Punitive Justice: When Race and Mental Illness Collide in the Early Stages of the Criminal Justice System

Marsha Rampersaud

Abstract

Youths in care are among the most vulnerable youths in our society. All youths in care have experienced trauma and sometimes exhibit trauma-induced behaviours which are perceived by others as disruptive or dangerous. The police are frequently called, which begins a cycle of criminalization for many youths, with racialized youths overrepresented in this group. Using an intersectional theoretical framework, this article shows how discriminatory perceptions of race and mental health influence justice system actors' decision-making, from arrest to bail. Drawing on data from qualitative interviews with twenty-five young adults (ages 18 to 24) who have had contact with the child welfare and criminal justice systems and ten practicing lawyers in Ontario, the analysis reveals race-based differences in justice system actors' responses to mental illness. Discriminatory views function as a lens through which racialized and mentally ill youths leaving care are perceived as threats and met with more punitive responses.

Keywords: youth leaving care, intersectionality, mental health, bail

Résumé

Les jeunes pris en charge par l'État sont parmi les jeunes les plus vulnérables de notre société. Tous ces jeunes ont vécu un traumatisme et ils présentent parfois des comportements induits par ce traumatisme qui sont perçus comme perturbateurs ou dangereux. Face à ces comportements, la police est fréquemment appelée, ce qui amorce un cycle de criminalisation pour de nombreux jeunes, les personnes racisées étant d'ailleurs surreprésentées dans ce groupe. En mobilisant un cadre théorique intersectionnel, cet article montre comment les perceptions discriminatoires face à la race et à la santé mentale influencent la prise de décision des acteurs du système judiciaire, et ce, de l'arrestation à la libération sous caution. Cet article s'appuie sur des données issues d'entretiens qualitatifs avec vingt-cinq jeunes adultes (âgés de 18 à 24 ans) ayant eu des contacts avec les systèmes de protection de l'enfance et de justice pénale ainsi que dix avocats qui exercent en Ontario. Notre analyse de ces entrevues révèle que les acteurs du système de justice adoptent des réponses face aux problèmes de santé mentale qui diffèrent en fonction de la race. Plus précisément, nous montrons que les perceptions discriminatoires agissent en

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qualité de lunette à travers laquelle les jeunes racisés et atteints de problèmes de santé mentale qui quittent la prise en charge étatique sont perçus comme une menace et sont ainsi la cible de réponses pénales plus punitives.

Mots clés: jeune quittant la prise en charge, intersectionnalité, santé mentale, liberté sous caution

Introduction

When children and youths are subjected to neglect or abuse in their family homes, the state's child protection system may intervene. Most of the time, social workers try to avoid apprehension by connecting families with treatments and supports. The *Child, Youth and Family Services Act* (2017) mandates apprehension be reserved for serious cases, where a social worker determines a child is experiencing sufficient harm to warrant immediate removal. Yet these assessments are subjective and can be misapplied. In Canada, the state has historically misused this power to disrupt and dismantle Indigenous and Black families, evidenced by the Sixties Scoop for example, which saw the widescale removal of Indigenous children from their families (Maynard 2017; TRC 2015). This legacy persists today, and Indigenous and Black children continue to be disproportionately referred to child protection services, investigated, and apprehended, and as a result are overrepresented in the child protection system (OHRC 2018). When children are apprehended and placed in out-of-home care, the state in effect becomes their parent. In Ontario, there are approximately 11,700 children and youths under the state's legal guardianship (MCCSS 2021). These young people are among the most vulnerable children and youths in our society (Snow 2006; Tarren-Sweeney and Vetere 2014).

Family separation is traumatizing, as is the instability youths face when in care (Rampersaud 2021). Experiencing trauma has significant mental, emotional, and physical effects that last long after young people 'age out'[1] of the child welfare system (Yehuda, Halligan, and Grossman 2001). Following a trauma, some young people develop survival skills in response to their environments which become visible as disruptive behaviours (Finlay et al. 2019). When triggered by memories of trauma or in response to overwhelming feelings, some behave in ways perceived by those around them as "acting out." When this happens, many foster parents and group home staff do not recognize these behaviours as expressions of pain and respond with behaviour-management approaches rather than trauma-informed ones (Finlay et al. 2019). This is especially true for racialized[2] youths; abundant literature documents how the behaviour of racialized youths is regularly perceived as "hostile" or "aggressive" (Konold et al. 2017; Watson and de Gelder 2017).

[1] Use of single quotations around 'aging out' is informed by Doucet (2020, 5): "We mindfully chose to put 'aging out' in single quotation marks … to de-normalize the term, as we advocate for equitable transitions to adulthood for youth in care."

[2] Recognizing everyone is racialized, I avoid the dichotomy racialized/non-racialized which indicates an absence of race for some (Wise 2011). Instead, I use the terms "racialized" in reference to persons of colour and "white" in reference to those racialized as white.

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The police are frequently called, which begins a cycle of criminalization for many (Bala, De Filippis, and Hunter 2013; Bala et al. 2015; Finlay et al. 2019; Scully and Finlay 2015) that often continues into adulthood.

Between 30% (BCRCY and PHO 2009) and 46% (StepStones for Youth 2020) of young people leaving care come into conflict with the law. Black, Indigenous, and other racialized youths are over-policed and over-criminalized (Jiwani 2019), and thus overrepresented in this group (Yi and Wildeman 2018). Many of these young people contend with mental health challenges stemming from early trauma, which continue to make them more visible to justice system actors and consequently render them more vulnerable to criminalization. Drawing on data from qualitative interviews with twenty-five youths leaving care who have come in conflict with the law as adults (ages 18 to 24) and ten practicing lawyers in Ontario, this article reveals the intricate intersection of race, mental health, and care status in the criminal justice system. Youths' and lawyers' experiences show how stigmatized views of mental health and discriminatory attitudes towards racialized groups combine to influence justice system actors' decision-making in the early stages of the legal process. Yet the connection between race, mental health, and experience of state guardianship is often ignored at this stage. Discriminatory views then function as a lens through which racialized youths leaving care who experience mental illness are perceived as threats and met with more punitive responses. Factors which render young people in need of protection before they turn eighteen are seemingly invisibilized by the efficiency-oriented operation of the adult criminal justice system, though their vulnerabilities persist. This circumstance illuminates the thin line between protection and punishment for former youths in care, as well as the need to question the appropriateness and form of punishment for society's most vulnerable young people.

Youths Leaving Care and the Criminal Justice System

According to Finlay et al. (2019), nearly two-thirds of youths leaving care experience mental health challenges. Post-traumatic stress disorder (PTSD), which results from experiencing or witnessing distressing or life-threatening events, such as violence or abuse (CAMH 2021), is particularly prevalent within this group (Kolpin 2018). Among youths in care who have experienced traumatic abuse, certain events and feelings, such as feeling threatened, may act as "triggers" that induce responses such as excessive re-experiencing, depersonalization, emotional numbing, and anxiety (Kolpin 2018; Lanius, Paulsen, and Corrigan 2014). When triggered, some youths respond in ways that are out-of-the-norm, disruptive, or dangerous, making them vulnerable to contact with the criminal justice system (Scully and Finlay 2015). Many turn to negative coping mechanisms, such as substance use or "risky" behaviours, which increase their likelihood of coming into conflict with the law. Although systematic data on the criminalization of youths leaving care is not collected in Ontario, one study in British Columbia determined that one in six youths leaving care experiences imprisonment (Shaffer, Anderson, and Nelson 2016). And a study conducted in Toronto found

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46% of youths leaving care in the city experience criminalization (StepStones for Youth 2020).[3]

According to Sugie and Turney (2017), criminal justice contact is socially patterned and concentrated among those who occupy "disadvantaged" socioeconomic positions, particularly those who are racialized and poor. Jiwani (2019) contends the race-based system of social stratification that underpins Canadian society is reflected in the criminal justice system, which emphasizes (1) policing racialized individuals more than white individuals (criminalization of race) and (2) policing types of crime concentrated among the poor and racialized, such as theft, rather than white collar crimes (racialization of crime). Because race and poverty are strong predictors of child welfare system contact, demographic factors, coupled with other risk factors, including histories of trauma and abuse, make racialized youths in care especially vulnerable to justice system contact (Contenta, Monsebraaten, and Rankin 2014; Yi and Wildeman 2018). There is considerable research investigating the relationship between mental illness and criminalization (Chaimowitz 2012; Charette, Crocker, and Billette 2014; Sugie and Turney 2017) and race and criminalization (Maynard 2017; Cesaroni, Grol, and Fredericks 2019). Yet few studies explore the relationship between all three (Chan and Chunn 2014) or consider how these factors connect to child welfare system involvement. This study contributes to debates in these areas by addressing ways social factors such as race, mental illness, and care status increase the likelihood of criminalization.

Focusing on the Early Stages of the Justice System—Arrest to Bail

While much of the extant literature focuses on incarceration, Sugie and Turney (2017) point out that it is neither the most frequent nor necessarily the most consequential interaction with the justice system. In fact, non-carceral components of the criminal justice system, such as everyday policing, probation, parole, and diversion programs, account for most criminal justice system operations (Kohler-Hausman 2018). In 2018, for example, there were more than two million incidents of crime reported to the police in Canada (Moreau 2019), yet only 17% of incidents resulted in a criminal proceeding, 11% of incidents resulted in a finding of guilt, and 4% of convicted individuals received custodial sentences (Public Safety Canada 2020). Most incidents (96%) do not result in imprisonment. Kohler-Hausman (2018) suggests that low level encounters with the justice system may seem trivial when compared with imprisonment, but it is these "trivial" infractions that keep many individuals entangled in the legal system. Given that rates of contact with the police and the courts are greater than the rate of incarceration (Lerman and Weaver 2014; Sugie and Turney 2017), this study focuses on youths' experiences in the early stages of the justice system—from arrest to bail.

[3] The disparities between these statistics may be because the British Columbia study referenced data collected from Public Health and the Child Advocate, making it possible to do a broader comparison among all youth in the province. In contrast, the Toronto study was conducted by an agency that supports youth in and leaving care in the city. Their data may have been collected among service providers, which may have skewed the number to be potentially higher.

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While the focus in the early stages of the legal process is on ensuring the preliminary stages of the criminal trial process are managed in an efficient manner (Myers 2009), these decisions may have a significant impact later in the process. Evidence shows that bail decisions, for example, are correlated with particular outcomes at sentencing: individuals who are denied bail are more likely to be convicted (Cohen and Reaves 2007; Dobbie, Goldin, and Yang 2017; Phillips 2008), and more likely to serve a custodial sentence than those released on bail (Dobbie, Goldin, and Yang 2017; Williams 2003). Ultimately, the decision to grant or deny bail is a pivotal one in the legal process and can have significant consequences for the accused.

Bail Court Decision-Making

Amendments to the *Bail Reform Act* (1972) enshrined in law a presumption of release on bail. If conditions are needed, individuals are to be released on the least onerous conditions necessary to address the three grounds for detention as outlined in section 515(10) of the *Criminal Code*: to ensure the accused will attend court (primary grounds), for the safety of the public (secondary grounds), and to maintain the public's confidence in the administration of justice (tertiary grounds). Section 515(2) of the *Criminal Code* prescribes that the court must consider the least onerous form of release before considering more restrictive ones.[4] This phased approach to determining an offender's sentence is known as the "ladder principle." The amendments reflected a meaningful recognition of the accused's presumption of innocence, which was later augmented by the *Charter*-protected right not to be denied reasonable bail without just cause (section 11e).

Since the 1990s, however, the number of individuals incarcerated in pre-trial detention in Ontario has steadily increased. By 2015, accused held in custody on remand comprised 60.7% of the provincial imprisonment population, meaning fewer than 40% of those held behind bars had been convicted and were serving a custodial sentence (Myers 2016; Statistics Canada 2015). This trend signals a contravention of the written law and suggests a presumption of detention, rather than release. The landmark Supreme Court of Canada decision in *R v Antic* (2017) affirmed the presumption of release and the restrained imposition of conditions. But by 2018/2019, the remand population comprised 70.9% of the provincial imprisonment population—an increase from the pre-*Antic* era (Statistics Canada 2020). The Supreme Court responded by re-emphasizing the presumption of release to the lower courts in *R v Zora* (2020).

High remand numbers are somewhat misleading, as most people who apply for bail are released. This is true for both the pre- and post-*Antic* eras. In 2020, for example, only 2% of those held in remand had been formally denied bail (OCJ 2020). Most accused who are held in remand are there because their case has been adjourned to another day (Myers 2015). These accused are, in effect, being held on short-term, preventive detention orders to give defence counsel time to formulate a

[4] Except when there is a reverse onus, meaning onus rests with defence counsel to show why detention is not necessary.

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release plan to which the Crown will consent. Yule and Schumann (2019) indicate most people who are held in remand are eventually released on bail, but only after spending some time in pre-trial detention, and usually with numerous restrictive conditions.

Intersectional Theoretical Framework

Intersectional theory recognizes that complex identities give rise to multiple and overlapping oppressions (Crenshaw, 1991; Hill Collins 2019). Identity and social location are intricately connected and impact how one interacts with social institutions, such as the criminal justice system (Burton et al. 2010). Though the Canadian criminal justice system is founded on principles of objectivity and colour-blindness,[5] the overcriminalization of the racialized and mentally ill reveals a different story (Walker 2010). This overcriminalization suggests the law on the books differs markedly from the law in practice (López 2006).

The interconnectedness of trauma, mental illness, race, and criminalization permeates the data. Since race and racism are intricately connected to care status, mental illness, and justice system contact, race is an integral analytical component of this intersectional inquiry. Though mental illness and care status are not social factors traditionally considered using this analytic framework, they are important components of one's identity. Focus on these two components provides insight into what happens when youths who have left care come into conflict with the law. Coding revealed the intersection of care status and mental illness with race makes racialized youths leaving care an especially vulnerable group among those who are criminalized.

Methods

This study draws on qualitative interview data collected with twenty-five young adults (ages 18 to 24) who had previous involvement in both the child welfare and criminal justice systems in Ontario. Targeted recruitment was conducted at community organizations that support youths both in and leaving care to identify youths who had experience being arrested or charged and had attended a bail hearing in the youth or adult criminal justice system. To contextualize the connection between trauma, mental health, and criminalization, some stories of criminalization as youths are recounted, though the analysis focuses on youths' experiences as adults. Two-thirds of those interviewed self-identified as racialized (68%, n = 17).

Two professional groups were also interviewed, including ten lawyers (eight Duty Counsel and two Crown Attorneys), and ten Youth-in-Transition (YIT) Workers. Individual Duty Counsel Offices were invited to participate in the study; Crown Attorneys were recruited from the Smart Justice Network. Youths and YIT Workers were recruited from the same community organizations. This article

[5] Being race conscious means recognizing racial difference; colour-blindness means refusing to recognize racial difference. The criminal justice system often purports colour-blindness and excludes race in discussions of law (Macdonald 2002).

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focuses on youths' and lawyers' responses. Centring youths' voices affirms their experiential knowledge as, "legitimate, appropriate, and critical to understanding, analyzing, and teaching about racial subordination" (Solórzano and Yosso 2002, 26). Lawyers' perspectives help contextualize youths' experiences and provide insight into the legal process. To protect participants' confidentiality, each youth has been assigned a pseudonym and members of professional groups have been assigned a code (YIT, DC, CROWN) and number (1, 2, 3).

Findings

Considering Extra-Legal Factors: Mental Health and Race

Because the Justice of the Peace (JP) is focused on the appropriateness of release—not guilt—there is a limited range of information about the accused deemed relevant at the bail stage. Relevant factors are ones that help the JP "predict" the risk associated with the accused's release. Permissible factors include legal factors, such as the accused's prior criminal history and the nature of the alleged offence(s). Lawyers agreed that only factors that address the primary, secondary, and tertiary grounds for detention outlined in section 515(10) of the *Criminal Code* are treated by the courts as relevant. One Duty Counsel articulated a sentiment shared by the group: "If we're planning for a bail hearing, then the most important information really is, where are you going to be living, do you have a criminal record, and what the charge is," and, depending on the nature of the offence, "you may need a surety or not need a surety" (DC 4). These factors represent the "key ingredients that the Crown is looking for" to consent to release (DC 4).

Factors such as care status become relevant later in the legal process, typically following conviction: "And especially at the disposition stage, where they're being sentenced or being given probation or whatever, you'd want to be talking about how the person got there" (DC 8). Duty Counsel indicated they rarely explicitly bring up an accused's care status at the bail stage, unless:

> the responses that [they get] at first intake would give [them] reason to [show] concern [for] their social structure, their safety net, [and] who they might be relying on for support. [This] might [prompt] a follow-up question about whether or not they did come from care. But it's not something that … comes top of mind when … dealing with a person who's over 18. (DC 2)

Although Crown Attorneys play a significant role in the bail decision (Yule and Schumann 2019), beyond details provided by the arresting officer in their synopsis, Crown Attorneys are only privy to information about the accused that is offered by defence counsel (CROWN 1). One Crown Attorney indicated, "there's not time to gather all kinds of background information" at this stage (CROWN 1). A Duty Counsel elaborated, the courts are "overburdened," "under-resourced," and "understaffed," which limits the amount of information that is introduced at this stage (DC 3). There is a high volume of cases on the daily docket, and to get through these cases, the court focuses on efficiency: the goal for bail court actors is to keep the court's processing of cases moving. These accounts are consistent with the literature, which describes bail courts as places of bureaucracy and efficiency, rather than justice (Feeley and Simon 1994; Myers 2015; Natapoff 2017).

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In addition to legal factors, such as nature of the offence and criminal history, the lawyers' accounts reveal that extra-legal considerations frequently factor into bail decisions. Narrow focus on the law, then, does not mean extra-legal factors are excluded from bail court discussions. Care status, for example, is not directly tied to one's legal history or the three grounds for release; thus, it is not immediately relevant at the bail stage, but it might come up *indirectly* when developing a bail plan if youths are asked about their "living situation and family connections" (DC 4). Sometimes a surety—a person who promises a sum of money to the court and agrees to supervise an accused in the community—may be required for release. Because most youths leaving care do not stay in touch with their foster families or group home staff and have tenuous connections to their families of origin, it is often difficult for them to identify a suitable surety and they may disclose their history in care.[6] Care status, then, is an extra-legal factor that is "peripherally connected" to the grounds for release (CROWN 1). Consequently, extra-legal factors that are connected—however loosely—to the grounds for release are relevant to the bail decision.

"Caring" Responses to Mental Health

Duty Counsel suggested that, in instances where the accused contends with mental health challenges, police officers and Crown Attorneys often "rely on myths about mental health" to determine the appropriate bail release plan (DC 1). Indeed, sometimes Crown Attorneys will read a synopsis from the arresting officer where, "the people that report the crime might say 'the mental health has gotten out of control,' 'it's untreated at this point,' 'I'm just not sure what the person's going to do,' 'I am nervous about the way he acts around me'—and that can sometimes be a barrier to the person being released at the bail stage" (DC 2).

This example highlights how influential the initial assessment of the arresting officer(s) is in subsequent stages in the legal process. Here the arresting officers appear to be describing unpredictable behaviour, which is not in itself a criminal offence. These descriptions become problematic when unpredictability is interpreted as riskiness. According to Duty Counsel, some Crown Attorneys argue that "a person's mental health is linked to unpredictability" and that their "level of unpredictability is enough for [them] to say [they] can't necessarily release this person back into the community" (DC 2). In making this argument, it appears the Crown is conflating mental illness with unpredictability and riskiness, making mental illness something that needs to be managed before release can be considered.

When faced with a mentally ill accused, the court sometimes exhibits a reluctance to release the accused for fear of what they *might* do. In these instances, "defence lawyers are often tasked with trying to say, a mental health diagnosis does not prevent someone from being released. It's a factor that can be addressed through care and through support" (DC 2).

[6] For more detail, see Rampersaud 2021.

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Elaborating on what is meant by "care" and "support," this lawyer explained they try to connect their clients with treatment or counseling as conditions of release. Several Duty Counsel indicated they use this tactic, suggesting it is a common practice. One Duty Counsel expressed that it is "very helpful" to create a "treatment plan for the mental health issues, where they are planning to get them to a psychiatrist and meds, that addresses the secondary grounds" (DC 5). Another said:

> …conditions that they meet with a mental health worker … or that they engage with certain types of counseling, or that kind of thing. … can give the court comfort that, even though they haven't been found guilty of an offence, their needs are being managed in the community, so it reduces or mitigates that public safety concern that the court has about releasing someone on bail. (DC 6)

Another Duty Counsel indicated that having a treatment plan in place increases the likelihood of release: "We get them linked with counseling, we have their potential sureties reach out to doctors, set up appointments ahead of time. People are much more likely to get released if we can articulate to the court that we've already set up some sort of plan" (DC 1).

Treatment conditions are often proposed to pre-empt the Crown's concerns about releasing the accused. Connecting the accused to treatment and similar supports is intended to show the Crown the accused is taking steps to manage their mental health symptoms in the community, thereby mitigating their riskiness and making it safer to release them. The consensus among the lawyers interviewed is that having a treatment plan in place increases the likelihood of release.

The appropriateness of imposing treatment conditions at this early stage, however, is questionable. Many accused have not yet received a formal mental health needs assessment, and uncertainty exists about the potential long-term benefit or success of treatment if it is coerced. Although treatment conditions are intended to be "caring" and "supportive," Sprott and Myers (2011) contend that, rather than "helping" the accused, multiple, restrictive bail conditions set accused up to fail. Accused individuals are likely to agree to any bail conditions to secure release from detention, even conditions they may not be able to comply with (Myers 2016). In some cases, an accused may have the initial substantive charge(s) withdrawn, only to accrue administration of justice (AOJ) charges for breaching their release conditions. If the accused does not want to be treated, these conditions will fail to meet their intended purpose. Rather, the mentally ill individual will likely breach and find themselves back before the courts, in a position where their release may be revoked.

Furthermore, at the bail stage, accused are to be presumed innocent; imposing onerous conditions such as requiring accused to attend treatment is not consistent with the law and creates undue harm for released individuals by adding circumstances that only invite breaches and further charges (JHSO 2013). Yule and Schumann (2019) argue that defence counsel should be objecting to these restrictive conditions, because establishing such onerous conditions from the outset violates the ladder principle. Though one lawyer described treatment conditions

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as "paternalistic" and "inappropriate" at the bail stage (DC 1), they also recognized that these conditions were sometimes needed to ensure their client's release from custody. This sentiment is consistent with Yule and Schumann's (2019) finding that defence counsel tend to focus on getting their client out of custody, even if the accused will be given several conditions. Perhaps Duty Counsel's focus on release could be alleviated if more attention were paid to *why* accused were being detained following arrest. This question calls attention to the bigger problem of conflating unpredictability, mental illness, and risk in bail court, which in practice creates a revolving door of criminalization for mentally ill individuals (Chan and Chunn 2014).

Punitive Responses to Race

To frame race as risk constitutes discrimination. Yet race is of paramount concern in the early stages of the legal process. Unlike mental health, race is often centred in bail court discussions without ever being explicitly mentioned. One Duty Counsel captured this sentiment: "There isn't an area of law, and especially in criminal law, that [anti-Black] racism doesn't exacerbate the issue. It exacerbates everything" (DC 7). They indicated that when race is introduced, it tends to be brought up in more subtle but insidious ways; for example, by associating a racialized person's neighbourhood and appearance with risk, danger, and criminality.

These references begin to appear early in the process, in the synopses prepared by the arresting officer(s). According to one lawyer, when the accused is racialized, arresting officers often make comments that are imbued with racist assumptions:

> I constantly read synopses from the police saying "this particular neighbourhood is known to be replete with examples of gang members and drugs," or "this person was found in this location that has all kinds of drugs and all kinds of bad people living in that neighbourhood." And they use inappropriate, quite frankly racist rhetoric, to try to argue that people are dangerous. (DC 1)

When an accused's neighbourhood is associated with "gangs," "drugs," and "all kinds of bad people," assumptions about their neighbourhood may influence how they are viewed by the court. Living in a particular neighbourhood is perceived by some justice system actors as an explanation for why a person is before the courts, the assumption being that neighbourhoods deemed "high crime" must be populated by "criminals." Some people are then seen as inherently more blameworthy and riskier than others. It is unsurprising that neighbourhoods most often referred to as "dangerous" and "bad" are largely poor and racialized. Consistent with Kellough and Wortley's (2002) examination of police synopses, initial assessments by the police matter; accused who receive a negative assessment from the police are more likely to be denied bail than those who receive neutral assessments (p.196). When controlling for legal factors, officers tend to more negatively assess Black individuals than other racial groups (Kellough and Wortley 2002). These findings suggest that risk can be manufactured and then made real when accused are treated as risky.

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Comments about the accused's appearance are also influential at the bail stage. One lawyer called attention to ways Crown Attorneys sometimes associate an accused's physical appearance with racist tropes about "what a criminal looks like" (DC 7): "I think race plays a factor. I think size plays a factor. When you have these tall, big youth, Black men—Black kids, they're not men, sorry—kids, there is a perception, 'Oh, he's a big guy. You know, he could do some real damage to her.' So, again, these are racist tropes of the big Black scary man, right?" (DC 7).

Young Black men are often met with a presumption of guilt, simply based on their size and the colour of their skin. According to Maynard (2017), this reaction in the courts is not new. In Canada, dominant narratives have linked crime and Blackness, beginning in the period of enslavement through to the contemporary era. Blackness, and consequently Black people, have consistently been perceived and treated as though they are threatening, by virtue of being Black (Maynard 2017). This narrative relies on the inherent blameworthiness of Black people and is manifested through and sustained by the legal system. Hinging risk assessments on race, however, amounts to discriminatory reasoning. If bail court decisions are even partly rooted in assumptions about a racial *group's* past behaviour, rather than factors about the individual accused, this shows that racialized accused are uniquely disadvantaged early in the legal process.

Mis/Interpreting Mental Health Symptoms

Young people in the child welfare system disproportionately experience mental illness, often stemming from past trauma (Yehuda, Halligan, and Grossman 2001). Youths' mental health symptoms are often perceived as disruptive behaviours, which may invite police involvement (Finlay et al. 2019). All youths interviewed had been arrested, including some who were arrested while experiencing mental distress. Some believed they had been arrested because the symptoms of their mental illness were mis/interpreted. Although youths were acting in response to their circumstances and in ways consistent with their illness, their behaviours were often interpreted as threatening or dangerous.

Carmela's experience provides a useful example. When Carmela, a twenty-four-year-old Black woman, was ten years old, her family emigrated to Canada. Two years after arriving, she was apprehended by the Children's Aid Society (CAS) and placed in foster care. Carmela experienced trauma leading to her apprehension by CAS and was re-traumatized by having to leave her family. She developed PTSD in response to these critical life experiences, but neither Carmela nor the adults in her life recognized her symptoms as being associated with mental illness, so they were consistently mis/interpreted and met with criminal, rather than caring, responses. Carmela has been arrested several times while experiencing PTSD symptoms. In her words, "Usually, 80% of the time when I find my own self institutionalized, that is because of my mental health to say the least."

When her PTSD is triggered, Carmela said she feels disassociated from her body: "Physically I was there, but mentally I wasn't there." In these moments, her fight or flight response assumes control and she cannot control her actions. Carmela shared that she is afraid in moments that she is triggered. It can also be frightening for those around her. She described an incident where she disassociated

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from her body and her foster mother panicked: "She didn't know [I] was lost because [I] was…[triggered]." Though Carmela had not been formally diagnosed at that time, her foster mother was aware of the traumas that had resulted in her apprehension and placement in foster care. Despite this knowledge, Carmela's foster mother interpreted her behaviour as dangerous and involved the police, leading to her first criminal charge at twelve years old.

This pattern of being triggered, then criminalized, repeated for much of Carmela's adolescence and young adulthood. She said: "I found with my situation, usually when I get in [trouble] … it's usually based on me experiencing a mental health issue and not really knowing how to deal with it personally, and then having the people around me not really understand it. And then it just kind of escalates to something bigger."

Before receiving a formal diagnosis, neither she nor the adults in her life understood her behaviour to be manifesting symptoms of PTSD. While it might be difficult for an individual who has no prior knowledge of Carmela's history or understanding of PTSD to recognize Carmela's symptoms, one might reasonably expect that her foster parents and group home staff—who receive training about the challenges youths face, have experience working with this population, and have access to the details of youths' histories—*would* have the knowledge and skills necessary to recognize Carmela's symptoms and to provide her with the support she needs. In cases where Carmela presents a danger to herself or those around her, it is the police, rather than mental health services, that are typically called. There is a lack of mental health services available in communities across Canada that could be called to intervene in these circumstances. Without viable supports and services, the adults in Carmela's life are put in the undesirable position of involving police and consequently contributing to her criminalization.

Carmela's circumstances are, unfortunately, common among youths leaving care. Dina, a twenty-one-year-old Black woman, said the actions leading to her criminal charge were a result of her being "unwell." At the time of her arrest, Dina said that she "was high, sick, [and] struggling with [her] mental health." Many youths said they were intoxicated when arrested but, when prompted to elaborate, indicated they used substances to cope with trauma, which then led to contact with the police. Scarlett, an eighteen-year-old white woman, shared she was arrested for substance use but explained substances helped her cope with recent trauma: "I'd just been sexually assaulted and stuff, and I was suffering a lot of PTSD, so everything was made so much worse." Similar to Scarlett, Arlo, a twenty-four-year-old Latin American man, said, "All that stuff [in my past] led to my alcoholism, that led to some really poor choices, which brought me to the bail courts." Even when police are called to help, young people's behaviour may be misinterpreted. Kalee, an eighteen-year-old white woman, said she was arrested while experiencing distress after a family member called the police requesting a wellness check.[7] In her words, "[The police] literally just handcuffed me right away."

[7] Wellness checks (also called welfare checks) are requests for police intervention, typically made by families, friends, or neighbours of an elderly person or a person experiencing a mental health crisis, to check on that person's well-being.

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These examples highlight a significant phenomenon of young people being criminalized at moments when they are experiencing distress. Sometimes, foster parents and group home staff fail to recognize trauma-induced behaviours when they are happening. Other times, they are under-resourced and lack the capacity to respond directly to the behaviour. There is a lack of community mental health resources to turn to, and so, out of fear, frustration, or anger, many will turn to law enforcement for support to help them *manage* youths' behaviour (Scully and Finlay 2015; Finlay et al. 2019). Yet this response fails to address the underlying causes of youths' behaviours and does not recognize their histories of trauma. For many youths leaving care, and particularly for those who are racialized, involving the police to address *behaviour* or *distress* is, from the outset, experienced punitively rather than positively. Involving police also does nothing to prevent these young people from experiencing criminalization in the future. On the contrary, criminalization may only exacerbate youths' mental health symptoms (Geller et al. 2014), increasing the likelihood of further criminalization.

For youths who have experienced trauma and who have significant difficulty trusting others, contact with the police can be devastating and re-traumatizing. This was the case for Dina, who experiences significant mental health challenges, including psychosis. Dina's past experiences of assault by men invoked a triggered response when she was approached by two male officers in plain clothes:

> Because of the shit that I went through when I was in care I have no trust for a lot of people, especially men. And the two officers that picked me up were both men and just not cool. And I'm happy that I didn't pick up another charge because I kind of tried to fight them. It was triggering. And it wasn't because I was just being defiant. It was more so trauma.

Dina's mental illness led her to believe the officers meant her harm. In response, she fought back and was met with force, then criminalized. The officers were unaware of her history of trauma and responded with force, as is protocol.

At the time of her arrest, Dina was at the hospital seeking treatment for injuries sustained in a recent assault:

> I was in the hospital too when it happened. …some guy had beat the shit out of me, so then I did what I did, and someone that I knew was like, "you should go to the hospital" because I had to get six stitches and stuff like that. And [the police officers] came up to me in the hospital. And I was like… don't put your hands on me and not say, "hey, are you such and such, you are being arrested for this," like what you see normally. But it wasn't like that. They just put their hands on me. … I understand you have to arrest me but don't do it that way. It was unnecessary.

Dina had just suffered an assault by a man. She was at the hospital seeking treatment for an injury she sustained during the assault. Yet, like Carmela, Dina's description of being approached by the officers indicates they perceived her to be a threat. Rather than being protected in a moment of extreme vulnerability, Dina was attacked again, by the police. Dina's experience of victimization at the hands of the police is shared by the majority of youths interviewed (64%, n = 16).

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These kinds of encounters create distrust between youths and the police. Dina states:

> Now every time I have [encounters with] police—because I do still struggle with my mental health and have wellness checks called and police in plain clothing—I'm always very wary of them. Because you're in plain clothing, you could be pretending you're a [police officer] … And with psychosis, that's not shit that you can play with. … I guess in certain situations they send police officers in plain clothing so it's not as intimidating, but it doesn't always help.

At the time of her interview, Dina was living in community-based supportive housing for individuals experiencing mental health challenges and told me that staff sometimes request wellness checks for her. Given Dina's history, more police contact in her life increases her risk of further criminalization. Importantly, although Dina was apprehended by the child welfare system, it is the criminal justice system—not her CAS worker—that administers wellness checks now that she is a legal adult. Young people who have experienced significant trauma need ongoing support, but the child welfare system's parental responsibilities end when the youths in their "care" reach the age of majority. In this way, the child welfare system can act as a pathway into the criminal justice system for youths leaving care.

Race-Based Responses to Distress

Importantly, not all young people were met with punitive responses by the police when exhibiting similar behaviours. Analyzing experiences of justice system contact using an intersectional framework reveals ways youths experience oppression and disadvantage from their unique positionalities. This framework allows for youths' experiences to be compared based on their race, care status, and mental health and reveals that some young people received different responses to their mental health symptoms from justice system actors, seemingly based on the racial group they belong to. Evidence of this race-based treatment can be seen in Carmela and Dina's experiences in comparison with David's, a twenty-two-year-old white man, and Jesse's, a twenty-four-year-old white man, all of whom were arrested while experiencing distress.

David had experienced homelessness for two years, had been formally diagnosed with schizophrenia, and used substances. These circumstances made him vulnerable to contact with the police. He described an instance of being arrested while trying to shoplift alcohol. David's mental health had deteriorated and he was "making a scene" in the store when the police were called (David). As David recounted his experience, he described resisting arrest and exhibiting behaviour the arresting officers would likely consider disrespectful: "I started yelling at them actually. Yeah, I was yelling at them and everything. I was swearing and cussing and everything at them." David was arrested and detained at the police station. He shared that the arresting officers identified his behaviour as related to his mental health and advocated for him to begin a mental health diversion program: According to David, the officers knew "putting [him] in jail would've made things worse

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because [he has] a mental health condition." As a result, David did not have to attend court and was instead connected to a community-based mental health service for vulnerable youth. Though Carmela, Dina, and David had all been accused of committing non-violent crimes, had similar histories of prior offences, and exhibited similar distress at the time of their arrests, only Carmela and Dina received custodial sentences.

Jesse was also detained after he was arrested. Jesse had left the province to connect with a romantic partner in another city. Shortly after he arrived, the connection between them deteriorated, becoming toxic and abusive, so Jesse left. Extremely distressed, Jesse used substances to cope and stole a car. He was arrested during the commission of a crime (theft) while under the influence of illegal substances. But he was also experiencing distress, which impacted the way officers treated him. In contrast to Dina, Jesse said he was not met with force while arrested, so there was no need for him to resist. His re-telling suggests that the arresting officers recognized his symptoms or did not consider him to be a threat—possibly both.

While Dina was arrested in the hospital while seeking treatment for an injury incurred during an assault, Jesse was arrested in the community while intoxicated, and after stealing a car. Dina indicated the arresting officers had little regard for why she might be seeking treatment; upon approaching her they put their hands on her. In contrast, Jesse shared that the arresting officers showed a lot of care for his wellbeing. He said: "they were constantly watching over me, making sure I was okay." It appears that the officers recognized that Jesse was unwell, but in Dina's case, even though her environment and injuries indicated she was not well, she said that the officers acted as though they perceived her to be a threat.

While many youths shared stories of being arrested while in distress, the stories of Dina, Carmela, David, and Jesse illustrate pronounced and concerning race-based differences in treatment by justice system actors. Though all four youths were criminalized for their behaviour, an intersectional framework reveals that white youths were met with more protective responses from police, while Black youths were met with more punitive responses. It appears officers' split-second interpretations of behaviour are filtered through a lens of pre-existing racial bias. Youths' experiences are consistent with Skolnick's (1966) earlier findings that police typically perceive young Black [men] as "symbolic assailants," which leads to more stops and differential treatment for this group (Skolnick 1966). Building on this work, Wortley (1996) contends there is a racial hierarchy of criminal justice treatment, wherein Black individuals are positioned at the bottom and white individuals are positioned at the top. This analysis reveals that among an already vulnerable group, Black youth leaving care are especially vulnerable.

Police officers' perceptions of race are significant and have material consequences in the legal process: police assessments influence the course of action taken by the Crown at the bail stage, which affects an accused's trajectory through the legal process (Kellough and Wortley 2002). The overrepresentation of racialized groups at every stage of the criminal justice system is a direct result of—and

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evidence of—the over-policing and differential treatment of racialized groups (Jiwani 2019).

Discussion and Conclusion

According to the ladder principle (*Criminal Code* s. 515(2)), the presumptive starting place for release is an undertaking. If conditions are imposed, the accused should be released with the least onerous conditions necessary in the circumstances. Yet, several Duty Counsel indicated that treatment conditions are commonplace when an accused is mentally ill. Such conditions are proposed to pre-emptively address the Crown's concerns about mental illness in general, rather than specific factors about the individual accused. Because there is no time at the bail stage—where efficiency is paramount (Feeley and Simon 1994; Myers 2015)—to fully consider the circumstances of the accused, it appears that treatment conditions are being imposed habitually to ensure the Crown is "comfortable" with releasing mentally ill individuals (DC 6). These measures are often inappropriate at this stage, leading to more surveillance and inviting more breaches, which keep mentally ill individuals ensnared in the justice system. It is significant that mental health is a factor that simply *must* be addressed at the bail stage. This practice conflicts with both the presumption of innocence and the presumption of release and assumes that the buy-in required to commit to treatment can be coerced.

The accused's race also impacts decision-making early in the legal process. Using an intersectional framework to analyze youths' stories of contact with the police revealed race-based differences in their experiences of being arrested while in distress. These findings are consistent with prior research documenting instances of police mis/interpreting the behaviours of racialized youth as "aggressive," "hostile," "threatening," and "dangerous" (Konold et al. 2017; Watson and de Gelder 2017). Carmela and Dina's trauma-induced behaviour was similarly mis/interpreted by police officers, with harmful effects. This finding reveals that among an already vulnerable group of youths leaving care, racialized youths are especially vulnerable.

In bail court, explicit mention of race as a risk factor is prohibited. Instead, race is brought up in comments about racialized youths' neighbourhood or appearance. It appears the accused's race, and racist assumptions about the racial group they belong to, influence decision-making in the early stages of the legal process to the disadvantage of racialized accused. At the bail stage, the accused is presumed innocent, and JPs are tasked with predicting future risk rather than determining guilt (Myers 2015). At this stage, JPs are less concerned about why an accused has come in conflict with the law. Their primary concern is evaluating the appropriateness of release, and in this decision, they may rely on typifications[8] about an accused's neighbourhood and appearance that are rooted in

[8] Schutz (1972) coined the term typification; he contends we come to understand the meaning of others' actions using our stocks of knowledge. Moscovici (1976) extended Schutz's work, suggesting typifications are shared frameworks for making sense of the world at a given time by a given group of individuals.

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stereotypes. These typifications function as shared frameworks for making sense of future risk and danger that inform decision-makers' thinking (Moscovici 1976). They help to speed up decision-making, which keeps the court moving. Yet the practice of relying on typifications instead of the unique characteristics of the accused can allow discriminatory views to impact reasoning, amounting to habitual racism that is justified under the guise of efficiency. The same logic results in blanket treatment conditions given to accused with mental illnesses, irrespective of whether their illness is connected to their offense. These practices render youths who are racialized *and* mentally ill especially vulnerable when they come into conflict with the law. Given that racialized youths are overrepresented in the child welfare and criminal justice systems (Yi and Wildeman 2018) and youths leaving care disproportionately experience mental illness (Deutsch et al. 2015), it is probable that justice system actors' assumptions about mental health and race impact justice system outcomes.

The habitual use of typifications to address mental health and race in bail courts allows social facts about the accused to have greater influence over justice system practices than legal rules (Natapoff 2017). The use of discriminatory typifications contributes to efficiency and helps keep the court moving, but this practice conflicts with the ladder principle and presumption of release because it fails to account for the individual characteristics of the accused (Yule and Schumann 2019). Treating young people according to the groups they belong to does not account for the complex reasons why they find themselves before the courts in the first place. Despite their "criminal" behaviours and having reached legal adulthood, young people leaving care are still very much in need of protection. These youths were removed from their familial homes by one state institution because they were in need of *protection,* but they are being met with *punishment* in another.

Importantly, it is the state that has deemed these young people in need of protection. They have been apprehended and placed in the state's care for this reason. While in care and after leaving care, however, many exhibit behaviours stemming from their difficult upbringings that increase their likelihood of experiencing criminalization. In Ontario, youth justice and child welfare are both administered by the Ministry of Children, Community and Social Services, which seems to acknowledge the interconnection between welfare and justice. Yet, the two systems function siloed from one another. While a subtle distinction may exist where justice is synonymous with "punishment" and welfare is synonymous with "protection," the two systems are very much interconnected; youths' stories illuminate this interconnectedness and reveal pathways from one system to the other.

In bail courts, the nexus between a youth's traumatic past and criminal present is rarely explicitly acknowledged, or, when it is acknowledged, that nexus is treated as secondary to the allegedly criminal behaviour itself: punishment is prioritized over protection. Accountability and consequences are undoubtedly important and necessary for those who engage in illegal activities. But focusing exclusively on the allegedly criminal act paints an incomplete

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picture and limits the shape that accountability can take, privileging punishment as the only response, regardless of whether it is appropriate in the circumstances (Garland 1990). More training for police, Crown Attorneys, and JPs about the complex needs of youths leaving care might improve youths' experiences in the justice system. Yet training alone ignores the bigger problem of youths leaving care disproportionately experiencing criminalization. More resources are needed for foster parents and group home staff to help them identify and support young people with complex mental health needs, without having to rely on intervention from law enforcement. Unless the reasons why these young people come into conflict with the law are addressed, this trend will persist.

Once a young person has been removed from their familial home, the state becomes their parent. But there are limits to state support. When young people behave in ways that are perceived as disruptive in response to the unstable environments they are placed in, the protection system relies on the punishment system to intervene. Time and again, young people leaving care come into conflict with the law for the very reasons they needed protection in the first place, but now they are being met with punitive responses. Ultimately, both the child welfare and criminal justice systems are failing to respond to the unique needs of young people in and leaving care. Policymakers and justice system actors must expand their thinking when it comes to justice, moving beyond punishment, while reflecting more broadly on what accountability means. In order to live up to its promise to protect, the state's responsibilities to children entrusted to its care cannot simply be handed over to the criminal justice system once youths turn eighteen. As young adults, youths leaving care continue to need support, guidance, and care.

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