as mitigation in sentencing); Talia Peleg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193, 258–60 (2019) (describing psychosocial reports prepared by social workers assisting defense counsel).

rehabilitation.[63] This commonly includes evidence that the defendant faced socioeconomic disadvantages that are among the root social causes of crime, such as poverty, limited educational opportunities, inadequate health care, familial hardships, and other criminogenic circumstances. These circumstances disproportionately impact racial and ethnic minorities but also affect socioeconomically disadvantaged whites.[64] Skilled defense counsel and social workers have presented such evidence to sentencing judges for many years.[65] Illustratively, this practice is extensive in modern U.S. capital cases where sentencing entails weighing aggravating and mitigating circumstances.[66] Although social-context evidence can be nil in death-penalty proceedings when defendants are poorly represented, competent counsel can devote hours to mounting comprehensive records that humanize offenders and help explain their wrongdoing without excusing it.[67]

The developments in Canada concern the *kind* of social-context evidence that is now legally recognized at sentencing. Alongside the type of evidence that has long been used, including in the cases of poor whites, reformers seek to marshal explicit evidence of the discrimination and marginalization that racial and ethnic minorities face. That is what this Article refers to as introducing evidence of "systemic racism" as mitigation at sentencing.

Canadian courts appear to mainly treat this evidence as a means of better understanding root social causes of crime in order to sentence more equally, humanely, and effectively. We will see that they have rejected the notion that this evidence should serve as an excuse or "race-based discount."[68] Nor does consideration of this evidence appear to be primarily treated as a remedy for past discrimination. The jurisprudence nonetheless considers that a history of

63. *See generally* MARC ANCEL, SOCIAL DEFENCE: A MODERN APPROACH TO CRIMINAL PROBLEMS 153–60 (John Wilson trans., 1965) (describing a historical shift toward rehabilitation based on an assessment of the defendant, especially since the twentieth century). *But see* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 6 (1990) (discussing mounting skepticism toward rehabilitation and treatment as sentencing principles toward the end of the twentieth century); *see also* O'MALLEY, *supra* note 59, ch. 4 (surveying the intersection of sentence proportionality and an offender's personal circumstances in modern Western democracies).

64. *See, e.g.*, HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993) (recounting the life path of an indigent white death-row prisoner in Louisiana).

65. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 608 (1978) ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."); *Morris* (ONCA), *supra* note 2, paras. 106–07 (describing "the individualized offence and offender-specific approach to sentencing that has always held sway in Canadian courts"); *see also* O'MALLEY, *supra* note 59, ch. 4 (discussing proportionality in punishment in Western democracies).

66. *See* WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 105–43 (2006).

67. *See* BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE ch. 5 (2017).

68. *See Ipeelee* (Can.), *supra* note 15, paras. 64, 70, 75; *Morris* (ONCA), *supra* note 2, para. 97.

persecution and marginalization is relevant to understanding a defendant's circumstances and root social causes of crime.[69]

Whereas courts throughout the United States have largely rejected explicit evidence of systemic racism or social inequality as mitigation at sentencing,[70] modern Canadian courts are finding it admissible, relevant, and probative. "Consistent with the rules of admissibility, a generous gateway for the admission of objective and balanced social context evidence should be provided," as the Ontario Court of Appeal underlined.[71]

At sentencing, the crime and the defendant's criminal record have the capacity to eclipse all other considerations, especially if violence was involved. Social-context evidence can consequently offer a fuller picture of an offender. Relatedly, such evidence may serve to check conscious or unconscious bias. For example, psychological studies suggest that Black offenders are likelier to be perceived as evil, irredeemable or undeserving of mercy.[72] Such bias seems less likely to affect a case's outcome when mitigation humanizes a defendant and situates their crime in a wider social context.[73]

Throughout the Article, we will further explore the concept of mitigation in criminal punishment. Mitigation should not be equated with innocence, as the premise at sentencing is that the defendant is guilty. Nor should mitigation be misunderstood as fully negating individual responsibility or human agency. Rather, mitigation is relevant to determining an offender's degree of moral culpability and their appropriate sentence. In particular, mitigation should inform how a judge weighs competing sentencing goals, such as retribution, denunciation, deterrence, incapacitation, and rehabilitation. Systemic racism and social inequality may be considered as mitigation as part of this holistic process.

Introducing evidence of systemic racism or social inequality as mitigation at sentencing can ultimately serve three important functions: i) enhancing the value of human rights and human dignity by weighing against the tendency to dehumanize criminals; ii) helping remedy discrimination, disparity, and inequality in sentencing; and iii) avoiding excessively harsh punishments by favoring shorter, sounder sentences or alternatives to incarceration. While these steps alone will not eliminate the over-incarceration of minorities, which might persist to an

---

69. *See infra* note 221 and accompanying text.

70. *See infra* Section V.A.

71. *Morris* (ONCA), *supra* note 2, para. 13.

72. *See* Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383 (2006) (psychological study finding that support for executing Black prisoners increases if they are darker-skinned).

73. *See e.g.*, GARRETT, *supra* note 67, ch. 5 (documenting the success of mitigation by skillful, well-funded public defenders in capital cases).

extent in any society, they have the potential to reduce it and contribute to fairer penal systems.

The thesis of this Article is therefore two-fold. On one level, it demonstrates how these three functions could reshape criminal sentencing. On another level, it argues that the ongoing developments in Canada reflect wider shifts in the long-term evolution of criminal justice that can be understood through historical and comparative analysis.

Tellingly, Australia and New Zealand have also moved toward mitigating sentences based on social and historical disadvantages for Indigenous defendants,[74] bolstering the thesis of a wider historical shift in Western societies. In both of these countries, such mitigation does not rest upon the concept of "systemic racism" but mostly on the marginalization, deprivation, and cultural background of Indigenous peoples.[75] As the concept of "race" appears more salient in contemporary America and Canada,[76] this Article employs the broader concept of mitigation based on "social inequality" alongside "systemic racism" when discussing the situation of diverse Western democracies.

Remarkably, New Zealand has adopted mathematical sentencing "discounts" for Māori, which may reduce the length of prison terms by fifteen percent.[77] The discount is not automatic and may hinge upon defense counsel's ability to present mitigation.[78] That said, this approach would sit uneasily with the evolution of modern American constitutionalism, which has rejected mathematical formulas or

74. THALIA ANTHONY, INDIGENOUS PEOPLE, CRIME AND PUNISHMENT 11 (2013); Elena Marchetti & Thalia Anthony, *Sentencing Indigenous Offenders in Canada, Australia, and New Zealand*, *in* OXFORD HANDBOOK TOPICS IN CRIMINOLOGY AND CRIMINAL JUSTICE (2016), https://doi.org/10.1093/oxfordhb/9780199935383.013.39 [https://perma.cc/5EMN-KRVU]; JEREMY FINN & DEBRA WILSON, SENTENCING LAW IN NEW ZEALAND 304–07 (2021); James C. Oleson, *Sentencing Theories, Practices and Trends*, *in* PALGRAVE HANDBOOK OF AUSTRALIAN AND NEW ZEALAND CRIMINOLOGY, CRIME AND JUSTICE 363, 367 (Antje Decket & Rick Sarre eds., 2017); Kate Warner, *Equality Before the Law: Racial and Social Background Factors as Sources of Mitigation at Sentencing*, *in* MITIGATION AND AGGRAVATION AT SENTENCING 124, 124 (Julian V. Roberts ed., 2011).

75. See the sources cited in the prior footnote.

76. *See infra* Section V.B.

77. *See* Tipene v. R [2021] NZCA 565 at [23] (N.Z.) ("Recent decisions of this Court have approved discounts of some 15 per cent as being appropriate in cases of serious offending in the context of a culturally alienated and marginalised upbringing."). This jurisprudence is discussed in Section V.B.

78. FINN & WILSON, *supra* note 74, at 304–07; *see also* Anthony Hopkins, *The Relevance of Aboriginality in Sentencing: 'Sentencing a Person for Who They Are*,' 16 AUSTL. INDIGENOUS L. REV. 37, 48 (2012) (underlining that, in Australian sentencing, whether "an offender's Aboriginality will be explored largely depends on the resources available to the lawyer and his or her capacity to [do so]").

quotas as a remedy to racial inequality.[79] Similarly, remember that Canada has rejected the idea of a "race-based discount" in its jurisprudence concerning mitigation for Indigenous and Black defendants.[80] Even though sentence discounts in New Zealand are not exclusive to Māori and may apply to defendants of any race or ethnicity,[81] this approach might prove less exportable than the more holistic one found in Canada.

Canada ultimately remains the country that is arguably making the most concerted effort to tackle systemic racism in criminal punishment today.[82] That obviously does not erase the sharp injustices in Canada's past and present, especially against Indigenous peoples,[83] yet these developments must be brought to light. Meanwhile, the United States is arguably the country that has faced the most vigorous *debate* over systemic racism in criminal justice,[84] despite persistent gridlock over reform due to disagreement about the nature of the problem or even its existence.[85]

In an extraordinary decision, *United States v. Leonard*, Canada even refused to extradite to America a criminal defendant in a cross-border drug trafficking case because his Indigeneity and related mitigating circumstances would have been ignored in the U.S. penal system.[86] The Ontario Court of Appeal held that "[i]t would be contrary to the principles of fundamental justice to surrender this young Aboriginal first-offender to face a lengthy, crushing sentence in the United States that would almost certainly sever his ties to his family and Aboriginal culture and community with which he so closely identifies."[87]

---

79. The U.S. Supreme Court's landmark *Bakke* decision held that the affirmative action program at U.C. Davis's medical school was unconstitutional because, in employing a fixed "quota" or "goal," "it is a line drawn on the basis of race and ethnic status." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (plurality opinion). In 2023, the Court expanded upon this reasoning to find university affirmative action policies unconstitutional. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

80. *Ipeelee* (Can.), *supra* note 15, paras. 64, 70, 75; *see also Morris* (ONCA), *supra* note 2, para. 97; *infra* note 214 and accompanying text.

81. Zhang v. R [2019] NZCA 507 at [162] (N.Z.).

82. *See., e.g.*, Hopkins, *supra* note 78, at 49 (arguing that Canada is ahead of Australia in formally requiring and funding *Gladue* reports for Indigenous defendants).

83. *See generally* HAROLD R. JOHNSON, PEACE AND GOOD ORDER: THE CASE FOR INDIGENOUS JUSTICE IN CANADA (2019).

84. *See generally* OWUSU-BEMPAH & GABBIDON, *supra* note 8.

85. *See generally* Provine, *supra* note 27, at 484 (discussing how politicians commonly deny the existence of systemic racism or inequality, "implicitly suggesting that African-Americans are simply more prone to crime").

86. United States v. Leonard, 2012 ONCA 622 (Can. Ont.) [hereinafter *Leonard* (Can. Ont.)]. The ruling overruled the Canadian Minister of Justice's extradition order. *Id.* paras. 2, 100.

87. *Id.* para. 94. For similar reasons, the Court likewise refused to extradite the alleged accomplice. *Id.* paras. 54–65.

Indigeneity and related mitigating circumstances are considerations in the United States within Tribal courts,[88] which are increasingly gravitating toward restorative justice, including peacemaking, family-group conferencing, sentencing circles, courts of elders, Healing to Wellness Courts, among other non-adversarial and non-punitive approaches.[89] But American Tribal courts possess limited jurisdiction over criminal cases[90] and cannot impose sentences longer than three years.[91] More serious criminal cases involving Indigenous defendants fall in state or federal courts, which can inflict draconian sentences and will readily ignore Indigeneity and relevant mitigation, as the Ontario Court of Appeal stressed in *United States v. Leonard* when refusing extradition from Canada.[92] Surely, Indigenous peoples in Canada also have limited sovereignty, hindering their capacity to create their own courts or pursue Indigenous legal traditions.[93] However, the object of this Article is what unfolds in mainstream criminal courts. Alongside Indigeneity, Canadian law is incrementally recognizing the impact of race and ethnicity to address inequality in criminal justice.

The Article thus speaks to audiences in multiple countries. For scholars focused on the United States in particular, it notably captures how many of the social changes that American reformers have advocated for decades, often to no

88. *See* Ulmer & Bradley, *supra* note 46, at 339 ("Unlike other disadvantaged groups, Native Americans' status as both tribal nationals and US citizens make them uniquely subject to interlocking forms of institutional power").

89. Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CAL. L. REV. 103, 108, 136-41 (2024).

90. *Id.*, *passim*. Moreover, "[m]ost modern Tribal courts are largely a product of the federal government and are thereby divorced from methods of traditional dispute resolution. Consequently, Tribal courts may not necessarily incorporate Indigenous worldviews or philosophies." *Id.* at 111-12.

91. *Id.* at 124. The Indian Civil Rights Act (1968) initially limited Tribal courts' sentencing authority to "imprisonment for a term of six months, a fine of $500, or both, and was later expanded to a year, a fine of $5,000, or both. In 2010, Congress expanded the Tribal sentencing limitation to three years . . . ." *Id.* (citing, *inter alia*, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2279 (codified at 25 U.S.C. § 1302(b)-(c))). *See also* Ulmer & Bradley, *supra* note 46, at 339 ("Given the historical context underlying US government–tribal relations, it is not surprising that federal law enforcement on tribal lands and federal district courts' distinct jurisdiction over Native American criminal defendants have long been at the center of considerable legal and political confusion and conflict.").

92. "The American justice system does not take Aboriginality into account when determining sentence and, according to the affidavit of the American criminal defence lawyer submitted to the minister by Leonard, the U.S. prisons to which Leonard would likely be assigned if convicted lack culturally appropriate programs for Aboriginal inmates." *Leonard* (Can. Ont.), *supra* note 86, para 11; *see also* Nasrin Camilla Akbari, *The* Gladue *Approach: Addressing Indigenous Overincarceration Through Sentencing Reform*, 98 N.Y.U. L. REV. 198 (2023) (comparing Canada's *Gladue* principles to the sentencing of Indigenous peoples in the United States).

93. *See* Hadley Friedland, *Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws*, 11 INDIGENOUS L.J. 1, 4 (2012) (discussing the absence of a tribal court system in Canada, unlike in the United States).

avail, are actually taking place in neighboring Canada.[94] Nowadays, U.S. public officials and experts increasingly look to Scandinavia as a model for change away from mass incarceration. Prisons in California, Oregon, Pennsylvania, and other states have begun implementing Scandinavian-inspired reforms.[95] But Canada is also worth learning from as a country at the United States' doorstep.

Naturally, parallels across societies do not mean that their histories, cultures, and social conditions are identical. For instance, the situation of Indigenous peoples should not be simply conflated with the experience of other minorities, such as Black people in America, Canada or Europe. Nor are these minority groups homogeneous, as they comprise a wide range of cultures and individual experiences. White persons in each society are not homogeneous either, given a diversity of origin and socioeconomic circumstances. The object of this Article is not to reify rigid categories or narrow representations.[96] That being noted, the situation of racial and ethnic minorities in diverse Western societies should be brought into comparison, as they share historical and social circumstances that have led them to disproportionately end up behind bars.[97]

The Article is structured as follows. Section I describes the over-incarceration of minorities in increasingly diverse Western democracies. Section II turns to *Morris*'s genesis as a test case with wider implications in the history of criminal punishment. Section III digs deeper into the evolution of the Canadian jurisprudence on systemic racism as mitigation in sentencing—and how it raises issues that will plausibly arise elsewhere. Section IV situates these developments

---

94. *See infra* Section V.A.; *see also* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 138, 207 (2009) (calling for America to reconsider the sentencing of minorities by drawing upon Canada's approach to sentencing Indigenous people).

95. *See* Cyrus Ahalt, Craig Haney, Kim Ekhaugen & Brie Williams, *Role of a US-Norway Exchange in Placing Health and Well-Being at the Center of US Prison Reform*, 110 AM. J. PUB. HEALTH S27 (2020); David H. Cloud, Dallas Augustine, Cyrus Ahalt, Craig Haney, Lisa Peterson, Colby Braun & Brie Williams, *"We Just Needed to Open the Door": A Case Study of the Quest to End Solitary Confinement in North Dakota*, 9 HEALTH & JUST. 28 (2021); Jordan M. Hyatt, Synøve N. Andersen, Steven L. Chanenson, Veronica Horowitz & Christopher Uggen, *"We Can Actually Do This": Adapting Scandinavian Correctional Culture in Pennsylvania*, 58 AM. CRIM. L. REV. 1715 (2021); Karen Bouffard, *States Put Norway-Style Prison Reforms to Work in U.S.*, DET. NEWS (Oct. 11, 2019), https://www.detroitnews.com/story/news/special-reports/2019/10/11/states-put-norway-style-prison-reforms-to-work/1682876001/ [https://perma.cc/X2E7-8LAR]; Anita Chabria, *California to Transform Infamous San Quentin Prison with Scandinavian Ideas, Rehab Focus*, L.A. TIMES (Mar. 16, 2023), https://www.latimes.com/california/story/2023-03-16/newsom-wants-to-transform-san-quentin-using-a-scandinavian-model [https://perma.cc/8NYV-46PY]; Cinnamon Janzer , *North Dakota Reforms its Prisons, Norwegian Style*, U.S. NEWS & WORLD REPS. (Feb. 22, 2019), https://www.usnews.com/news/best-states/articles/2019-02-22/inspired-by-norways-approach-north-dakota-reforms-its-prisons [https://perma.cc/3GAL-EMJ3].

96. *See* KWAME ANTHONY APPIAH, THE LIES THAT BIND: RETHINKING IDENTITY (2018) (philosophical study analyzing how race and other conceptions of identity are social constructs that have taken distinct forms throughout history).

97. *See supra* note 39.

in historical context, theorizing how they are an extension of longstanding humanistic sentencing principles and the Enlightenment. The Article's final part discusses how other societies have already pushed in the same direction as *Morris* in past years, while recounting the setbacks of reformers in the United States, Australia, and New Zealand—setbacks that also shed light on prospects for social change.

The future of criminal justice is among the great sociopolitical challenges facing increasingly diverse societies.[98] The relative normalization of authoritarian populism as a political movement[99] may exacerbate penal populism, such as campaigning or governing based on "tough-on-crime" platforms with racial dog whistles about "dangerous minorities."[100] Simultaneously, growing demographic diversity will plausibly lead to mounting demands for social equality and racial justice, including in the sphere of criminal justice. These contrary movements may lead to irreconcilable perspectives and political gridlock over penal reform. Yet diverse societies might find common ground in universal principles, from equality to human rights rooted in human dignity. We will see that the longstanding sentencing principles of individualization and proportionality enable the humanization of defendants; and that introducing social-context evidence of systemic racism or social inequality as mitigation can enhance this process. Innovation can entail blending the old and the new.

## I. INCARCERATION IN INCREASINGLY DIVERSE DEMOCRACIES

The issues at the heart of this Article will remain important in the foreseeable future due to the growing demographic diversity displayed in Table 1. Minorities are projected to become the majority of the U.S. population by 2045.[101] Canada too is growing more and more diverse, as are the United Kingdom, France, and

98. *See* YASCHA MOUNK, THE GREAT EXPERIMENT: WHY DIVERSE DEMOCRACIES FALL APART AND HOW THEY CAN ENDURE (2022).

99. *See id.* at 1–2, 183; TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); JAN-WERNER MÜLLER, WHAT IS POPULISM? (Penguin 2017).

100. *See generally* JONATHAN SIMON: GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

101. Jonathan Vespa, Lauren Medina & David M. Armstrong, U.S. CENSUS BUREAU, DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060, at 13 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf [https://perma.cc/47MF-6KQP] ("Beginning in 2045, [non-Hispanic whites] are no longer projected to make up the majority of the U.S. population.").

much of the modern Western world.[102] This section therefore offers context on the over-incarceration of minorities in these increasingly diverse societies.

**Table 1: Percentage of Demographic Groups by Self-Identification**[103]

| Group | United States | Canada | England & Wales |
|---|---|---|---|
| White | 58.9 | 70 | 81 |
| Hispanic | 19.1 | 1.6 | 0.1 |
| Black | 13.6 | 4.3 | 4.2 |
| Asian | 6.3 | 19.3 | 9.6 |
| Indigenous | 1.3 | 5 | n/a |
| Two or more | 3 | 0.9 | 3 |

In particular, racial and ethnic minorities constitute approximately 41.1 percent of the U.S. population, next to 30 percent of the Canadian population.[104] Census definitions sometimes vary[105] but Canada reports a larger Indigenous

102. *See generally* JOUET, EXCEPTIONAL AMERICA, *supra* note 42, at 12–13, 186, 191; *The Canadian Census: A Rich Portrait of the Country's Religious and Ethnocultural Diversity*, DAILY (Stat. Can., Ottawa, Ont., Can.) (Oct. 26, 2022), https://www150.statcan.gc.ca/n1/en/daily-quotidien/221026/dq221026b-eng.pdf [https://perma.cc/G59A-BVA2]; *Ethnic Group, England and Wales: Census 2021*, STAT. BULL. (Off. Nat'l Stat.) (Nov. 29, 2022), https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/bulletins/ethnicgroupenglandandwales/census2021/pdf [https://perma.cc/5SSB-B3SR]; *Population Estimates, July 1, 2022*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 [https://perma.cc/RKM8-ZY3G] (last visited Mar. 2, 2024).

103. This table is based on the U.S., Canada, and U.K. census data cited at notes 102–108. Recall that each census uses relatively different categories and methodologies.

104. This estimate corresponds to the population not identifying as white (non-Hispanic) in the U.S. census or as white in the Canadian census. *The Canadian Census: A Rich Portrait of the Country's Religious and Ethnocultural Diversity*, *supra* note 102; U.S. CENSUS BUREAU, *supra* note 102; *see also Visible Minority by Gender and Age: Canada, Provinces and Territories*, STAT. CAN. (June 21, 2023), https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=9810035101&pickMembers%5B0%5D=2.1&pickMembers%5B1%5D=3.1&pickMembers%5B2%5D=4.2 [https://perma.cc/4CF8-88Z8].

105. For example, Canada employs the category of "visible minority" to count "racialized groups." *The Canadian Census: A Rich Portrait of the Country's Religious and Ethnocultural Diversity*, *supra* note 102. However, it does *not* count Indigenous people under the "visible minority" category: "The Employment Equity Act defines visible minorities as 'persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour.' The visible minority population consists mainly of the following groups: South Asian, Chinese, Black, Filipino, Arab, Latin American, Southeast Asian, West Asian, Korean and Japanese." *Visible Minority*, STAT. CAN., https://www12.statcan.gc.ca/census-recensement/2021/ref/dict/az/Definition-eng.cfm?ID=pop127 [https://perma.cc/92KU-CT53] (Oct. 26, 2022).

population at 5 percent compared to 1.3 percent in the United States, whereas the United States has a bigger Black population at 13.6 percent next to 4.3 percent.[106] Moreover, persons of Asian descent constitute 19.3 percent of the population in Canada, compared to 6.3 percent in America.[107] The way each census counts people of Latin American origin varies more significantly, but the Hispanic population in the United States is unquestionably far larger at 19.1 percent, next to approximately 2 percent in Canada.[108] England and Wales, a European jurisdiction that collects data on race or ethnicity,[109] is included in Table 1 to widen the comparison.[110] However, because the census data for Australia[111] and New Zealand[112] are less comparable due to their different categorizations, they are not included in Table 1. Many countries with increasingly diverse populations, such as France, also do not collect census data on race or ethnicity.[113]

---

106. *The Canadian Census: A Rich Portrait of the Country's Religious and Ethnocultural Diversity*, *supra* note 102; *Indigenous Population Continues to Grow and Is Much Younger Than the Non-Indigenous Population, Although the Pace of Growth Has Slowed*, DAILY (Stat. Can., Ottawa, Ont., Can.), Sept. 21, 2022, https://www150.statcan.gc.ca/n1/en/daily-quotidien/220921/dq220921a-eng.pdf [https://perma.cc/7L8Y-JPRV]; U.S. CENSUS BUREAU, *supra* note 102. In the U.S. Census, the figure for Indigenous persons corresponds to "American Indian and Native Alaskan, alone."

107. *Asian Heritage Month*, STAT. CAN. (May 10, 2023, 11:00 AM), https://www.statcan.gc.ca/o1/en/plus/3575-asian-heritage-month [https://perma.cc/FD9N-5B7L]; U.S. CENSUS BUREAU, *supra* note 102.

108. An estimated 1.6 percent of the Canadian population identifies as "Latin American" according to the national census, which lacks the categories of "Hispanic or Latino" or "non-Hispanic white" found in the U.S. census. *The Canadian Census: A Rich Portrait of the Country's Religious and Ethnocultural Diversity*, *supra* note 102. Some argue that the Hispanic population in Canada is therefore undercounted and that the U.S. census method would be preferable. *Measuring the Latin American Population in Canada – Why Is It Important?*, CAN. HISP. BAR ASS'N (Nov. 3, 2020), https://www.chbalegal.com/blog/measuring-the-latin-american-population-in-canada-why-is-it-important [https://perma.cc/CP3F-5AWL].

109. *See generally Census 2021*, *supra* note 102.

110. *See* Darren Stillwell, *Comparing Ethnicity Data for Different Countries*, GOV.UK: DATA IN GOV'T (Jan. 25, 2022), https://dataingovernment.blog.gov.uk/2022/01/25/comparing-ethnicity-data-for-different-countries/ [https://perma.cc/2J8G-NXN3]. On comparative census history and methodology, see also Stevens, Ishizawa & Grbic, *supra* note 41.

111. Except for the Indigenous population, *see infra* note 122, the Australian census does not provide data on race or ethnicity like the U.S., Canadian, and U.K. censuses, which indicate the white, Asian, Black or Hispanic population more specifically. While Australia asks people about their "ancestry" and provides information on "cultural diversity," including place of birth and primary language, these data are less comparable. *See Cultural Diversity: Census*, AUSTL. BUREAU STAT. (June 28, 2022), https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/latest-release [https://perma.cc/H2XB-KTGM]; *Understanding and Using Ancestry Data*, AUSTL. BUREAU STAT. (June 28, 2022), https://www.abs.gov.au/statistics/detailed-methodology-information/information-papers/understanding-and-using-ancestry-data [https://perma.cc/TM2U-TM24].

112. According to the New Zealand census, the main ethnic groups are "European" at 70.2 percent, "Māori" at 16.5 percent, "Asian" at 15.1 percent, and "Pacific" (i.e., Pacific Islanders not including Māori) at 8.1 percent. *2018 Census Population and Dwelling Counts*, STATS NZ, https://www.stats.govt.nz/information-releases/2018-census-population-and-dwelling-counts/ [https://perma.cc/55HB-ZSHM] (Mar. 5, 2020).

113. *See generally* Stillwell, *supra* note 110.

Table 2 further illustrates how minorities are greatly overrepresented among prisoners in diverse Western societies. In America, Black people constitute approximately 32.5 percent of state and federal prisoners, more than double the share of the U.S. population that is Black. By comparison, 30.6 percent of the U.S. prison population is white, non-Hispanic, 23.5 percent is Hispanic, 1.2 percent is Asian, and 1.6 percent is Indigenous.[114] Canada appears to collect such statistics less systematically.[115] Still, Indigenous peoples constitute approximately 32 percent of Canadian federal prisoners,[116] whereas Black people represent another 9 percent and Asians 5 percent.[117] The fact that Indigenous persons are a comparatively larger group in Canada than in the United States, both in society at large and in prison, helps explain why concerns about discrimination in Canadian criminal justice have primarily concentrated on their plight. But the situation of Black Canadian prisoners has gained growing attention.[118] Demographically, the Black population in Canada is much smaller than in America though it is expanding rapidly, partly due to immigration.[119] Yet a Black community has

---

114. ANN E. CARSON, BUREAU JUST. STAT., U.S. DEP'T JUST., PRISONERS IN 2021 — STATISTICAL TABLES 10 tbl.3 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/V3HS-USMU]. The "Indigenous" category corresponds to "American Indian/Alaska Native" in the table. A recent article describes how "[r]acial disparities in imprisonment remain high but have fallen by about a third in recent decades. Black imprisonment rates are nearly five times those for Whites, but there is enormous variation between states. The overall US ratio masks the differences; in some states the Black-White disparity ratio is over 12." Roberts, Watson & Hester, *supra* note 11, at 348.

115. *See* DEP'T JUST. CAN., OVERREPRESENTATION OF BLACK PEOPLE IN THE CANADIAN CRIMINAL JUSTICE SYSTEM (2022), https://www.justice.gc.ca/eng/rp-pr/jr/obpccjs-spnsjpc/pdf/RSD_JF2022_Black_Overrepresentation_in_CJS_EN.pdf [https://perma.cc/PVB6-CXFR] ("National disaggregated data on the racialized identity of those who come in contact with the criminal justice system remain fairly limited and underreported.").

116. *Overrepresentation of Indigenous and Black Prisoners*, PUB. SAFETY CAN., *supra* note 18. The proportion of Indigenous offenders admitted into federal and provincial facilities is similar. *Adult Custody Admissions to Correctional Services by Indigenous Identity*, STAT. CAN. (Jan. 25, 2024), https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001601 [https://perma.cc/96SA-NDU2].

117. *Overrepresentation of Indigenous and Black Prisoners*, PUB. SAFETY CAN., *supra* note 18. In Canada, federal prisons generally hold people serving two years or more, whereas provincial prisons hold those with shorter sentences. Fewer demographic data are available for provincial correctional facilities. A study of Ontario provincial facilities nonetheless concluded that Black people were substantially overrepresented there. Akwasi Owusu-Bempah, Maria Jung, Firdaous Sbaï, Andrew Wilton & Fiona Kouyoumdjian, *Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada*, RACE & JUST. (2021), [https://perma.cc/LP5F-5PQX]; *accord* DEP'T JUST. CAN., *supra* note 115.

118. *See generally Overrepresentation of Indigenous and Black Prisoners*, PUB. SAFETY CAN., *supra* note 18; Owusu-Bempah, Jung, Sbaï, Wilton & Kouyoumdjian, *supra* note 117.

119. *See* STAT. CAN., CANADA'S BLACK POPULATION: GROWING IN NUMBER AND DIVERSITY (Feb. 6, 2019), https://www150.statcan.gc.ca/n1/en/pub/11-627-m/11-627-m2019006-eng.pdf [https://perma.cc/5Q43-VG4L].

existed for generations in parts of Canada, especially in Nova Scotia since the eighteenth century.[120]

We equally see in Table 2 that Indigenous peoples are hugely overrepresented among prisoners in Australia and New Zealand.[121] In Australia, Aboriginal peoples and Torres Strait Islanders constitute merely 3 percent of the national population[122] but 33 percent of prisoners.[123] In New Zealand, Māori represent 16.5 percent of the population[124] but 52 percent of prisoners.[125] Despite enduring punitiveness and periods of regression, these countries have recognized mitigation due to social hardships in the cases of Indigenous defendants.[126] These circumstances suggest that, alongside Canada, more countries may move toward such remedies to restrain incarceration.[127]

A critique of sentencing reform for Indigenous defendants is that it does not question the colonial law that has been foisted on Indigenous peoples. Writing in the Australian context, Thalia Anthony makes an observation that could also apply to the United States, Canada or New Zealand: "Ad hoc dispensation of lighter prison sentences alone is insufficient for Indigenous justice because it does not threaten the [colonial legal order]."[128] Yet the prospective expansion of Indigenous legal traditions or sovereign Indigenous courts is an intricate question beyond the scope of this Article,[129] which focuses on the sentencing of minorities

120. *See* Karolyn Smardz Frost, *Planting Slavery in Nova Scotia's Promised Land, 1759–1775*, *in* UNSETTLING THE GREAT WHITE NORTH: BLACK CANADIAN HISTORY 53 (Michele A. Johnson & Funké Aladejebi eds., 2022).

121. *See also* Warner, *supra* note 74, at 127–28 (discussing Australia and New Zealand's penal population).

122. *Aboriginal and Torres Strait Islander People: Census,* AUSTL. BUREAU STAT. (June 28, 2022),https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples /aboriginal-and-torres-strait-islander-people-census/latest-release [https://perma.cc/SEF6-6UAQ].

123. *Prisoners in Australia*, AUSTL. BUREAU STAT. (Jan. 25, 2024), https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release [https://perma.cc/ZRV7-YK46].

124. STATS NZ, *supra* note 112.

125. *Key Initiatives*, N.Z. MIN. JUST. (July 18, 2023), https://www.justice.govt.nz/justice-sector-policy/key-initiatives/key-initiatives-archive/hapaitia-te-oranga-tangata/ [https://perma.cc/C3FD-3REN] ("Māori are 37% of people proceeded against by Police, 45% of people convicted, and 52% of people in prison.").

126. *See infra* Section V.B.

127. *See., e.g.*, Warner, *supra* note 74, at 137 ("[C]ourts in Australia and Canada have had little difficulty in accepting the relevance of social and economic disadvantage provided that it can be linked with the offending for which an offender is now being sentenced.").

128. ANTHONY, *supra* note 74, at 200. In New Zealand, Māori defendants have similarly argued that "the courts lack jurisdiction to consider their cases and that they should instead be brought before a Māori customary law-based criminal justice system administered by Māori," although courts dismissed such challenges based on Parliamentary sovereignty and applicable criminal statutes. Andrew Erueti, *Conceptualising Indigenous Rights in Aotearoa New Zealand*, 27 N.Z. U. L. REV. 715, 740 (2017).

129. ANTHONY, *supra* note 74, at 199–209; Marchetti & Anthony, *supra* note 74, at 11–15; Val Napoleon & Hadley Friedland, *Indigenous Legal Traditions: Roots to Renaissance*, *in* OXFORD HANDBOOK OF CRIMINAL LAW 225 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

within Western legal systems. Despite its dire shortcomings, Canadian law on the sentencing of Indigenous defendants has been a model to Australians[130] challenging the mass imprisonment of Aboriginal peoples and Torres Strait Islanders,[131] further suggesting that this approach can be better than the status quo.

**Table 2: Incarceration Across Various Demographic Groups**[132]

| Group | Percentage of Prisoners |
|---|---|
| Black, United States | 32.5 |
| Hispanic, United States | 23.5 |
| Indigenous, United States | 1.6 |
| Asian, United States | 1.3 |
| Black, Canada | 9 |
| Indigenous, Canada | 32 |
| Black, England & Wales | 12 |
| Asian, England & Wales | 8 |
| Indigenous, Australia | 33 |
| Indigenous, New Zealand | 52 |

Europe faces analogous challenges with incarcerated minorities. In England and Wales, Black people constitute 12 percent of prisoners and persons of Asian descent another 8 percent.[133] France is more representative in not tallying prisoners by race or ethnicity, though it does count foreigners, who are also

130. An Australian government commission reported that stakeholders wanted provisions that "mirrored the Canadian statutory principle of imprisonment as a last resort—requiring the sentencing court to pay particular attention to the circumstances of Aboriginal offenders." AUSTL. L. REFORM COMM'N, PATHWAYS TO JUSTICE—AN INQUIRY INTO THE INCARCERATION RATE OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES 207 (2017).

131. In a major case, the defense unsuccessfully invoked Canadian law as persuasive authority to improve the sentencing of Indigenous peoples in Australia. *Bugmy v The Queen*, 249 CLR 571 (2013) (Austl.). Australian scholars subsequently criticized the High Court of Australia for not adopting the Canadian approach. *See* Thalia Anthony, Lorana Bartels & Anthony Hopkins, *Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice*, 30 MELBOURNE U. L. REV. 47, 67 (2015); Guy C. Charlton, *Indigenous Over-Incarceration and Individualised Justice in Light of Bugmy v The Queen*, 50 AUSTL. BAR REV. 427 (2021); *see also infra* note 493 and accompanying text.

132. The data in Table 2 stem from sources provided at notes 114-117, 123, 125, and 133.

133. GEORGINA STURGE, UK PRISON POPULATION STATISTICS, HOUSE OF COMMONS LIBRARY 14 (2023).

overrepresented in its penal system.[134] This approach tends to undercount French or European citizens of color who are not foreigners but often second- or third-generation immigrants.

Overall, the sharp overrepresentation of minorities among prisoners cannot simply be explained by what occurs at sentencing, as disparities may simultaneously reflect root social causes of crime, rates of offending in particular communities or for certain individuals, or the discretion of the authorities to disproportionately target marginalized groups.[135] For instance, patterns in police arrests and prosecutorial charges are decisions that occur "upstream" from sentencing but that influence racial disparities in incarceration.[136]

While the over-incarceration of minorities is a pervasive problem in modern Western democracies, the point of this Article is not that criminal justice reform should only focus on systemic racism. Social science suggests that doing so can be counterproductive and that evidence of systemic racism must be marshaled strategically. A host of studies find that telling people about racial disparities does not have the effect that many scholars and activists would expect.[137] Support for harsh prison terms and aggressive policing *rises* when people are told that a higher proportion of those facing these measures are Black.[138] Jennifer Eberhardt and Rebecca Hetey, two prominent social scientists, have described this quandary as follows:

> Many legal advocates and social activists assume that bombarding the public with images and statistics documenting the plight of minorities will motivate people to fight inequality. Our results call this assumption into question. We demonstrated that exposure to extreme racial disparities may make the public less, not more, responsive to attempts to lessen the severity of policies that help maintain those disparities—even when people agree that such policies are too punitive. This produces quite a challenge for those striving to create a more equal and just society. Perhaps

134. *See generally* WHITMAN, *supra* note 40, at 79; Jean-Marie Delarue, *La détention des étrangers en France*, 36 ARCHIVES DE POLITIQUE CRIMINELLE 161 (2014); Loïc Wacquant, *Des "ennemis commodes". Étrangers et immigrés dans les prisons d'Europe*, 129 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 63 (1999).

135. Roberts, Watson & Hester, *supra* note 11, *passim* (analyzing prospective causes of racial disparities in the United States, Canada, New Zealand, as well as in England and Wales).

136. *See id.* at 351 (observing that "primary causes [of racial disparities in America] are located upstream and include prosecutorial charging decisions, police arrest decisions, sentencing laws and policies, and racial differences in criminal justice system involvement").

137. Rebecca Hetey & Jennifer Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS PSYCH. SCI. 183, 183–85 (2018) [hereinafter Hetey & Eberhardt, *The Numbers Don't Speak for Themselves*].

138. *Id.*

> motivating the public to work toward an equal society requires something more than the evidence of inequality itself.[139]

One way to interpret these findings is that voters will be less likely to identify and empathize with prisoners if they are from a different race or ethnicity.[140] Another possible explanation is that data can be interpreted in opposite ways. As Eberhardt and Hetey observe, many people will not primarily view data about racial disparities as a sign of racial discrimination, but rather as a sign that certain racial groups commit more crimes. If so, only emphasizing the predicament of Black prisoners, for example, could backfire by suggesting that Black people disproportionately commit crimes, thereby reinforcing the stereotype of the Black criminal.[141] Paradoxically, this stereotype contributes to systemic racism in the first place, such as the harsh and unforgiving penalties that Black offenders disproportionately face. While the aforementioned studies were conducted in the United States, comparable pitfalls plausibly exist in any society where minorities are highly over-incarcerated.

This body of social science suggests that penal reform should not focus exclusively on racial discrimination or disparities. Rethinking sentencing should be a multifaceted and pragmatic process. Arguments against systemic racism can be marshaled alongside humanistic arguments against ruthless punishments or alongside utilitarian arguments stressing that draconian prison terms do not make society safer and waste a fortune in taxpayer money.[142] In particular, long-term incarceration has diminishing returns and can be counterproductive. It hinders rehabilitation and can lead to the phenomenon of institutionalization where prisoners greatly struggle to reenter society after years behind bars.[143] Accordingly, factoring evidence of systemic racism at sentencing to avoid excessively long sentences would not defeat public safety but could actually enhance it.

With regard to racial disparities, however, Eberhardt and Hetey propose remedies that actually evoke the ongoing shifts in Canadian law. First, they recommend improved contextualization "to convey that racial disparities are not

---

139. Rebecca Hetey & Jennifer Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1952 (2014).

140. *See* JOUET, EXCEPTIONAL AMERICA, *supra* note 42, ch. 7 (describing how a conflux of social factors have especially otherized prisoners in modern American society).

141. Hetey & Eberhardt, *The Numbers Don't Speak for Themselves*, *supra* note 137, at 184-85.

142. *See generally* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003) (documenting how harsher prison terms do not reduce the crime rate).

143. *See generally* RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 44 (2019); ROSE RICCIARDELLI, SURVIVING INCARCERATION: INSIDE CANADA'S PRISONS 79–85, 116–17 (2014).

natural or due to fixed stereotypical traits."[144] Second, they suggest focusing on "systemic racism" to understand disparities stemming from legal institutions and societal factors, instead of treating racism merely as the fruit of personal biases or prejudices.[145] Both of these goals are at the heart of the *Morris* and *Anderson* jurisprudence, namely: i) improved contextualization to paint a fuller picture of defendants as human beings; and ii) recognition of systemic racism as a root social cause of crime and a problem that courts should avoid perpetuating.[146]

This legal standard may be a sign of progress but, even assuming its diligent implementation throughout Canada, it remains to be seen to what extent it could change sentencing outcomes in practice. These are more reasons why the social changes unfolding in Canada deserve closer attention in the United States and other Western democracies where minorities are highly over-incarcerated.

## II. TESTING THE LAW

On the night of December 13, 2014, the police responded to an alleged home invasion in Scarborough, a district of Toronto.[147] Plainclothes officers stopped four Black males in a parking lot, one of whom ran away.[148] This scenario was hardly unique to Canada, as it evoked circumstances found in the United States, the United Kingdom, continental Europe, and other societies where tensions between police and minorities are commonplace.[149]

A policeman drove toward the suspect, Kevin Morris, trying to stop him. They collided. Morris fell, stood up, and kept running. Additional officers responding to the call saw him discard a jacket. They retrieved it, finding a loaded revolver within. Caught, Morris was eventually convicted of unlawful gun possession following a jury trial.[150]

This Ontario case would have been ordinary but for what occurred at sentencing. Defense counsel, Faisal Mirza and Gail Smith, mounted a test case aiming to have the law recognize that the systemic racism that Black Canadians

144. Hetey & Eberhardt, *The Numbers Don't Speak for Themselves*, *supra* note 137, at 185.

145. *Id.* at 186.

146. *See infra* Sections II–III.

147. R. v. Morris, 2018 ONSC 5186, para. 3 (Can. Ont.) [hereinafter *Morris* (ONSC)].

148. *Id.*

149. *See generally* BUTLER, *supra* note 8; DIDIER FASSIN, ENFORCING ORDER: AN ETHNOGRAPHY OF URBAN POLICING (Rachel Gomme trans., 2013); SAMUELS & OLORUNNIPA, *supra* note 8; Bell, *supra* note 8.

150. *Morris* (ONSC), *supra* note 147, para. 2. The three counts were possession of an unauthorized firearm, possession of a prohibited firearm with ammunition, and carrying a concealed weapon. *Id.* The jury acquitted Morris of assaulting an officer with the intent to resist arrest. *Id.*

face should be considered as mitigation at sentencing.[151] Counsel accordingly introduced two pre-sentencing reports by expert witnesses who documented Kevin Morris's life path and its relationship to systemic racism.[152] Mirza, an influential defense counsel who has since then become a judge,[153] had previously advocated the introduction of pre-sentencing reports that would better document the situation of Black defendants.[154] Smith, another leading defense counsel, was further convinced that traditional pre-sentence reports were based on pro-forma templates, lacked sufficient information, suffered from racial bias, and were drafted by probation officers in an adversarial relationship to the accused.[155]

*Morris* was a "test case," namely a legal case that aims to "test" the law and make it evolve through an elaborate litigation strategy. Test cases have historically been a staple of legal reform movements in the United States.[156] Social change in other democratic societies has relied far less upon litigation and far more on legislation, partly because the magnitude of social divides in the United States often preclude common ground at the political level.[157] Accordingly, a Canadian test case like *Morris* reflected an approach to reform that has been more influential in the United States than in Canada. Even so, test cases are not an exclusively

151. *Morris* (ONSC), *supra* note 147, paras. 13-46. In *Anderson*, the contemporaneous Nova Scotia case, Faisal Mirza was also counsel for the Criminal Lawyers' Association as an intervener. *Anderson* (NSCA), *supra* note 4, at 1. Interveners in Canada are analogous to *amici* in the United States. Paul M. Collins & Lauren A. McCarthy, *Friends and Interveners: Interest Group Litigation in a Comparative Context*, 5 J. L. & CTS. 55, 57–58 (2017).

152. *Morris* (ONSC), *supra* note 147, paras. 13–46.

153. *See infra* note 301.

154. Faisal Mirza, *Race, Culture, Community and Sentencing: Culturally Competent Pre-Sentence Reports*, 38 FOR THE DEFENCE MAG. (Can.) F8 (2017).

155. Gail D. Smith, *The Value and Purpose of Culturally Sensitive Pre-Sentence Reports*, 40 FOR THE DEFENCE MAG. (Can.) F7 (2020).

156. Emblematic test cases in the United States have notably focused on school desegregation, gay rights, and the abolition of the death penalty. *See* Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (finding racial segregation unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003) (decriminalizing homosexuality); Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing same-sex marriage as a constitutional right); Furman v. Georgia, 408 U.S. 237 (1972) (per curiam) (finding the death penalty unconstitutional); *but see* Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion) (reauthorizing the death penalty). Importantly, test cases are not only a vehicle for liberal causes, as epitomized by landmark decisions against gun control, restrictions on the role of money in politics, and the constitutional right to abortion. *See* Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (finding that key restrictions on political spending violate the First Amendment); District of Columbia v. Heller, 554 U.S. 570 (2008) (concluding that the Second Amendment protects an individual right to bear arms); Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (eliminating the constitutional right to abortion that *Roe v. Wade* had recognized in 1973).

157. *See generally* JOUET, EXCEPTIONAL AMERICA, *supra* note 42.

North American practice. Litigators in France, for example, have mounted test cases to challenge racial profiling by police.[158]

In Canada, *Morris* in Ontario was one of two contemporaneous test cases for the recognition of systemic racism as a mitigating circumstance for Black defendants, as it was matched by *Anderson* in Nova Scotia.[159] We will return to *Anderson* in the next section. Neither of them were the first Canadian decisions to consider these questions for the sentencing of Black people, although these two cases broke new ground in addressing various matters more profoundly.[160] *Morris* appears to have received the most attention in Canada, perhaps given Ontario's prominence on the national landscape.[161] However, *Morris* and *Anderson* remain unknown abroad despite their significance.

*Morris* and *Anderson* built upon the recognition of systemic discrimination as mitigation for Indigenous defendants under the 1996 legislative amendment to the Canadian Criminal Code that led to the *Gladue* jurisprudence.[162] In *Morris*, the defense did not equate Black and Indigenous people but effectively sought to expand *Gladue* by creating a formal requirement to consider the experience of Black people, another marginalized minority.[163] To this effect, counsel submitted two detailed expert reports: i) a sociohistorical analysis of the predicament of Black people in Toronto and its criminal justice system; and ii) a personal history of Kevin Morris's own underprivileged upbringing and ongoing hardships as a young Black male.[164]

The trial judge, Shaun Nakatsuru, proved receptive. His decision was not merely historic in recognizing the relevance of this critical evidence. Judge

158. *See generally* Jonathan Birchall, *The Fight Against Police Ethnic Profiling in France Returns to the Courts*, OPEN SOC'Y FOUNDS.: VOICES (Feb. 23, 2015), https://www.opensocietyfoundations.org/voices/fight-against-police-ethnic-profiling-france-returns-courts [https://perma.cc/9AN4-L4CN].

159. *Anderson* (NSCA), *supra* note 4.

160. In 2014, an influential juvenile case notably considered the social circumstances of Black Canadians at sentencing. R. v. X, 2014 NSPC (Can. N.S.) [hereinafter *R. v. X* (NSPC)]. The author of the *X* decision was Judge Anne S. Derrick, who later authored *Anderson* when on the Nova Scotia Court of Appeal. Shaun Nakatsuru, the same trial judge who decided *Morris* in 2018, also rendered a similar decision in *Jackson* a few months earlier. *See* R. v. Jackson, 2018 ONSC 2527 (Can. Ont.) [hereinafter *Jackson* (ONSC)]. Among other precedents, a 2003 Ontario decision rejected an attempt to formally extend to Black people the statutory sentencing principles concerning Indigenous people. Still, it left the door open to such evidence: "[T]he principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence . . . ." R. v. Borde (2003), 63 O.R. (3d) 417, para. 32 (Ont. C.A.). *See also* Andrea S. Anderson, *Considering Social Context Evidence in the Sentencing of Black Canadian Offenders*, 45 MAN. L.J. 152, 158–63 (2022) (discussing history of jurisprudence).

161. *See, e.g.*, Anderson, *supra* note 160 (discussing *Morris* in greater detail than *Anderson*); Dugas, *supra* note 12 (same).

162. *See supra* note 13 and accompanying text.

163. Interveners also made this point. *See Morris* (ONCA), *supra* note 2, paras. 8, 113, 117. Recall that interveners in Canada are akin to *amici* in the United States. *See* Collins & McCarthy, *supra* note 151, at 57–58.

164. *Morris* (ONSC), *supra* note 147, paras. 13–46.

Nakatsuru's judgment was also memorable for its style, as it was written as a poetic open letter to Kevin Morris. Consider the following excerpts:

> [At] ten years of age you began to notice how many were dying in your neighborhood. Dying of violence. You did not have a lot of options. You decided you would live with it. That you would survive. Yet at the same time, you felt hopelessness. A hopelessness that you have admitted led to recklessness. A hopelessness from which there was no escape. That led to a feeling that a violent death potentially awaited you.[165]
>
> There was once a young man that you looked up to as a boy. But he was taken from you. He was shot.[166]
>
> In 2013, you were critically stabbed. As a result, your spleen and half of your pancreas were removed. You still suffer physical symptoms from this. You believe that someone who you felt to be a friend had set you up. In January of 2014, you were diagnosed . . . with Post-Traumatic Stress Disorder ("PTSD") and paranoia with dysphoria and anxiety. You were never treated for the PTSD or paranoia. You reported . . . that you do not feel you can find peace within yourself until you die. You cope by talking to your mother. You have few others in your life. Some of your friends have died, gone to prison, or become estranged while you have been in jail.[167]

The opinion embodied a concept found in the field of Law and Literature, namely "law *as* literature."[168] The humanism palpable in Judge Nakatsuru's decision is relevant to the thesis of this Article: the recognition of systemic racism can be understood as an extension of longstanding humanistic aspirations for criminal justice.[169]

Judge Nakatsuru drew upon another groundbreaking case he had decided five months earlier, *Jackson*, where defense counsel Emily Lam and Faizal Mirza had submitted detailed evidence about systemic racism and the defendant's personal history as a Black Canadian.[170] Judge Nakatsuru readily found this evidence relevant to and consistent with the Canadian Criminal Code's holistic approach to sentencing.[171] "[T]he time has come," *Jackson* held, for sentencing judges to

165. *Id.* para. 40.
166. *Id.* para. 37.
167. *Id.* para. 42.
168. GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 3–27 (2000).
169. *See infra* Section IV.
170. *Morris* (ONSC), *supra* note 147, paras. 8–10, 26–35.
171. *Id.* paras. 75–92, 99.

consider "the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration."[172] Despite this soaring language, Judge Nakatsuru found that the four-year sentence that the defense had recommended was "too low" given the gravity of the crime—possessing a loaded gun in violation of a court order—and a criminal record comprising an assault and several robberies.[173]

While *Jackson* received less public attention than *Morris*, it demonstrated how this process will not necessarily spell a short sentence, as Judge Nakatsuru later explained to Kevin Morris:

> This approach led to a result that I suspect Mr. Jackson was not pleased with. I sentenced him to 6 years for his first possession of a loaded handgun, which is a very long time. But the [prosecution] was asking for more. The evidence and the approach in his case moved the needle to a lower sentence. But not as low as he wanted. For you see, it was not really his first gun charge. He had been convicted of prior robberies using guns. His case was different from yours. He is different from you.[174]

This process led to a more favorable outcome for Kevin Morris. Weighing both mitigating circumstances and the seriousness of the firearm offenses in a holistic fashion, Judge Nakatsuru sentenced him to one day in jail plus eighteen months of probation.[175] However, as the trial judge he declined to formally extend to Black defendants the *Gladue* sentencing procedure used for Indigenous defendants.[176] The Ontario Court of Appeal would likewise refuse to create a formal requirement for judges to consider the situation of Black defendants, thereby deferring to Parliament, which had only referenced Indigenous persons in the 1996 legislation regarding restraint in the use of imprisonment.[177] This aspect of the decision, which disappointed activists, was the main takeaway from a reductive news report.[178]

---

172. *Jackson* (ONSC), *supra* note 160, paras. 82.

173. *Id.* paras. 12–15, 174.

174. *Morris* (ONSC), *supra* note 147, paras. 9–10.

175. *Id.* para. 99.

176. The *Morris* trial decision does so by omission but, in *Jackson*, Judge Nakatsuru had explicitly held that "it is both inappropriate and unnecessary to try and analogize the historical and current circumstances of African Canadians to Indigenous persons or to simply unthinkingly apply a *Gladue* type analysis to Mr. Jackson." *Jackson* (ONSC), *supra* note 160, para. 73; *see also Gladue* (Can.), *supra* note 14.

177. *Morris* (ONCA), *supra* note 2, paras. 13, 118–22.

178. *Ontario's Top Court Criticized for Declining to Require Judges to Consider Anti-Black Racism in Sentencing*, CBC (Oct. 8, 2021), https://www.cbc.ca/news/canada/toronto/r-v-morris-anti-black-racism-ontario-court-1.6205252 [https://perma.cc/96RA-LGMX].

Adding to the impression that the Ontario Court of Appeal had been unreceptive, it raised Kevin Morris's sentence to two years in prison—after finding too lenient Judge Nakatsuru's sentence of one day in jail and eighteen months of probation for the firearm offenses at hand.[179] Some commentators emphasized that the Court had raised the sentence,[180] but omitted that it had permanently stayed the sentence's imposition.[181] The prosecution had conceded that "the incarceration of Mr. Morris at this time would be inappropriate" given "the passage of time and subsequent events," including his guilty plea to a separate home invasion for which he received over three years in prison.[182]

Overall, the Ontario Court of Appeal's decision was a "significant step forward" in the words of defense counsel Faisal Mirza.[183] The defense did not get everything it was asking for—it seldom does—but the outcome of this test case was relatively favorable by Canadian standards and would have been extremely favorable by U.S. standards. *Morris* thus deserves greater attention as a landmark case emphasizing the relevance of systemic racism as mitigation at sentencing—a shift that may ultimately materialize in other Western democracies.

## III. HISTORIC CANADIAN DECISIONS RELEVANT TO MANY NATIONS

This section focuses more closely on the two major Canadian appellate decisions on test cases about the sentencing of Black people. Whereas *Morris* arose in the highly diverse Toronto metropolitan area in Ontario,[184] the contemporary *Anderson* case stemmed from Nova Scotia, a province with a longstanding Black community.[185] Nova Scotia matched and, in various ways, preceded Ontario in emphasizing the relevance of systemic racism as mitigation by playing a leading role in instituting pre-sentencing reports known as IRCAs or Impact of Race and Culture Assessments.[186] While pre-sentencing reports offering social-context evidence had previously been instituted for Indigenous

179. *Morris* (ONCA), *supra* note 2, paras. 3, 7, 11, 183-84.

180. Gorman, *supra* note 12, at 44; Gary P. Rodrigues, *Case Law Digests: R. v. Morris* [(Ont. C.A. 2021)], *Systemic and Background Factors: Non-Aboriginal Offenders*, *in* CRANKSHAW'S CRIMINAL CODE OF CANADA (Gary P. Rodrigues ed., undated).

181. *Morris* (ONCA), *supra* note 2, paras. 3, 7, 11, 183-84.

182. *Id.* para. 7 n.2

183. Alyshah Hasham, *Court Endorses Use of Anti-Black Racism Reports in Sentencing*, TORONTO STAR (Oct. 8, 2021), https://www.thestar.com/news/gta/2021/10/08/court-endorses-use-of-anti-black-racism-reports-in-sentencing.html [https://perma.cc/YN8H-92XA].

184. *See generally* CITY OF TORONTO, T.O. HEALTH CHECK: AN OVERVIEW OF TORONTO'S POPULATION HEALTH STATUS 11 (2019) ("Toronto has become one of the most ethnically diverse cities in the world due largely to immigration.").

185. *Anderson* (NSCA), *supra* note 4, paras. 75, 95–100.

186. IRCAs are often traced to a 2014 juvenile case. *See R. v. X* (NSPC), *supra* note 160, paras. 158–98.

defendants,[187] it apparently was in Nova Scotia that such reports came to be used more systematically for Black people.[188] As we shall see, *Anderson* actually employed stronger language than *Morris* in holding that a trial court's failure to consider evidence of systemic racism as mitigation at sentencing can be reversible error.[189]

A debate has emerged over which decision went further, especially the extent to which Black Canadians should be treated like Indigenous Canadians under prior legislation and jurisprudence.[190] In *Anderson*, the Nova Scotia Court of Appeal drew a parallel between the situation of both groups for sentencing purposes.[191] In *Morris*, the Ontario Court of Appeal distinguished both groups and underlined that Indigenous people were the only group whom Parliament had identified in the statute concerning restraint in imprisonment.[192] But it simultaneously noted that the *Gladue* jurisprudence regarding Indigenous defendants "can inform the sentencing of Black offenders in several respects."[193] In any event, reasonable people may disagree about the extent to which the predicament of Black and Indigenous people is alike.[194] The bottom line is that both *Anderson* and *Morris* pointed to the relevance of systemic racism as mitigation in sentencing.

This section delves closer into these historic appellate decisions, which are not merely relevant to Canada. They concern issues that have been widely debated in America, Europe, Australia, and New Zealand—namely in Western societies whose penal systems grapple with questions of racial discrimination and social inequality.

### *A. Morris (2021), Ontario Court of Appeal*

The Ontario Court of Appeal found that considering systemic racism was consistent with scores of precedents establishing that evidence presented at sentencing should "supply a picture of the accused as a person in society—his background, family, education, employment record, his physical and mental health, his associates and social activities and his potentialities and

187. *See supra* note 15 and accompanying text.

188. *See Anderson* (NSCA), *supra* note 4, paras. 31, 104–05 (discussing the introduction of IRCAs in Nova Scotia).

189. *Id.* paras. 118, 123.

190. *See* Gorman, *supra* note 12, at 43–46; Tim Quigley, Anderson *and* Morris*: Reducing the Disproportionate Imprisonment of Afro-Canadian and Indigenous People*, 74 CRIM. REP. 440 (2021).

191. *Anderson* (NSCA), *supra* note 4, paras. 92–3.

192. *Morris* (ONCA), *supra* note 2, paras. 13, 118–22.

193. *Id.* para. 123.

194. In *Morris*, the intervener Aboriginal Legal Services argued that the *Gladue* jurisprudence and legislative mandate concerning the sentencing of Indigenous persons cannot be applied to non-Indigenous persons. *Morris* (ONCA), *supra* note 2, para. 10. The Supreme Court of Canada has further indicated that the situation of Indigenous Canadians is different. *Ipeelee* (Can.), *supra* note 15, paras. 80–87; *see also Gladue* (Can.), *supra* note 14.

motivations."[195] As the next section will describe, this was a logical evolution in the history of criminal justice. Before going further, however, this part will dissect the *Morris* appellate decision because it sheds light on what weighing systemic racism as mitigation at sentencing can mean in practice.

*Morris* held that the substantive gravity of an offense itself is not mitigated by systemic racism.[196] This approach is understandable given that murder, rape, assault, robbery or, in this case, gun crime are grave offenses per se. The Ontario Court of Appeal equally "reject[ed] the claim that societal complicity in anti-Black racism diminishes the need to denounce and deter serious criminal conduct," although it "accept[ed] wholeheartedly that sentencing judges must acknowledge societal complicity in systemic racism."[197] Complicating the picture, systemic racism not only means that Black people are disproportionately incarcerated, but also that they are disproportionately victims of crime.[198] The judges were mindful of this quandary, as they suggested that victims in high-crime neighborhoods would not wish defendants to invoke systemic racism to receive excessively lenient sentences.[199]

Nevertheless, "life experiences can certainly influence the choices made by the offender," including "societal disadvantages flowing from systemic anti-Black racism in society and the criminal justice system."[200] This evidence "speaks to the offender's moral responsibility for his acts and not to the seriousness of the crimes."[201] In particular, a court can "recogniz[e] the seriousness of the offence" but afford "less weight to the specific deterrence of the offender and greater weight to the rehabilitation of the offender through a sentence that addresses the societal disadvantages caused to the offender by factors such as systemic racism."[202]

---

195. *Morris* (ONCA), *supra* note 2, para. 88 (quoting R. v. Bartkow (1978), 24 N.S.R. 2d 518, 522 (N.S. App. Div.)).

196. *Id.* paras. 67–86.

197. *Id.* para. 86; *see also* Marie Manikis, *Recognising State Blame in Sentencing: A Communicative and Relational Framework*, 81 CAMBRIDGE L.J. 294, 298–301 (2022) (arguing that the Canadian jurisprudence has failed to adequately consider state complicity or blame, which should be integrated into the sentencing process).

198. That is notably true in both Canada and the United States. RACHEL E. MORGAN & ALEXANDRA THOMPSON, BUREAU JUST. STAT., U.S. DEP'T JUST., CRIMINAL VICTIMIZATION, 2020 – SUPPLEMENTAL STATISTICAL TABLES (2022), https://bjs.ojp.gov/content/pub/pdf/cv20sst.pdf [https://perma.cc/73AH-6V9T]; Farrah Merali, *Black Communities Plagued by High Number of Homicides*, CBC (Jan. 16, 2022), https://www.cbc.ca/news/canada/toronto/new-uoft-research-sheds-light-on-homicides-1.6315931 [https://perma.cc/RQ6V-ADCL]; *see also* Ewing & Kerr, *supra* note 14, at 39 (noting that a "jurisprudential dilemma" for Canadian judges "is how to reconcile *Gladue* with the reality that Indigenous offenders often take as their victims other Indigenous people, who are disproportionately vulnerable to criminal victimization").

199. *Morris* (ONCA), *supra* note 2, para. 85.

200. *Id.* para. 75.

201. *Id.* para. 76.

202. *Id.* para. 79.

Moreover, "evidence that an offender has had frequent and confrontational contact with the police may mean one thing in one community, but quite another in a community in which the influences of anti-Black racism have shaped a confrontational and adversarial relationship between the police and members of the community, especially young Black men."[203] "By understanding the social milieu in which the offender interacted with the police," *Morris* added, "the sentencing judge is better able to fashion a sentence that, to the extent possible, realistically addresses the needs and potential of the offender, as well as the seriousness of the offence."[204]

While the Ontario Court of Appeal was adamant that judges should take "judicial notice" of systemic racism as a general circumstance,[205] it reasoned that the defense should also substantiate specific claims about an offender. On one hand, the Court faulted the defense expert witness for baselessly suggesting that "the failure to follow-up on Mr. Morris's diagnosed psychiatric issues may have been a reflection of systemic racism," as medical records instead "indicate[d] that the psychiatrist did prescribe medication and follow-up psychotherapy. Mr. Morris chose not to take the medication or go back to the psychiatrist for the psychotherapy."[206] This example suggests that systemic racism will not be a catchall. On the other hand, the Court found that the bulk of the expert witness report presented compelling mitigation, including a "trajectory, as it relates to education and employment, [that] is more reflective of the institutional biases and systemic inadequacies faced by Mr. Morris than any lack of potential or interest on Mr. Morris's part."[207] The Ontario judges concluded that this evidence should lead the law to respond "in a positive way that benefits Mr. Morris and ultimately the community."[208]

*Morris* echoed the Supreme Court of Canada on several points, as *Anderson* would too.[209] In *Ipeelee* (2012), the Justices sought to clarify the *Gladue* jurisprudence concerning the sentencing of Indigenous persons. The Justices found that lower courts were misapplying both the Criminal Code and *Gladue* by i) excluding serious crimes from this mitigation process; and ii) requiring proof of a causal relationship between a crime and systemic discrimination against Indigenous persons.[210] Although the Ontario Court of Appeal did not cite *Ipeelee* on either of these points in *Morris*, it never suggested that systemic racism becomes irrelevant in serious cases. *Morris* further specified that a defendant need

203. *Id.* para. 103.

204. *Id.*

205. *Id.* paras. 13, 42, 123.

206. *Id.* para. 146.

207. *Id.* para. 104.

208. *Id.*

209. *See Anderson* (NSCA), *supra* note 4, paras. 93, 117–19, 146–48 (drawing upon Supreme Court of Canada jurisprudence on the sentencing of Indigenous persons).

210. *Ipeelee* (Can.), *supra* note 15, paras. 80–87; *accord Anderson* (NSCA), *supra* note 4, para. 118 (noting that a causal link is not required between a crime and social-context evidence).

not prove a "direct causal link between the offence and the negative effects of anti-Black racism" as a mitigating circumstance.[211] At the same time, *Morris* held that "[t]here must . . . be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue."[212]

The Supreme Court of Canada's jurisprudence is equally relevant because it discussed social and political objections to the consideration of systemic discrimination as mitigation in the sentencing of Indigenous people, including allegations that it amounts to preferential treatment, a "race-based discount" or "reverse discrimination."[213] The Canadian Justices then rejected these claims. While *Morris* did not delve into this sociopolitical debate, it stressed that the upshot was not a race-based discount: "[M]itigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. Everyone agrees there can be no such discount."[214]

Even the prosecution "acknowledge[d] the reality of overt and institutional racism," accepting that judges must "take it into account within the sentencing scheme set out by Parliament."[215] Yet the prosecution argued that "the trial judge allowed his consideration of the impact of overt and institutional racism on Mr. Morris to overwhelm all other considerations," thereby resulting in an overly lenient sentence.[216]

The Ontario Court of Appeal finally settled on a sentence of two years, a raise from the one day in jail and eighteen months of probation that Judge Nakatsuru had imposed after trial.[217] But the Court heeded the prosecution's request to stay the prison sentence.[218] Weighing all of the evidence in a holistic fashion, it found that after initially failing to express remorse, Kevin Morris was in the process of taking responsibility for his wrongdoing after his second conviction for a home invasion.[219] The gun crime at the heart of the appeal had been his first offense.[220] The upshot regarding the evidence of systemic racism was as follows: "The moral blameworthiness of Mr. Morris's conduct is mitigated by his mental and physical health issues, as well as his educational and economic disadvantages. All of those

211. *Morris* (ONCA), *supra* note 2, para. 96.

212. *Id.* para. 97.

213. *Ipeelee* (Can.), *supra* note 15, paras. 64, 70, 71, 75; *see also supra* note 50 (quoting reform opponent).

214. *Morris* (ONCA), *supra* note 2, para. 97.

215. *Id.* para. 5.

216. *Id.* para. 6.

217. *See supra* note 179 and accompanying text.

218. *Morris* (ONCA), *supra* note 2, paras. 183–84.

219. *Id.* paras. 7 n.2, 159.

220. *Id.* paras. 7 n.2, 158.

factors are influenced by the systemic anti-Black racism Mr. Morris has experienced."[221]

The test case therefore led to a major ruling recognizing the relevance of systemic racism at sentencing, as well as a relatively favorable outcome for Kevin Morris himself. This was a testament to the defense's strategy, including the comprehensive report crafted by its expert witness Camisha Sibblis, a clinical social worker and Ph.D. candidate.[222] The Ontario Court of Appeal found that such pre-sentencing reports offering detailed social-context evidence are "not commonly used in Ontario," although they "can be of great assistance to a sentencing judge" and should be "adequately funded."[223]

Change was not merely afoot in Ontario. Nova Scotia's highest court and the Canadian government pointed in the same direction, as we shall now see.

### *B. Anderson (2021), Nova Scotia Court of Appeal*

In 2018, Rakeem Anderson, a twenty-three-year-old Black man, was stopped at a vehicle checkpoint on a Nova Scotia highway.[224] The trial judge found that he was "sober, polite, respectful and cooperative" as the police seized a loaded revolver during a pat-down search.[225] Anderson was subsequently convicted at trial of several counts of unlawful gun possession,[226] analogously to the defendant in *Morris*.[227]

The mitigating evidence presented at sentencing sought to contextualize the crime without excusing it. Rakeem Anderson "had 'extreme proximity' to gun violence due to a best friend being shot dead,"[228] one of four friends who had been killed throughout his life.[229] An expert witness explained that fear and trauma in marginalized communities where guns are prevalent can lead people "to arm themselves for protection without any intention of carrying out an act of violence."[230] The trial and appellate courts accepted this conclusion.[231] They further weighed evidence of Anderson's upbringing in a broken home in an underprivileged, marginalized Black community.[232] Social-context evidence included the fact that 30 percent of Black males in Halifax had been arrested for a

221. *Id.* para. 179.
222. *Id.* para. 44.
223. *Id.* para. 147.
224. R. v. Anderson, 2020 NSPC 10, para. 3 (Can. N.S.).
225. *Id.* para. 33.
226. *Id.* para. 1.
227. *See supra* note 150 and accompanying text.
228. *Anderson* (NSCA), *supra* note 4, para. 31.
229. *Id.* para. 66.
230. *Id.* para. 44.
231. *Id.* para. 61, 63, 67, 144.
232. *Id.* paras. 63–66.

crime at one point in their lives, compared to 6.8 percent of white males.[233] The trial and appellate judges equally considered the history of colonialism, slavery, and discrimination in Nova Scotia, a region of Canada that has had a Black community since the eighteenth century.[234]

The trial judge chose an alternative to incarceration known as a "conditional sentence," a relative equivalent to probation in the United States.[235] In addition to regular meetings with a probation officer, the two-year conditional sentence forbade Anderson from having a weapon and required eight months of house arrest, followed by a 9 p.m. to 6 a.m. curfew for eight months, among other measures.[236] The judge further required him to attend "Afrocentric therapy interventions to address trauma, attend literacy and education interventions with an Afrocentric focus and obtain a reading assessment, seek out mentorship with [community-based organizations], and perform 50 hours of community service work in the African Nova Scotian community."[237] Imprisonment can be a consequence for failing to comply with such conditions.[238] The Nova Scotia Court of Appeal upheld the sentence while providing guidance to lower courts on how to approach these sentencing issues.[239]

The Nova Scotia Court of Appeal underscored that judges should readily take judicial notice of such social-context evidence without requiring defendants to bring forth expert witnesses or other sources.[240] It concurrently held that IRCA pre-sentencing reports are indispensable for Black Canadians and that such reports must discuss the influence of slavery and systemic racism.[241] The judges added that such pre-sentencing reports were also valuable in "[a]ddressing aggravating factors and offering a deeper explanation for them."[242] Even though the prosecution cautioned against giving excessive weight to such mitigation,[243] the *Anderson* appeal was not particularly adversarial in the sense that the defense and

233. *Id.* para. 66 (citing SCOTT WORTLEY, HALIFAX, NOVA SCOTIA STREET CHECKS REPORT (2019)).

234. *Id.* paras. 75, 95–100. *See also* Smardz Frost, *supra* note 120 (discussing the history of African Nova Scotians).

235. *See generally How Sentences Are Imposed,* DEP'T JUST. CAN. (last modified July 7, 2021), https://www.justice.gc.ca/eng/cj-jp/victims-victimes/sentencing-peine/imposed-imposees.html [https://perma.cc/NJ8E-PT3K].

236. *Anderson* (NSCA), *supra* note 4, paras. 70–73.

237. *Id.* para. 72. Unlike in *Morris*, much of the discussion by both the trial and appellate courts in *Anderson* focused on the lack of Afrocentric rehabilitation programs in Nova Scotia prisons; and the capacity to access such programs in community-based organizations offering therapeutic counseling and resources. *Id.* paras. 30–55.

238. *Id.* para. 155.

239. *Id.* paras. 163–63.

240. *Id.* paras. 110-11.

241. *Id.* para. 111.

242. *Id.* para. 121.

243. *Id.* paras. 78–80.

prosecution "expressed a clear consensus that IRCAs are a necessary resource for judges tasked with balancing the objectives and principles of sentencing."[244]

Most importantly, the Nova Scotia Court of Appeal employed language that went further than the Ontario Court of Appeal in holding that a sentencing judge must "consider an offender's background and circumstances in relation to the systemic factors of racism and marginalization."[245] Failing to do so "may amount to an error of law."[246] Lastly, the court emphasized that "it should be possible on appeal for the court to determine, based on the record or the judge's reasons, that proper attention was given to the circumstances of the offender. Where this cannot be discerned, appellate intervention may be warranted."[247]

It remains to be seen whether the Nova Scotia Court of Appeal will regularly reconsider punishments imposed by trial judges. Notwithstanding its broad language about judicial review, a limiting principle can be found in its decision: "a judge's determination of the applicable sentencing range needs to be accorded a high degree of deference."[248] However, appellate rulings like *Anderson* and *Morris* have the potential to guide and calibrate sentencing by trial judges to make appellate intervention less necessary.

The prosecution's perspective can simultaneously evolve. At trial in *Anderson*, prosecutors demanded a sentence of two to three years in prison for unlawful gun possession with no violence—a firearm found during a traffic stop.[249] While it acknowledged the mitigating circumstances that African Nova Scotians face for historical and social reasons, the prosecution advanced that rehabilitation should take "a back seat" to denunciation and deterrence for firearms offenses.[250] On appeal, the prosecution began by advocating one year of incarceration but eventually changed its position to accept an alternative to incarceration.[251] The Nova Scotia Court of Appeal praised the Crown, namely the prosecution,[252] when striking a hopeful tone in the conclusion of its landmark decision:

> The Crown's position has evolved substantially . . . . The sentencing of African Nova Scotian offenders must similarly

244. *Id.* para. 12. *See also id.* paras. 10–12, 112–13 (noting that the prosecution accepted the relevance of such systemic evidence as mitigation at sentencing).

245. *Id.* para. 118.

246. *Id.*

247. *Id.* para. 123.

248. *Id.* para. 132.

249. *Id.* paras. 15–16, 23.

250. *Id.* para. 25.

251. *Id.* paras. 78–79, 164.

252. As Canada is a constitutional monarchy, the prosecution acts in the name of the "Crown." Incidentally, the "*R.*" in Canadian criminal case names, say *R. v. Morris*, stands for "*Regina*" or "*Rex*," meaning queen or king. The same general conventions exist in the United Kingdom. *See Crown*, INC. COUNCIL L. REPORTING FOR ENG. & WALES, https://www.iclr.co.uk/knowledge/glossary/crown/ [https://perma.cc/AUE7-7F82] (last visited Feb. 1, 2024).

> evolve. This is to be accomplished by judges taking into account evidence of systemic and background factors and the offender's lived experience, ideally developed through an IRCA, at every step in the sentencing process, and in the ultimate crafting of a just sanction. Mr. Anderson's sentencing shows that change is possible, for the offender, and as significantly, for our system of criminal justice.[253]

### *C. Assessing a Growing Jurisprudence*

This section explores the growing jurisprudence regarding evidence of systemic racism as mitigation in the cases of Black Canadians, which is also relevant to America, Europe, and any country that may someday move in this direction. While the Supreme Court of Canada has yet to address this matter,[254] this section surveys recent Court of Appeal decisions citing *Anderson* and *Morris*, albeit not the growing number of trial-court decisions citing these cases.[255] This expanding jurisprudence would be best analyzed in a future empirical study researching to what extent, if any, this jurisprudence has changed sentencing outcomes over time.[256]

At the outset, several cases interpret the jurisprudence narrowly. In *Bakal*, a Black defendant with a prior criminal record was convicted of various firearm offenses, while acquitted of drug trafficking, and sentenced to over four years in prison.[257] The trial judge "noted that the appellant had a good childhood without abuse or addiction" and provided "insufficient information to consider how racism may have affected his moral blameworthiness in any meaningful way."[258] The

253. *Anderson* (NSCA), *supra* note 4, para. 164.

254. R. v. Hills, 2023 SCC 2, para. 55 (Can.) (citing *Anderson* (NSCA), *supra* note 4; *Morris* (ONCA), *supra* note 2) (acknowledging the jurisprudence without ruling on it).

255. According to a search on the Westlaw database in mid-2023, over one hundred lower-court decisions cited the *Morris* appellate decision, whereas approximately thirty lower-court decisions cited the *Anderson* appellate decision. *See also* Dugas, *supra* note 12, at 125–47 (surveying judicial opinions following the *Morris* trial court decision but before the Ontario Court of Appeal's ruling).

256. Such a study could draw on prior research assessing the long-term impact of sentencing reform for Indigenous defendants. *See* Julian V. Roberts & Ronald Melchers, *The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001*, 45 CAN. J. CRIMINOLOGY & CRIM. JUST. 211 (2003); Jane B. Sprott, Cheryl Marie Webster & Anthony N. Doob, *Criminal Justice Reform and the Mass Imprisonment of Indigenous People in Canada*, *in* JUSTICE, INDIGENOUS PEOPLES, AND CANADA: A HISTORY OF COURAGE AND RESILIENCE 177 (Kathryn M. Campbell & Stephanie Wellman eds., 2023); *see also* Chloé Leclerc, *La boîte noire des tribunaux: les difficultés à comprendre, à mesurer et à améliorer les pratiques judiciaires*, 52 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE 233, 248 (2023) (calling for improving data collection so that scholars can better analyze Canadian criminal justice, including the *Morris* jurisprudence).

257. R. v. Bakal, 2023 ONCA 177, paras. 2, 18 (Can. Ont.).

258. *Id.* para. 67.

Ontario Court of Appeal upheld the sentence on the ground that "there must be some connection between the racism identified in the community and the circumstance or events said to explain or mitigate the criminal conduct,"[259] as *Morris* had held that "[a]bsent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour."[260]

Another recent decision, *S.M.*, upheld a five-year sentence for human trafficking and assault while reiterating that, "[a]lthough a sentencing judge may take judicial notice of the existence of anti-Black racism, there must also be some connection between the fact of systemic racism and criminal conduct in issue."[261] "No foundation was laid before the sentencing judge to make such a finding,"[262] a conclusion suggesting that sentencing outcomes will depend on the defense's capacity to build a record of mitigation.[263]

At any rate, the jurisprudence so far does not suggest that defense counsel will manage to change the equation in homicide cases. In *S.B.*, a re-sentencing on appeal reached the same conclusion as a trial judge who imposed ten-years-to-life on a Black juvenile convicted of murder in Toronto.[264] This outcome was perhaps predictable given the crime's horror—a fellow teenager "shot in the head twice at close range, execution-style."[265] The decision shows that in extremely aggravated cases the offense can overwhelm any mitigation, including social-context evidence. Citing *Morris*, the Ontario Court of Appeal acknowledged that the youth's "upbringing in a crime-ridden neighbourhood with a lack of positive role models does, to an extent, explain his involvement in gangs and criminal behavior. As a youth, he was susceptible to grooming by gang members, who offered him a sense of belonging and comradery."[266] Nonetheless, the Court found that this social-context evidence lacked probative value given the youth's crime and record at the time of sentencing.[267]

The *Morris* principles did not spell a more favorable outcome in *Abdulle*, another Ontario case. A young adult of African descent was convicted of second-degree murder for shooting another youth in a public area during a gang feud.[268] Affirming the sentence of fifteen-years-to-life, the Ontario Court of Appeal

259. *Id.* para. 65.

260. *Id.* (quoting *Morris* (ONCA), *supra* note 2, para. 97).

261. R. v. S.M., 2023 ONCA 417, para. 27 (Can. Ont.) (per curiam) (internal citation omitted) (citing *Morris* (ONCA), *supra* note 2, paras. 42, 90–101).

262. *Id.* para. 27.

263. *See also* R. v. Abdisalam, 2021 MBCA 97, para. 10 (Can. Man.) ("[C]ounsel for the accused acknowledges that, unlike [in *Anderson* and *Morris*], there was no evidentiary foundation before the judge regarding overt and systemic anti-Black racism or its impact on this particular accused.").

264. R. v. S.B., 2023 ONCA 369, paras. 1–4, 6 (Can. Ont.).

265. *Id.* para. 1.

266. *Id.* para. 65.

267. *Id.* paras. 66–67.

268. R. v. Abdulle, 2023 ONCA 32, paras. 1, 3, 32 (Can. Ont.).

deemed that evidence of systemic racism would not have changed the outcome even if it had been properly considered. "[E]ven though it was an error for the trial judge not to accept that the appellant had suffered some measure of anti-Black discrimination," the trial judge "made no error in finding the offence is so serious that the practical reality would have been that it would have had virtually no impact on the determination of an appropriate period of parole ineligibility."[269]

The approach in *Abdulle* reflected a pitfall of criminal sentencing—using the length of imprisonment as a benchmark of the gravity of an offense or the value of a victim's life. In Canada, the sentence for second-degree murder is ten-to-twenty-five-years-to-life.[270] This means that a defendant faces a life sentence though more mitigated cases may result in ten years of parole ineligibility and more aggravated ones up to twenty-five years of ineligibility. The minimum does not signify release but when someone becomes *eligible* for release after demonstrating rehabilitation. An inherent difficulty with the aforesaid sentencing ranges is that the minimum sentence is already long, especially by Canadian standards where sentences are not as lengthy as in the United States on average.[271] Because judges can fear appearing lenient in choosing the "minimum," they may regularly lean toward longer sentences, just as Canadian parole boards are relatively reluctant to release prisoners.[272]

If *Bakal*, *S.M.*, *S.B.*, and *Abdulle* could be taken to mean that nothing has changed sentencing-wise, other recent cases reveal more favorable outcomes for Black defendants. This jurisprudence equally suggests that social-context evidence of systemic racism is more probative if combined with other mitigation.

In *West*, social-context evidence ostensibly resulted in a shorter sentence than the defendant would otherwise have received. A Black woman pleaded guilty to a multitude of offenses committed in a two-year period, including theft, possession of stolen property, breaking and entering, property damage, unlawful use of a credit card, fraud, theft of a motor vehicle, dangerous operation of a motor vehicle, failure to attend court, and breaches of probation orders.[273] At sentencing, the trial

269. *Id.* para. 39 (internal citation omitted).

270. Canada Criminal Code, R.S.C. 1985, c C-46 § 745(c).

271. *See generally* Webster & Doob, *supra* note 25; PORTFOLIO CORRECTIONS STATISTICS COMM., PUB. SAFETY CAN., CORRECTIONS AND CONDITIONAL RELEASE STATISTICAL OVERVIEW: 2020 ANNUAL REPORT 16, 125 (2022).

272. A study on sentences for second-degree murder in Canada from 1977 to 2020 found "a significant increase in the length of parole ineligibility periods set by judges," coupled with "a significant and increasing delay in being released when first eligible [for parole]." That being said, 54.7 percent of life-sentenced prisoners received periods of parole ineligibility at the minimum (10 years) or near it (11-12 years), showing relative restraint compared to the normalization of life without possibility of parole in America. Debra Parkes, Jane Sprott & Isabel Grant, *The Evolution of Life Sentences for Second Degree Murder: Parole Ineligibility and Time Spent in Prison*, 100 CANADIAN BAR REV. 66, 78, 79 tbl.2, 84 (2022).

273. R. v. West, 2021 NSCA 80, para. 7 (Can. N.S.).

judge found that Nirica West's behavior "was fueled primarily by a crack cocaine addiction."[274] She received over two years in prison and appealed, in part, on the grounds that the sentence did not comport "with the imperative to reduce incarceration rates for racialized offenders."[275] The Nova Scotia Court of Appeal upheld the sentence as consistent with *Anderson*, agreeing with the trial judge that the sentence "was less onerous than it might have been" and stood at the "low end of the range," as "[t]his was not a case where the principle of restraint was ignored."[276]

Similarly, in *L.C.*, the defendant's punishment might have been worse without social-context evidence. The Ontario Court of Appeal affirmed a sentence of over six years and three months for smuggling a large quantity of cocaine into Canada.[277] As this sentence was on the lower end of the range of six to eight years for drug smuggling, mitigation appeared to shape this outcome.[278] The trial judge "considered and gave appropriate mitigating weight to the evidence and the appellant's submissions concerning the effects of anti-Black racism on her circumstances."[279]

*Desmond-Robinson* further demonstrated that mitigation can be effectively balanced against aggravating evidence.[280] A young Black male convicted of possessing drugs and a sawed-off rifle received an alternative to incarceration from the Ontario Court of Appeal, with a conditional sentence of two years to be served in the community.[281] The record "paint[ed] a very positive picture" of this "young first offender with considerable potential."[282] "Circumstances beyond his control, some of which no doubt reflect systemic racism, diminish his moral culpability," the Court continued.[283] The offenses had taken place five years earlier and, since then, the appellant worked as a restaurant chef after completing a culinary program. Moreover, he had stayed out of trouble and had undertaken significant familial responsibilities.[284] While the favorable outcome might be more explainable by a positive personal record than by social-context evidence, the judicial opinion suggested that both went hand-in-hand.

As the jurisprudence continues to evolve, judges, litigators, and scholars will need to address fundamental questions in coming years. In particular, will the consideration of systemic racism as mitigation lead to shorter, sounder sentences

274. *Id.*
275. *Id.* para. 24.
276. *Id.* (internal citation omitted).
277. R. v. L.C., 2022, ONCA 863, paras. 1–4 (Can. Ont.).
278. *Id.* paras. 29, 33–39.
279. *Id.* para. 39.
280. R. v. Desmond-Robinson, 2022 ONCA 369 (Can. Ont.).
281. *Id.* paras. 1-5, 13-20.
282. *Id.* para. 16.
283. *Id.*
284. *Id.* para. 17.

and more alternatives to incarceration? Or will it be a pro-forma consideration before inflicting the same sentences as before?

At present, Indigenous persons remain a substantial proportion of Canada's prisoners despite the normalization of social-context evidence regarding systemic racism or social inequality in their cases.[285] The use of social-context evidence originated in the aforementioned 1996 legislative reform and subsequent institutionalization of *Gladue* pre-sentencing reports.[286] By some estimates, the over-incarceration of Indigenous Canadians has only worsened.[287] In 1996, approximately 16 percent of people admitted to prison in Canada were Indigenous,[288] although they represented only around 3 percent of the Canadian population.[289] As of 2021, Indigenous people constituted approximately 32 percent of federal prisoners,[290] compared to 5 percent of the Canadian population.[291] These circumstances suggest that extending the *Gladue* approach cannot alone decrease the over-incarceration of Black people or other minorities.

A recent study on Indigenous prisoners conveys both the potential and limitations of current efforts. At first glance, it found that "the difference in the rates of imprisonment between non- Indigenous and Indigenous people in Canada in 2017/ 2018 is astonishing – 78.6 [prisoners] per 100,000 [residents] (non-Indigenous) and 677 per 100,000 (Indigenous)."[292] Delving deeper into the data, its findings suggested that judges have tried to remedy the over-incarceration of Indigenous peoples by giving them "slightly shorter custodial sanctions" over time, despite criminal records with more convictions for violent offenses and more

285. *Overrepresentation of Indigenous and Black Prisoners*, PUB. SAFETY CAN., *supra* note 18; *see also* Efrat Arbel, *Rethinking the 'Crisis' of Indigenous Mass Imprisonment*, 34 CANADIAN J.L. & SOC'Y 437 (2019).

286. *See supra* note 13 and accompanying paragraph.

287. In 2011, the Supreme Court of Canada had already observed "the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened" since the 1996 legislative reform. *Ipeelee* (Can.), *supra* note 15, para. 62; *see also* Ugo Gilbert Tremblay, *Expliquer la hausse du poids carcéral des Autochtones depuis la réforme du* Code criminel *de 1996: cinq variables négligées*, *in* LE DROIT PÉNAL EN TEMPS DE CRISE (Alexandre Stylios & Jean-Paul Céré eds. forthcoming 2025) (on file with author) (analyzing several hypotheses on the over-incarceration of Indigenous Canadians, including discrimination, crime rates, and demographic trends).

288. *See* Roberts & Melchers, *supra* note 256, at 220 tbl.1. These are data for adults in provincial and territorial custody, which hold the vast majority of prisoners. *Id.* at 217, 220 tbl.1. The percentage of Indigenous federal prisoners was similar around that time. *Id.* at 211. In Canada, sentences of two years or longer are served in federal facilities, whereas shorter sentences are generally served in provincial and territorial ones. *Id.* at 238 n.5.

289. *1996 Census: Aboriginal Data*, DAILY (Stat. Can., Ottawa, Ont., Can.), Jan. 13, 1998, 8:30 AM, https://www150.statcan.gc.ca/n1/daily-quotidien/980113/dq980113-eng.htm [https://perma.cc/F6YL-AEMN].

290. *Overrepresentation of Indigenous and Black Prisoners*, PUB. SAFETY CAN., *supra* note 18.

291. *Indigenous Population Continues to Grow and Is Much Younger Than the Non-Indigenous Population, Although the Pace of Growth Has Slowed*, *supra* note 106.

292. Sprott, Webster & Doob, *supra* note 256, at 192.

prior contact with corrections.[293] "Contrary to what one might expect, we see that Indigenous offenders were *more likely* to receive *short* sentences (1–80 days) than non-Indigenous offenders. Further, Indigenous offenders were *less likely* than non-Indigenous offenders to be handed down *long* sentences (184+ days)."[294] But the study's authors stress that "minor changes to the *sentencing* process will not adequately address the disproportionate representation of Indigenous people in Canadian correctional institutions."[295] While underscoring that sentencing cannot fix root problems requiring greater attention, from socioeconomic deprivation to over-policing in Indigenous communities,[296] the authors note that improved sentencing has a role to play, including "careful consideration of well-constructed, thoughtful 'Gladue Reports'" offering social-context evidence.[297]

The jurisprudence on Black defendants discussed above likewise suggests that a combination of skillful defense counsel and detailed pre-sentencing reports can lead to more favorable outcomes for defendants. Strikingly, in a recent decision the Saskatchewan Court of Appeal looked to *Anderson* and *Morris* for guidance, but was unsure how to apply their principles. Unlike in these precedents, trial counsel had neither requested a pre-sentencing report nor marshaled a record of how discrimination and marginalization had affected the defendant.[298]

Unless courts are willing to take judicial notice of mitigating evidence, the jurisprudence may especially benefit people with the best defense counsel, such as those in *Jackson*, *Morris*, and *Anderson*. As Judge Nakatsuru observed, "there are some very practical advantages in taking this judicial notice. The offender will often have limited or no resources to retain experts."[299] Yet the Canadian government has stepped in to mend this problem by allocating several million dollars to the preparation of IRCA pre-sentencing reports documenting the impact of systemic racism on criminal conduct.[300] The Canadian government's support for reform therefore warrants closer attention, as it may serve as a blueprint for other countries to tackle this problem.

### *D. Momentum for Change*

Human agency can shape and reshape the law. Several social actors played a recurrent role in the emergence of the *Morris* and *Anderson* jurisprudence, such

293. *Id.* at 190.
294. *Id.* (emphasis in original).
295. *Id.* at 193 (emphasis in original).
296. *Id.* at 193–95.
297. *Id.* at 193.
298. R. v. Omer, 2022 SKCA 147, para. 33–35 (Can. Sask.).
299. *Jackson* (ONSC), *supra* note 160, para. 90.
300. *IRCA Pre-Sentencing Reports*, DEP'T JUST. CAN., *supra* note 6.

as Faisal Mirza as defense counsel,[301] Judge Shaun Nakatsuru in Ontario,[302] Judge Anne S. Derrick in Nova Scotia,[303] and Robert Wright, a registered social worker and sociologist, who served as an expert witness on the impact of race in leading cases.[304] But these events are also the fruit of a long-term historical evolution in Canada and the wider Western world.[305] Before exploring this transnational evolution, this final subsection will further discuss the momentum for social change in Canadian society.

The Canadian government under Prime Minister Justin Trudeau of the Liberal Party has not only supported the *Morris* and *Anderson* jurisprudence, but also repealed multiple mandatory-minimum penalties that precluded judges from considering mitigation.[306] Although a relative tendency toward the status quo has long characterized Canadian criminal justice,[307] this decision may gradually contribute to social change.[308] These developments also confirm that Canada is taking the kinds of steps that many advocates of penal reform in the United States have unsuccessfully advocated for decades.[309]

A lay of the land may be useful. As in the United States, Canada has a federal system where a national federal government shares power with provinces, which

---

301. Faisal Mirza became a trial judge in 2022 upon being appointed to the Ontario Superior Court. He previously was co-counsel with Emily Lam in *Jackson*, co-counsel with Gail Smith in *Morris*, and intervener on behalf of the Criminal Lawyers' Association in the *Anderson* appeal. *Jackson* (ONSC), *supra* note 160; *Morris* (ONSC), *supra* note 147; *Morris* (ONCA), *supra* note 2; *Anderson* (NSCA), *supra* note 4; DEP'T JUST. CAN., *Minister of Justice and Attorney General of Canada Announces Judicial Appointments in the Province of Ontario* (Sept. 22, 2022), https://www.canada.ca/en/department-justice/news/2022/09/minister-of-justice-and-attorney-general-of-canada-announces-judicial-appointments-in-the-province-of-ontario.html [https://perma.cc/4HDA-NQ88].

302. Recall that Judge Nakatsuru authored two seminal decisions in 2018: *Jackson* (ONSC), *supra* note 160; *Morris* (ONSC), *supra* note 147.

303. Recall also that Judge Derrick authored both *X*, the 2014 juvenile case that first considered IRCA pre-sentencing reports, and *Anderson* after joining the Nova Scotia Court of Appeal. *R. v. X* (NSPC), *supra* note 160; *Anderson* (NSCA), *supra* note 4.

304. Robert Wright is credited with writing the first IRCA in Nova Scotia in the *X* juvenile case in 2014, before co-authoring the *Anderson* IRCA with Natalie Hodgson. *Anderson* (NSCA), *supra* note 4, para. 30–31. Wright likewise authored the pre-sentencing report on race in *Jackson*, the 2018 Ontario case. *Jackson* (ONSC), *supra* note 160, para. 29.

305. *See infra* Section IV.

306. DEP'T JUST. CAN., *Bill C-5: Mandatory Minimum Penalties to Be Repealed*, https://www.canada.ca/en/department-justice/news/2021/12/mandatory-minimum-penalties-to-be-repealed.html [https://perma.cc/KCL2-XJJK] (Dec. 7, 2021).

307. *See generally* Anthony Doob & Cheryl Webster, *Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century*, 45 CRIME & JUST. 359 (2016) [hereinafter Doob & Webster, *Weathering the Storm*].

308. The Correctional Investigator—an independent, ombudsman that monitors federal prisons—had raised concern about the overrepresentation and mistreatment of Black prisoners for years. *See generally* OFFICE OF THE CORRECTIONAL INVESTIGATOR (Can.), ANNUAL REPORT 2021-2022 39–76 (2022) (investigating the situation of Black prisoners).

309. *See generally supra* note 8.

are relatively similar to American states.[310] That being noted, the Canadian federal government plays a greater role in criminal justice compared to the U.S. federal government, as Canadian provinces have less jurisdiction than American states in this sphere. In the United States, substantive criminal law can be created by either state or federal law, although the overwhelming majority of criminal cases fall under state law.[311] In Canada, the substance of criminal law is solely a matter of federal jurisdiction, but criminal justice is mostly administered by provincial courts and governments.[312] *Anderson* and *Morris* indeed were prominent provincial decisions that interpreted sentencing principles under the Canadian Criminal Code, a federal statute. Accordingly, the Canadian federal government's support and buy-in can help expand and consolidate this jurisprudence on systemic racism, which it did by providing funding for IRCA pre-sentencing reports.[313]

Relatedly, fighting systemic racism was a rationale for this legislative reform that repealed mandatory-minimum prison terms for certain drug and firearm offenses; and allowed greater use of alternatives to incarceration:[314]

> The Government recognizes that there is systemic racism in Canada's criminal justice system. We have heard Canadians, the courts and criminal justice experts, and seen the evidence of the disproportionate representation of Indigenous peoples, as well as Black Canadians and members of marginalized communities, both as offenders and as victims. The proposed legislation would help to address these issues. It would also ensure courts can continue to impose tough sentences for violent and serious crimes.[315]

This legislation passed by a wide margin under the Trudeau government,[316]

---

310. *See generally* MALCOLMSON & MYERS, *supra* note 3, at 58–64, 146–49.

311. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 13, 189 (2017).

312. *See generally* DEP'T JUST. CAN., *The Criminal Code of Canada*, https://www.justice.gc.ca/eng/csj-sjc/ccc/index.html (June 4, 2021).

313. *IRCA Pre-Sentencing Reports*, DEP'T JUST. CAN., *supra* note 6.

314. An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act, S.C. 2022, c 15 [Bill C-5] (Can.).

315. DEP'T JUST. CAN., *Bill C-5*, *supra* note 306; *see also* CAN. STANDING SEN. COMM. ON LEGAL & CON. AFF., *Bill C-5, An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act* (last modified Jan. 19, 2023) (providing information on the goals and provisions of this legislative reform).

316. The vote in the House of Commons was 206 to 117 on a party line. All members of the Liberal Party, NDP (New Democratic Party), Bloc Québecois, and Green Party voted in favor, whereas all members of the Conservative Party voted against. Can. H. Commons, Vote no. 155, 44th Parliament, 1st Session, Bill C-5, An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act, June 15, 2022, https://www.ourcommons.ca/members/en/votes/44/1/155?view=party. In the Canadian Senate, the vote was 36-11 with two abstentions. Can. Sen., 44th Parliament, 1st Session, An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act – C-5 – Third Reading, Nov. 17, 2022, https://sencanada.ca/en/in-the-chamber/votes/details/593588/44-1.

overcoming allegations by the Conservative Party that it was "soft on crime."[317] David Lametti, the Minister of Justice, had defended both the funding for IRCA pre-sentencing reports[318] and the repeal of several mandatory minimums as remedies to racial inequities and disparities.[319] From 2010 to 2020, Indigenous offenders comprised 20 percent of people admitted to federal corrections with mandatory minimums, whereas Black offenders comprised 11 percent,[320] figures reflecting the disproportionate incarceration of minorities.[321]

This legislative reform is intertwined with the relative attention that Canadian courts have given to excessive punishments, unlike the immobilism of U.S. courts in the face of mass incarceration.[322] By repealing numerous mandatory minimums, the Canadian government partly sought to limit the proliferation of court challenges to these punishments, which represented over a third of all constitutional challenges to the Canadian Criminal Code as of December 2021.[323] The success rate of these challenges over the prior decade was remarkable: 69 percent of those against drug offenses prevailed and so did 48 percent of those against firearm offenses.[324] In contrast, U.S. courts have rejected practically all constitutional challenges to excessive prison terms since the 1980s, leaving aside limitations to the scope of life without parole for juveniles.[325]

Canadian advocates have nonetheless expressed concern that this legislation will do little to remedy the over-incarceration of racial and ethnic minorities.[326] As is usually the case with penal reform in any country, any progress in Canada will likely be slow and hard fought. But the Canadian government indicated that

317. Matteo Cimellaro, *One-Third of Canada's Mandatory Minimums Have Been Repealed, but Advocates Don't Believe It Will Lessen Incarceration Crisis*, CAN.'S NAT'L OBSERVER (Nov. 22, 2022), https://www.nationalobserver.com/2022/11/22/news/third-canada-mandatory-minimums-repealed-advocates-incarceration-crisis [https://perma.cc/G5P7-8LU6].

318. *IRCA Pre-Sentencing Reports*, DEP'T JUST. CAN., *supra* note 6.

319. *See* DEP'T JUST. CAN., *Rooting Out Systemic Racism Is Key to a Fair and Effective Justice System* (Dec. 7, 2021), https://www.canada.ca/en/department-justice/news/2021/12/rooting-out-systemic-racism-is-key-to-a-fair-and-effective-justice-system.html [https://perma.cc/SR3Y-G939].

320. *Policy Qs and As: Bill C-5, An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*, DEP'T JUST. CAN., https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/c5/qa-qr.html [https://perma.cc/3JJ2-RFPK] (Jan. 19, 2023) [hereinafter *Policy Qs and As: Bill C-5*].

321. *See supra* Table 1.

322. Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 56, at 713–27; *see also infra* notes 381, 385 and accompanying text.

323. DEP'T JUST. CAN., *Mandatory Minimums and the Courts*, https://www.canada.ca/en/department-justice/news/2021/12/mandatory-minimum-penalties-and-the-courts.html [https://perma.cc/4LST-QZU6] (Apr. 14, 2022).

324. *Id.*

325. *See infra* note 385 and accompanying text.

326. Cimellaro, *supra* note 317.

these steps "are generally consistent with international trends moving away from reliance on [mandatory-minimum prison terms]."[327]

Time will tell whether these steps will concretely change sentencing outcomes. For now, they suggest a growing consensus in Canada about the fundamental principles of *Morris* and *Anderson*, which were both unanimous, 5-0 appellate decisions. But this is far more than a Canadian story.

## IV. A STEP IN THE HISTORICAL EVOLUTION OF PUNISHMENT IN THE WEST

This section broadens our lens by offering comparative and historical light. *Morris*, *Anderson*, and their progeny do not merely reflect modern debates about systemic racism, as they build upon longstanding principles of criminal punishment. These principles are hardly limited to Canada but are found in numerous Western countries, from the United States to Europe, Australia, and New Zealand, which is why these cases should be understood as part of a longer transnational history.

American exceptionalism is also key to understanding this transnational evolution, as well as the value of individualization and proportionality.[328] We will see that the United States has largely abandoned these sentencing principles since the advent of mass incarceration approximately half a century ago.[329] The abandonment of these norms restraining punishment contributed to the normalization of draconian sentences and prison population explosion.[330] Yet the peculiar divergence of modern America should not eclipse the wider convergence across Western democracies.

### *A. Individualization and Proportionality in Sentencing*

*Morris* was both settled law and new law.[331] The Ontario Court of Appeal understood that its seminal ruling was not a departure from longstanding practices:

---

327. *Policy Qs and As:* Bill C-5, *supra* note 320.

328. "American exceptionalism" primarily refers to distinctive features that make America an "exception" in comparison to other Western democracies, if not the entire world. This comparative definition differs from the ideological definition of "American exceptionalism" as a nationalistic faith in American superiority—"exceptional" in the sense of outstanding or magnificent. This Article employs the comparative definition. *See* JOUET, EXCEPTIONAL AMERICA, *supra* note 42, at 22-27.

329. *See infra* note 373 and accompanying paragraphs.

330. *See infra* Table 3.

331. Lisa Kerr, a prominent scholar, observed that "[t]he most surprising thing about [*Morris*] isn't that the legal system has confirmed that the corrosive effects of anti-Black racism may be important for judges to consider when sentencing Black defendants. It's that it took so long to make explicit that sentencing courts must receive, understand and act on evidence of this kind, when that had already long been settled by law." Lisa Kerr, *Ontario's Top Court Says Anti-Black Racism Should Be Considered in the Legal System. That's a Start.*, GLOBE & MAIL (Oct. 11, 2021), https://www.theglobeandmail.com/opinion/article-ontarios-top-court-says-anti-black-racism-should-be-considered-in-the/ [https://perma.cc/68UE-G8F9].

> We see nothing new in th[is] approach to sentencing . . . . It reflects the individualized offence and offender-specific approach to sentencing that has always held sway in Canadian courts. The sentencing process, as it exists, can properly and fairly take into account anti-Black racism and its impact on the offender's responsibility, and the selection of an appropriate sanction in all the circumstances. What is new is the kind of information provided in reports like the two filed in this case and a judicial willingness to receive, understand, and act on that evidence.[332]

The core principles that the Ontario Court of Appeal was referring to can be understood as *individualization* and *proportionality*. These principles are generally recognized throughout Western democracies.[333] They enable judges to consider mitigating circumstances and apply a sentence fitting the defendant's degree of culpability.

To begin, the principles of individualization and proportionality are found in the Canadian Criminal Code: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[334] This does not solely entail mitigation, as judges should also consider aggravating circumstances, such as a defendant's decision to target a vulnerable victim or commit a hate crime.[335] The Supreme Court of Canada has reaffirmed that justice requires "a proportionate sentence," which "is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime."[336] Relatedly, the statute lists diverse purposes of sentencing to be considered holistically, including public safety, denunciation, deterrence, incapacitation, rehabilitation, individual responsibility, and reparations to victims or the community.[337] The Supreme Court of Canada underscored the importance of these sentencing principles when invalidating mandatory minimums that

332. *Morris* (ONCA), *supra* note 2, para. 107. *See also* Dugas, *supra* note 12, at 115 (discussing "the individual nature of sentencing decisions for all offenders" in Canada).

333. *See generally* O'MALLEY, *supra* note 59, ch. 4.

334. Canada Criminal Code, R.S.C. 1985, c. C-46 § 718.1.

335. *Id.* § 718.04, 718.2.

336. R. v. Nur, 2015 SCC 15, para. 43 (Can.).

337. Canada Criminal Code, R.S.C. 1985, c. C-46 § 718.

precluded judges from imposing shorter sentences based on mitigating circumstances.[338]

It would be myopic to associate these practices narrowly with Canadian law, as they are ubiquitous across the West. Consider the European Prison Rules. The third of their "Basic Principles," coming after human rights and inalienable rights, is that sentences must be "proportionate to the legitimate objective for which they are imposed."[339] A subsequent rule adds: "The severity of any punishment shall be proportionate to the offence."[340] The European Prison Rules express principles found in national legal systems and should not merely be seen as aspirational best practices.[341]

Illustratively, France's Constitutional Court has proclaimed that "the principle of individualization in sentencing . . . stems from Article 8 of the Declaration of the Rights of Man and the Citizen of 1789," a legacy of the French Revolution and a pillar of modern French constitutionalism.[342] Article 8 of the Declaration provides that "[t]he Law must prescribe only the punishments that are strictly and evidently necessary."[343] The value of proportionality in the French judicial system impeded Nicolas Sarkozy—the most "law-and-order" French President in modern times—from substantially harshening punishments during his tenure from 2007 to 2012.[344]

---

338. *See Nur*, para. 4 (striking mandatory minimums of three and five years for firearm offense); R. v. Smith, [1987] 1 S.C.R. 1045 (Can.) (striking seven-year mandatory minimum for drug offense); R. v. Lloyd, 2016 SCC 13 (Can.) (striking one-year mandatory minimum for drug offense). Leading Canadian scholars have further underscored that sentencing should be approached holistically, thereby requiring individualization and proportionality, among other considerations. *See, e.g.*, Kent Roach, *Searching for* Smith*: The Constitutionality of Mandatory Sentences*, 39 OSGOODE HALL L.J. 367, 399, 412 (2001); Walter S. Tarnopolsky, *Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?*, 10 OTTAWA L. REV. 1, 32–33 (1978).

339. COUNCIL OF EUR., EUROPEAN PRISON RULES (2006).

340. *Id.* Rule 60.2.

341. "The European Prison Rules are recommendations of the Committee of Ministers to member States of the Council of Europe as to the minimum standards to be applied in prisons. States are encouraged to be guided in legislation and policies by those rules and to ensure wide dissemination of them to their judicial authorities as well as to prison staff and inmates." Murray v. Netherlands, App. No. 10511/10, para. 73 (Apr. 26, 2016), https://hudoc.echr.coe.int/eng?i=001-162614 [https://perma.cc/WJ2U-E4HE]. "Formally adopted as a recommendation – and thus an instrument of 'soft law' – the [European Prison Rules] reflect the state of not only legal but also political, cultural and social assumptions about the prison and prisoners' rights in Europe." Kresimir Kamber, *Remedies for Breaches of Prisoners' Rights in the European Prison Rules*, 11 NEW J. EUR. CRIM. L. 467, 467-68 (2020).

342. Conseil constitutionnel [CC] [French Constitutional Court] decision No. 2005-520DC, July 22, 2005, § 3 (my translation). The revolutionary text is the *Déclaration des droits de l'homme et du citoyen* of 1789, which may be translated as "Declaration of the Rights of Man and the Citizen," "Declaration of Human Rights and the Citizen" or "Declaration of Human and Civic Rights."

343. DECLARATION OF HUMAN AND CIVIC RIGHTS OF 26 AUGUST 1789 Art. 8 (Fr. 1789), https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf [https://perma.cc/M2GN-JLRC].

344. Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 56, at 735–36.

The German Penal Code's "General Principles" of sentencing again encompass individualization, such as the relevance of "the offender's prior history, personal and financial circumstances."[345] It further provides that judges must assess both aggravating and mitigating circumstances: "When fixing the penalty the court weighs the circumstances which speak in favour of and those which speak against the offender."[346] Another section titled "Principle of Proportionality" stipulates that "[a] measure of reform and prevention may not be ordered if it is disproportionate to the severity of the offence . . . and to the degree of danger which the offender poses to society."[347]

Analogously, a study on Nordic penal systems describes proportionality as follows: "Courts have a general right to go below the prescribed minimum whenever exceptional reasons justify it. . . . Lists of aggravating criteria are exhaustive. Lists of mitigating criteria are always open-ended. The phrasing of mitigating criteria usually leaves more scope for judicial discretion than does the phrasing of aggravated criteria."[348] It goes without saying that, as anywhere else, proportionality is hardly the sole sentencing principle in Nordic countries, which can also prioritize prevention, rehabilitation, incapacitation, and other considerations.[349]

A holistic approach encompassing varying degrees of individualization and proportionality is a feature of criminal sentencing in other European countries,

345. Strafgesetzbuch [StGB] (Penal Code), § 46, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0210 [https://perma.cc/XC3L-464N] (Ger.).

346. *Id.*

347. *Id.* § 62.

348. Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 356 (2011).

349. *Id.* at 357.

such as the United Kingdom,[350] Ireland,[351] and Spain.[352] This again speaks to a wider evolution among modern Western democracies.

Indeed, similar considerations are found in Australia and New Zealand.[353] Whereas sentencing law in Australia varies by state or territory, individualization and proportionality are fundamental elements.[354] That is likewise the case in New Zealand,[355] where sentences factor in aggravating and mitigating circumstances.[356] Furthermore, these two countries are those that most resemble Canada in weighing systemic inequality as mitigation in the cases of Indigenous defendants. In New Zealand and several Australian jurisdictions, the law allows judges to consider an Indigenous person's cultural background and social circumstances at sentencing,[357] although this practice has had limited impact on the colossal incarceration rate of Indigenous peoples.[358] If sentencing reform is not a panacea to wider social ills in these societies or any other, improved mitigation practice has the potential to restrain punitiveness.[359]

---

350. *See generally* LYNDON HARRIS, ACHIEVING CONSISTENCY IN SENTENCING ch. 1 (2022); Marie Manikis, *The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions*, 59 OSGOODE HALL L.J. 587, 623–24 (2022). Despite non-negligible differences, a comparative study also describes how in both England and Germany "the priority appears to be proportionate sentences, with the emphasis on the 'right' sentence based on the harm caused, and the blameworthiness of the offender." Katrin Höffler & Nicola Padfield, *The Implementation of Sentences*, *in* 2 CORE CONCEPTS IN CRIMINAL LAW AND CRIMINAL JUSTICE 349, 359 (Kai Ambos, Antony Duff, Alexander Heinze, Julian Roberts & Thomas Weigend eds., 2022); *see also* Julian V. Roberts & Andrew Ashworth, *The Evolution of Sentencing Policy and Practice in England and Wales*, 2003-2015, 45 CRIME & JUST. 307, 308 (2016) (discussing calls for more proportional sentencing in nineteenth-century Britain).

351. *See generally* Niamh Maguire, *Sentencing*, *in* ROUTLEDGE HANDBOOK OF IRISH CRIMINOLOGY 298, 300 (Deirdre Healy, Claire Hamilton, Yvonne Daly & Michelle Butler eds., 2015) (describing how, despite differences, both Northern Ireland and the Republic of Ireland have "individualised sentencing systems").

352. *See generally* Eduardo Demetrio Crespo, *Análisis de los criterios de la individualización judicial de la pena en el nuevo código penal español de 1995*, 50 ANUARIO DE DERECHO PENAL Y CIENCIAS PENALES 323 (1997) (describing individualization and proportionality in Spanish sentencing); Bernardo Feijoo Sánchez, *Individualización de la pena y teoría de la pena proporcional al hecho*, 1 INDRET 1, 4 (2007) (arguing that, although proportionality plays a greater role in debates over criminal sentencing in Anglo-Saxon countries and Germany, it has a measure of influence in Spain).

353. *See* Oleson, *supra* note 74, at 364.

354. *See generally* JEREMY GANS, MODERN CRIMINAL LAW OF AUSTRALIA 8–9, 209, 217 (2d ed 2016); Oleson, *supra* note 74, at 363–64; Mirko Bagaric & Richard Edney, *The Proportionality Thesis in Australia: Application and Analysis*, 4 INT'L J. PUNISHMENT & SENT'G 38, 39–41 (2008); Hopkins, *supra* note 78, at 38.

355. *See generally* Oleson, *supra* note 74, 363–64.

356. Warren Young & Andrea King, *Sentencing Practice and Guidance in New Zealand*, 22 FED. SENT'G REP. 254, 255 (2010); *see, e.g.*, Zhang v. R [2019] 3 NZCA 507 at [10] (N.Z.) ("[P]ersonal mitigating circumstances relating to the offender are applicable to all instances of Class A drug offending, including methamphetamine dealing, as in the case of any other offending.").

357. Oleson, *supra* note 74, 366–67.

358. *See infra* Section V.B.

359. *See* Warner, *supra* note 74, at 142–43 (discussing prospects for improved sentencing of Aboriginal peoples).

In the United States, Canada, Europe, Australia, and New Zealand, judges can draw upon pre-sentencing reports, which may contain information about the defendant's individual circumstances.[360] The point is not that top-notch, comprehensive pre-sentencing reports are consistently used throughout the West.[361] Rather, it is that individualization and proportionality are fundamental considerations in a wide range of societies.[362]

Of course, one cannot fully understand national sentencing practices solely from legislation or core principles. Even though individualization and proportionality are components of criminal justice in the United Kingdom,[363] for example, life sentences tend to be much more frequent there than in continental Europe.[364] Australia and New Zealand's incarceration rates also outstrip those of all Western democracies except the United States, as Table 3 indicates.[365] Some countries are more punitive than others and none always abides by its ideals.

All the dimensions of individualization and proportionality in sentencing cannot be discussed in depth within this Article, including competing theories on the roots of these principles. For instance, scholars debate whether proportionality stems from a retributive approach to punishment aiming for proportionality to moral wrongdoing or a consequentialist approach aiming for proportionality to various utilitarian goals,[366] such as a search for optimal deterrence.[367]

---

360. *Id.* at 125; Young & King, *supra* note 356, at 254.

361. In Ireland, for example, pre-sentencing reports "will only be requested in a small proportion of the cases dealt by the criminal courts in any one year," meaning that they are a "finite resource" whose role at sentencing requires analysis. Nicola Carr & Niamh Maguire, *Pre-Sentence Reports and Individualised Justice: Consistency, Temporality and Contingency*, 14 IRISH PROBATION J. 52, 55 (2017).

362. *See also* Richard S. Frase, Carsten Momsen, Tom O'Malley & Sarah Lisa Washington, *Proportionality of Punishment in Common Law Jurisdictions and in Germany*, *in* 1 CORE CONCEPTS IN CRIMINAL LAW AND CRIMINAL JUSTICE 213, 256 (Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend & Alexander Heinze eds., 2020) (concluding that "similar retributive and nonretributive proportionality principles can be found in both common law systems and the German system").

363. *See supra* note 350.

364. DIRK VAN ZYL SMIT & CRISTINA APPLETON, LIFE IMPRISONMENT: A GLOBAL HUMAN RIGHTS ANALYSIS 93 (2019); Dirk Van Zyl Smit & Katrina Morrison, *The Paradox of Scottish Life Imprisonment*, 28 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 76, 80–81 (2020).

365. *See also* John Pratt, *Penal Scandal in New Zealand*, *in* PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY 31, 34 (Arie Frieberg & Karen Gelb eds., 2008) (arguing that punitive trends in New Zealand and the United States, among other countries, undermine proportionality in sentencing).

366. *See generally* Manikis, *supra* note 350, at 604–19 (arguing that Canadian sentencing is predominantly based on a desert-based conception of proportionality); Frase, Momsen, O'Malley & Washington, *supra* note 362 (discussing retributive, consequentialist, and expressivist conceptions of proportionality in punishment); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"*, 1 CRIM. L. FORUM 259 (1990) (same).

367. *See, e.g.*, Crespo, *supra* note 352, at 337–41 (discussing theoretical debate over deterrence and proportionality in Spain).

Proportionality might best be understood as a malleable and multifaceted concept[368] whose substance stems from "prevailing social and moral values."[369] Even if it were primarily retributive in origin,[370] that dimension would seem to be intertwined with the question of mitigation.[371] That is because retribution and just deserts entail making punishments proportional to wrongdoing, as opposed to inflicting the harshest penalties on everyone.[372] In any event, the modern Western world has widely converged toward individualization and proportionality in sentencing.

Contemporary America is an outlier in having largely rejected the principles of individualization and proportionality.[373] This is a reason for the exceptionally punitive practices that have led the United States toward the highest incarceration rate worldwide.[374] Table 3 shows that U.S. imprisonment levels dwarf those of its neighbors and various Western societies.

**Table 3: Incarceration Rates: Prisoners Per 100,000 Residents (2024)**[375]

| Country | Incarceration Rate |
|---|---|
| United States | 531 |
| Canada | 90 |
| Mexico | 174 |
| England and Wales | 145 |
| Scotland | 147 |
| France | 114 |
| Germany | 69 |
| Ireland | 93 |
| Netherlands | 65 |
| Sweden | 80 |
| Australia | 157 |
| New Zealand | 179 |

368. O'MALLEY, *supra* note 59, at 64 (observing that proportionality "may be compatible with a variety of penal philosophies").

369. Tapio Lappi-Seppälä, *Humane Neoclassicism: Proportionality and Other Values in Nordic Sentencing*, *in* OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME? 209, 227 (Michael Tonry ed., 2019).

370. *See supra* note 366.

371. Marie Manikis has described how "just deserts proportionality provides a framework for individualized desert-based calibration" based on the degree of blameworthiness so that a sentence "is neither too severe nor too lenient." Manikis, *supra* note 350, at 594.

372. *See generally* Michael Tonry, *Can Twenty-First Century Punishment Policies Be Justified in Principle?*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 3 (Michael Tonry ed., 2011) (discussing the intersection of retribution and proportionality as theories of punishment).

373. *See* Tonry, *supra* note 372, at 9 (describing how, "[e]xcept in lip service, proportionality largely disappeared as a policy goal" in America in the 1980s onward).

374. *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, *supra* note 33.

375. *Id*.

While the Eighth Amendment of the U.S. Constitution bars "cruel and unusual punishments," the U.S. Supreme Court has interpreted it extremely narrowly. In 2003, its pivotal *Lockyer v. Andrade* decision upheld a term of fifty-years-to-life for a petty recidivist sentenced under California's three-strikes law. Leandro Andrade, a Latino veteran who became a heroin addict while serving in the U.S. military, had shoplifted videotapes worth $153. The titles included *Snow White*, *Cinderella*, *Batman Forever*, and *Little Women*. While Andrade claimed that the videotapes were meant to be gifts, his goal may have been to resell them in order to feed his drug addiction.[376] Erwin Chemerinsky, a prominent professor and public-interest lawyer, eventually took Andrade's case pro bono. Chemerinsky challenged the excessiveness and absurdity of the sentence to no avail. In a 5-4 vote, the Court deemed that the sentence was not excessive and that Andrade's individual circumstances were irrelevant.[377] The conservative majority technically recognized that the Eighth Amendment forbids "grossly disproportionate" prison terms even as it upheld Andrade's sentence.[378] In practice, it reasoned that the Eighth Amendment does not cover the excessiveness of prison terms,[379] following its jurisprudence that individualized proportionality review is limited to capital cases under a doctrine known as "death is different."[380] "If Andrade's sentence is not grossly disproportionate," the dissenters protested, "the principle has no meaning."[381]

Since 2010 the U.S. Supreme Court has reconsidered this jurisprudence in the area of juvenile life without parole, by limiting this sentence's applicability to children while refusing to abolish it.[382] This evolving jurisprudence gave an impetus to a wave of state reforms. At the time of writing, 28 states had

376. ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 2 (2010).

377. Lockyer v. Andrade, 538 U.S. 63 (2003).

378. *Id.* at 77 ("The gross disproportionality principle reserves a constitutional violation for only the extraordinary case.").

379. The Court especially discussed its influential precedent in *Harmelin*, which had interpreted the Eighth Amendment exceedingly narrowly in upholding life without parole for a first-time felon who possessed a huge quantity of cocaine. *Lockyer*, 538 U.S. at 73–76 (citing Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (plurality opinion)).

380. *Harmelin*, 501 U.S. at 995 ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.").

381. *Lockyer*, 538 U.S. at 83 (Souter, J., dissenting). *See also* Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 56, at 713–27.

382. Graham v. Florida, 560 U.S. 48 (2010) (finding life without parole unconstitutional for juveniles in non-homicide cases); Miller v. Alabama, 576 U.S. 460 (2012) (upholding constitutionality of life without parole for juveniles in homicide cases but finding that it cannot be a mandatory sentence); Montgomery v. Louisiana, 577 U.S. 190 (2016) (making *Miller* retroactive).

categorically abolished life without parole for juveniles.[383] However, draconian prison terms for adults are still effectively excluded from Eighth Amendment protection,[384] just as state-level reforms for adult prisoners remain limited.[385]

Two centuries ago, American society tended to be ahead of Europe in adopting rehabilitative and humanistic sentencing practices tailored to one's culpability.[386] When Alexis de Tocqueville traveled to the United States in the 1830s, he famously observed that "in no country is criminal justice administered with more mildness than in the United States."[387] Up until the rise of mass incarceration in the 1970s, U.S. incarceration levels were relatively similar to those of Canada and European nations.[388] Modern America exemplifies what can happen to a country when its penal system abandons individualization and proportionality as guiding principles.[389]

### *B. The Present in Historical Context*

Introducing evidence of systemic racism or social inequality is a means of enhancing individualization and proportionality in sentencing. The prior section described how these principles are commonplace in modern Western democracies. The current section outlines historical events that contributed to the development of these principles insofar as they aim to sentence more humanely, fairly, and rationally. It further describes how modern judicial decisions, such as those

383. *States That Ban Life Without Parole for Children*, CAMPAIGN FOR FAIR SENT'G YOUTH, https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/ [https://perma.cc/EC5P-N38M] (last visited Feb. 2, 2024).

384. Mugambi Jouet, *Juveniles Are Not So Different: The Punishment of Juveniles and Adults at the Crossroads*, 33 FED. SENT'G REP. 278 (2021).

385. *See* GHANDNOOSH, *supra* note 32.

386. *See generally* Mugambi Jouet, *Revolutionary Criminal Punishments: Treason, Mercy, and the American Revolution*, 61 AM. J. LEGAL HIST. 139 (2021) (analyzing the relative moderation of criminal punishments in the founding era, from ordinary crimes to alleged treason); Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, *supra* note 60, at 68–75 (documenting the rise of the anti-death-penalty movement in nineteenth-century America).

387. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 694 (Henry Reeve trans., Bantam 2000).

388. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 33 (2011).

389. The past restraint in imprisonment that Stuntz recounts reflects the value of proportionality in American sentencing until the mass incarceration era. *Id.* at 2, 33–34. In 1983, *Solem v. Helm* actually recognized that "proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. 277, 292 (1983). However, the U.S. Supreme Court subsequently retreated from *Solem* in *Harmelin* and *Lockyer*, thereby eviscerating constitutional proportionality analysis. *See* Harmelin v. Michigan, 501 U.S. 957, 1004–09 (1991) (Kennedy, J., concurring in part) (interpreting *Solem* very narrowly while upholding draconian prison term); Lockyer v. Andrade, 538 U.S. 63, 68–74 (2003) (calling into question *Solem*'s validity as a precedent); *see also* Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 56, at 718–23 (discussing *Solem* and Eighth Amendment jurisprudence).

abolishing life without parole in Canada[390] and continental Europe,[391] reflect this historical evolution.

While a comprehensive history of humanistic sentencing principles in Western societies lies beyond these pages, their roots stretch at least as far as the Renaissance. In this epoch, influential figures like Erasmus, Thomas More, and Montaigne called for a reconsideration of merciless and inhuman penalties.[392] Montesquieu later urged for "proportion in punishments."[393] His vision entailed assessing the circumstances of the crime and the criminal.[394] Enlightenment thinkers eventually went further, insisting that punishments should be more humane, rational, and proportional. Cesare Beccaria, the most influential Enlightenment philosopher on criminal justice, wrote that punishments should be proportional to their deterrent value. Those exceeding that threshold were "tyrannical" in Beccaria's eyes.[395] These were among the reasons why he became the leading voice for the abolition of capital punishment, which he cast as state murder.[396] On another level, Beccarian philosophy was wary of mitigation based on individual circumstances and instead pointed to uniform sentencing guidelines.[397] It envisioned punishment that would be firm but mild—proportional to culpability and mindful of the wrongdoer's humanity.[398] Beccaria was read by numerous influential figures who carried his ideas forward, such as his call to abolish capital punishment.[399] Among his readers stood Voltaire, who published a thorough commentary on Beccaria's treatise. Voltaire denounced disproportional, ruthless penalties, including the law's inability to fairly assess the culpability of miserable members of society.[400] These reflections increasingly led Voltaire toward opposition to capital punishment and support for more merciful sentences.[401]

---

390. *Bissonnette* (Can.), *supra* note 37.

391. *Vinter* (ECtHR), *supra* note 36.

392. Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, *supra* note 60, at 58–61.

393. MONTESQUIEU, 1 THE SPIRIT OF THE LAWS 97 (Thomas Nugent & J.V. Prichard trans., George Bell & Sons 1909).

394. *See id.* at 97–100.

395. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 50 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., Univ. of Toronto Press 2008) (1764).

396. *See id.* at 55.

397. WHITMAN, *supra* note 40, at 50.

398. *Id.*

399. *See generally* JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION (2014).

400. VOLTAIRE, COMMENTARY ON THE BOOK *ON CRIMES AND PUNISHMENTS*, BY A PROVINCIAL LAWYER (1766), *reprinted in* ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 113 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., 2008).

401. *See* VOLTAIRE, PRIX DE LA JUSTICE ET DE L'HUMANITE (Bern, Ferney 1778).

The most visible legacy of this historical evolution may be the incremental decline of the death penalty since the nineteenth century.[402] Today, the death penalty has been abolished in law or practice in over two-thirds of all countries.[403] The United States is also the lone Western democracy to retain it, although its use has markedly declined in American society, too.[404]

This historical evolution likewise shaped the wider movement for prisoners' rights. In 2013, the European Court of Human Rights abolished life without parole in its historic *Vinter* decision.[405] This jurisprudence certainly presents contradictions, including the United Kingdom's capacity to exempt itself from *Vinter* for reasons beyond the scope of this Article.[406] Yet the European Court has enforced *Vinter* against other nations[407] and its jurisprudence requires an individualized review of continued imprisonment after no more than twenty-five years behind bars.[408] The consideration of an offender's personal and social circumstances is a central feature of the *Vinter* jurisprudence.[409] In 2022, the Supreme Court of Canada converged with *Vinter* in abolishing de facto life without parole in the form of parole ineligibility that could stretch for decades and beyond life expectancy.[410] While Canada's Criminal Code has no provision for life without parole per se, a 2011 amendment enabled its functional equivalent by allowing courts to impose twenty-five-year terms of parole ineligibility to be served consecutively for each murder committed by a defendant, such as seventy-five years of parole ineligibility for a triple homicide.[411] The seminal *Bissonnette* decision unanimously held that this legislative scheme "is difficult to reconcile

402. Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, *supra* note 60.

403. AMNESTY INT'L, *supra* note 35.

404. *See id.*; DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2022: YEAR END REPORT 2 (2022), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report [https://perma.cc/V2C2-R5FQ] (describing a "20-year sustained decline of the death penalty in the United States").

405. *Vinter* (ECtHR), *supra* note 36.

406. *See* Hutchinson v. United Kingdom, App. No. 57592/08 (Jan. 17, 2017), https://hudoc.echr.coe.int/eng?i=001-170347 [https://perma.cc/VJ8S-93UV]; *see also* Ergul Celiksoy, *'UK Exceptionalism' in the ECtHR's Jurisprudence on Irreducible Life Sentences*, 24 INT'L J. HUM RTS. 1594 (2020); Jouet, *The Abolition and Retention of Life Without Parole in Europe*, *supra* note 36.

407. Jouet, *The Abolition and Retention of Life Without Parole in Europe*, *supra* note 36.

408. *Vinter* (ECtHR), *supra* note 36, para. 120 ("[C]omparative and international law materials [demonstrate] clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter."). *See generally* Murray v. Netherlands, App. No. 10511/10, para. 113 (Apr. 26, 2016), https://hudoc.echr.coe.int/fre?i=001-162614 [https://perma.cc/4ZFV-KGA8] (enforcing *Vinter*).

409. Jouet, *The Abolition and Retention of Life Without Parole in Europe*, *supra* note 36. Yet the *Vinter* jurisprudence has not considered systemic racism or an equivalent concept under these personal and social circumstances. *See id.* This underscores the groundbreaking nature of the Canadian jurisprudence concerning Black and Indigenous defendants.

410. *Bissonnette* (Can.), *supra* note 37.

411. *Id.* paras. 3, 31, 35.

with the principles of proportionality and individualization in sentencing."[412] The longest possible sentence in Canada would remain a single, non-consecutive term of twenty-five-years-to-life for first-degree murder.[413] *Bissonnette* emphasized the value of rehabilitation—an objective "intimately linked to human dignity in that it reflects the conviction that every individual has the capacity to reform and re-enter society."[414]

Hence, the overarching trend in Europe and Canada is toward abolishing lifelong imprisonment, partly under a humanistic understanding of individualization and proportionality in sentencing. The normalization of life without parole in the United States has overshadowed this important evolution in prisoners' rights.[415] While Western democracies still commonly fail to live by their humanistic sentencing principles,[416] they have made genuine progress in abolishing the harshest punishments.[417]

How does the consideration of systemic racism and social inequality fit in this long-term historical evolution? The landmark Canadian decisions in *Anderson* and *Morris* found that evidence of systemic racism is a mitigating circumstance at sentencing by drawing upon the principles of individualization and proportionality. Consider the Nova Scotia Court of Appeal's reasoning: "Sentencing is an inherently individualized process [that must] pay close attention to the circumstances of all offenders in order to craft a sentence that is genuinely fit and proper."[418] These are among the reasons why "[t]he moral culpability of an African Nova Scotian offender has to be assessed in the context of historic factors and systemic racism, as was done in this case."[419] This process aims to sentence fairly and avoid excessively harsh punishments. If properly conducted, it offers a fuller picture of defendants as human beings and leads to more humane sentences.

---

412. *Id.* para. 110.

413. *Id.* para. 147.

414. *Id.* para. 141. Lisa Kerr has argued that, notwithstanding *Bissonnette*, "the Parole Board of Canada is all but certain to deny release for the small handful of inmates who have killed multiple people," even after 25 years. "While that sliver of hope may well be immensely significant to an offender and to their experience of incarceration," parole does not focus solely on rehabilitation but also on a crime's gravity and the perspective of victims. Lisa Kerr, Annotation, *Dignity Cannot Be Totally Denied: The Limits of Bissonnette*, 81 CRIM. REPS. 7th 330, 330 (2022) (Can.).

415. *See* Jouet, *The Abolition and Retention of Life Without Parole in Europe*, *supra* note 36.

416. *See generally* LA PERPÉTUITÉ PERPÉTUELLE (Yannick Lécuyer ed., 2012); LIFE IMPRISONMENT AND HUMAN RIGHTS (Dirk Van Zyl Smit & Catherine Appleton eds., 2016); LONG-TERM IMPRISONMENT AND HUMAN RIGHTS (Kirstin Drenkhahn, Manuela Dudeck & Frider Dünkel eds, 2014).

417. *See* Jouet, *The Abolition and Retention of Life Without Parole in Europe*, *supra* note 36.

418. *Anderson* (NSCA), *supra* note 4, para. 115.

419. *Id.* para. 146.

The history of criminal sentencing has now intersected with the history of movements for racial equality and against discrimination.[420] Debates over race, ethnicity, immigration, and the social status of minorities are not new, but they are taking new forms and gaining salience throughout the West.[421] This evolution has sparked social tensions, including the resurgence of nativism, xenophobia, and authoritarianism.[422] At the same time, it is leading social actors in various Western democracies to increasingly address inequality and set out to remedy the over-incarceration of minorities.

## V. FROM THE PAST TO THE FUTURE

If the developments occurring in Canada are a step in a wider transnational history, the next logical question is to what extent other societies may converge in the same direction. For decades, many Americans have actually advocated the kinds of race-conscious penal reforms presently occurring in Canada.[423] By the late 1960s, American reformers had already mounted a test case, *Maxwell v. Bishop*,[424] that might have become a step toward a U.S. version of *Anderson* or *Morris* if it had prevailed. This section describes how contingent circumstances impeded this evolution in the United States. In the meantime, Australia and New Zealand moved toward considering social-context evidence as mitigation in the cases of Indigenous defendants, although this has scarcely ended the mass incarceration of their Indigenous peoples. Modern Europe is likewise experiencing a debate about the over-incarceration of its minorities. We will now delve into this modern history, including periods of regression, immobilism, and progress.

### *A. American Challenges of Yesteryear, Yesterday, and Tomorrow*

Given that the United States is Canada's closest neighbor and that a debate over systemic racism plays a significant role in modern American society, the United States might seem to be where this evolution is likeliest to continue. But this step would face formidable resistance in an America where the political center has long been more to the right of Canada and other Western societies.[425] The

420. Judge Nakatsuru's words illustrate the convergence of these two historical currents: "[Individualization] has always been the fundamental duty of a sentencing judge in sentencing anyone. Thus, I ask rhetorically what is wrong in paying particular attention to the circumstances of the African Canadian offender to achieve a truly proportionate sentence. The answer is self-evident. Nothing." *Jackson* (ONSC), *supra* note 160, para. 115.

421. *See generally* MOUNK, *supra* note 98.

422. *See generally id.*

423. *See generally supra* note 8.

424. Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).

425. *See generally* Jerome Karabel & Daniel Laurison, *An Exceptional Nation? American Political Values in Comparative Perspective* 2, 13, 33 (Inst. for Rsch. Lab. & Emp., Working Paper No. 136-12, 2012), https://irle.berkeley.edu/wp-content/uploads/2012/12/An-Exceptional-Nation.pdf [https://perma.cc/K2K7-SHS6].

hyper-polarization of American society nowadays,[426] its limited consensus on penal reform,[427] and the superconservative supermajority on the U.S. Supreme Court would further impede such a shift in the foreseeable future, at least at the national level.[428] In fact, American society is currently facing a vigorous debate about the future of race-conscious remedies. The U.S. Supreme Court has partly eliminated them in the area of voting rights[429] and has ended affirmative action in university admissions.[430] Penal reform of any kind is likelier at the state level at present, as changes unfolding in Washington State illustrate.[431] Should an equivalent to *Morris* or *Anderson* materialize in America someday, it may initially be under state law in a blue state.

Constitutional efforts to consider systemic racism at sentencing will need to overcome *McCleskey v. Kemp*.[432] That 1987 Supreme Court decision has so far doomed challenges to institutional discrimination in criminal punishment.[433] The test case in *McCleskey* revolved around a comprehensive statistical study by David Baldus, which found evidence of racial discrimination in the administration of the death penalty in Georgia, especially based on the victim's race.[434] Defendants charged with killing white victims were 4.3 times likelier to receive a death sentence than defendants charged with killing Black victims.[435] In a contentious 5-4 ruling, the Supreme Court rejected the claim of systemic discrimination, holding that such statistical data is irrelevant and that a defendant must instead prove intentional discrimination in their case—a virtually insurmountable standard of proof.[436]

---

426. *See generally* ALAN ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP (2018).

427. *See generally* GHANDNOOSH, *supra* note 32.

428. *See, e.g.*, Steiker & Steiker, *supra* note 22, at 1623 (discussing how the U.S. Supreme Court now "seems extremely inhospitable to federal constitutional challenges to the death penalty").

429. Shelby County v. Holder, 570 U.S. 529 (2013) (holding that various provisions of the Voting Rights Act of 1965 are no longer necessary and therefore unconstitutional).

430. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that affirmative action is a race-based policy not justified by a compelling state interest).

431. *See infra* note 444 and accompanying text.

432. 481 U.S. 279 (1987).

433. *See, e.g.*, Chien, Ball & Sundstrom, *supra* note 31, at 3-4 (discussing how California's Racial Justice Act ostensibly "gives by state statute what the *McCleskey* decision foreclosed constitutionally," although the statute has had minimal impact since its enactment in 2020).

434. *McCleskey*, 481 U.S. at 286.

435. *Id.* at 287.

436. *Id.* at 292–99; *see also* KIRCHMEIER, *supra* note 20, at 192 (recounting how "some consider [*McCleskey*] the worst United States Supreme Court decision since the Court upheld the Fugitive Slave Law"); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 78 (2014) (describing *McCleskey* as "a widely condemned opinion").

*McCleskey* echoed *Maxwell v. Bishop*, a 1968 test case based on an analogous challenge to systemic racial discrimination against Black people who had received the death penalty for rape in the South.[437] That challenge had fallen on deaf ears. The petitioners before the Eighth Circuit argued that this outcome reflected "how difficult it is for Negro litigants generally and those without means particularly, to make courts see the reality of the world, indeed the segregated world in which they live."[438]

The claim in *Maxwell* rested on statistical research by the renowned criminologist Marvin Wolfgang.[439] In a decision authored by Harry Blackmun, the future Supreme Court Justice, the Eighth Circuit ruled: "We are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice."[440] The Supreme Court would not review *Maxwell* on the merits, vacating the judgment due to an unrelated procedural issue.[441] But *Maxwell* foreshadowed *McCleskey* two decades later, as then-Circuit Judge Blackmun seemed to discourage this type of test case: "We are not certain that, for Maxwell, statistics will ever be his redemption."[442] Nevertheless, one may find hope for a future evolution in U.S. constitutional law in how Blackmun himself later dissented in *McCleskey*, arguing that the Court should accept a constitutional challenge to institutional racism based on rigorous statistical data.[443]

In fact, an evolution on this front is already occurring in part of the country. Consider the approach that Washington State's Supreme Court adopted in its watershed *Gregory* decision, which unanimously abolished the death penalty under the state constitution in 2018.[444] Among other factors, *Gregory* accepted the fundamental findings of a statistical study by the sociologist Katherine Beckett, which demonstrated the racially discriminatory application of capital punishment at a systemic level in Washington State.[445] "To reach our conclusion, we afford great weight to Beckett's analysis and conclusions," the judges

437. Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

438. *Id.* at 145 (citation omitted).

439. *Id.* at 141.

440. *Id.* at 147.

441. Maxwell v. Bishop, 398 U.S. 262 (1970) (vacating and remanding because several prospective jurors were improperly removed from the panel).

442. *Maxwell*, 398 F.2d at 148.

443. McCleskey v. Kemp, 481 U.S. 279, 345 (1987) (Blackmun, J., dissenting).

444. State v. Gregory, 427 P.3d 621 (Wash. 2018). For a comprehensive discussion of the events surrounding Washington's abolition of the death penalty, consult Steiker & Steiker, *supra* note 22, at 1671–81.

445. KATHERINE BECKETT & HEATHER EVANS, THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014 (2014), https://files.deathpenaltyinfo.org/legacy/documents/WashRaceUPDATE.pdf [https://perma.cc/7T95-88YT].

explained, adding that the prosecution's challenges to the study had led its findings to only grow "more refined, more accurate, and ultimately, more reliable."[446]

The Washington State Supreme Court effectively converged with Canadian courts in its willingness to recognize evidence of systemic racial discrimination: "Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance."[447] The Washington Justices were unequivocal: "We need not go on a fishing expedition to find evidence external to Beckett's study as a means of validating the results. Our case law and history of racial discrimination provide ample support."[448]

This was a stark contrast from the U.S. Supreme Court's 5-4 majority in *McCleskey*, which rejected systemic racism's relevance for Black people facing the death penalty in Georgia—a Southern state with a long legacy of slavery and segregation. "[W]e will not infer a discriminatory purpose on the part of the State of Georgia," *McCleskey* underlined.[449] As Carol Steiker and Jordan Steiker have observed, Washington State's high court "took great lengths to insulate its opinion from federal review by stating explicitly that it did not reach the federal constitutional issue [concerning systemic racial discrimination]," because "it is virtually certain that the U.S. Supreme Court would have reversed" based on *McCleskey*.[450]

To be sure, the granular legal issue in *Morris* and *Anderson*—whether a Black defendant may present evidence of systemic racism as mitigation at sentencing—differed from the one in *Maxwell*, *McCleskey*, and *Gregory*—whether the death penalty should be abolished in light of evidence of systemic discrimination in its administration. But the claims in both lines of cases shared a common premise that systemic or structural racism exists and is relevant to sentencing. *Morris* and *Anderson* may be understood as a broader application of the kind of challenge in *Maxwell*, *McCleskey*, and *Gregory*. Indeed, the Canadian cases allow evidence of systemic racism across the board in sentencing, rather than solely as a basis to challenge the lawfulness of a particular punishment.

*McCleskey* concerned the death penalty but was a broad holding reflecting the view that systemic or structural racism in criminal sentencing is a nonissue; and that American courts should not entertain challenges to racial disparities:

> Apparent disparities in sentencing are an inevitable part of our criminal justice system . . . . McCleskey's claim, taken to its

446. *Gregory*, 427 P.3d at 633.
447. *Id.* at 635.
448. *Id.*
449. McCleskey v. Kemp, 481 U.S. 279, 299 (1987).
450. Steiker & Steiker, *supra* note 22, at 1679, 1680.

> logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . . [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.[451]

*McCleskey* thus vastly differs from the Canadian jurisprudence, which recognizes that systemic or structural racism is a serious problem; and that courts have a responsibility to consider remedies to racial disparities or inequalities in criminal sentencing. On one hand, *Anderson* and *Morris* rested upon individual evidence of mitigation for Rakeem Anderson and Kevin Morris.[452] On the other hand, this was *individualization in the context of group experience* driven by concern about remedying racial disparities that Black people face in the penal system. In fact, both *Anderson*[453] and *Morris*[454] begin with emphatic points about racial disparities. The same concern with remedying stark disparities has shaped the Canadian jurisprudence concerning Indigenous people.[455] Yet the law in the United States is not set in stone and may someday evolve past the narrow position of *McCleskey*, with which four Justices dissented.[456]

For the time being, *Maxwell* and *McCleskey* exemplify how American litigators have historically tended to fail in attempts to marshal evidence of systemic discrimination at sentencing, whereas Canadian reformers have proved more successful. The Canadian prosecutors in *Morris*[457] and *Anderson*[458] actually recognized the relevance of systemic racism as mitigation in the cases of Black defendants, building upon over two decades of recognition of such factors for Indigenous Canadians.[459] Recall that, under Prime Minister Trudeau, the

---

451. *McCleskey*, 481 U.S. at 312, 314–15.

452. *See supra* Sections III.A.–B.

453. "We are now well aware that the disproportionate incarceration of Black offenders reflects the systemic discrimination and racism that permeates the criminal justice system. As the Supreme Court of Canada very recently noted, since *R. v. Parks*, 'courts have acknowledged the wide range of ways the criminal justice system can disproportionately affect accused persons' who are Indigenous or racialized." *Anderson* (NSCA), *supra* note 4, para. 5 (citing R. v. C.P., 2021 SCC 19, para. 89 (Can.); R. v. Parks (1993), 15 O.R. 3d 324 (Can. Ont. C.A.)).

454. "It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis." *Morris* (ONCA), *supra* note 2, para. 1.

455. *See Gladue* (Can.), *supra* note 14, para. 58 (discussing sharp disparities in the incarceration of Indigenous people); *Ipeelee* (Can.), *supra* note 15, paras. 57, 62 (deploring the persistence of sharp disparities in the aftermath of *Gladue*).

456. *See generally* McCleskey v. Kemp, 481 U.S. 279, 327 (1987) (Brennan, J., dissenting) (emphasizing that "prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims").

457. *Morris* (ONCA), *supra* note 2, para. 5. *See also supra* note 215 and accompanying text.

458. *Anderson* (NSCA), *supra* note 4, paras. 10–12, 112–13.

459. *See supra* note 13 and accompanying paragraph.

Canadian government also welcomed this shift by providing funding for pre-sentencing reports documenting the impact of systemic racism.[460] This was a far cry from the prosecution in *McCleskey*, which firmly denied the existence of systemic racial discrimination when defending the death penalty[461]—a punishment that Canada abolished in 1976, a decade before *McCleskey*.[462] Accordingly, the nexus of punitiveness and discrimination in the U.S. penal system make an equivalent to *Morris* or *Anderson* implausible at present, especially on a nationwide level under U.S. constitutional law or federal law.

Last but not least, American reformers may face another kind of challenge if they were to point to Canada as a model to follow: the reticence to learn from the experiences of foreign countries. The United States' power and relative insularity often means that transnational influence can be a one-way street where America influences other countries, but is much less influenceable by them.[463] However, prior generations of Americans were more amenable to learning from the wider world. For instance, the use of foreign law or international standards as persuasive authority in judicial decisions was not controversial before the turn of the twenty-first century, due to mounting opposition from conservative judges and politicians.[464] Many contemporary American jurists have nonetheless recognized the value of learning from the experiences of the outside world and from international human rights norms, such as Justices Stephen Breyer, Ruth Bader Ginsburg, and Anthony Kennedy.[465] In addition to evolving standards of decency at the national level, international human rights standards factored into key U.S. Supreme Court decisions on prisoners' rights.[466] Should the American social landscape evolve in years to come, legal actors may prove more willing to learn from Canadian jurisprudence. Of course, it is also possible that American law could someday independently reach the same conclusion as in *Morris* or *Anderson* without even being aware of these cases, which echo longstanding attempts by American reformers to push in this direction.[467]

---

460. *IRCA Pre-Sentencing Reports*, DEP'T JUST. CAN., *supra* note 6.

461. Brief for Respondent at 5–7, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84–6811), 1986 WL 727361.

462. Jouet, *The Day Canada Said No to the Death Penalty in the United States*, *supra* note 24, at 441.

463. *See generally* JOUET, EXCEPTIONAL AMERICA, *supra* note 42, at 232–60.

464. Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT'L L.J. ONLINE 1, 2 (2010), https://dash.harvard.edu/handle/1/10511098 [https://perma.cc/9H9J-88FF].

465. *Id.* at 5–8, 11–13.

466. *See* Graham v. Florida, 560 U.S. 48, 80–82 (2010) (abolishing juvenile life without parole in non-homicide cases); Roper v. Simmons, 543 U.S. 551, 577–78 (2005) (abolishing the juvenile death penalty); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) (abolishing the death penalty for the intellectually disabled).

467. *See generally supra* note 8.

Better attention to mitigation is a logical evolution in societies where individualization, proportionality, and the rehabilitation of prisoners are fundamental objectives of criminal justice. In contrast, improved mitigation practice might seem irrelevant in a society narrowly concerned with retribution, deterrence, and incapacitation. Insofar as modern America has become such a society in the age of mass incarceration, it may someday choose another path and converge with less punitive societies aspiring toward criminal justice with a human face.[468]

### *B. Beyond North America*

The concept of "race" used in North America is not universal,[469] which may hinder the recognition of systemic racism as mitigation in sentencing in other Western democracies. These circumstances might cut against this Article's theory that this recognition marks a step in the wider evolution of criminal justice in the Western world. While the prior subsection explored obstacles to such a shift in the United States, the present one considers why other Western democracies will not necessarily move in this direction either. Still, the growing demographic diversity of modern European societies and the fact that they tend to be more liberal or social-democratic than contemporary America[470] suggest that future generations of reformers may eventually converge toward a standard analogous to *Morris* or *Anderson*. Meanwhile, Australia and New Zealand have already developed such a jurisprudence for Indigenous defendants, which we will explore as additional evidence of a transnational evolution in sentencing.

468. This Article focuses on mainstream criminal courts within Western legal systems, but the path to social change may be different for Indigenous courts. For American Tribal courts, for instance, Lauren van Schilfgaarde argues that "[e]nhanced individual rights alone, especially expressed in an adversarial court system, will not remedy Tribal criminal justice," which requires greater sovereignty and jurisdiction over criminal cases. van Schilfgaarde, *supra* note 89, at 56. Her case study describes how diverse Tribal governments are currently expanding their jurisdiction by negotiating the transfer of certain criminal cases to Tribal courts, thereby improving their capacity to implement restorative justice and Indigenous legal traditions. *Id.* at 45–57. A wider question is the relationship of American constitutionalism to Indigenous peoples. *See* Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 12 (2023) (arguing that "[w]e have yet to reckon with the constitution of American colonialism as an aspect of our constitutional law").

469. *See supra* note 41.

470. *See generally* Karabel & Laurison, *supra* note 425, at 13 (empirical research finding that "the United States comes out noticeably to the right of all 19 other countries [studied]").

For starters, the overarching social debate over race in North America has significantly converged.[471] This arguably reflects the influence of the United States and its media coverage in Canadian society.[472] While American social trends also tend to have an outsized influence on other Western societies, if not most of the world,[473] the effect is plausibly more significant on Canada—an immediate neighbor with close cultural and economic ties.[474] Liberals in both America and Canada have thus come to regularly refer to race (e.g., systemic racism, racial disparities, unconscious bias, etc.) when analyzing society and advocating reform.[475] In both countries the government can also have race-conscious policies, such as collecting census data on race or ethnicity[476] and distinctive laws or policies regarding their Indigenous citizens.[477] *Morris* and *Anderson* could be viewed as a Canadian analog to longstanding practices in U.S. law and policy.

Europe tends to differ from North America's approach. In France, for example, the government prohibits racial discrimination but cannot lawfully recognize or classify people by race or ethnicity. It is illegal for the French census

471. *See, e.g.*, Tom Blackwell, *How Critical Race Theory Sparked Controversy in the U.S. and Influenced Canadian Education*, NAT'L POST (Can.) (Feb. 7, 2022), https://nationalpost.com/news/canada/what-is-critical-race-theory [https://perma.cc/TK3J-MUPN]; Caroline Labelle, *Le Québec s'américanise*, JOURNAL DE MONTRÉAL (Apr. 16, 2021, 1:32 PM), https://www.journaldemontreal.com/2021/04/16/le-quebec-samericanise [https://perma.cc/7443-W83C]; Azra Rashid, *Racism & the Americanization of Canadian History: Why We Shouldn't Look at Ourselves Through a U.S. Lens*, CONVERSATION (May 26, 2021, 2:11 PM), https://theconversation.com/racism-and-the-americanization-of-canadian-history-why-we-shouldnt-look-at-ourselves-through-a-u-s-lens-159974 [https://perma.cc/VWD7-EBRV].

472. *See generally supra* note 471.

473. *See generally* Poushter, *supra* note 9.

474. *See, e.g.*, William Borders, *Canada Is Seeking to Reduce U.S. Cultural Influence*, N.Y. TIMES L2 (Jan. 11, 1975), https://www.nytimes.com/1975/01/11/archives/canada-is-seeking-to-reduce-us-cultural-influence.html [https://perma.cc/ECD6-AC9X]; Aleksandre Katamadze, *La dépendance du Canada envers les États-Unis: liberté ou opportunité?*, CONFLITS (Aug. 21, 2020), https://www.revueconflits.com/canada-etats-unis-dependance/ [https://perma.cc/7MEK-DJDH]. Another question beyond these pages is whether predominantly francophone Quebec is less influenced by the United States than the rest of Canada. *See generally* LE DESTIN AMÉRICAIN DU QUÉBEC: AMÉRICANITÉ, AMÉRICANISATION ET ANTI-AMÉRIQUE (Guy Lachapelle ed., 2011).

475. *See supra* note 471.

476. *See supra* note 104 and accompanying text.

477. *See generally* JOHN J. BORROWS & LEONARD I. ROTMAN, INDIGENOUS LEGAL ISSUES: CASES, MATERIALS & COMMENTARY (6th ed. 2022) (Can.); MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2d ed. 2020).

to collect such data, as France considers itself an indivisible republic.[478] In postwar France, government collection of data about "race" can evoke the racial anti-Semitic laws of Nazi occupiers and their French collaborators.[479] For all of these reasons, a formal equivalent to *Morris* or *Anderson* in France is inconceivable in the foreseeable future. In practice, that does not mean that French judges cannot be mindful of the inequities facing defendants from underprivileged minority groups in their society—even if one's race or ethnicity is not officially considered. Skilled French criminal defense counsel already marshal such evidence at sentencing, just as French court personnel can convey it in the reports they prepare for sentencing.[480] If a French equivalent to *Morris* or *Anderson* will not come to pass, a better application of the principles of individualization and proportionality under French law could potentially lead to the same outcome for marginalized minorities. The same might be said about other continental European countries, which might not mesh with the North American approach either. Insofar as these societies may differ in their understanding of race, they may consequently

478. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2007-557DC, Nov. 15, 2007, paras. 24, 29 (Fr.) (holding that the French government cannot collect data based on race or ethnicity); *Ethnic-Based Statistics*, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ETUDES ECONOMIQUES (Sept. 16, 2016), https://www.insee.fr/en/information/2388586 [https://perma.cc/6ZGX-7DTT] (Fr.) (describing French law and policy). French proponents of reform argue that collecting these data would help document and expose racial disparities and systemic racism. Some view the French government's policy of assimilation and integration of minorities or immigrants as discriminatory. Opponents respond that officially recognizing racial categories would foster "*communautarisme*" (communitarianism)—a fractured society where each race or community lives apart. *See generally* Gary Dagorn, *La difficile utilisation des statistiques ethniques en France*, LE MONDE (Mar. 19, 2019, 8 :36 PM), https://www.lemonde.fr/les-decodeurs/article/2019/03/19/la-difficile-utilisation-des-statistiques-ethniques-en-france_5438453_4355770.html [https://perma.cc/8D3R-4KSF].

479. Patrick Simon, *Les sciences sociales françaises face aux catégories ethniques et raciales*, 105 ANNALES DE DÉMOGRAPHIE HISTORIQUE 111, 121 (2003).

480. In a nutshell, in French criminal trials defense counsel can present mitigation concerning "remorse, difficult personal history, addiction, and so forth." Jacqueline Hodgson & Laurène Soubise, *Understanding the Sentencing Process in France*, 45 CRIME & JUST. 221, 230 (2016). Judges ultimately have discretion to "adapt the sentence to the needs of the individual offender in order to make it more effective and to prevent reoffending." *Id.* at 231. Judges can also revisit prior sentences and adapt them "depending on the evolution of the personality of the convicted person and her financial, familial, and social situation, which must be evaluated regularly." *Id.* From a comparative angle, however, scholars observed "the minor part played by the defense lawyer" in France's predominantly inquisitorial model. *Id.* at 253. "In more adversarial systems of criminal justice as in England and Wales and the United States, we are accustomed to judges and prosecutors remaining at a distance from the accused, all contact being mediated through the defense lawyer. . . . At trial [in France], the judge maintains a constant dialogue with the accused; the defense lawyer plays a diminished role, usually consisting of a brief mitigation speech." *Id.* at 256. Nevertheless, skilled French defense counsel are known for their eloquence and role in obtaining acquittals or favorable outcomes for their clients, including based on mitigating circumstances, as illustrated by a book on oral arguments and its adaptation into a highly successful play. *See* MATTHIEU ARON, LES GRANDES PLAIDOIRIES DES TENORS DU BARREAU (2013); Sandrine Blanchard, *Richard Berry: « La plaidoirie est un acte de justice qui peut impacter la société »*, LE MONDE (Dec. 9, 2019, 6:21 AM), https://www.lemonde.fr/culture/article/2019/12/09/richard-berry-la-plaidoirie-est-un-acte-de-justice-qui-peut-impacter-la-societe_6022137_3246.html [https://perma.cc/QY8M-3MMH].

differ in their understanding of systemic racism in sentencing. But their criminal courts still could find innovative ways to better consider the circumstances of minorities in order to reduce their over-incarceration.

The United Kingdom may prove a more auspicious venue for an equivalent to *Morris* or *Anderson*, as systemic racism in its penal system has become a significant object of social debate, much like in the United States and Canada.[481] The types of limitations existing under French law also appear absent in the United Kingdom, which illustratively allows the census to collect data on race or ethnicity.[482] Additionally, Thomas O'Malley has observed that fundamental principles regarding the sentencing of Canadian and Australian Indigenous peoples are analogous to mitigating principles found in the Republic of Ireland, such as having a dysfunctional or deprived background.[483]

Finally, recall that Australia and New Zealand are the Western countries that most closely match what Canada has done in recognizing social-context evidence as mitigation in the cases of Indigenous defendants, as neither the United States nor Europe have taken a comparable path so far.[484] Although Australian criminal law can vary depending on the state or territory, mitigation for Aboriginal peoples and Torres Strait Islanders has encompassed "disadvantage due to post-colonial conditions" and "[t]he existence of Indigenous laws and cultural practices which explain the offender's motivation for committing the offense."[485] New Zealand instead has a national standard for criminal law under which Māori mitigating circumstances are usually considered under sentencing legislation.[486]

Australia's experience especially suggests that any trend toward mitigation based on race or ethnicity can reverse itself. "A disadvantaged social background can be regarded as a mitigating factor in Australian courts, particularly if there is a causal link between such a background and the offending behaviour," as Kate

481. Keir Irwin-Rogers, *Racism and Racial Discrimination in the Criminal Justice System*, 2 JUS., POWER & RESISTANCE 243 (2018); KEIR MONTEITH, REMI JOSEPH-SALISBURY, ERICA KANE, FRANKLYN ADDO & CLAIRE MCGOURLAY, RACIAL BIAS AND THE BENCH: A RESPONSE TO THE JUDICIAL DIVERSITY AND INCLUSION STRATEGY (2020-2025) (2022), https://documents.manchester.ac.uk/display.aspx?DocID=64125 [https://perma.cc/C9JV-HJZU]; Owen Bowcott & Vikram Dodd, *Exposed: 'Racial Bias' in England and Wales Criminal Justice System*, GUARDIAN (Sept. 7, 2017, 7:01 PM), https://www.theguardian.com/law/2017/sep/08/racial-bias-uk-criminal-justice-david-lammy [https://perma.cc/K5VG-C4C3].

482. *Ethnic Group, England and Wales: Census 2021*, *supra* note 102.

483. O'MALLEY, *supra* note 59, at 192–94. O'Malley describes this as a matter of "recognising a social reality concerning the circumstances in which certain offenders have grown up," noting that "giving preferential treatment to a specified population group . . . could well create constitutional difficulties" in Ireland. *Id.* at 193.

484. *See supra* note 357 and accompanying text.

485. Marchetti & Anthony, *supra* note 74, at 5–6.

486. *Id.* at 7. *See* Sentencing Act 2002, s 26(2)(a), 27(1)(a) (N.Z.) (providing that the offender's "cultural background" may be relevant to sentencing).

Warner explains.[487] Nowadays, however, "courts have tended to resile from the approach of the 1970s to the late 1990s, which accepted that the history of colonization and the socio-economic disadvantage suffered by Aboriginal Australians justified imposing more lenient sentences on indigenous offenders."[488] One question in the Australian debate is the role of such mitigation when victims are from the same group—a matter that *Morris* also addressed in Canada when considering the situation of Black victims.[489] Warner describes how Australian courts "have emphasized the need to denounce and deter violence against Aboriginal women and children in particular. It has been argued that the change has been such that membership of a dysfunctional indigenous community is now aggravating rather than mitigating."[490] Today, a third of Australia's prisoners are Indigenous,[491] despite being barely three percent of the national population.[492]

The narrowing of mitigation for Indigenous defendants crystalized in a major decision by the High Court of Australia in 2013. In *Bugmy*, the defense relied on Canadian law as persuasive authority in an effort to expand mitigation for Indigenous defendants in Australia.[493] The Court rejected this test case, emphasizing that Canada's *Gladue* jurisprudence stems from a 1996 statute and that Australia has no such legislation.[494] Worse, the judges rejected the notion that Aboriginal peoples' historical and societal circumstances were generally mitigating:

> There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender.

---

487. Warner, *supra* note 74, at 128. A distinguished scholar of criminal justice, Warner incidentally became the first woman Governor of Tasmania. Liz Gwynn, *Tasmania's Outgoing Governor Kate Warner Reflects on Her Tenure*, ABC NEWS (Austl.) (June 1, 2021, 4:15 PM), https://www.abc.net.au/news/2021-06-02/outgoing-tasmanian-governor-kate-warner-reflects-on-tenure/100180484 [https://perma.cc/R663-SL35].

488. Warner, *supra* note 74, at 128.

489. *See supra* note 198 and accompanying text.

490. Warner, *supra* note 74, at 128. Thalia Anthony offers an analogous account of regression in Australia: "Since the late 1990s the higher courts have retreated from recognizing Indigenous 'difference' as a mitigating circumstance," given the view that Indigenous offenders' circumstances make them a risk to their communities, thereby requiring "more severe sentences to reflect the seriousness of crimes in these 'dysfunctional' communities and deter their behaviours." ANTHONY, *supra* note 74, at 16.

491. AUSTL. BUREAU STAT., *supra* note 123; *see also* AUSTL. L. REFORM COMM'N, *supra* note 130, at 96 (documenting a 41 percent increase in the incarceration rate of Aboriginal and Torres Strait Islander people between 2006 and 2016).

492. AUSTL. BUREAU STAT., *supra* note 122.

493. *Bugmy v The Queen* (2013) 249 CLR 571, paras. 28–35 (Austl.).

494. *Id.* para. 36.

> Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.[495]

This stance diverges from Canadian law, which has taken judicial notice of systemic racism and accepted the need to address the over-incarceration of both Indigenous and Black people.[496] Even though *Bugmy* partly left the door open to such mitigation[497] and various cases since then have been more perceptive about Aboriginal defendants' circumstances,[498] the High Court of Australia took a narrow view of these matters by pointing to the absence of legislation akin to the 1996 Canadian statute addressing Indigenous over-incarceration.[499] But the High Court could have been far more receptive to the predicament of Aboriginal defendants based on existing Australian law and precedents.[500] Scholars have argued that the nation's courts have latitude to remedy the over-incarceration of Aboriginal peoples because systemic discrimination reflects "a judicial failure"[501]—a claim that litigators may raise on behalf of defendants in other countries where legislators have yet to step in.

This obstacle is especially relevant to the United States, where the Supreme Court has proved extraordinarily deferential to legislatures in the face of mass incarceration on practically world-record levels.[502] In response to a constitutional challenge to California's three-strikes-law and its lifelong sentences for petty recidivists, the Court emblematically held: "This criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme. We do not sit as a 'superlegislature' to second-guess these policy choices."[503]

*Bugmy* is also relevant to America and other countries where people will push back against remedies focused on race or ethnicity, whether enacted by legislation

---

495. *Id.*

496. *See supra* Sections II, III.

497. For instance, *Bugmy* noted that "[a]n Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence." *Bugmy*, 249 CLR 571, para. 37. The High Court added that "the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending." *Id.* para. 44.

498. *See, e.g.*, Chris Charles, *Four Recent Decisions on Sentencing Aboriginal People*, 26 J. JUD. ADMIN. 49 (2016) (discussing post-*Bugmy* jurisprudence in the state of South Australia).

499. *Bugmy*, 249 CLR 571, para. 36.

500. Anthony, Bartels & Hopkins, *supra* note 131, at 59–63, 67–68.

501. *Id.* at 67; *accord* Charlton, *supra* note 131.

502. Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 56, at 713–27.

503. Ewing v. California, 538 U.S. 11, 28 (2003) (plurality opinion).

or judicial decision.[504] After all, the High Court of Australia objected that it would *violate* individualization in sentencing to take judicial notice of historical and social hardships facing Aboriginal peoples.[505] But Australian scholars have responded that the "recognition of systemic disadvantage provides for a fuller picture of the individual's circumstances,"[506] and that "the offender's individual circumstances can be understood by reference to this group experience."[507] Stephen Rothman, a Justice on the Supreme Court of New South Wales, has underlined that destabilization borne from a "200 year history of dispossession from their own land; exclusion from society; discrimination; and disempowerment" is relevant mitigation for Aboriginal defendants.[508] "To treat Aborigines differently in Australia by taking account of such factors is an application of equal justice; not a denial of it," Rothman argued.[509] This understanding of individualization is consistent with the Supreme Court of Canada's jurisprudence on the sentencing of Indigenous defendants,[510] as well as with *Anderson* and *Morris* on Black defendants.[511]

Mirko Bagaric, an Australian scholar, has urged a new approach that may also tempt reformers in America, Canada, and other societies: "a concrete mathematical sentencing discount" of 25 percent for Indigenous offenders. "The reason for this figure is that it is roughly the same as that conferred for an early guilty plea in most Australian jurisdictions and experience has shown that the discount is substantial enough to change behaviour (for example, encourage guilty pleas) but not so large as to undermine the integrity of the sentencing system," Bagaric notes.[512] This differs from the Canadian jurisprudence, which has explicitly rejected a "race-based discount" as a means of attenuating sentences for

504. Regarding the ongoing debate over race-based classifications or remedies in American society, see generally DAVID E. BERNSTEIN, CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA (2022); Cass R. Sunstein, *The Invention of Colorblindness*, SUP. CT. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4498466 [https://perma.cc/KP8N-9YLE].

505. *Bugmy*, 249 CLR 571, para. 36.

506. Anthony, Bartels & Hopkins, *supra* note 131, at 49.

507. *Id.* at 68.

508. *Id.* at 53 (quoting Justice Stephen Rothman, The Impact of *Bugmy* & *Munda* on Sentencing Aboriginal and Other Offenders, Speech at the Ngara Yura Committee Twilight Seminar 10 (Feb. 25, 2014)).

509. *Id.*

510. *Id.* at 67–72 (citing, *inter alia*, *Ipeelee* (Can.), *supra* note 15).

511. *See generally Morris* (ONCA), *supra* note 2, para. 13 ("Courts may acquire relevant social context evidence through the proper application of judicial notice or as social context evidence describing the existence, causes and impact of anti-Black racism in Canadian society . . . .").

512. Mirko Bagaric, *Let's Slash Indigenous Sentences by a Quarter*, AUSTRALIAN (Jan. 3, 2020), https://www.theaustralian.com.au/commentary/lets-slash-indigenous-jail-terms-by-a-quarter/news-story/3c54b5379588826b806627771cd3a04a?btr=8f58ea0b616c8524874f09a1a2fdbe55 [https://perma.cc/KXD2-NDHV].

Indigenous or Black offenders.[513] Such a discount would likewise stand in tension with the evolution of American law, given its rejection of mathematical formulas or quotas as remedies to racial inequality.[514]

New Zealand has actually adopted a mathematical sentencing "discount" that is available to Indigenous defendants, thereby offering a concrete example of how this approach could function elsewhere.[515] Judges assessing a sentencing discount rely on social-context evidence presented under Section 27 of the Sentencing Act, which became known as "cultural reports," although the accuracy of this shorthand is disputed.[516] To be clear, this is not a "race-based discount" and it differs from Bagaric's proposal in various ways.[517] The discount is not automatic, as the defendant must demonstrate a link between their background and their

513. *Ipeelee* (Can.), *supra* note 15, paras. 64, 70, 75; *Morris* (ONCA), *supra* note 2, para. 97; *see also supra* note 214 and accompanying text.

514. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978) (plurality opinion); *see also supra* note 79.

515. *See* FINN & WILSON, *supra* note 74, at 304–07. Sentencing "discounts" are not limited to personal mitigating factors in New Zealand, as they can also notably apply to guilty pleas. The Court of Appeal has specified how to approach such discounts: "There can be no hard and fast rule requiring discounts for mitigating circumstances to be applied uniformly as a percentage of the starting point. In the context of discounts for guilty pleas, . . . discounts on a percentage basis are preferable. We note from a survey of High Court decisions that discounts for cultural factors reflected in [pre-sentencing] reports are routinely calculated on percentage terms." *Whittaker v. R* [2020] NZCA 241, at [49] (N.Z.) (footnotes omitted).

516. Among other provisions, Section 27 states: "If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on . . . the personal, family, whanau, community, and cultural background of the offender." Sentencing Act 2002, s 27(1)(a) (N.Z.); *see also Access to Justice Impacted by Proposed Repeal of Sentencing Report Funding*, N.Z. L. SOC'Y (Feb. 8, 2024), https://www.lawsociety.org.nz/news/newsroom/advocacy-in-action/access-to-justice-impacted-by-proposed-repeal-of-sentencing-report-funding/ [https://perma.cc/BR8B-2JS5] (noting that a Section 27 report, "often erroneously described as a 'cultural report', allows the offender to put evidence before the Court about their background, how that may have contributed to their offending, any support mechanisms available to them, and any actions they have taken to resolve the offending").

517. David Harvey, a retired judge now in private practice, surveyed the use of Section 27 reports and emphasized that "information about background, culture and other social and economic aspects of an offender's provenance may be used by offenders other than Māori. It is not specifically race based although that may have been the main driver for the enactment of the section." David John Harvey, *Discounting Cultural Issues Revisited* 43–44 (July 6, 2022) (self-published online article), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155689 [https://perma.cc/D7A4-R5WB].

crime.[518] The individual experience of the offender is assessed in the context of group experience, which does not amount to a blanket discount based on identity.[519] Moreover, these fundamental principles and the related sentencing "discounts" do not apply solely to Māori but to people of any ethnicity,[520] as underlined in *Zhang*, a consolidated appeal comprising the cases of defendants from minority groups and underprivileged whites.[521]

In *Tipene*, for instance, the New Zealand Court of Appeal reduced the sentence of a Māori man who was driving a stolen car and tried to flee into a private home, where he suddenly demanded money from its residents at knifepoint before stabbing a police dog when resisting arrest.[522] The Court considered these aggravating circumstances but found "a linkage between Mr Tipene's dependence on methamphetamine, which is rooted in his deprived traumatic childhood and youth, which itself is a product of systemic cultural deprivation, and his offending."[523] As a result, the Court "consider[ed] a 15 per cent deduction . . . appropriate."[524]

If the upshot was a mathematical sentence discount for a Māori, the outcome rested on concrete mitigating evidence: a childhood "marked by violence and deprivation, cultural disconnectedness despite strongly identifying as Māori, lack

---

518. FINN & WILSON, *supra* note 74, at 304–07 (discussing jurisprudence). Yet the Court of Appeal later specified that "symptoms of systemic Māori deprivation are reasonably self-evident, including (among other things) intergenerational social and cultural dislocation of the whānau, poverty, alcohol and or drug abuse by whānau members and by the offender from an early age, whānau unemployment and educational underachievement, and violence in the home. Evidence from whānau about the offender's life is enough." *Carr v. R* [2020] NZCA 357, at [58] (N.Z.) (quoting *Solicitor-General v. Heta* [2018] NZHC 2453, at [50] (N.Z.)). In Māori, "whānau" refers to "extended family, family group, a familiar term of address to a number of people - the primary economic unit of traditional Māori society." *whānau*, TE AKA MĀORI DICTIONARY, https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=wh%C4%81nau [https://perma.cc/RL2D-47NE] (last visited Feb. 17, 2024).

519. *See Carr* [2020] NZCA 357, at [58]. In 2013, the New Zealand Court of Appeal held that "an absolute requirement that a court allow an offender a fixed discount against an otherwise appropriate starting point solely on account of his or her ethnicity is of such fundamental and far-reaching importance to sentencing policy that it could only be sanctioned by Parliament . . . ." *Mika v. R.*, [2013] NZCA 648, at [9] (N.Z.). "Parliament could not have intended that a standard discount based on ethnicity should be applied undiscerningly by courts irrespective of whether that factor related to the offender's culpability for a particular crime," the Court underlined. *Id.* at [10]. In response to the defendant's emphasis on "the disproportionate representation of those of Māori heritage in New Zealand's prison population," the Court added: "Judges in all jurisdictions are acutely conscious of that factor and its reflection of the economic, social and cultural disadvantages suffered by many Māori. We accept that those circumstances frequently contribute to offending. But it does not logically follow that a person is more likely to be at a disadvantage and to offend simply by virtue of his or her Māori heritage. To some such a proposition may appear offensive." *Id.* at [12].

520. *Zhang v. R* [2019] NZCA 507, at [162] (N.Z.).

521. *See, e.g.*, *id.* at [301] ("Turning to personal circumstances, we agree that a discount is warranted for Mr Yip's youth; his genuine remorse . . . ; lack of prior convictions; limited English and the fact that his support systems were in Hong Kong.").

522. *Tipene v. R* [2021] NZCA 565, at [2–6, 18] (N.Z.).

523. *Id.* at [23].

524. *Id.*

of schooling, early entry into the criminal justice system, and alcohol and drug dependence."[525] Adam Tipene reportedly dropped out of school at 12 years old and "began accompanying an uncle who would break into houses to steal food and items of value."[526] "Around this age, Mr Tipene began using methamphetamine. He became addicted. He recalls a change in his behaviour, as he became overly aggressive and started bullying others."[527]

*Tipene* exemplifies how such sentencing discounts in New Zealand are not automatic.[528] Even so, this growing jurisprudence recognizes that "systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability."[529]

But for the discount, the Court found that the sentence in *Tipene* should have been six years and three months. Resentencing resulted in a term of five years, after factoring a fifteen percent discount for the aforesaid mitigation combined with a separate discount for a guilty plea. As the trial judge had initially imposed a sentence of five years and three months, the reduction effectively amounted to three months.[530] The relative length of the sentence recalls a recurrent question: whether considering mitigating evidence of systemic racism or social inequality will genuinely change sentencing outcomes.

In New Zealand, it will again take more than improved mitigation practice to resolve a situation where 52 percent of prisoners are Māori.[531] In 2019, the government launched a prominent policy initiative to reduce Māori imprisonment,[532] but it has struggled to change the status quo.[533] "Tough-on-

525. *Id.* at [18].

526. *Id.* at [19].

527. *Id.*

528. *See supra* note 518 and accompanying text.

529. *Zhang v. R* [2019] NZCA 507, at [159] (N.Z.). The translation of "rangatiratanga" in Māori is "kingdom, realm, sovereignty, principality, self-determination, self-management," whereas "mana" refers to "prestige, authority, control, power, influence, status, spiritual power, charisma." *mana,* TE AKA MĀORI DICTIONARY, https://maoridictionary.co.nz/word/3424 [https://perma.cc/R8AQ-A3YR] (last visited Mar. 5, 2024); *rangatiratanga*, TE AKA MĀORI DICTIONARY, https://maoridictionary.co.nz/word/6480 [https://perma.cc/8PDW-4FQ5] (last visited Mar. 5, 2024).

530. *Tipene v. R* [2021] NZCA 565, at [26–27] (N.Z.).

531. N.Z. MIN. JUST., *supra* note 125.

532. N.Z. DEP'T CORR., HŌKAI RANGI: ARA POUTAMA AOTEAROA STRATEGY 2019–2024 (2019), https://www.corrections.govt.nz/__data/assets/pdf_file/0003/38244/Hokai_Rangi_Strategy.pdf [https://perma.cc/HKT4-F68J].

533. *See* RADIO N.Z., *Corrections Defends Slow Progress on Hōkai Rangi Strategy* (Dec. 16, 2020, 10:41 AM), https://www.rnz.co.nz/news/national/432947/corrections-defends-slow-progress-on-hokai-rangi-strategy [https://perma.cc/PL9E-6SSR]; Sophie Cornish, *Māori Even More Overrepresented in Prisons, Despite $98m Strategy*, STUFF (N.Z.) (May 1, 2022, 12:24 AM), https://www.stuff.co.nz/national/128306867/mori-even-more-overrepresented-in-prisons-despite-98m-strategy [https://perma.cc/5LA5-8F42].

crime" politics continue to play a role in New Zealand, as Christopher Luxon vowed to limit sentencing discounts before becoming Prime Minister in late 2023.[534] Keeping a campaign promise, his government subsequently barred public funding for the preparation of "cultural reports" with social-context evidence under Section 27 of the Sentencing Act, which has not been repealed itself.[535] While these developments may severely undermine the use of such reports,[536] *Tipene* and other cases previously showed that social-context evidence has the potential to check long sentences.[537]

Besides Canada, the United States may thus learn from Australia and New Zealand's experience. These two countries have the highest incarceration rates in the West after America.[538] Their experience suggests that steps toward recognizing systemic racism and social inequality in criminal justice can lead to regression, backlash, or immobilism—unless a paradigm shift cements more humane, rehabilitative, and egalitarian approaches to punishment. Given the extraordinary harshness of the U.S. penal system in the age of mass incarceration, it would likewise take a major paradigm shift for social change in American society, which will not merely occur from improved mitigation practice in the cases of minorities. Even though the Canadian penal system is not as harsh as

---

534. *See* David Harvey, *A Retired District Judge Unpicks Christopher Luxon's Sentencing Policy*, LAW ASS'N (N.Z.) (July 7, 2023), https://thelawassociation.nz/retired-judge-unpicks-luxons-sentencing-policy/ [https://perma.cc/TEQ5-YAL6] (criticizing Luxon's campaign proposals on sentencing).

535. Luxon's government charged that these sentencing reports had become expensive, fostered lenient sentences, and offered no benefit to victims or the administration of justice. Experts disagreed. Axing public funding still allows defendants to fund the preparation of these reports privately, although few will presumably have the means to do so. *See Legislation Scrapping Funding for Section 27 Cultural Sentencing Reports Passes Under Urgency*, RADIO N.Z. (Mar. 6, 2024), https://www.rnz.co.nz/news/political/510971/legislation-scrapping-funding-for-section-27-cultural-sentencing-reports-passes-under-urgency [https://perma.cc/5CND-BN4J]; *Government to Introduce Bill Cutting Funding for Cultural Reports, Prime Minister Christopher Luxon Fronts Media*, N.Z. HERALD (Feb. 6, 2024), https://www.nzherald.co.nz/nz/politics/prime-minister-christopher-luxon-fronts-media-as-clock-ticks-on-100-day-plan/TPUOCXQ73ZH7FKX3FDLTLN5T4U/ [https://perma.cc/RZ8V-TG73]; Soumya Bhamidipati, *Axeing of Cultural Reports Funding Will Hurt Poorer Sections of Society, Experts Say*, RADIO N.Z. (Feb. 8, 2024), https://www.rnz.co.nz/news/national/508705/axeing-of-cultural-reports-funding-will-hurt-poorer-sections-of-society-experts-say [https://perma.cc/E6FN-FDBS].

536. A law professor noted that barring public funding for these sentencing reports would shift costs elsewhere and would not always end the analysis of social-context evidence for indigent defendants: "Defence lawyers have a professional responsibility to make sure all relevant information is put before the court. If this cannot come in the form of a report prepared by someone with the relevant expertise, the lawyer will have to look elsewhere. . . . Expect more oral evidence to be called – from social workers who might have had a role in the offender's background, for example." Kris Gledhill, *Ending Legal Aid for Cultural Reports at Sentencing May Only Make Court Hearings Longer and Costlier*, THE CONVERSATION (Feb. 14, 2024), https://theconversation.com/ending-legal-aid-for-cultural-reports-at-sentencing-may-only-make-court-hearings-longer-and-costlier-223627 [https://perma.cc/L7VD-8L5M].

537. *See also, e.g.*, Aramoana v. R., [2021] NZCA 558 (N.Z.) (reducing sentence on appeal after fuller consideration of Māori defendant's mitigating circumstances).

538. *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, *supra* note 33.

those of the United States, Australia or New Zealand, its enduring punitiveness toward Indigenous and Black people further suggests that meaningful progress will be an uphill battle there, too.[539]

### *C. Social Change and Its Implications*

The evolution discussed throughout this Article has the potential to strengthen human rights and liberal democracy. A fuller understanding of mitigation at sentencing can protect freedom by serving as a restraint on imprisonment and harsh penalties. It can foster equality by addressing the plight of those who face social hardships and live in criminogenic environments.[540] And humanizing offenders by better understanding their circumstances is consistent with the growing recognition of human dignity as an inalienable attribute possessed by everyone, including people guilty of grave crimes.[541]

Evidence of systemic racism as mitigation in sentencing need not be limited to any demographic group. While efforts to introduce this evidence in Canada have centered on Indigenous and Black people, it could include Asians, Latinos, Muslims or any other marginalized group in any society. This approach should not be misunderstood as a zero-sum game favoring one group over another. It must be rooted in universal humanistic principles.

For the same reason, this approach would not preclude considering socioeconomic disadvantage or any other mitigation in the cases of white defendants. Notwithstanding the racial dynamics in the United States, for example, a sizable segment of the people who receive the death penalty are poor or working-class whites.[542] Discussing claims that social-context evidence entails preferential treatment for Indigenous defendants in Australia and Canada,[543] Kate

539. On enduring inequality and harshness in Canada, see generally JOHNSON, *supra* note 83; RICCIARDELLI, *supra* note 143.

540. *See* Nicole Leeper Piquero, Alex R. Piquero & Eric S. Stewart, *Sociological Viewpoint on the Race-Crime Relationship*, *in* THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY 43 (Kevin M. Beaver, J.C. Barnes & Brian B. Boutwell eds., 2014) (discussing criminogenic environments and other factors influencing offending in minority communities).

541. *See* Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, *supra* note 60.

542. As of April 1, 2022, 42 percent of people on death row were white, 41 percent were African American, 14 percent were Latino, and 3 percent belonged to another group. DEATH PENALTY INFO. CTR., *Race and the Death Penalty by the Numbers*, https://deathpenaltyinfo.org/policy-issues/race/race-and-the-death-penalty-by-the-numbers [https://perma.cc/YZY7-S4UJ] (last visited Apr. 8, 2023); *see also* PREJEAN, *supra* note 64 (describing the circumstances of underprivileged whites facing capital punishment in the Deep South).

543. Warner, *supra* note 74, at 131, 135.

Warner similarly argues that it actually "applies to all offenders" and "does not offend the principle of equality before the law."[544]

This evolution could still foster resentment or disinformation, such as the notion that double standards favor minorities.[545] Some legislators voiced this objection when the Canadian Parliament debated its 1996 legislation providing that judges must consider the social circumstances of Indigenous defendants.[546] Although such objections appear to have relatively limited traction in Canada today,[547] they could preclude other countries from heading in this direction.

Concerns about a separatist justice system partly rest upon the misunderstanding that when a crime occurs everyone receives the same punishment and that minorities should therefore not receive preferential treatment. In reality, sentences for the same crimes can vary significantly among white defendants alone. This is partly due to the principles of individualization and proportionality that lead sentences to vary depending on aggravating and mitigating circumstances. Not all murders, assaults or robberies are alike, just as not all the people who commit these crimes.

This is reflected in the elastic sentencing schemes existing in many democratic societies. The sentencing range for second-degree murder in Canada, for instance, can span from ten-years-to-life to twenty-five-years-to-life.[548] New York State has an analogous sentencing scheme of fifteen-years-to-life to twenty-five-years-to-life for second-degree murder.[549] This means that legislators have determined that some crimes and criminals deserve ten or fifteen years of parole ineligibility, respectively, whereas others deserve twenty-five years.[550] Distinctions still exist, of course, including the fact that parole has generally become much rarer in America, both by U.S. historical standards and comparative

544. *Id.* at 137.

545. *See, e.g.*, *Ipeelee* (Can.), *supra* note 15, paras. 64, 70, 71, 75 (discussing social criticism of Canadian sentencing procedures for Indigenous persons).

546. *See supra* note 50 and accompanying text.

547. The general acceptance of the *Gladue* jurisprudence in Canadian criminal justice does not mean that the overarching concept of systemic racism is a matter of national or political consensus. For instance, this concept has proved controversial in Quebec, where Premier François Legault—the equivalent of a state governor in the United States—rejected the notion that "systemic racism" exists in the province. *See* Matthew Lapierre, *Legault Supports Protesters, But Says There's No Systemic Racism in Quebec*, MONTREAL GAZETTE (June 1, 2020), https://montrealgazette.com/news/premier-legault-stands-in-solidarity-with-anti-racism-protesters [https://perma.cc/7XND-DDP3] ("Some Quebecers engage in discrimination, Premier François Legault said Monday in the wake of protests over the killing of [George Floyd] by police in the United States, but he added there is no systemic racism here."). At any rate, two-thirds of Quebeckers agree that systemic racism exists in their province, a figure similar to national poll results. *Two-Thirds of Quebecers Say Systemic Racism Exists in the Province: Poll*, MONTREAL GAZETTE (Sept. 30, 2021), https://montrealgazette.com/news/local-news/two-thirds-of-quebecers-say-systemic-racism-exists-in-the-province-poll [https://perma.cc/9MWX-B7MB].

548. Canada Criminal Code, R.S.C. 1985, c C-46 § 745(c).

549. N.Y. PENAL LAW §§ 70.00, 125.25 (McKinney 2019).

550. This does not include other variations between jurisdictions, such as time credited for good behavior.

ones.[551] The bottom line is that sentences for the same crime can vary based on individualization and proportionality, as the Supreme Court of Canada stressed in a recent decision: "There is no mathematical formula to determine the specific number of years that would make a sentence in excess of a legitimate penal aim. The analysis, in all cases, must be contextual and there is no hard number above or below which a sentence becomes grossly disproportionate."[552]

Although attempts to treat like cases alike under principles of parity or equality can limit divergence between sentences for the same kind of crime, especially acute disparities,[553] a measure of divergence appears unavoidable in any just penal system for at least two fundamental reasons. First, sentencing judges must have the discretion to weigh aggravating and mitigating circumstances in line with the principles of individualization and proportionality.[554] Second, efforts to eliminate this discretion have often taken the form of strict mandatory minimums that force judges to impose prison terms of a specific length, irrespective of mitigation.[555] Politicians often defend such mandatory minimums on the ground that judges are excessively lenient.[556] In America, the mandatory minimums under the U.S. Sentencing Guidelines adopted in the 1980s were also touted as a remedy to inequality.[557] The guidelines did not help minorities or underprivileged defendants, who disproportionately faced rigid, draconian sentences that judges could not deviate from.[558] Even in countries like Canada and France, where mandatory minimums have been markedly shorter than in America, judges have pushed back against legislative attempts to reduce their discretion at sentencing.[559] We additionally saw that Canada recently repealed numerous mandatory minimums for gun and firearm offenses.[560]

---

551. *See, e.g.*, Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, 9 ANN. REV. L. & SOC. SCI. 353, 355 (2013).

552. R. v. Hills, 2023 SCC 2, para. 143 (Can.).

553. *See, e.g.*, *id.* para. 132. Parity was also part of the proportionality test that the U.S. Supreme Court once adopted to interpret the Eighth Amendment, before abandoning this standard. *See* Solem v. Helm, 463 U.S. 277, 292 (1983); *see also supra* note 389 (discussing *Solem*).

554. *See, e.g.*, Neil Hutton, *Sentencing, Inequality and Justice*, *in* SENTENCING AND SOCIETY, *supra* note 27, at 548, 552 (discussing the tension between individualization and equality of treatment in sentencing).

555. *See, e.g.*, Doob & Webster, *Weathering the Storm*, *supra* note 307, at 362, 368 (discussing the Canadian debate over mandatory minimums).

556. *See id.*

557. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223 (1993).

558. *Id.* at 287.

559. *See generally* Doob & Webster, *Weathering the Storm*, *supra* note 307, at 362, 368, 402–10; Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 56, at 735–36; *see also* Laura Cahillane, *The Constitutionality of Mandatory Minimum Sentencing in Ireland*, 65 IRISH JURIST 64 (2021) (exploring tensions between proportionality and mandatory minimum legislation in Ireland).

560. *See supra* note 314 and accompanying text.

To a greater extent than peer nations, Canada is incrementally recognizing that equality under the law should not be understood in a formalistic manner but in light of social context. A driving principle is that "equality does not necessarily mean identical treatment and . . . the formal 'like treatment' model of discrimination may in fact produce inequality."[561] In the eyes of the law, "insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons."[562]

In the end, discretion is unavoidable in any penal system. The key question is *how* discretion will apply. A fair, humane, and effective penal system entails affording judges the discretion to implement the principles of individualization and proportionality as part of a holistic sentencing process. Considering evidence of systemic racism or social inequality as mitigation at sentencing is the next logical step in the historical evolution of these principles.[563]

Another way of conceptualizing the relevance of this evidence is by looking at the other side of the picture. The fact that a defendant targeted a victim for racist reasons is a widely accepted aggravating circumstance at sentencing. For instance, the German Penal Code states that courts should weigh "the offender's motives and objectives, in particular including racist, xenophobic, antisemitic or other motives evidencing contempt for humanity."[564] Similar provisions exist in many societies, such as the United States, United Kingdom, and France.[565] The upshot is that, if it is relevant that a defendant was motivated by racism, it may also be relevant that a defendant was a victim of racism. That does not mean that criminal defendants should simply be viewed as victims. Again, mitigation does not deny individual responsibility. If a defendant were innocent or not legally responsible for their behavior, they should not have been found guilty and should not face sentencing. Guilt is the starting point of the sentencing analysis, not its end.

Identity can ultimately be understood as a double-edged sword in criminal justice. Race and ethnicity have long shaped sentencing in the form of discrimination, from intentional prejudice to unconscious bias. These social ills may be understood as the *dehumanizing* dimensions of identity. Contrariwise, social-context evidence may be understood as the *humanizing* dimension of race

561. *Leonard* (Can. Ont.), *supra* note 86, para. 60 (Can. Ont.) (quoting R. v. Kapp, 2008 SCC 41, para. 15 (Can.)).

562. *Id.* (citing *Gladue* (Can.), *supra* note 14).

563. *See supra* Section IV. This shift likewise appears consistent with the evolution of desert theory, which "has developed a more flexible understanding of culpability grounded in social context," drawing on "interdisciplinary knowledge and empirical data" to better understand the offender's characteristics and circumstances. Manikis, *supra* note 350, at 597.

564. Strafgesetzbuch [StGB] [Penal Code], § 46(2), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [https://perma.cc/7TSV-F83X] (Ger.).

565. *See generally* Jon Garland & Corinne Funnell, *Defining Hate Crime Internationally*, *in* THE GLOBALIZATION OF HATE 15 (Jennifer Schweppe & Mark Austin Walters eds., 2016) (comparative study of hate crimes in America and beyond).

and ethnicity at sentencing. Such mitigation can shed light on how a defendant is more than their worst act by helping the sentencer understand the circumstances that have contributed to a crime. Without this process, defendants from particularly disadvantaged and crime-ridden communities risk having their race or ethnicity considered only as an *aggravating* circumstance.[566]

That is actually one way of theorizing why racial and ethnic minorities are highly over-incarcerated in America, Canada, Europe, Australia, and New Zealand. The authorities understand that minorities are highly over-incarcerated and may rationalize or justify these circumstances as the fruit of higher crime rates in dysfunctional, dangerous communities. This is notably a way to understand the voluminous literature on the treatment of Black men in the United States, an extraordinary proportion of whom are under the control of the penal system.[567] Australian scholars have likewise documented how the marginalization of Aboriginal peoples has come to be perceived as an aggravating circumstance because their social environment is considered dysfunctional and criminogenic.[568]

Sentencing reform is not a substitute to addressing societal structures that lead marginalized people to disproportionately end behind bars.[569] If criminal courts cannot realistically solve wider social ills shaped over generations, they do not have to help perpetuate them indefinitely.

## CONCLUSION

This Article has analyzed events at the intersection of two contrary currents in the history of Western criminal justice. First, a salient historical trend has been punitiveness that has disproportionately struck marginalized members of society, from poor and working-class whites to racial and ethnic minorities. A host of theories and analytical frameworks have sought to interpret these dynamics, such as those centering on social control, risk-management, penal populism or

566. Incidentally, some scholars have expressed concern about the use of algorithms or actuarial tools in criminal court decisions, which may effectively treat race as a risk factor or aggravating circumstance. *See* Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015) (arguing that "risk today has collapsed into prior criminal history, and prior criminal history has become a proxy for race"); Aleš Završnik, *Algorithmic Justice: Algorithms and Big Data in Criminal Justice Settings*, 18 EUR. J. CRIMINOLOGY 623 (2019) (discussing ongoing debates about big data).

567. *See generally supra* note 8.

568. *See, e.g.*, ANTHONY, *supra* note 74, at 28 (critiquing a sentencing model resting on an alleged "Indigenous predilection to crime"); *see also supra* note 490 and accompanying text.

569. *See, e.g.*, ANTHONY, *supra* note 74, at 6–8 (arguing that the limited recognition of Indigeneity in Australian sentencing serves to legitimize the penal system without addressing profound structural injustices and the legacy of colonization); Sprott, Webster & Doob, *supra* note 256, at 193 ("[I]f we want to substantially reduce Indigenous incarceration to levels more in line with other populations, a singular focus on sentencing will fall far short of the wider goal.").

institutionalized racism.[570] Second, another current in the history of Western criminal justice has been the humanization of criminal punishment. That trend is exemplified by the gradual abolition of the death penalty since the Enlightenment.[571] This movement has also challenged imprisonment, as demonstrated by the abolition of life without parole in Canada and continental Europe.[572] We explored how the principles of individualization and proportionality have been at the heart of this historical trend, as they have enabled judges to be merciful, consider mitigating circumstances, and allow social reinsertion based on rehabilitation.

The Article has captured how the first and second historical currents intersect in efforts to consider evidence of systemic racism or social inequality as mitigation at sentencing. The ongoing transformations in Canada may foreshadow similar developments in other Western democracies. The United States could have become a trailblazer in this area decades ago. American reformers have pushed in this direction since at least the 1960s with *Maxwell v. Bishop*,[573] although their efforts have faced stronger resistance than in modern Canada, as exemplified by the hold of *McCleskey v. Kemp* on U.S. constitutional law.[574] In the meantime, Australia and New Zealand have introduced such mitigation principles in the cases of Indigenous defendants, although these countries have faced greater pushback and challenges than Canada in this area.

Should this evolution continue, it could help remedy a problem found in modern Western societies: the over-incarceration of minorities. Questions nonetheless remain as to whether this trailblazing step will have the desired impact in Canada, thereby offering lessons for other societies whose penal systems grapple with discrimination and inequality. At this stage, the 1996 Canadian legislative reform introducing systemic discrimination as a sentencing consideration in the cases of Indigenous persons has largely failed to reduce their dramatic over-incarceration, even as it has become a fundamental principle of Canadian law.[575] Expanding this approach to Black people will therefore not necessarily change their predicament. Still, if these principles are properly applied, Indigenous defendants are better off with them than without, which explains why reformers have sought to extend comparable mitigating circumstances to Black defendants. All of these questions have far wider implications than for these two particular minority groups, just as their significance reaches far beyond Canada.

---

570. For competing and complementary perspectives, see generally BUTLER, *supra* note 8; FASSIN, *supra* note 149; MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., 1995) (1975 1st ed.); GARLAND, *supra* note 63; OWUSU-BEMPAH & GABBIDON, *supra* note 7; SIMON, *supra* note 100; LOÏC WACQUANT, PRISONS OF POVERTY (2009).

571. Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, *supra* note 60.

572. *Bissonnette* (Can.), *supra* note 37; *Vinter* (ECtHR), *supra* note 36.

573. 398 F.2d 138 (8th Cir. 1968).

574. 481 U.S. 279, 292 (1987).

575. *See supra* note 286 and accompanying text.

Considering evidence of systemic racism or social inequality at sentencing reflects the age-old principles of individualization and proportionality, as it enables judges to better tailor punishments to culpability. This step should not be seen as preferential treatment for minorities but as a means of ensuring that sentencing principles are applied more equally. In other words, individualization and proportionality are not only relevant for minorities. Judges must consider the mitigating circumstances that white defendants face, such as socioeconomic hardships. Simply put, a sentencing judge should always consider a defendant's social circumstances. A key distinction is that this consideration is likelier to be overlooked in the case of minorities, who are at greater risk of being dehumanized and reduced to their crime or worst traits.[576]

Once guilt is established, a sentencing hearing should not solely address aggravating circumstances but also relevant mitigating circumstances, which should encompass root social causes of crime. "Sentencing judges have always taken into account an offender's background and life experiences," as the Ontario Court of Appeal emphasized.[577] If so, the law should keep evolving. The ongoing transformations in Canada may be the next step in the historical evolution of criminal punishment in an increasingly diverse Western world.

576. *See, e.g.*, *supra* note 72 and accompanying text.
577. *Morris* (ONCA), *supra* note 2, para. 88.