THE SILENT INJUSTICE IN WRONGFUL CONVICTIONS IN CANADA: IS RACE A FACTOR IN CONVICTING THE INNOCENT?

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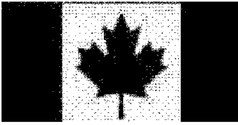

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ABSTRACT

This research concentrates on the phenomenon of wrongful conviction and the socio-legal context in which it operates. Within this study, this research investigates the race-crime dynamic. The connection between race and crime is made visible by the fact that racialized and Aboriginal people are over-represented, compared to the population, in every stage of the North American criminal justice system. While racial discrimination in the criminal justice system, to say the least, is morally troubling, the prospect of incarcerating an innocent person is unthinkable. What happens when these two phenomena coincide? Since the 1983 Nova Scotia Court of Appeal decision in *R. v. Marshall* and the subsequent public inquiry, the role of systemic racism in wrongful conviction cases in Canada has gone unexplored.

Situated in the writings of Critical Race Theory this research examines what has been included within the concept of miscarriages of justice and questions where are the experiences of racialized and Aboriginal people in the narratives and reports on the wrongfully convicted in Canada. Certainly, race and racism are not entirely absent from the discourse. In the United States, for example, some attention has been given to the subject with discussions showing that racial disparities found elsewhere in the criminal justice system also appear in the conviction of the innocent. However, when exploring the mainstream discourse in Canada on wrongful convictions and how to prevent them, the racialized and Aboriginal experiences are relatively ignored. If and when racial discrimination exists in cases of wrongful convictions, it is not documented and, in turn, it is denied. One explanation is that the same systemic barriers that racialized and Aboriginal defendants encounter in the criminal justice system also exist when addressing race as a factor in wrongful convictions. Another reason is that Canadian lawyers have failed to engage in racial litigation and the judiciary has resisted in the adoption of critical race approaches when invited to do so. In the end, the need to rethink the current cause and approaches to the study of wrongful convictions is paramount.

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We have to talk about liberating minds as well as liberating society – Angela Davis.

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CHAPTER ONE

1. - INTRODUCTION

Faith in the Canadian justice system is predicated in large part on the basic belief that the guilty will be convicted and punished, while those who are innocent will be found not guilty and set free. The core foundations of the criminal justice system: the presumption of innocence; the standard of proof beyond a reasonable doubt; the right to effective legal counsel; the right to a speedy trial; the obligations on the Crown to make full disclosure; the availability of appellate review; and the right to an adjudication on the merits without regard to gender, religious preference and race – all have as their underlying basis the recognition "that it is better for ten who are truly guilty to go free than to convict a single innocent person."[1]

This research is motivated by the concern for the conviction of the innocent. The wrongful conviction of the factually innocent is a social problem that has been inherent to the criminal justice system. In Canada, numerous highly publicized exonerations have increased the visibility of wrongful convictions and generated concern by criminal justice scholars, practitioners, and policy-makers. With the proliferation of innocence projects and organizations dedicated to addressing wrongful convictions throughout the country, the public is familiar with the notorious wrongful conviction cases of *David Milgaard, Thomas Sophonow, Guy Paul Morin, James Driskell, and Gregory Parsons.* However, despite the heightened attention to our justice system's fallibility, many Canadians and system officials still view these cases as tragic but atypical. After all, Canada has numerous constitutional safeguards in place that are intended to protect the criminally accused. Canadians pride themselves on the due process guarantees, as mentioned above, that, in theory, ensure the conviction of the guilty and the exoneration of the innocent. Such confidence in the criminal justice system assumes that constitutional protections are always paramount and safeguards are always implemented. This fundamental assumption,

[1] Jeffrey R Manishen, "Wrongful Convictions, lesson learned: The Canadian Experience" (2006) 13 Journal of Clinical Forensic Medicine 296. See also William Blackstone, *Commentaries on the Laws of England* 1765.

however, fails to recognize the critical fact that the justice system is a feature of human fallibility; both, at times, unfair and unequal. Systematic analysis of wrongful convictions cases reveals that these safeguards are difficult to maintain. This thesis emphasizes that cases of the wrongly convicted are not anomalies that have slipped through the cracks, but are rather the result of a larger pattern of systemic failures and flaws in the operation of the justice system.

Very little research has been undertaken to qualify how many individuals have been wrongfully convicted in Canada.[2] Since 1986, seven public commissions of inquiry have been held in Canada following cases where wrongful convictions were confirmed. Most recently, the Ontario government launched a public inquiry following revelations relating to pathologist Dr. Charles Smith's discredited testimony, which allegedly contributed to a number of wrongful convictions involving infant deaths.[3] This recent inquiry has again brought national attention to the fallibility of the criminal justice system and, in turn, revitalized the conversation on wrongful convictions in Canada.

What makes certain criminal cases particularly vulnerable to wrongful convictions? Who are the most at risk to be wrongly convicted? Studies consistently reveal a number of well recognized factors that can lead to the conviction of the innocent. For example, police mistakes and misconduct have caused wrongful convictions in Canada. In general, the police have been found to focus on suspects prematurely and ignore evidence that does not support their early selection of a likely perpetrator, coerce false confessions, conduct poorly administered and biased lineups, and withhold exculpatory evidence from prosecutors. Police, however, are not the only sources of wrongful convictions. The other commonly recognized causes of wrongful convictions are: ineffective representation by defence counsel; prosecutorial misconduct; perjured testimony (particularly by government informants); and the corruption of scientific evidence. These are not problems found in only one or two wrongful conviction cases but are

[2] Barrie Anderson et al, *Manufacturing Guilty: Wrongful Conviction in Canada* (Halifax: Fernwood Publishing, 1998) at 8-10.
[3] See Ontario, *The Inquiry into Pediatric Forensic Pathology in Ontario*, vol 1(Queen's Printer for Ontario, 2008).

systemic problems that, either alone or in connection to each other, have produced wrongful convictions.

In light of the national attention wrongful convictions have again received, there remains an important area of the inquiry that is still in its infancy. Having determined what has been included as the legal causes of wrongful convictions, there exists limited research focused directly on whether racial discrimination is a distinct or contributing cause of wrongful convictions in Canada. It has been over four decades since the wrongful conviction of Donald Marshall, Jr., the first-high profile case of its kind in Canada, tackled the relationship between race and wrongful conviction. Racial discrimination has long been recognized as a part of the North American criminal justice system.[4] Donald Marshall, Jr.'s wrongful conviction, imprisonment, release, and acquittal were subject to a public inquiry. One of the most significant findings of the commission was that the prosecution of Marshall, a Mik'maq, was the result of racism. As such, why is it that since the *Royal Commission on the Donald Marshall, Jr. Prosecution*, racial bias as a contributing cause of wrongful convictions has not developed?

This thesis answers this question by exploring the numerous causes of wrongful convictions and, more importantly, the social characteristics of the wrongly accused. Certainly, race and racism are not completely ignored in the discourse on wrongful convictions. In the United States, for example, some attention has been given to the subject showing that racial disparities found elsewhere in the American criminal justice system also appear in the conviction of the innocent. However, when exploring the mainstream discourse in Canada on wrongful convictions and how to prevent them, the racialized experience is relatively absent.

This begs the question as to whether there is a gap in the research on wrongful convictions and racial injustice. Such evidence however is elusive and obtaining it has been

---

[4] See Frances Henry et al, *The Colour of Democracy: Racism in Canadian Society*, 4th ed, (Toronto: Harcourt Canada, 2009) at 121 -147; Ontario, *Paying the Price: the Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003); Wendy Chan et al, *Crimes of Colour: Racialization and the Criminal Justice System in Canada* (Peterborough: Broadview, 2002); Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen's Printer for Ontario, 1995).

challenging. The experiences of racialized accused in wrongful convictions are not widely published. Consequently, a triangulated methodology was required, which incorporated aspects of Critical Race Theory in order to determine how, if at all, the experiences of racialized persons should feature in the discourse of wrongful convictions.

The search for answers to this question is the purpose of this thesis. The thesis is presented in two parts. Part I defines, describes, and analyzes the phenomenon of wrongful convictions; examining both how and why wrongful convictions occur. Part II examines the social characteristics of the wrongly convicted; specifically, the role race plays in the criminal justice system and its implications for miscarriages of justice. The lack of research on the racialized experience and the desire to understand the causes of wrongful convictions necessitated a review of the literature. Chapter 2 describes what the existing literature does and does not reveal about wrongful convictions, exploring many of the contributing causes that lead to cases of wrongful convictions. The review begins with an examination of the ways in which researchers have defined and identified the frequency of wrongful convictions. The literature review makes it clear that miscarriages of justice are not a result of a single flaw or mistake; rather many factors can be at the root.

In order to understand racial bias as a contributing factor to wrongful convictions, one must understand the broader historical context of racism in the criminal justice system and in society as a whole. What follows in Chapter 3 is a discussion of the ways in which race and racial bias has entered and affected the criminal justice system and, in turn, sets the foundation to better understand the nexus between race and wrongful convictions within a larger structural context. Chapter 3 sets out in greater detail the theoretical underpinnings of the thesis. Examining the social construction of race and the process of racialization, the writings of Critical Race Theory are utilized to understand that racism exists in subtle and systemic forms in the Canadian criminal justice system. This includes a consideration of how racial bias has

influenced law and how legal neutrality, policies and practice subordinate the racialized and Aboriginal experience. The issue of racial oppression in the criminal justice system has gained the attention of criminologists and other academics. In this chapter examples are drawn from the case law, the reports of taskforces and commissions, such as the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, as evidence of racism in the Canadian criminal justice system. The purpose here is to facilitate a more informed understanding and analysis of the manifestation of racism in the administration of justice.

Chapter 4 builds on Chapter 3 by critically examining the wrongful conviction and subsequent public inquiry in the case of Donald Marshall, Jr. The Marshall case is a documented example of how mistakes and racial biases can collaborate to convict an innocent person. The chapter concludes by critically examining the degree of racial awareness during the inquiry and questions whether the marginalized status of the Mi'kmaq population contributed to Marshall's conviction. The case is an effective vehicle to discuss how the criminal justice system can discriminate against the racialized and others from disadvantaged groups.

The core of the thesis, found in Chapter 5, offers a more in-depth examination and exploration of the link between the race of the defendant and the increased likelihood of wrongful conviction. To facilitate this objective, particular attention is given to academic literature in the United States, where scholars have been turning their attention to the racial and ethnic disparities in the criminal justice system in the course of studying miscarriages of justice. The chapter looks at a few cases since the *Royal Commission on Donald Marshall, Jr.* to illustrate that the issue of race in wrongful convictions in Canada has been silenced or decontextualized. If and when racial injustice exists in wrongful convictions, it is not documented and, in turn, it is denied. One explanation is that the same systemic barriers that racialized defendants encounter in the criminal justice system also exist when addressing racism as a factor in wrongful convictions. Another reason is that Canadian lawyers have failed to engage in racial litigation

and the resistance of judiciary to the adoption of critical race approaches when invited to do so. The chapter concludes by suggesting the development of critical race standards when addressing racial bias in the criminal justice system.

The study is approached from several angles. First, through the review of previous studies on wrongful convictions, along with the findings from the Marshall case, the conclusion is drawn that race is a contributing factor to wrongful convictions. Second, the review of literature on race, racism and the justice system puts the discussion of racial bias and wrongful convictions in the larger context of what role race plays in the criminal justice system in general. Such an analysis evidences that racialized and Aboriginal persons are more likely to be disproportionately represented in the criminal justice system.

The intent of this research and thesis is threefold: (1) within the writings of Critical Race Theory to provide theoretical explanation of how systemic racism permeates the administration of justice; (2) to fill substantial gaps in existing knowledge of racial bias in wrongful conviction cases and; (3) to assess the efficacy of the Canada's criminal justice system. There is another personal goal, namely, to play some part in the recognition that racial discrimination requires further exploration in the study of wrongful convictions as it affects issues of social equality, power relations, and equal access to justice. Ultimately, the research is exploratory. The main point of this research is to encourage more work in this area. It does not seek to present a full explanatory theory on the racialized experience in wrongful convictions. Instead, its aim is to analyze the direction taken in the study on wrongful convictions in order to rethink the current assumptions and approaches.

CHAPTER TWO

WRONGFUL CONVICTIONS - A LITERATURE REVIEW

2. - INTRODUCTION

In a perfect criminal justice system only the guilty are punished while the innocent remain free. However, the Canadian public is exposed, at times, to convincing evidence that a person may spend two, five, ten or more years in prison for a crime that he or she did not commit or for a crime that never took place at all, proving that the justice system is far from perfect. During the past decade, there has been growing international interest in the topic of wrongful convictions and its implications. As in other jurisdictions, Canada has witnessed several high-profile cases of wrongful convictions that have led to an increased recognition of the fallibility of the criminal justice process. The Canadian public is familiar with the cases of *David Milgaard*, *Thomas Sophonow*, *Guy Paul Morin*, *Steven Turscott*, *Donald Marshall Jr.*, *James Driskell* and *Gregory Parsons*. However, these names are only some of the individuals who have been incarcerated at length for crimes that they did not commit. Many miscarriages of justice in Canada remain hidden from view, which has obscured the extent of the problem and, in turn, has undermined the integrity of the administration of justice.

Despite increased attention to the issue, literature on wrongful convictions in Canada is somewhat limited. Given the seriousness of wrongful convictions, the phenomenon demands further exploration. In this chapter the central issues and causes of wrongful convictions are discussed. The intent of this review is not to offer an exhaustive study of the literature; rather, the literature review provides an overview of the salient areas in the study of wrongful convictions in order to develop a deeper analysis of the various aspects of the problem. The literature review begins with an examination of the ways in which researchers, particularly in the United States, have attempted to define and identify the frequency of wrongful conviction cases.

Part II addresses the significance of studying wrongful convictions. Finally, in Part III the documented causes of wrongful convictions are identified.

2.1 - PART I: DEFINING WRONGFUL CONVICTION

What is a wrongful conviction? A number of different terminologies are used throughout the literature to describe wrongful convictions such as *miscarriage of justice*, *false imprisonment*, and *malicious prosecution*. However, it is important to emphasize that there is no single and universally agreed upon definition for the term 'wrongful conviction'.[5] In brief, wrongful conviction is an exoneration or acquittal that results from an error that violated an individual's due process rights. In the major studies conducted in the United States[6] and the United Kingdom[7] distinctions are made between legal and factual innocence. Legal innocence refers to individuals whose convictions are quashed due to errors of law (for example the introduction of inadmissible evidence), and to those acquitted by the courts. In the Canadian legal system, individuals who are acquitted or have their convictions quashed are legally innocent; however, this does not necessarily mean that the individuals are considered to be innocent. Factual innocence refers to individuals who have been wrongfully convicted and/or imprisoned for crimes that they did not commit (for example, they are "behaviourally innocent"[8] of the crimes for which they were convicted). C. Ronald Huff further distinguishes between factual and legal innocence by referring to convicted innocents as false positives and guilty offenders who beat the system or who are not apprehended as false negatives.[9] In this review,

[5] For example, see Hugo A Bedau & Michael L Radelet, "Miscarriage of Justice in Potentially Capital Cases," (1988) 41:4 Stan L Rev 161; C. Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996).

[6] Edwin M Borchard, *Convicting the Innocent*: Sixty-Five Actual Errors of Criminal Justice (New York: Garden City Publishing, 1932); R Brandon & C Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London: George Allen and Uwin, 1973); H Beadu & M Radelet, "Miscarriages of Justice in Potentially Capital Cases," (1988) 41:4 Stan L Rev 161; Martin Yant, *Presumed Guilty: When Innocent People are Wrongly Convicted* (Buffalo, NY: Prometheus Books, 1991); Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996).

[7] Ruth Brandon & Christie Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London: George Allen and Uwin, 1973)[Brandon & Davies].

[8] This term has been utilized by Hugo A. Bedau & Michael L. Radelet, "Miscarriage of Justice in Potentially Capital Cases," (1988) 41:4 Stan L Rev and C. Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996).

[9] C. Ronald Huff, "Wrongful Conviction: Societal Tolerance of Injustice" (1987) Research in Social Problems and Public Policy at 101, 99-115.

'wrongful conviction' is defined as the conviction of a factually innocent person. In other words, wrongful convictions indicate the exoneration of an individual who was convicted of a crime in which he or she had no factual role. The conviction of a factually innocent person can also be used to reference an individual who was convicted of a crime that never occurred.

Further, Walker argues that a miscarriage of justice occurs whenever suspects, defendants or convicts are treated by the state in a manner that breaches their rights.[10] A miscarriage of justice is also used to describe: (1) pre-trial detention for individuals who cannot afford bail, and against whom the charges are later dropped,[11] or who are acquitted after trial;[12](2) individuals implicated in a crime or who were accessories to a crime in a minor way but not guilty of the more serious charge for which they were convicted;[13] (3) individuals whose convictions are later overturned on appeal;[14] (4) individuals whose convictions are later quashed;[15] and (5) false accusations of crime.

In addition to varying definitions, the standard used to determine proof of innocence may also differ across research studies. For example, Edward Borchard's historical analysis of 65 American and British cases was limited to incidents where innocence was proven, where the murdered person turned up alive, or where the real culprit was subsequently convicted. American scholars Bedau and Radelet studied cases of erroneous convictions "in which the defendant was, or might have been, sentenced to death."[16] They found 350 cases "in which defendants convicted of capital or potentially capital crimes in this century, and in many cases

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[10] Clive Walker, "Miscarriage of Justice in Principle and Practice" in C Walker & Keir Starmer, ed, *Justice in Error* (London: Blackstone, Press) at 17.
[11] C. Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996) at 10-11; Tim Anderson, "What is the Problem?" (1993) 5:1 Current Issues in Criminal Justice at 72-84.
[12] Barrie Anderson et al, *Manufacturing Guilt: Wrongful Conviction in Canada* (Halifax: Fernwood, 1998) [Barrie Anderson].
[13] Brandon & Davies, *supra* note 12 at 19.
[14] Barrie Anderson, *supra* note 12 at 73
[15] *Ibid* at 20.
[16] Hugo A Bedau & Michael L Radelet, "Miscarriage of Justice in Potentially Capital Cases," (1988) 41:4 Stan L Rev 23 [Bedau & Radelet].

sentenced to death, have later been found to be innocent."[17] The primary evidence Bedau and Radelet used to determine proof of innocence included legislative indemnity, reversals by trial or appellate courts, appellate acquittals, and executive pardons.[18] In another major United States study, Huff, Rattner and Sagarin determined proof of innocence only in cases where an indisputable error had been discovered.[19] Brandon and Davies considered innocence proven in cases where free pardons were granted, or in cases that were quashed following referrals to the Court of Appeal.[20]

The criterion used for examining cases in the research also differs when studying wrongful convictions. Some researchers have confined their analysis to convicted innocents who have been officially exonerated because of indisputable error,[21] while others have not.[22] In other studies, some authors fail to specifically define wrongful convictions, while still focusing their case analysis on the factually innocent.[23] Bedau and Radelet include in their study of 350 cases only those cases "in which the defendant was convicted of homicide or sentenced to death for rape and when either no such crime actually occurred or the defendant was legally and physically uninvolved in the crime."[24] In the Huff *et al* study only convicted individuals who had clearly been exculpated were included, specifically "people who have been arrested on criminal charges, who had either pled guilty to the charge or had been tried and found guilty;

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[17] Bedau & Radelet, *supra* note 16 at 23-24. Bedau & Radelet assert that 23 innocent people were executed in the United States between 1905 and 1974.
[18] *Ibid* at 49-50.
[19] C Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996) at 15. See also Arye Rattner, "Convicted But Innocent: Wrongful Conviction and Criminal Justice System" (1988) 12:3 Law and Human Behavior at 284, 283-293.
[20] Brandon & Davies, *supra* note 7 at 19.
[21] Borchard, *Convicting the Innocent*: Sixty-Five Actual Errors of Criminal Justice (New York: Garden City Publishing, 1932); Brandon & Davies, supra note 3; Bedau and Radelet, *supra* note 12; Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996).
[22] Paul R Wilson, "When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia" (1989) 24:1 Australian Journal of Social Issues at 5, 3-22 [Wilson].
[23] Erle S Gardner, *The Court of Last Resort* (New York: William Solan Associates, 1952); Jerome Frank& Barbara Frank, *Not Guilty* (New York: Doubleday & Co., 1957); Edward D Radin, The Innocents (New York: William Morrow & Co., 1964).
[24] Bedau & Radelet, *supra* note 16 at 45.

and who, notwithstanding a plea or the verdict, were in fact innocent".[25] In Wilson's examination of wrongful convictions in Australia, no assumptions of guilt or innocence are proffered; Wilson confines his analysis to those cases in which "guilt was not established beyond a reasonable doubt."[26] In most cases, research in various countries reveals that exoneration refers to convictions where it was later determined the alleged crime never occurred or the convicted person was not the perpetrator,[27] to persons granted free pardons, or when convictions are quashed after a case is referred to an appellate court.

Notwithstanding incontrovertible proof of innocence, disagreements as to the appropriate criteria to be used to identify a wrongful conviction are bound to continue. Although errors in an individual's case can reasonably be considered a miscarriage of justice, identifying those individuals who are factually innocent can provide a more definitive segment of the problem. The literature reveals that defining wrongful convictions depends, in part, on the particular values and interests of researchers and/or the exigencies of specific research studies.

2.2. - PART II: THE IMPORTANCE OF STUDYING WRONGFUL CONVICTIONS

In the Canadian criminal justice system it is certainly possible for a person accused of a criminal offence to be tried, and be acquitted – even though that person is actually guilty. In this context, a finding of 'not guilty' may only mean that the Crown did not prove its case in satisfaction of the required standard of proof. On the other hand, it is also possible that a person is tried and found guilty of an offence that he or she did not commit. The former is arguably easier to understand, while the latter continues to gain public recognition. Wrongful convictions are important to study for a variety of reasons. One of the reasons is that all law-abiding citizens

[25] C Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996) at 10. Determined that an individual is to be 'clearly exculpated' "either because the alleged crime was never committed or, more frequently, the convicted person was not the perpetrator." See also Brandon & Davies, *supra* note 7 at 19. Brandon & Davies define "wrongful imprisonment" as those who have been wrongfully convicted and imprisoned for "a crime [they] did not in fact commit and who [have] been sent to prison on the basis of this conviction".
[26] See Wilson, *supra* note 22.
[27] See Borchard, *Convicting the Innocent*: Sixty-Five Actual Errors of Criminal Justice (New York: Garden City Publishing, 1932); Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996).

deserve their freedom and "should be free from oppression by the criminal justice system."[28] Additionally, wrongful convictions inflict psychological harm to those who are mistakenly convicted.[29] It has been well- documented that wrongful convictions influence not only the lives of the individuals who have been directly affected; they are also important from a public safety standpoint.[30] In short, for every accused person who is wrongfully convicted and imprisoned, the actual perpetrator escapes punishment and remains at liberty within society. Wrongful conviction is also important to study because of the potential to undermine public confidence in the criminal justice system.[31] In general, those who hold a favourable impression of the justice system and who perceive it as legitimate, prior to gaining knowledge of a wrongful conviction, will, arguably, have their positive perceptions challenged.

2.2.1. - Frequency of Wrongful Convictions

The credibility of any criminal justice system rests, in large part, on how fairly it treats those individuals charged with offences. The main goals of the Canadian criminal justice system are the protection of the public and the deterrence of crime. Important safeguards exist to ensure that no person is unjustly deprived of their fundamental rights and freedoms.[32] The Canadian commitment to fairness is ultimately reflected in the presumption of innocence of the accused, the prosecution's burden of proving guilt beyond a reasonable doubt, and the availability of appellate review in cases of legal and factual error.[33] However, no criminal justice system is infallible.

[28] R Ramsey & J Frank, "Wrongful Conviction: Perceptions of Criminal Justice Professionals regarding the Frequency of Wrongful Conviction and the Extent of System Errors" (2007) 53 Crime & Delinquency 437, 438 [Ramsey & Frank].
[29] Adrian Grounds, "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46 Can J Criminology & Crim Just 165-182.
[30] C Ronald Huff, "Wrongful Conviction and Public Policy" (2002) 20 Criminology at 1-18; Ramsey & Frank, *supra* note 28.
[31] C Ronald Huff, "Wrongful Conviction and Public Policy" (2002) 20 Criminology at 1-18 [Huff].
[32] Canada, Department of Justice, Addressing Miscarriage of Justice: Reform Possibilities for Section 690 of the Criminal Code. A Consultation Paper (Ottawa: Communications Branch, Department of Justice, 1998) [Department of Justice, 1998].
[33] Department of Justice, 1998, *supra* note 32.

Wrongful convictions were, until relatively recently, thought to occur rarely.[34] Despite this long-standing assumption, it can be persuasively argued that wrongful convictions have occurred alongside the evolution of the criminal justice system.[35] The phenomenon of wrongful convictions has not until the last few decades gained national attention, due in large part to repeated discovery of the factual innocence of a convicted person. Cases of wrongful conviction continue to accumulate. As it stands, there is no central database existing in either the United States or Canada for keeping track of wrongful convictions.[36] In Canada, very little research has been conducted to determine the number of people who have been wrongly convicted.[37] It has been suggested that this number is unknowable:

> There may be thousands of cases of wrongful convictions in Canada because, for a variety of reasons, innocent people may plead guilty during plea bargaining. Although justice officials stress that wrongful convictions are rare occurrences, the available evidence indicates that the cases that do come to our attention are only the tip of the proverbial iceberg.[38]

Although the number of wrongful convictions is an unknown dark figure, there have been numerous scholars in the United States who have made an effort to quantify the rate at which innocent people are erroneously convicted and imprisoned. The American scholars who have attempted to derive estimates of wrongful convictions have relied on surveying justice system officials to arrive at an approximation.[39] Other scholars have generated estimates using their own methodology.[40] Regardless of the approach employed, these endeavours are uniquely

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[34] F Carrington, *Neither Cruel nor Unusual* (New York: Arlington House, 1978).
[35] Robert Carl Schehr & Jamie Sears, "Innocence Commissions: Due Process Remedies and Protection For the Innocent" (2005) 13 Critical Criminology 181 [Schehr & Sears].
[36] See S Gross, "Exonerations in the United States 1989 through 2003" (2005) 95 J Crim L & Criminology at 523; Barrie Anderson, *supra* note 12.
[37] Barrie Anderson, *supra* note 12.
[38] *Ibid* at 8-9.
[39] See R Huff, A Rattner & E Sagarin, "Guilty Until Proven Innocent: Wrongful Conviction and Public Policy" (1986) 32:4 Crime & Delinquency 518. Ramsey & Frank, supra note 28; Zalman et al, "Officials' Estimates of Incidence of 'Actual Innocence' Convictions"(2008) 25 Justice Quarterly 72-100.
[40] For example, D M Risinger, "Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate" (2007) 97 Can J Criminology & Crim Just at 761-806 [Risinger].

important because they provide the most promising insight into how widespread wrongful convictions may be.

Existing speculation on the frequency of wrongful convictions in the United States ranges from very few cases each year to up to twenty percent of all recorded convictions.[41] In 1992, Radelet, Bedau, and Putnam argued that 416 known miscarriages of justice in capital or potentially capital cases occurred between 1900 and 1990 in the United States, including twenty-three cases where the accused was executed. However, the first attempt to quantify the rate of wrongful convictions in the United States was undertaken by Huff, Rattner and Sagarin in their survey of justice officials. Of the 177 respondents who provided estimates on the incidence of wrongful convictions, the vast majority believed that such errors comprise less than one percent of all convictions in the United States. The second most common estimate was one to five percent, with twenty percent of justice system officials falling into that response category. Based on the estimates provided by the justice officials, Huff and his colleagues then developed a wrongful conviction estimate using conservative assumptions. They argued that with a national conviction rate of fifty percent for crimes and a wrongful conviction of one-half of a percent, there would be approximately 5,700 individuals sent to prison each year for crimes that they did not commit. Huff *et al* argued that "the frequency of error may well be much higher in cases involving less serious felonies," which would make the error rate even higher then one-half of a percent.[42]

Like Huff *et al*, Ramsey and Frank also surveyed justice system officials in an effort to understand their perceptions of wrongful convictions. In the Ramsey and Frank study, respondents estimated that wrongful convictions occur in their own jurisdiction in .5 percent to one percent of all cases. However, when asked to estimate the incidents of wrongful convictions

[41] W Holmes, "Who are the wrongful convicted on death row?" in Saundra Westervelt & John Humphrey, eds, Wrongly *Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 99-131.
[42]R Huff, A Rattner & E Sagarin, "Guilty Until Proven Innocent: Wrongful Conviction and Public Policy" (1986) 32:4 Crime & Delinquency at 523 [Huff, Rattner & Sagarin].

in jurisdictions throughout the United States, forty percent of respondents estimated that it occurred in more than three percent of cases. Indeed, for all groups surveyed (that is, police, prosecutors, defence lawyers, and judges), their estimate of wrongful conviction in the United States were higher than their estimates of wrongful conviction in their own jurisdictions.

Extending the work of Ramsey and Frank, Zalman and his colleagues surveyed Michigan justice officials."[43] Similar to the justice officials in the Ramsey and Frank study, the estimates of Michigan justice officials increased when they were asked to estimate a wrongful conviction rate for the entire United States. The category increased to one to three percent; with 28.8 percent of respondents estimating that four to ten percent of all guilty verdicts are wrongful convictions, and another nineteen percent estimating that wrongful convictions represent more than ten percent of all convictions nationwide. When the findings of Ramsey and Frank and Zalman *et al* are compared to the conviction estimates that Huff *et al* presented over two decades ago, it is evident that there is currently greater concern among criminal justice officials in the United States regarding the occurrence of wrongful convictions than before.

Different from the survey method employed by the above mentioned American scholars, Risinger came to his empirical wrongful conviction rate using a different approach. Focusing only on DNA exonerations in rape-murder cases, Risinger concluded that at least 3.3 percent and as high as five percent of all convictions are wrongful. For the low-end estimate, he used 319 as the denominator and 10.5 as the numerator. The 319 represents the number of capital rape-murder conviction in his study period, while 10.5 is the number of cases of rape-murder wrongful convictions that occurred during his study period. For the maximum wrongful conviction rate Risinger took into consideration the number of post-conviction cases in which defence counsel may have failed to request DNA testing. Assuming failure to request DNA testing did not occur in half of the 319 convictions included within the denominator, Risigner

[43] Zalman et al, "Officials' Estimates of Incidence of 'Actual Innocence' Convictions" (2008) 25 Justice Quarterly at 85 [Zalman].

approximated that it happened in less than half of those cases, and thereby argued that 5 percent is an appropriate ceiling rate for rape-murder wrongful convictions. In the end, the fact that wrongful convictions occur points to the significance of studying the contributing factors and underlying causes.

2.3. - PART III: THE CAUSES OF WRONGFUL CONVICTIONS

2.3.1 Casual Factors

There is a better understanding in the scholarship of the reasons why wrongful convictions occur than there is of the overall rate at which they occur. The legal causes of wrongful convictions have been well documented.[44] Scholarship on the topic dates back to Edward Bochard's seminal work, *Convicting the Innocent,* in which he reviewed sixty-five wrongful convictions in an attempt to understand their causes. Since Bochard's work was published, the conclusions of studies that addressed the primary causes underlying the occurrences of wrongful conviction have been consistent. It is important and necessary to discuss the primary causes of wrongful convictions within this review of the literature.

The causes underlying the conviction of innocents tend to fall within the following categories: eyewitness misidentification; police and prosecutorial tunnel vision and misconduct; perjury by witnesses, perpetrators, forensic examiners, jailhouse informants; junk science; and incompetent or overburdened defence counsel, and, more recently, racial bias.[45] Before addressing these causes individually, as academic researchers note, wrongful convictions are most often the product of multiple causal factors. In other words, "research has revealed that

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[44] See Bedau & Radelet, *supra* note 16; B Scheck, P Neufeld & J Dwyer, *Actual Innocence* (New York: Doubleday, 2000); J B Gould, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System* (New York: New York University Press, 2008).

[45] See J B Gould, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System* (New York: New York University Press, 2008). Scheck et al, *Actual Innocence* (New York: Doubleday, 2000); R A Leo, *Police Interrogation and American Justice* (Cambridge, MA: Harvard University Press, 2008); S M Kassin & G H Gudjonsson, "The Psychology of Confessions" (2004) 5 Psychological Science in the Public Interest at 33; H Schoenfeld, "Violated Trust: Conceptualizing Prosecutorial Misconduct" (2005) 21 Journal of Contemporary Criminal Justice at 250; K Findlay & M Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases"(2006) Wis L Rev at 291; C Zimmerman, "From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions" in Saundra Westervelt & John Humphrey, eds, *Wrongly Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 55-76.

wrongful convictions do not occur as a result of a single error by a sole individual."[46] Both individual and systemic factors can contribute to wrongful convictions.[47] Smith and colleagues note that case studies show that an initial error focusing suspicion on the wrong person contaminates a case.[48] However, after a case is contaminated, additional errors influence subsequent stages of the criminal proceedings.[49] For that reason, Smith *et al* argues that the multiple causes of a wrongful conviction work together to secure the conviction of most factually innocent persons. Further, Huff *et al* also discovered the justice system's failure with more than one error occurring and noted "isolating any one individual factor misses the point."[50] Therefore, such interaction effects are an important aspect of wrongful convictions.

2.3.1.1 - Mistaken 'Eyewitness' Testimony

A positive identification of an accused is an essential element of proving a criminal offence. Eyewitness testimony that directly links the accused to the commission of the alleged offence is often one of the most important and compelling parts of a Crown's case. Dr. Elizabeth Loftus, a recognized expert in eyewitness testimony, has stated "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant and says, 'that's the one.'"[51] However, eyewitness identification evidence is fraught with inherent frailties. Psychologists have long demonstrated inherent frailties exist because of normal deficiencies in the human memory; consequently, eyewitness identification is inherently unreliable.[52]

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[46] Myriam S. Denvo & Kathryn M. Campbell, "Criminal Injustice" (2005) 21:3 Journal of Contemporary Criminal Justice 226 [Denvo & Campbell].

[47] G Castelle & E Loftus, "Misinformation" in Saundra Westervelt & John Humphrey, eds, *Wrongly Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 17-35 [Castelle & Loftus].

[48] Smith et al, "How Justice System Officials View Wrongful Convictions" (2009) Crime & Delinquency.

[49] K Findley & M Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases"(2006) Wis L Rev at 291-398 [Findley & Scott].

[50] C Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996) at 65. See also Bedau & Radelet, *supra* note 16 at 56; Barrie Anderson, *supra* note 12 at 21.

[51] E Loftus, *Eyewitness Testimony* (Cambridge, MA: Harvard University Press, 1979); See also C Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996) at 53 [Huff et al].

[52] R Sanders, "Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards" (1984) 12 Am J Crim Law at 189-220 [Saunders].

Psychologists have researched eyewitness misidentification extensively, which has led to a substantial body of literature over the years.[53] The psychological literature shows that rates of mistaken identification can be particularly high. Although the existing eyewitness literature suggests that there is a reliable correlation between confidence and accuracy overall, the confidence of any eyewitness is not always indicative of the veracity of their assertion.[54] The testimony or identification of any eyewitness who conveys confidence has the potential to prove disastrous for an innocent person and can ultimately lead to his or her wrongful conviction. Another truth about eyewitness beliefs is that they can be contaminated by suggestion.[55] According to Loftus, "studies show that misinformation can change an individual's recollection in predictable, and sometimes very powerful, ways.[56] In brief, eyewitness errors may happen for several reasons, including suggestive police interviewing, unconscious transference, and the malleability of confidence.[57] Suggestive police interviewing may occur if the police communicate information to eyewitnesses that influences and contaminates their testimony. Finally, unconscious transference is said to occur among witnesses when a person seen in one situation is confused or recalled as a person seen in another situation.[58] Research in the United States has also shown that witnesses who identify a suspect in a police line-up or photos are far more confident of their choice if given feedback from authorities.[59] Despite these findings, according to Denov and Campbell, "most jurors are unaware of the unreliability of eyewitness testimony and may place unwarranted faith in its accuracy."[60]

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[53] See Gary L Wells, "What Do We Know About Eyewitness Identification? (2003) 48:5 American Psychologist at 553-571 [Wells].
[54] Wells, *supra* note 53 at 556.
[55] E Loftus, *Eyewitness Testimony* (Cambridge, MA: Harvard University Press, 1979) [Loftus].
[56] *Ibid* at 868.
[57] Castelle & Loftus, *supra* note at 37; E Loftus, *Eyewitness Testimony* (Cambridge, MA: Harvard University Press, 1979); Loftus & J Doyle, *Eyewitness Testimony: Civil and Criminal*, 3d ed (Charlottesville, VA: Lexis Law, 1997).
[58] Loftus, *supra* note 55.
[59] G Wells & A Bradfield, "Good, You Identified the Suspect: Feedback to Eyewitness Distorts their Reports of the Witnessing Experience" (1998) 83 Journal of Applied Psychology at 83, 360-376.
[60] Denvo & Campbell, *supra* note 46 at 226. Se also Saunders, *supra* note 52.

MacFarlane states that eyewitness identification is "the single most important factor leading to wrongful convictions."[61] Research in the United States and the United Kingdom reveals that eyewitness error is one of the single most important factors leading to wrongful convictions in those countries. In the United States, Bedau and Radelet's examination of 350 cases in which defendants were convicted of capital or potential capital crimes, found 193 such errors. Though mistaken witness identification often occurred in combination with other errors, it was either the primary or singular cause of the erroneous conviction in most instances. Similar to Bedau and Radelet, Scheck *et al*, also reported mistaken eyewitness identification as responsible for the majority of the cases they examined. In eighty-four percent of their sample, wrongful convictions resulted, at least in part, from eyewitnesses' misidentification.

In his survey of the extant literature, Rattner found that "eyewitness misidentification is the factor most often associated with wrongful conviction."[62] Of the 205 cases that were included in his assessment, 100 were due to eyewitness misidentification. Gould also reported similar findings in his recent study that highlighted the work of the Innocence Commission of Virginia. Of the eleven cases of wrongful capital conviction that Gould examined, eight resulted, at least in part, from problems with eyewitness identification. Finally, in their recent examination of 340 exonerations from 1989 to 2003, Gross and colleagues found that mistaken eyewitness identification by at least one witness played a role in sixty-four percent of exonerations. Finally, Huff's work shows that eyewitness errors occur in nearly sixty percent of cases. [63]

[61] Bruce McFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31 Man LJ 403 at 445.

[62] Arye Rattner, "Convicted But Innocent: Wrongful Conviction and the Criminal Justice System" (1988) 12:3 Law and Human Behavior at 292.

[63] In Canada, there is a significant body of case law that acknowledges and discusses the inherent frailties of eyewitness identification. For example, see *R. v. Hibbert*, [2002] S.C.R. 445 at 50-52. See also Denvo & Campbell, *supra* note 46. The Driskell, Sophonow, Morin and Lamer commissions of inquiry have also concluded that eyewitness misidentification has been the foundation of miscarriages of justice in Canada. The case of Michel Dumont further illustrates how erroneous eyewitness identification contributes to wrongful convictions in Canada. In 1990, a woman came forward to the police alleging that she had been sequestered and sexually assaulted at knifepoint. A composite sketch of the perpetrator was disseminated to the public, and an anonymous call made to the police claimed that the sketch resembled Dumont. Approached by the police, Dumont agreed to be photographed. As a result, the complainant identified Dumont as the assailant. During his trial, no circumstantial or material evidence was presented; the only available evidence was the complainant's identification. Dumont was convicted of sexual assault in 1991. During the next few

2.3.1.2. - False or Coerced Confessions or Admissions

Another source of wrongful convictions is false confessions.[64] Arguably, a confession is viewed as one of the most powerful pieces of evidence that the prosecution can bring against an accused. A confession is normally defined as a "detailed written or oral statement in which a person admits to having committed some transgression, often acknowledging guilt for a crime."[65] Confessions are important because they serve as highly potent and persuasive evidence in court and virtually always result in the conviction of a criminal defendant. The problem with confessions as recognized by Kassin and Gudjonsson is that questions "often arise on whether a statement is authentic, voluntary, reliable, the product of competent waiver of rights, and in accord with the law."[66] Research illustrates that juries, and the general public, are more inclined to believe a defendant who confesses to a crime, regardless of other available evidence pointing to the contrary.[67] The dominant view is that an individual would not confess to a crime that he or she did not commit. The reality is that research reveals that innocent people do confess to crimes they have not committed.

The Canadian courts have acknowledged the phenomenon of false confessions, and have noted that experts have identified five basic kinds of false confessions: voluntary, stress compliant, coerced-complaint, non-coerced persuaded and coerced-persuaded.[68] In the United States, the findings of Bedau and Radelet suggest that false confessions are relatively common

[64] Bedau & Radelet, *supra* note at 16; Gross et al, "Exonerations in the United States 1989 through 2003" (2005) 95 J Crim L & Criminology at 523; Gould, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System* (New York: New York University Press, 2008).; S M Kassin & G H Gudjonsson, "The Psychology of Confessions" (2004) 5 Psychological Science in the Public Interest at 33-67.
[65] S M Kassin & G H Gudjonsson, "The Psychology of Confessions" (2004) 5 Psychological Science in the Public Interest at 35 [Kassin & Gudjonsson].
[66] Kassin & Gudjonsson, *supra* note 66 at 36.
[67] R Leo & R Ofshe, "The Consequence of False Confessions: Deprivation of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88 J Criminology & Crim L at 429-496 [Leo & Ofshe].
[68] See *R v Oickle*, [2002] 2 S.C.R. 3, 147 C.C.C. (3d) 321. Stress complaint confessions occur when the pressure of interrogation become so intolerable that suspects confess simply to end the interrogation. Coerced-complaint confessions are the product of classic coercive influence techniques such as threats and promises. The non-coerced persuaded confession occurs when police tactics cause the innocent person to become confused, doubt his memory, be temporarily persuaded of his guilt and confess to a crime he did not commit. The coerced-persuaded confession is similar to the non-coerced persuaded. However, it also involves the classically coercive aspects of the coerced-compliant confession.

errors that often lead to convictions. In their examination of exonerations in potentially capital cases, they found forty-nine convictions- or fourteen percent of the exonerations examined – resulted from false confessions. Gross *et al* reported similar findings, with fifteen percent of the 340 exonerations in their sample stemming from a defendant's false or coerced admission of guilt. Finally, twenty-five percent of miscarriages of justice in the work of Scheck *et al* were, in part, attributable to false confessions.

Studies have shown that methods of psychological interrogation may cause intellectually normal individuals to confess "to serious crimes of which they are entirely innocent."[69] False or coerced confessions occur because police officers are often granted power that remains unchecked in the interrogations rooms. Most false confessions are "usually the product of long, intensive interrogations that eventually frighten or deceive or break the will of a suspect to the point where he will admit to a terrible crime that he did not commit. Some of the interrogations stretch over days and involve relays of police interrogators."[70] According to Leo, "the structure, culture, and practice of police interrogation are orchestrated to maximize the state's ability to prosecute the suspect and undermine his ability to present a successful defense in the trial process."[71]

In the case of the United States, Leo argues that "police interrogation in the American adversary system is rooted in fraud because detectives seek to create the illusion that they share a common interest with the suspect and that he can escape or mitigate punishment only by cooperating with them and producing a full confession".[72] The reality is that manipulation, deception and trickery are all common interrogation devices. Research illustrates that in general police officers often believe that they are dealing with suspects who are guilty. Given this mindset, their concern is not with whether the suspect is responsible for the crime, but rather

[69] Denvo & Campbell, *supra* note 46 at 228-229; See also Leo & Ofshe, *supra* note 68.
[70] Gross et al," Exonerations in the United States 1989 through 2003" (2005) 95 *J Crim L & Criminology* at 544 [Gross et al].
[71] R A Leo, *Police Interrogation and American Justice* (Cambridge, MA: Harvard University Press, 2008) at 11 [Leo, 2008].
[72] Leo, 2008, *supra* note 71 at 25.

with finding the quickest way to elicit a confession that corroborates their beliefs of the suspect's culpability. According to Leo the common mindset is that, "an innocent person inside an interrogation room is little more than an urban legend."[73]

Another dilemma regarding confessions is that most people, especially police and prosecutors, view a confession to be "irrational and self-destructive", and, therefore, cannot fathom nor believe that an innocent person would offer a confession falsely, especially when it involves serious offenses such as murder or rape.[74] The notion that an innocent person would confess is commonly referred to as the "myth of psychological interrogation."[75] There are various reasons as to why the myth of psychological interrogation persists. That is, most people are unaware of what exactly takes place throughout the course of a criminal interrogation.[76] They "are unfamiliar with how police are trained to interrogate suspects or with studies that describe actual interrogation processes."[77] Without the knowledge of the techniques employed during interrogations, most people are more likely to reject the notion that an innocent person would falsely confess to a crime he or she was not responsible for committing.

A study conducted by Drizin and Leo, which analyzed 125 cases of proven interrogation-induced false confessions, provides insight into one of the factors that has a profound impact on the police interrogation outcomes: the length of an interrogation. Their analysis revealed that more than eighty percent of false confession in the United States resulted from interrogations that lasted at least six hours.[78] Additionally, another fifty percent of confessions in their analysis were the fruit of interrogations that were drawn out for period of at least twelve hours. Such extensive interrogation practices are extremely effective because of their ability to wear down a suspect's resistance to manipulation and deceit and, thereby increase the likelihood that he will

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[73] Leo, 2008, *supra* note 71 at 22.
[74] *Ibid* at 23.
[75] R A Leo, "False Confession" in Saundra Westervelt & John Humphrey, eds, *Wrongly Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 36-54 [Leo, 2005].
[76] Leo, 2005, *supra* note 75.
[77] Leo, 2005, *supra* note 75 at 197.
[78] S Drizin & R A Leo, "The Problem of False Confessions in the post-DNA world" (2004) 82 NCL Rev at 891-1007.

confess to a crime. Unfortunately, as has been discussed, not all confessions that are produced from interrogations are honest and legitimate.

False confessions can lead to miscarriages of justice because confessions are regarded as a powerful and persuasive evidence of the guilt of the accused. The reality is that judges and juries are not inclined to believe claims of innocence by someone who has already confessed.[79] It is not surprising then, as noted above, that false and coerced confessions have been found to be one of the most common causes of wrongful convictions.[80] Examples of false confessions can be found in a number of Canadian cases, including Romeo Phillion and Anthony Hanemaayer.[81]

2.3.1.3. - Police and Prosecutorial Misconduct

Unprofessional conduct on the part of police, prosecutors, and the judiciary is an important contributing factor to convicting the innocent.[82] Huff *et al* have argued that if they had to isolate a single system dynamic that permeates high numbers of wrongful conviction cases, they would describe it as "police and prosecutorial overzealousness."[83] The police, who play a crucial role in deciding whom to charge and in obtaining evidence, are central to the focus in wrongful conviction cases. Zuckerman argues that the "roots of miscarriages of justice are to be found in police investigations."[84] Police misconduct includes: careless police work, the planting and/or manufacturing of evidence, threats to potential witnesses, coaching witnesses at police lineups, obtaining confessions through brutality or threat, or overlooking evidence that supports the defendant's claims of innocence.[85] Further, errors may also occur through the misuse of informants, soliciting false confessions, and relying on poor forensic science. Police targeting of

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[79] Huff et al, *supra* note 51 at 473-474.
[80] Scheck et al, *Actual Innocence* (New York: Doubleday, 2000); Kassin & Gudjonsson, *supra* note 66; Leo, 2008, *supra* note 71.
[81] See R v Phillion, [2010] OJ No 2602; R v Hanemaayer, [3008] OJ No 3087.
[82] Scheck et al, *Actual Innocence* (New York: Doubleday, 2000).
[83] Huff et al, *supra* note 51 at 64. The authors define overzealous as the anxiety to solve a case.
[84] A Zuckerman, "Miscarriage of Justice – A Root Treatment" (1992) Crim L Rev at 323-324.
[85] See Jerome Frank& Barbara Frank, *Not Guilty* (New York: Doubleday & Co., 1957); Huff et al, *supra* note 53 at 71-71; Bedau & Radelet, *supra* note 16; Denvo & Campbell, *supra* note 46 at 227.

racialized communities and other disadvantaged groups constitutes another systemic factor in police misconduct. As Barrie Anderson notes, in the case of Aboriginal people they are "twenty times more likely" to come in contact with police than non-Aboriginal people in Canada.[86]

Prosecutors vary in capability, judgment and experience. Mistakes or improper behaviour by prosecutors are also a common element of most wrongful convictions. Professional misconduct may occur in the form of withholding evidence considered favourable to the defence. Full disclosure to the accused of the evidence in the case is a vital part of any criminal prosecution.[87] In short, full disclosure by the Crown at all stages of the criminal process is critical to ensuring that the accused receives a fair trial. Further, if the prosecution has exclusive possession of information favourable to the defense but withholds it, not only does it raise ethical questions about prosecutorial conduct, but also may contribute to wrongful convictions.[88] Prosecutors are sometimes guilty of presenting false testimony, allowing testimony to stand without correction, and withholding exculpatory evidence that favours the defendant.[89]

Where a factually innocent accused is charged with an offence, the Crown as well as the police have an overwhelming advantage in terms of information about the crime. In these cases, the importance of adequate disclosure is heightened because it is the factually innocent that stand to suffer most when exculpatory information, usually unknown to the perpetrator, is withheld.[90] For example, in the *Inquiry Regarding Thomas Sophonow* it was found that a great deal of significant material was not disclosed to the defence. Had this evidence been disclosed,

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[86] Barrie Anderson, *supra* note 12 at 75.
[87] See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326
[88] M Rosenberg, "Public Inquiries: The Process and the Value" (2002) Journal of the Association in Defence of Wrongly Convicted.
[89] *Ibid* 254-255.
[90] Huff et al, *supra* note 51 at 452.

it may have had a significant impact on the trial process and ultimate verdict.[91] Although *Huff et al*, acknowledge that, in some cases, police and prosecutors engaged in deliberate misconduct, they found that, overall, most of the subjects in their study were wrongfully convicted because of "unintentional errors made by witnesses and by those who staff and operate the justice system."[92]

Tunnel Vision

Unprofessional behavior by the police or prosecution may, however, be well intended and motivated by a desire to strengthen the case against a suspect that they are convinced is guilty. This process is often referred to as tunnel vision. As a result, in addition to mistaken eyewitness testimony and false confessions, further studies have shown that tunnel vision also causes wrongful convictions. For example, in the studies in the United States, Bedau and Radelet found eighty-three such errors in their analysis of miscarriages of justice. Thirty-five of the errors were the product of prosecutors withholding exculpatory evidence; fifteen resulted from overzealous prosecution; and thirty-three stemmed from overzealous police and negligence. Scheck *et al* reported comparable findings, with 381 of the murder convictions they examined reversed due to prosecutorial misconduct.

Tunnel vision has been defined as the "compendium of common heuristics and logical fallacies, to which we are all susceptible, that leads actors in the criminal justice system to focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt."[93] Tunnel vision is due largely to the fact that they receive "incomplete pictures of their cases" from investigators.[94] Prosecutorial tunnel vision also occurs as a result of the reality of plea-bargaining. Even in cases where evidence against

[91] Huff et al, *supra* 51 at 453. The *Inquiry Regarding Thomas Sophonow* found that when the Crown does not properly disclose the evidence to the defence, the risk of a wrongful conviction increases significantly. The defence is, for example, precluded from pursuing a line of questioning calling a witness, or impeaching the credibility of a key witness for the Crown.
[92] Huff et al, *supra* note 51 at 143.
[93] Findley & Scott, *supra* note 49 at 292.
[94] *Ibid* at 330.

an accused is relatively weak, prosecutors are able to produce a guilty plea by offering the prospect of lesser punishment. Arguably, over time many prosecutors begin to generalize and believe that all defendants they prosecute are factually culpable. Schoenfeld's hypothesis argues that the prosecutorial acts of misconduct "are essentially violations of the norms of trust and, therefore, stem from the nature of trust relationships."[95] While prosecutorial tunnel vision is more a product of unintentional psychological processes than malevolent motives, there are prosecutors who unfortunately engage in deliberate acts of misconduct.

Findley and Scott discuss the multiple reasons why tunnel vision exists in their research. In large part, the authors directed their attention to cognitive biases and institutional pressures as being the primary motivating factors underlying the phenomena of tunnel vision. In addition to cognitive bias, Findley and Scott also discuss the role of institutional pressures in tunnel vision. Namely, the thought processes of the police officers are influenced by the desire to convict the offender, which, in turn, helps minimize the pressure that the community may place on them. Community expectations that pressure officers to secure convictions can be overwhelming, especially when the expectations concern high-profile crimes such as murder and sexual assault.

Tunnel vision is insidious because it is, at times, the result of a well-intentioned belief in an individual's guilt. This can lead to a disregard for information or evidence that is inconsistent with the Crown's theory of a case. The unique role of the Crown must be examined when considering the nature, cause and effect of tunnel vision. While in theory, the role of the Crown is not to seek a conviction, but rather to see that justice is achieved, prosecutorial tunnel vision and, in turn, misconduct, can occur at all stages of the criminal process.[96] The Driskell,

[95] H Schoenfeld, "Violated Trust: Conceptualizing Prosecutorial Misconduct" (2005) 21 *Journal of Contemporary Criminal Justice* at 250-270 [Schoenfeld].
[96] Schoenfeld, *supra* note 95 at 254.

Sophonow and Morin inquiries all discussed the dangers of tunnel vision, and all made recommendations for the prosecution to safeguard against tunnel vision.

In summary, Martin indentifies three predisposing factors that can contribute to convicting an innocent person. These include (1) the high profile nature of the case that pressures authorities for a quick resolution; (2) the marginalized status of the accused as an outsider; (3) and a case premised on evidence that is suspect or inherently unreliable.[97] When all three factors are present, there may be a greater chance that the authorities will pressure a defendant into a false confession, overlook the initial reluctance of an eyewitness, believe an unreliable jailhouse informant, or fail to disclose exculpatory evidence to an accused. In the end, the prosecution plays an important role in ensuring that an accused person receives a fair trial. The literature reveals that mistakes or improper conduct by the prosecution are a common element in cases of wrongful convictions.

2.3.1.4. - Inadequate or Incompetent Defence Counsel

Ineffective legal representation is another problem associated with the occurrence of wrongful convictions. Unmanageably large caseloads and insufficient funding are two of the shortfalls customarily related to defence counsel inadequacy.[98] In general, overwhelming caseloads are common and often the cause of defence lawyers being ineffective in the courtroom. In addition, some defence lawyers are simply unprepared to defend their clients.[99] According to Zalman, "convicting factually innocent defendants represented by incompetent lawyers is unjust in a system dedicated to the rule of law."[100] This injustice runs contrary to the ideals of due process, fairness, and equality in the court of law. In the end, inadequate or incompetent defence counsel is associated with, and may be responsible for the conviction of

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[97] D Martin, "The Police Role in Wrongful Convictions: An International Comparative Study" in Saundra Westervelt & John Humphrey, eds, Wrongly *Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 77-95.
[98] Zalman, *supra* note 45.
[99] Huff, *supra* note 31.
[100] Zalman, *supra* note 45 at 301.

innocent individuals. The importance of effective counsel is immeasurable for its capacity to protect innocent persons during the legal process and thereby decrease the likelihood of wrongful convictions.

2.3.1.5. - Perjury by Witnesses and Jailhouse Informants

Perjured testimony is another factor associated with the incidence of wrongful convictions that is well documented in the wrongful conviction literature, particularly in the United States. Bedau and Radelet found perjury by witnesses to be one of the primary causes of wrongful convictions in the capital cases they examined.[101] In addition, Scheck *et al* reported that one-fifth of wrongful convictions in the cases they examined occurred, in part, because of perjured testimony.[102]

Embedded in the culture of the criminal justice system the use of jailhouse informants plays an important role in the conviction of the innocent. In Canada, the use of jailhouse informants has led to several wrongful convictions.[103] The issue with the testimony of jailhouse informants is that it is usually viewed as a means to an end. In other words, jailhouse informants are "willing to shape their stories to whatever is needed" because they are usually given "favorable considerations" of some kind.[104] They may receive favourable treatment while in prison, shortened prison sentences, property or monetary awards for their testimony.[105]

According to Zimmerman, the vast majority of individuals who choose to become informants do so because they come into contact with the law by either being suspected,

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[101] Bedau & Radelet, *supra* note 16.

[102] Scheck et al, *Actual Innocence* (New York: Doubleday, 2000) [Scheck et al].

[103] For example, Morin, Driskell, and Sophonow were all wrongfully convicted in cases where the Crown relied on jailhouse informants. Morin was wrongfully sentenced to life imprisonment in 1992 for the murder of 9 –year-old Christine Jessop. He was ultimately acquitted. Driskell was found guilty in 1991 for the murder of Perry Harder in Winnipeg. The reliability of key witnesses was a central concern in the case. Sophonow was convicted of the murder of Barbara Stoppel and spent four years in prison before the Manitoba Court of Appeal acquitted him in 1985.

[104] Huff, *supra* note 31 at 7.

[105] C Zimmerman, "From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions" in Saundra Westervelt & John Humphrey, eds, Wrongly *Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 55-76 [Zimmerman].

accused, or convicted of a crime.[106] As such, their motivations and testimony are not benevolent, but rather motivated solely by self-interest. Unfortunately, the political and social pressures that law enforcement and prosecutors face in trying to solve crimes and bring forth convictions can be overwhelming and the use of informants offers them a readily available option to deal with such pressures. In reality, "the lure of informants is strong because they save both time and effort."[107]

In one study of thirteen Illinois death row inmates found to be wrongfully convicted, nearly forty percent were prosecuted using the testimony of jailhouse informants.[108] Similarly, Scheck *et al* found that of sixty-two cases in which DNA evidence exonerated an innocent defendant, fifteen (twenty-four percent) relied at least in part on informants to secure the conviction. American studies indicate that, to the average juror, there is little difference between the manner in which they weigh confessions that have been obtained by the police and a confession obtained through a jailhouse informant.[109] The problem with jailhouse informants is that information is not always accurate and can lead to the conviction of innocent persons. As such, "the use of informants has been identified as a powerful factor biasing the criminal justice process and leading to convictions of innocent people."[110]

Unfortunately, saving time and money by using informants does not always lead to an accurate conviction. Regrettably, with perjury being reported in forty-three percent of all exonerations in the United States, the allowed use of testimony offered by informants has grown into a serious legal issue that needs to be addressed.[111]

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[106] Zimmerman, *supra* note 105 at 58.
[107] *Ibid* at 61.
[108] See K Armstrong & S R Mills, "Until I can be Sure" *Chicago Tribune* (2000), online: <www.chicagotribune.com>.
[109] P Cory, *Commission of Inquiry Regarding Thomas Sophonow* (Winnipeg, Manitoba: Department of Justice, 2001).
[110] Zimmerman, *supra* note 105 at 55.
[111] Gross et al, *supra* note 70.

2.3.1.6. - Faulty or Problematic Forensic Science

Expert testimony can be a powerful and important piece of evidence in a prosecution. The accuracy of forensic evidence has been responsible for the exoneration of hundreds of innocent people in the United States, however, forensic labs and the scientists and technicians who operate them are unfortunately not always reliable. Not only are unintentional errors made but there are also are unethical and fraudulent reports and decisions. As a result, fake or faulty autopsy reports have been used to convict innocent people. Most recently in Canada, an Ontario coroner's inquiry reviewed forty-four child autopsies conducted by leading pathologist Dr. Charles Smith and found that Smith made questionable conclusions of foul play in twenty cases – thirteen of which had resulted in criminal convictions.[112]

In the United States, the most well-known case of forensic fraud concerned Fred Zain, the former director of the West Virginia State Police Crime Lab.[113] During his career, Zain's fraudulent forensic practices and perjured testimony accounted for scores of faulty convictions, which sent many innocent people to prison for years. According to Castelle, Fred Zain's coworkers testified that he recorded fake, incriminating data in over 100 cases when, in fact, DNA testing produced no result whatsoever.[114]

With the recent expansion of the field of forensic science and the increased use of forensic experts in criminal cases, there is a widespread presumption that science may be able to provide answers to previously unknown facts. Despite the claim of scientific objectivity,

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[112] See Ontario, *The Inquiry into Pediatric Forensic Pathology in Ontario*, vol 1 (Queen's Printer for Ontario, 2008; After the reviews of the findings were made public in 2007, the Ontario government ordered a public inquiry into the doctor's practices. In that inquiry, Justice Stephen Goudge found that Smith actively misled his superiors, made false and misleading statements in court and exaggerated his expertise in trial. William Mullins-Johnson was convicted of the first-degree murder of his four-year-old niece based on Dr. Smith testimony. Dr. Smith's opinion that the child had been sexually assaulted at the time of death was essential to the jury's verdict. Dr. Smith was the only specialist to conclude that the child was sexual assaulted prior to death. New expert evidence revealed that the child died of natural causes. In 2005, a misplacing of crucial evidence in the case promoted an audit. The missing exhibits were eventually located on Smith's desk. As a result, Mullins-Johnson applied to the Minister of Justice for review of his murder conviction. Mullins-Johnson would eventually be exonerated. Similarly, in the case of Morin, the misuse of forensic evidence – hair comparison evidence- was found to be one of the main causes of his wrongful conviction.

[113] See George Castelle, "Feature: Lab Fraud – Lessons Learned from the Fred Zain Affair" (1999) 23:12 Champion; Castelle & Lotus, *supra* note at 47; Scheck et al, *supra* note at 102.

[114] George Castelle, "Feature: Lab Fraud – Lessons Learned from the Fred Zain Affair" (1999) 23:12 Champion at 1 [Castelle].

"human error in interpreting forensic science, whether deliberate or unintentional, may contribute to wrongful convictions."[115] In addition to fraudulent practices of forensic scientists, law enforcement officers also have been found guilty of planting evidence, such as false fingerprints and footprints in criminal cases.[116]

2.3.1.7. - Race/Ethnicity

Ample research by criminologists and critical race theorists has pointed to the racial disparities in arrest, pretrial detention, and sentencing among African Americans in the United States and Aboriginal peoples in Canada.[117] Although race and ethnicity are salient factors in many wrongful convictions, most research identifies these variables as additional factors. Recent research has begun to suggest that an over-representation of racialized people can also be found among the wrongfully convicted.[118]

In their work, Gross and his colleagues concluded that race was a significant factor in rape convictions. Despite Blacks representing only twenty-nine percent of all prisoners serving sentences for rape, they represent sixty-four percent of the documented rape exonerations. In addition to Gross' findings, a recent study by Taslitz highlighted the psychological processes that often cause race to become an influential factor in erroneous convictions.[119]

Harmon also found that a defendant's race was related to capital convictions that turned out to be erroneous. The most telling finding of her study was that non-white defendants convicted of killing White victims were six times more likely to be wrongfully convicted than white defendants who killed non-white victims.[120]

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[115] Denvo & Campbell, supra note 46 at 230.
[116] Castelle, *supra* note 114.
[117] Denvo & Campbell, *supra* note 46 at 230.
[118] Karen F Parker et al, "Racial Bias and Conviction of the Innocent in the Wrongly Convicted" in Saundra Westervelt & John Humphrey, eds, Wrongly *Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 114-129.
[119] Andew E Taslitz, "Racial Blind sight: The Absurdity of Color-Blind Criminal Justice" (2007) 5:1 Ohio St J Crim L 1.
[120] T Harmon "Race for Your Life: An Analysis of The Role of Race in Erroneous Capital Convictions" (2004) 29:1 Criminal Justice Review at 90.

Bedau and Radelet identify race in their synopses of 350 potentially capital cases, but racial prejudice is not the main focus of their paper. The racial distribution of Bedau and Radelet's 350 defendants shows that 151, or forty-three percent, are known to be Black. They argue that "because Black Americans are more likely than Whites to be arrested and indicted for felony offences, it appears that the risk of a miscarriage of justice falls disproportionately on blacks when compared to their representation in the population, but in comparison to their arrest rates."[121] Bowers and Pierce note that "race is truly a pervasive influence on the criminal justice processing of potentially capital cases, one that is evident at every stage of the process."[122] In their later book, Radelet, Bedau and Putnam devoted a few chapters to historical cases involving Black defendants and White victims which revealed how racial prejudiced often led to the lynching of men who had not yet been tried or convicted.[123] Similarly, Huff *et al* identify race as a causal factor, among others, which contributes to wrongful convictions. They found that "[m]any convicted innocents are white, some are even middle-class, but a disproportionate number are black and Hispanic."[124] As the authors note, many causal factors, including race, "duplicate and overlap one another and synergistically act together."[125]

Yant also devotes a chapter in his book to the issue of race, describing many of the cases detailed in other research studies.[126] In the Canadian context, although minimal research has addressed the link between race and wrongful conviction, the *Marshall Commission* fueled extensive commentary, including discussions about racism.[127] Wildsmith argues that the Marshall Commission "should not have shied away from using the term 'racism' more

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[121] Bedau & Radelet, *supra* note 16

[122] William J Bowers & Glenn L Pierce, "Racial Discrimination and Criminal Homicide Under Post-Furman," In Hugo A Beadu, ed, *The Death Penalty in America*, 3d ed (New York: Oxford University Press, 1982) 220, 206-224.

[123] Michael L Radelet et al, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Boston: UPNE, 1994).

[124] Huff et al, *supra* note 51 at 80. However, the overall arrest rates for various ethnic and racial groups are not provided.

[125] *Ibid* at 81.

[126] Yant, *Presumed Guilty: When Innocent People are Wrongly Convicted* (Buffalo, NY: Prometheus Books, 1991) at 177-204.

[127] For example see, Joy Mannette, *Exclusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood, 1992).

systematically," and that it "could have benefited from paying more attention to institutional and structural racism" rather than focusing on individual racism.[128]

2.3.1.8. - Social Inequalities/Class

Although wrongful convictions are not confined to marginalized classes, the review of the literature demonstrates an inverse relationship between class and wrongful convictions. In brief, the lower one's status is in the social order, the higher the chances of arrest and erroneous conviction. Class prejudice and racism are central to Barrie Anderson's study.[129] Anderson argues that a comprehensive understanding of wrongful conviction must be subjected to "two levels of analysis."[130] The first level "involves the hands-on work of the professionals and bureaucrats who run the legal and justice system."[131] The second level of analysis "involves an understanding of how the systemic political, economic and social inequality endemic to Canadian society leads to the marginalization of large groups of Canadians, some of whom become wrongfully convicted."[132] Analyses of wrongful conviction must consider the society within which a criminal justice system is embedded and operates, as well as the institutional factors within the criminal justice system itself that may hinder or promote conviction errors. Ultimately, Anderson's theoretical approach provides a foundation to challenge the common issues surrounding the wrongful conviction problem.

2.3.2. - Additional Factors

2.3.2.1. - Adversarial Setting

In addition to identifying the causal factors that facilitate wrongful convictions, researchers also point to the importance of identifying the systemic criminal justice procedures

[128] Bruce H Wildsmith, 'Getting at Racism: The Marshall Inquiry", (1991) 55:1 Sask L Rev 106, 97-126. Wildsmith cites Hughes and Kallen, who make distinction between individual racism (racism discrimination stemming from conscious, personal prejudice), institutional racism (racial discrimination by an individual carrying out the dictates of others who are prejudiced or of a prejudiced society) and structural racism (inequalities in the system-wide operation of society which exclude substantial numbers of members of a particular ethnic categories from significant participation in its major social institutions.

[129] For example, see Bedau and Radelet, *supra* note 16; Huff et al, *supra* note 51; Brandon & Davies, *supra* note 7.

[130] Barrie Anderson, *supra* note 12 at 12.

[131] Barrie Anderson, *supra* note 12.

[132] *Ibid.*

that militate against either discovering miscarriages,[133] or rectifying them in a timely fashion. For example, overly restrictive rules of procedure and evidence hamper efforts to rectify wrongful convictions. The principle of finality, according to Malleson, is one of the main reasons why judges in English courts of appeal "take restrictive approach to their roles in reviewing convictions."[134] Appellate courts are also reluctant to tamper with jury verdicts.[135] The emphasis on legal, rather than factual issues also hinders those seeking conviction remedies through appellate courts.[136] Generally, appeals on questions of fact are "granted only if some new evidence is produced which could not be produced at the original trial. Lack of resources also precludes many from accessing the appeal process. [137]

2.3.3. - Further Research

Limited research indicates additional causal factors in wrongful conviction: plea-bargaining, community pressure for conviction, unequal resources between state and the accused, and media-fueled prejudice of high-profile cases.[138] As well, in his examination of the Morin, Milgaard and Marshall cases, along with high-profile wrongful convictions in the United Kingdom and United States, Logan found that "one of the most pernicious causes (of wrongful conviction), and the one that is always scathingly denied by the establishment, is politics."[139] Finally, none of the research cited in the literature review analyzed gender differences with respect to wrongful convictions. This is likely due to the perception that serious violent and other crimes are committed by men. These areas demand further exploration.

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[133] Huff et al, *supra* note 51 at 534.

[134] Kate Malleson, "Appeal Against Conviction and the Principle of Finality" (1994) 21:1 Journal of Law and Society at 151 [Malleson].

[135] *Ibid* at 134. See also Brandon & Davies, *supra* note 7 at 104.

[136] Barrie Anderson, supra note 12 at 83.

[137] Brandon & Davies, *supra* note 7 at 115. See also Malleson, *supra* note 134.

[138] See Huff et al, *supra* note 51; Bedau and Radelet, supra note 16; See also Leo & Ofshe, *supra* note 68 at 478-479; Barrie Anderson, *supra* note 12; C. Ronald Huff, "Wrongful Convictions: Societal Tolerance of Injustice" (1987) 4 Social Problems and Public Policy at 104.

[139] Alistair Logan, "What Causes a Miscarriage of Justice?" (1995) 1:1 Journal of the Association in Defence of Wrongly Convicted at 7.

2.4. - SUMMARY

Despite the systemic checks and balances that have developed in criminal proceedings, guilt or innocence is ultimately decided by fallible humans. The review illustrates how and why wrongful convictions occur and how they have manifested. The reality is that wrongful convictions will almost certainly continue to occur in Canada and elsewhere. The conviction and imprisonment of an innocent person is a fundamental and deeply rooted social and legal problem that requires a deeper analysis of the issues.

CHAPTER THREE

DOES RACE MATTER? SYSTEMIC RACISM IN THE CRIMINAL JUSTICE SYSTEM

> Racism, and in particular anti-black racism is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism.[140]

> Aboriginal people are overrepresented in virtually all aspects of the [criminal justice] system. As this Court... noted in *R. v. Williams* there is a widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system." The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources ... [including] bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms of aboriginal offenders.[141]

3. - INTRODUCTION

Concerns about racial bias have long played an integral role in the debate regarding the fairness of the criminal justice system. The justice system strives to provide an impartial process that dispenses justice to all regardless of race, culture, or national and ethnic origin. International research, however, has consistently revealed that, along with age and gender, race is one of the strongest correlations of criminal activity. The nexus between race and crime is rooted in racist ideology and the process of racialization. The questions and controversies surrounding the issues of race, crime and the criminal justice system cannot be answered in isolation from its historical and social context. The production and reproduction of racism does not happen within the hermetically sealed walls of the criminal justice system, nor is it confined to a specific organization and/or decision. The criminal justice system structure is comprised of ideologies, values, norms and practices that are deeply connected and embedded in a diverse social system.

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[140] Doherty J.A.; *R. v. Parks*, [1993] O.J. No. 2157, 84 C.C.C. (3d) 353, at 369 (CA) [*Parks*].

[141] Cory and Iaccobucci JJ, *R .v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at paras. 61, 64-65 [*Gladue*].

This chapter examines more closely how the process of racialization operates and intersects across the Canadian criminal justice system and how this process has categorized, marginalized and criminalized members of racialized and Aboriginal communities. In short, the chapter looks at the justice system from the perspective of those who have been differentially treated. Part I begins with the notion of race. The most appropriate starting point for the discussion on systemic racism in the criminal justice system is to examine the concept of race. The analysis of race has shifted to focus on the social and political significance of physical traits that have been used to characterize people and actions. The social construction of race and its subsequent criminalization has had several consequences for racialized and Aboriginal communities. The theoretical framework of Critical Race Theory is also presented to examine the process of racialization in Canada with attention to the legal system.

In Part II evidence of racism from studies and various official inquiries into the Canadian justice system is examined. Perhaps the most extensive research conducted on racism and crime was the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System.*[142] Specific focus is placed on this public inquiry which was established to investigate systemic racism at all stages of the administration of justice. Part III concludes by addressing the relationship between Aboriginals, racialized communities and the criminal justice system, with particular attention to the experience in Ontario. Specific examples of differential treatment by the police, courts and the correctional system are discussed.

[142] Ontario, *The Report of the Commission on Systemic Racism in Ontario Criminal Justice System* (Toronto: Queen's Printer, December, 1995) [*Commission on Systemic Racism*].

3.1. - PART I: THEORETICAL PERSPECTIVE: THE SOCIALLY CONSTRUCTED REALITY OF RACE AND CRIME

3.1.1. - Race and its Social Value

To comprehend the consequences of the criminal justice system among racialized and Aboriginal communities it is essential to examine the social construction of race. The notion of race is commonly accepted as an ascribed feature in that it signifies certain physical and cultural characteristics which are associated with people at birth. One of these characteristics is skin colour, which has been seen to provide a logical basis for classifying people and for understanding why people behave differently.[143] In the past, race was defined as a natural or biological division based on physical distinctions.[144] In general, our understanding of race has moved beyond the biogenetic categories and notions of phenotype. Today, most race-critics and academics contend that race does not exist in a real or objective sense, recognizing that race is about social power.[145] In other words, since race represents a convenient marker by which people and groups are defined, race has been given social importance. Over time, as it becomes socially acceptable to consider people on racial grounds, physical and cultural traits become significant. As such, race is a socially constructed notion.[146]

The social construction of race produces two major outcomes in Canadian society. First, is the social construction of a hierarchy of 'races', which is manifested by which groups are considered socially desirable according to their racial origin.[147] Second, racial grouping has become associated with power. Race provides the grounds to segregate people who are then treated differently from others. Racial differentiation also justifies such action. The reality is that

[143] Peter S Li, "The Market Value and Social Value of Race" in Maria A Walls & Siu-Ming Kwok, eds, Daily *Struggles: The Deepening Racialization and Feminization of Poverty in Canada (*Toronto: Canadian Scholars' Press, 2008) at 21[Li].
[144] *Policy and Guidelines on Racism and Racial Discrimination* (Toronto: Ontario Human Rights Commission, 2005), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy> at 11-12 [Policy and Guidelines].
[145] See Edouard Machery & Luc Faucher, "Social Construction and Concept of race" (2005) 72 Philosophy of Science at 1215; Allison Briscoe-Smith, "Are we Born Racist? Rubbing Off" (2008) Greater Good Science Centre online: <http://www.michaelaanavi.com>.
[146] Li, *supra* note 143.
[147] Li, *supra* note 143 at 21.

there is a racialized society which impacts people in their daily lives and, in turn, determines how society decides who fits into which racial classification. The process by which society attributes social significance to groups on superficial physical grounds is referred to as racialization.[148]

3.1.2. - <u>The Politics of Racialization</u>

Race scholars argue that race is an objective phenomenon until we give social meaning to it. The social meaning applied to race is based upon and justified by an ideology of racial superiority, that is, the ideology of racism.[149] In this way, "racism produces race, as a social categorization, through the process of racialization."[150] Racialization is the driving force of racial inequality.[151] Robert Miles defines racialization as a "process of categorization through which social relations between people [are] structured by the signification of human biological characteristics in such a way as to define and construct differentiated social collectivities."[152] It also highlights the historical influences of colonialization and conquest in shaping the ideological frameworks developed around categories of race.[153] According to Miles, "racialization refers to the historical emergence of the idea of 'race' and to its subsequent reproduction and application."[154]

In the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, racialization is described as "the process by which societies construct race as real, different and unequal in ways that matter to economic, political, and social life."[155] To put it simply, what drives racialization on a daily basis is the system of social importance given to

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[148] Li, *supra* note 143 at 21.
[149] Steve Martinot, *The Rule of Racialization: Class, Identity, Governance* (Philadelphia: Temple University Press, 2003) at 75 [Martinot].
[150] Martinot, *supra* note 149 a at 76
[151] *Commission on Systemic Racism*, supra note 142 at 39.
[152] Robert Miles, *Racism* (New York: Routledge, 1989) at 75. See also Wendy Chan & Kiran Mirchandani, eds, *Crimes of Colour Racialization and the Criminal Justice System in Canada* (Peterborough, Broadview Press, 2002) at 12.
[153] See Wendy Chan & Kiran Mirchandani, eds, *Crimes of Colour Racialization and the Criminal Justice System in Canada* (Peterborough, Broadview Press, 2002) at 12.
[154] Robert Miles, *Racism* (New York: Routledge, 1989) at 76 [Miles].
[155] *Commission on Systemic Racism, supra* note 142 at 40.

race.[156] In short, racialization makes it socially meaningful to regard people on racial grounds, and it attributes social value to people according to racial origin.[157] The idea of race cannot sustain itself as a meaningful concept "unless it is also supported by social actions which reflect the relevance of race."[158] As noted, race is seen to have social value by society placing social worth on physical and cultural characteristics of people. In this respect, racial ideas and social practices mutually reinforce each other. Without racialization the notion of race would not exist.

3.1.2.1. - Being Racialized

How does the notion of race create a system of differences? What is the meaning given to 'white' or 'black' racial identity? The concept of race is multifaceted and has consequences for society. Those consequences have less to do with physical traits and more to do with the reaction to physical features. Groups are racialized differently from and in relations to one another, thus, creating a complex structure of social positioning.[159] The ways in which social significance is attributed to groups on physical grounds is racialization, that is – the feelings, opinions, stereotypes, and antipathies that continue a system of racial dominance.[160] The Ontario Human Rights Commission, for example, describes communities facing racial injustice as racialized. This is because "society artificially constructs the idea of race based on geographic, historical, political, economic, social and cultural factors, as well as physical traits, that have no justification for notions of racial superiority or racial prejudice."[161]

Racialization is the starting point in understanding contemporary notions of racial identity.[162] It is a critical tool in studying how racial identities are created and re-shaped.[163]

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[156] Martinot, *supra* note 149 at 75.
[157] Li, *supra* note 143 at 21.
[158] *Ibid* at 22.
[159] Claire Jean Kim, "Unyielding Positions: A Critique of the 'Race' Debate" (2004) 4:3 *Ethnicites* at 345 [Kim].
[160] Martinot, *supra* note 149 at 75.
[161] Ontario, *Racism & Discrimination: Your Rights and Responsibilities* (Toronto: Queen's Printer for Ontario, 2008) online: Ontario Human Rights Commission: <http://www.ohrc.on.ca/en/issues/racism>.
[162] Paul Knepper, "Rethinking the racialization of crime: the significance of black firsts" (2008) 31:3 Ethnic and Racial Studies at 507 [Knepper].

Physical characteristics have been used as a means of racial stratification. Historically, Canada has maintained discriminatory policies and practices towards people of certain racial origins, "with the result that the racial origin of members of such groups and their social conditions became inseparable in defining the meaning of race."[164] This processes of racialization explains how Europeans, for example, became 'white'. History reveals that Irish and Jewish immigrants who were once classified as "near-black" would become "white over time."[165] In brief, the term white was legitimatized through biological theories of race and defined in a system of social relations of domination and hierarchy.[166] In constructing a hierarchy based on physical characteristics, whiteness assumed hegemony by self-definition, "the meaning and valuation of whiteness are derived from the demeaning and devaluation of others."[167]

To further illustrate this point, in their book, *Racial Formation in the United States*, Michael Omi and Howard Winant[168] show that as a result of slavery in American colonies, "individuals who had been 'Ibo', 'Yoruba', 'Fulani', and so-on, were stripped of their identities and were classified and re-defined as 'Negros', 'Coloured', and 'Black'."[169] In addition, social stereotypes of various groups changed over time to facilitate societies obtaining what it wanted from the particular group in question. As author and activist bell hooks notes, as a result of their history Africans have appropriated the label black. This label is a social and political identifier of their position in North American society. In the case of Aboriginal peoples, their history has been characterized by the domination of Europeans, which led to the destruction of their livelihood and the loss of autonomy. As such terms like "Indian or Native have become

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[163] Martinot, supra note 14 at 24; See also Karim Murji & John Solomos, eds, *Racialization: Studies in Theory and Practice* (New York: Oxford University Press, 2005) at 3.
[164] Li, *supra* note 143 at 22.
[165] Kim, supra note 159 at 346. See also Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) at 40-41; Karim Murji & John Solomos, eds, Racialization: Studies in Theory and Practice (New York: Oxford University Press, 2005) at 10-11.
[166] Kim, *supra* note 159 at 346.
[167] Martinot, *supra* note 149 at 129.
[168] Michael Omi & Howard Winant, *Racial Formation in the United States: From 1960s to 1990s*, 2d ed (London: Routledge, 1994).
[169] J Paul Grayson, "Racialization and Black Student Identity at York University" (Institute for Social Science Research, York University, 1994) at 11. See also Michael Omi & Howard Winant, *Racial Formation in the United States: from 1960s to 1990s*, 2d ed (London: Routledge, 1994) at 64.

associated not only with a racial origin of past," it also "signifies a contemporary people who are economically deprived, socially marginal and politically militant."[170] The characterization of people of Asian descent as Orientals, Mongolians or Asiatics also reflect how the notions of race manage and controls segments of the population and maintain racial order.[171] Further, the contemporary notions of race, reveal how poverty and criminality, for example, "has become fused with racial identities."[172]

3.1.3. – The Ideology of Racism and its Systemic Nature

The analysis of systemic racism stems from the process of racialization. In this thesis, the concept of systemic racism is employed to describe situations where what appear to be neutral laws, policies and practices operate unevenly or in an unfair manner to the detriment of racialized and Aboriginal people. Racism in this sense is not about whether individuals hold racist views; rather it addresses the uneven impact of laws, policies and practices. In one of the early legal articles that attempted to come to grips with the concept of racism, author Kretzmerz argued that racism is "the theory or idea that there is a casual link between inherited physical traits and certain traits of personality, intellect or culture, and combined with it, the notion that some races are inherently superior to others."[173] In this respect, systemic racism is "the social production of racial inequality in decisions about people in the treatment they receive."[174] Systemic racism often manifests itself in organizational or institutional structures and programs.

3.1.3.1. - Legalized Racism

Canada's image as a tolerant society leads most to view 'racism' as meaning only overt acts conducted by racist people. But, racism should not be perceived only in that way; rather, it should be understood that, racism "is interwoven in the very fabric of the social system in

[170] Li, *supra* note 143 at 23.
[171] *Ibid*; Kim, supra note 159 at 346.
[172] Knepper, *supra* note 162 at 507.
[173] D Kretzemer, "Freedom of Speech and Racism" (1987) 8 Cardozo L Review 445, 451-452.
[174] Commission on Systemic Racism, *supra* note 142 at 39.

Canada."[175] Canada has a colonial history that gave rise to racism and oppression, which has been reinforced and perpetuated by law. Throughout Canadian history the government has used the law as an instrument for explaining racial differences, for reinforcing notions embedded in dominant cultural system, and for establishing the social construction of 'otherness'.[176]

Canada's legal history contains numerous examples of the law being used to subordinate members of racial groups. These laws maintained discriminatory policies and practices towards people of certain racial origins, "with the result that the racial origin of the members of such groups and their social conditions became inseparable in defining the meaning of race."[177] The racialization of Aboriginals, Blacks, Japanese, Chinese, South Asians, and other racialized groups has a long history. This legacy is illustrated in early legislation. For example, the Canadian government, through the *Indian Act*[178] and subsequent legislation and treaties, introduced racism to the relationship between Canada and its Aboriginal people. Aboriginal people have been subjugated to racist and assimilation policies that have led to their political, social and economic degradation. Specific policies included: the denial of the right to vote, forced relocation to reserves, and expropriation of their land.[179] Further, it was laws historically that made it illegal for Blacks to learn to read and write and to fully participate in public life. It was also the use of laws during the Second World War that forcibly removed Japanese Canadians from their homes and incarcerated them in jails and internments.[180]

The lived historical experiences of Canada's racialized and Aboriginals communities demonstrate that law produces and reproduces the means to rationalize and legitimize social

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[175] Phil Fontaine, "Modern Racism in Canada" (Donald Gow Lecture in Policy Studies, delivered at Queen's University, 24 April 1998) online: Queen's University <http:www.queensu.ca/sps/conferences_events/lectures/Donald_gow/98 prelims.pdf> [unpublished].
[176] Carol Tator and Frances Henry, *Racial Profiling in Canada: Challenging the Myth of a Few Bad Apples* (Toronto: University of Toronto Press, 2006) at 39 [Tator & Henry].
[177] Li, *supra* note 143 at 22.
[178] *Indian Act*, RSC 1985, c I-5.
[179] See Tator & Henry, *supra* note 176 at 39.
[180] *Ibid.*

control "on behalf of those who hold power and the interest they represent."[181] Until recently, the law has ignored and omitted racism in its discourse. While often harder to recognize, because of ideas of multiculturalism and equality, contemporary racism continues to perpetuate the marginalized status of racialized and Aboriginal communities. It is not a coincidence that communities, which historically experience racial discrimination, "continue to be placed on the lowest rungs of the social, economic, political and cultural ladder in Canada."[182] Racialized and Aboriginal communities have been affected by discrimination differently than their counterparts. The law can no longer be understood as a neutral construct. Thus, the recent work of critical race theorists posit the need to establish a connection between race and law, by "situating legal theory within social, political, and economic conditions, and interpreting juridical procedures according to dominant ideologies."[183]

3.1.4. - Critical Race Theory

Critical Race Theory ("CRT") embraces a movement of liberal scholars, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in North American legal culture, and, more generally, in society as a whole.[184] Critical race theorists examine how we (society) have come to believe in the reality of race. CRT puts race at the center of its critical analysis.[185] As noted, law is not innocent of racism; "the law itself is racialized."[186] The use of CRT is to understand the nature and forms of racial oppression in the legal context.

Although not one set of methodologies define CRT, scholars who write within this perspective seek to challenge the dominant discourse on race and racism and how it relates to

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[181] Tator & Henry, *supra* note 176 at 40.

[182] Ontario, *Paying the Price: the Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003), online: Ontario Human rights Commission <http://www.ohrc.on.ca/en/resources/discussion_consulaton/RacialProfileReportEn/pdf> at 5 [Paying the Price].

[183] Tator & Henry, *supra* note 176 at 40.

[184] Kimberle Crenshaw, ed, *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1990)

[185] Daria Roithmayr, "Introduction to Critical Race Theory in Educational Research and Praxis" in Laurence Parker et al, eds, *Race is...Race Isn't: Critical Race Theory and Qualitative Studies in Education* (Colorado: Westview Press, 1999) at 1-5

[186] Tator & Henry, supra note 176 at 44.

one's social, economic, and political status. At the heart of CRT is the belief that "legal discourse has not appropriately taken account of the social reality of race and racism and has ignored the fact that law is both a product and a promoter of racism."[187] By examining how policies and practices are used to subordinate certain racial and ethnic groups, CRT focuses on the role of law in maintaining racial lines and classifications.[188]

In summary, the dominant themes of CRT are: (1) the need to move beyond existing rights analysis; (2) an acknowledgement and analysis of the centrality of racism, "not just the White supremacy form of racism but also the systemic and subtle forms that have the effect of subordinating people of colour"; (3) the rejection of the colour-blind approach to law; and (4) a contextual analysis which "positions the experiences of oppressed peoples at its centre of analysis."[189] Most proponents of CRT embrace the concept of historical race, that is – the history of a particular groups' racialization in a given society. The foundation of CRT framework is that race is a social construction.

3.1.5. - The Criminalization of Race and the Racialization of Crime

The aim of challenging social dynamics of hierarchical power is central to the concerns of critical race theorists in the realization of social justice. How crime is conceptualized and defined has serious implications for how society understands the relationship between the powerful and the powerless in a given social context. The criminalization of racialized groups is not just a theoretical concept, but rather a realty that affects the lives of many Canadians. Criminalization refers to the process of socially constructing laws in order to regulate the behaviours and actions of members of society. The process of criminalization is through the

[187] Carol A. Alyward, *Canadian Critical Race Theory: Racism and the* Law (Halifax: Frenwood Press, 1999) at 30 [Alyward].
[188] See Kimberle Crenshaw et al., eds, *Critical Race Theory: Key Writings that Formed the Movement* (New York: New York Press, 1995); Alyward, *supra* note 187.
[189] Alyward, *supra* note 187 at 34.

construction of labeling and targeting the activities of particular groups that authorities have deemed "it necessary to control."[190]

The formation of racial groups is itself a social process involving unequal power relations. Racialization is part of a broader process whereby "categories of the population are constructed, differentiated, interiorized and excluded."[191] The criminalization of certain racialized and Aboriginal groups within the Canadian context can be understood, first, in the ways in which 'whiteness' has been constructed as race-less, and second, within the context of historical relations between Aboriginal people, early setters and immigrants.[192] Within this approach, discussions of crime are situated within understandings of how racialized identities are constructed and reconstructed through images rather than merely representing individual actions; how discourses of crime form and enact racial hierarchies; and how the criminalization of certain racialized groups is "intrinsically situated within and connected to class and gender positions normalized through a variety of social structures and institutions."[193]

The fear of crime has been an integral component of the operation of justice system. In turn, this fear has situated itself in the criminalization of racialized and Aboriginal groups. Labelling an activity, person, or group of persons as criminal is often "a part of a broader strategy of repression and control."[194] Fleras and Elliott discuss in detail the social construction of race, and suggest that a correlation between race and crime is due to unwarranted surveillance and control of racialized groups.[195] In her article, "Race and Criminalization," Angela Davis argues that the disproportionate number of Black people, for example, in the criminal justice system suggests that the Black population has been systematically targeted for

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[190] Wendy Chan & Kiran Mirchandani, eds, *Crimes of Colour Racialization and the Criminal Justice System in* Canada (Peterborough, Broadview Press, 2002) at 15 [Chan & Mirchandani].
[191] See Chan & Mirchandani, *supra* note 190 at 13.
[192] *Ibid* at 13; Yasmin Jiwani, "The Criminalization of 'Race' The Racialization of Crime" in Wendy Chan & Kiran Mirchandani, eds, *Crimes of Colour Racialization and the Criminal Justice System in* Canada (Peterborough, Broadview Press, 2002) at 67, 69.
[193] Chan & Mirchandani, *supra* note 190 at 10.
[194] S. C.Hall et al, *Policing the Crisis: Mugging, the State, Law and Order* (London: MacMillan Press, 1987) at 187.
[195] A. Flears & J.L. Elliot, *Unequal Relations: An Introduction to Race, Ethnic and Aboriginal Dynamics in Canada*, 5d ed (Toronto: Pearson Canada Inc., 2006).

exploitation by what she terms "the punishment industry." She writes, "this out of control punishment industry is an extremely effective criminalization industry, for the racial imbalance in incarcerated populations is not recognized as evidence of structural racism, but rather is invoked as a consequence of the assumed criminality of black people."[196] The criminal justice system, by targeting racialized and Aboriginal groups for criminal prosecution, naturalizes the perception of specific races as criminals, which in turn justifies the targeting of racialized groups for criminal prosecution. The relationship between crime and the historical and social structures that shape our understanding has resulted in social constructed definitions of crime that maintain gender, race, and class divisions. These definitions of crime and categories of criminality are neither fixed nor natural. The perceptions of racial discrimination reveal that the process of racialization -- the link between race and crime -- operates at every stage of the justice system in Canada.

3.2. - PART II: RACE AND THE PERCEPTIONS OF BIAS IN THE JUSTICE SYSTEM

In the 1980s perceptions of racism experienced by racialized and Aboriginal people in Ontario's criminal justice system extended, first, to more routine aspects of policing, such as police stops and arrest and then encompassed non-policing aspects of the criminal justice system, including courts, lawyers, and judges. Police violence came to be seen as a part of a larger picture of systemic mistreatment of racial groups in the criminal justice system.[197] Further, stories circulated about the mistreatment in the criminal courts and correctional system. As the issue developed, so did the calls for adequate responses to what was seen as an abuse of racial power. By the early 1990s, relations between the police and Toronto's racialized

[196] Angela Y. Davis, "Race and Criminalization: Black Americans and the Punishment Industry" in Eugene McLaughin, ed, *Criminological Perspectives: Essential Readings*, 2d ed (London: SAGE Publications Ltd, 2005) at 290.
[197] Toni Williams, "Racism in Justice: The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System" in Susan Boyd, Dorothy Chunn, and Roberts Menzies, eds, *Using Power; the Canadian Experience* (Halifax: Fernwood Publishing, 2001) at 201 [Williams].

communities became increasingly strained and led to a number of highly publicized incidents.[198] Allegations that the Canadian criminal justice system was racially biased, were continually dismissed by government officials as representing groundless opinions of organizations and advocates.[199] In general, government officials argued that the vast majority of racialized citizens had "complete confidence in the police and criminal courts."[200] However, in response to the increasing dissatisfaction expressed by public figures in the racialized communities, the provincial government established, in 1992, a Commission to examine and report on allegations of systemic racial bias in the Ontario criminal justice system. The final report of this Commission was released in 1994.

3.2.1. - Perceptions of Systemic Racism in the Criminal Process

3.2.1.1 - Background to the Commission on Systemic Racism

The creation of the Commission grew out of the mobilization of members of Toronto's Black communities in response to police shootings over the previous fifteen years. Between 1978 and 1992 Ontario's police officers had shot one black woman and at least thirteen black men, eight of whom were killed. Eleven of the fourteen shootings had occurred in Toronto. One noticeable aspect of these shootings was that they happened in groups.[201] In her study, Toni Williams shows that three killings occurred in a fifteen-month period between August 1978 and November 1979; another four shootings occurred between August 1988 and October 1989; and in the eight months between September 1991 and May 1992, another five individuals were shot.[202] Members of Toronto's Black communities reacted to these shootings by demanding change in the delivery of police services. Specifically, these groups would press for

[198] Scot Wortley, "Racializing Risk: Police and Crown Discretion and the Over-representation of Black People in the Ontario Criminal Justice System" in Anthony Harriott, Farley Brathwaite, and Scot Wortley, eds, *Crime and Criminal Justice in the Caribbean* (Kingston, Jamaica: Arawak Publications, 2004) at 175 [Wortley, Racializing Risk].
[199] Scot Wortley & Andrea McCalla, "Racial Discrimination in the Ontario Justice System" in Julian V Roberts & Michelle G Grossman, eds, 3ed, Criminal Justice in Canada (Toronto: Thomson Nelson, 2008) at 187-190 [Wortley & McCalla].
[200] Wortley & McCalla, *supra* note 199 at 188- 190.
[201] Williams, *supra* note 197 at 203.
[202] Williams, *supra* note 197 at 203. See also *Commission on Systemic Racism*, *supra* note 142.

accountability and reforms in policing practices to prevent future shootings. Activist groups argued that racism in policing was a contributing factor in the shootings. Many advocates insisted that police violence was just one element of a broader problem of how power was used and misused to control racialized people. Community groups that had organized around demands for police accountability also began to complain that many racialized groups in other parts of the criminal justice process were being mistreated. By the early 1990s, racial tension mounted as private citizens, organizations and advocates began to protest against abuse of power. As a result, then Premier, Bob Rae appointed a special advisor on race relations, Stephen Lewis, to develop a comprehensive report to resolve the problems behind the public's demands for change.[203]

Lewis consulted with Black and other racialized groups throughout the province. Many of the individuals and groups who participated in the investigation felt strongly that the criminal justice system discriminated against racialized communities. His report presented their demands. There were three key elements of the Lewis Report. First, he recognized the reality of systemic racism as a pervasive characteristic of Ontario society.[204] Second, the Report would challenge the conventional thinking at the time that the usage of 'visible minority' captured the experiences of all racialized people in their dealings with social institutions and structures. Rather, the Lewis Report identified that Black people were especially vulnerable to systemic racism. The third element of the Report focused on the criminal justice system as a whole. Lewis noted significant complaints not only about policing but also concerning racial discrimination in other stages of the justice system. The Report found that differential treatment

[203] Williams, *supra* note 197 at 205.
[204] Ontario, *Stephen Lewis Report on Race Relations in Ontario* (Toronto: Gov't of Ontario, 1992); see Toni Williams, *supra* note 197 at 205).

was meted out by the police, courts and in corrections.[205] Overall, the Lewis Report represented a shift in thinking which acknowledged that racial inequality is a manifestation of racial power.

Similarly, the problems of racism in the justice system were also acknowledged by the Law Reform Commission of Canada in 1992. The Law Reform Commission noted that "racism in the justice system is a consistently expressed and central concern to Canada's minorities."[206] The Commission found that racism was visible in police harassment, in the lack of access to both police protection and legal aid, and in the differential treatment during sentencing. The Law Reform Commission went on to argue that "the racism of which these groups speak mirrors attitudes and behaviour found in Canadian society as a whole."[207] Four months after these reports, the Ontario government established a six-person commission to examine the extent to which systemic racism affected the administration of justice in Ontario. The concerns expressed in both previous reports were echoed in the Commission's findings. Past government reports mostly criticized the treatment of Aboriginal people.[208] The Ontario Report was the first to examine the treatment of other racialized groups throughout the criminal process. The Commission was directed to investigate, by means of empirical research, "the extent to which the exercise of discretion has an adverse impact on racial minorities."[209]

3.2.1.2. - Selected Findings of the Commission

Is there discrimination within the Canadian criminal justice system? Do the police, criminal courts, and the correctional system treat racialized accused more harshly than their counterparts? Why do some racial groups appear to be more involved in criminal activity than others? The investigation of these questions was the central task of the *Commission on*

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[205] *Ibid.*

[206] Frances Henry et al, *The Colour of Democracy: Racism in Canadian Society*, 4th ed, (Toronto: Harcourt Canada, 2009) at 124 [Henry et al].

[207] Tator & Henry, *supra* note 176 at 46; See Ottawa, *Consultation Documentation* (Ottawa: Law Reform Commission,1992) at 10.

[208] See Royal Commission on Donald Marshall Jr. Prosecution (Halifax: Queens Printer, 1989); Justice on Trial: Report of the Task Force of the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (Edmonton: Queen's Printer, 1991); Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg: Queen's Printer, 1991).

[209] *Commission on Systemic Racism*, supra note 142.

Systemic Racism in the Ontario Criminal Justice System. In 1994, the *Commission on Systemic Racism* issued its report, following a survey of over 1,200 Toronto's adults (18 years of age or older) who identified themselves as Black, Chinese, or White. Over 400 respondents were randomly selected from each racial group. The survey results indicated that three out of every four Black Torontonians (seventy-six percent) believed that the police treated members of their racial group worse than others. Further, sixty percent of the Black respondents also felt that members of their racial group were treated worse by the criminal courts.[210] The findings indicated that perceptions of racial bias were not limited to the Black community. Over half of the White respondents (fifty-six percent) reported that they thought Black people were treated worse by the police, while a third (thirty-five percent) believed that Blacks were treated worse by the courts.

With respect to the prison system, the Report found that both African Canadian men and women were over-represented. White accused were more likely to be released by police and less likely to be detained after bail hearing. At the time of the Commission, African Canadians made up three percent of the provincial population; however the Commission found that African Canadians were admitted to prison at higher rates than their White counterparts across the spectrum of offences. During the six-year period from 1986 to 1992, the Black imprisoned population increased by 204 percent.[211] The Commission also found that Blacks were twenty-seven times more likely to be imprisoned before their trials on charges of drug trafficking and importing drugs and about twenty times as likely to be imprisoned for drug possession charges. The Commission noted a strong difference with regards to sentencing. In general, Whites found guilty were less likely to be sentenced to prison, or sentenced more lightly than racialized groups. Racist behaviour, both systemic and individual, the Commission argued, was mainly directed against African Canadians prisoners.

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[210] Wortley & McCalla, *supra* note 196 at 189.
[211] Henry et al, *supra* note 124 at 203

The *Commission on Systemic Racism* confirmed many of the complaints of those involved in the events that led to its creation. The Report provided formal acknowledgment of how discretionary power can be abused in ways that produce racial inequality and how the abuse of power has become embedded in routine practices.

3.2.1.3. - Additional Studies

Subsequent research has shown that perceptions of racial discrimination are still widespread. These studies have illustrated that a high proportion of racialized youth, for example, perceive that the criminal justice system is discriminatory.[212] A 1995 survey of 1,870 Toronto high school students would show that over half of the Black respondents (fifty-two percent) felt that the police treated members of their racial group worse than their counterparts. By contrast, only twenty-two percent of South Asians, fifteen percent of Asians, and four percents of Whites felt that they were subject to discriminatory treatment.[213] Similarly, another high school survey, conducted in 2000, found that seventy-four percent of Black students believed that members of their racial group were more likely to be unfairly stopped and questioned by the police than members of other racialized groups. This opinion that Blacks were disproportionately stopped and questioned was also shared by thirty-one percent of South Asians, twenty-seven percent Asians, and thirteen percent of Whites.[214]

These findings have caused some government and criminal justice representatives to finally admit that the perception of discrimination exists in Ontario, and that, at the very least, to acknowledge that the criminal justice system suffers from a serious public relations problem. These reports have also motivated various police organizations to implement programs

[212] S Wortley, "Justice for all? Race and Perceptions of bias in the Ontario criminal justice system – A Toronto Survey" (1996) 38 Canadian Journal of Criminology 439 -467 [Wortley, Justice for all].
[213] M.D. Ruck & S. Wortley, "Racial and Ethnic High School Students' Perceptions of School Disciplinary Practices: A Look at Canadian findings " (2002) 31 Journal of Youth and Adolescence 185-195 [Ruck & Wortley].
[214] S Wortley & J Tanner, "Data, Denials and Controversy: The Racial Profiling Debate in Toronto" (2003) 45 Journal of criminology and Criminal Justice, 267 – 390 [Wortley & Tanner].

designed to improve relationships with various racialized and Aboriginal communities.[215] However, there is still considerable debate about the cause of these perceptions of racial bias. The opposing view is that perceptions of injustice are inaccurate and have been created by other factors, such as peer socialization and exposure to stories about racism in the American media.[216] On the other hand, critics of the justice system feel that perceptions of discrimination reflect reality.

Empirical evidence continues to show that the perceptions of racial bias in the Canadian criminal justice system are not unfounded. The differential treatment of Aboriginal and racialized peoples in Canada's criminal justice system is now well documented. The findings of the studies indicate that racialized and Aboriginals communities are treated differently. In summary, evidence continues to confirm that differential treatment of Aboriginal and racialized peoples, leading to differential decision-making, "starts at the point of entry into the system and continues [through] to the point of exit."[217]

3.2.2. - Racial Bias in the Criminal Justice System

While most Canadians would deny the existence of widespread racism, the fact remains that Canadian history does not support such denials. The *Commission on Systemic Racism in the Ontario Criminal Justice System*, like many other inquires, task forces, and royal commissions, concluded that not only was racism still entrenched in Canadian society, but that "the practices of the criminal justice system tolerate racialization."[218] The invisibility of Canadian racism and its impact on the legal process was only begun to be addressed by critical race theorists in the late 1980s and early 1990s. Those few Canadian critical race scholars began writing about the impact of race and racism on Canadian law. For example, in 1994, Professor

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[215] P Stenning, "Policing the Cultural Kaleidoscope: Recent Canadian Experience" (2003) 7 Policing & Society 21-8 7 [Stenning].
[216] Wortley & McCalla, *supra* note 199 at189.
[217] Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998); Joanne St Lewis. "Racism and the Judicial Decision-making Process" (1994) 7:2 Currents 17; See also Henry et al, *supra* note 206 at 124.
[218] *Commission on Systemic Racism, supra* note 142 at 410.

Joanne St. Lewis wrote a critical piece on *Racism and the Judicial Decision-Making Process* in which she defined racism in the judicial context as:

> [a]n attitude in the judicial decision-making process which assumes the inherent superiority of the values of the dominant cultural/racial group and the concomitant inferiority of another cultural/racial group. The issue of racism is fundamentally about power of the mass and the shared belief system; the power to shape reality in accordance with one's values; the power to give voice to or to silence the diversity of others; the power to rewrite history and to develop legislation which meets the socio-economic imperatives of the majority.[219]

In recent years the courts have recognized that racism affects the administration of justice. For example, in *R. v. Parks*[220] it was ruled that Blacks could challenge prospective jurors on the grounds of racial bias. This right was further strengthened in *R. v. Williams,*[221] which extended its entitlement to Aboriginal people. The Ontario Court of Appeal then allowed such challenges for cause with respect to all racialized groups. In 2004, in *R. v. Spence,*[222] the same court granted a new trial to a Black appellant whose victim was East Indian. Although the jurors had been asked about racial bias, the Crown had contended that racism was "greatly diminished" because the victim was also a person from a racialized community.[223] In these decisions the courts did accept that, although racial bias was difficult to prove, a lesser standard of evidence would be acceptable.[224] Further, judicial bias has also been addressed by the courts. The Supreme Court of Canada considered that issue in *R.D.S v. Her Majesty the Queen,*[225] in which a Black provincial court judge in Nova Scotia who made statements about the unequal treatment of Blacks was cleared of allegations of judicial bias.

Widespread racism in the administration of justice and its adverse impact on racialized and Aboriginal communities has also been judicially noted. In *Parks*, Justice Doherty concluded

[219] Joanne St Lewis. "Racism and the Judicial Decision-making Process" (1994) 7:2 Currents 17.
[220] *Parks, supra* note140.
[221] [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128 (S.C.C.).
[222] [2005] S.C.J. No. 74. [2005] 3 S.C.R. 458.
[223] Tator & Henry, *supra* note 176 at 45-47.
[224] Tator & Henry, *supra* note 176 at 46.
[225] *R. v. S(R.D.),* [1997] 3 S.C.R. 484 [*RDS*].

that, "[o]ur institutions, reflect and perpetuate negative stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate these negative stereotypes. These elements combine to infect our society as a whole with the evil of racism."[226] In *Peart v. Peel Regional Police Services Board,*[227] the court observed that, "the community at large and the courts, in particular, have come, some would say belatedly, to recognize that racism operates in the criminal justice system."[228] With this recognition has been the acceptance by the courts that racialization occurs and is a day-to-day reality in the lives of those affected by it.

3.3. - <u>PART III: THE RACIALIZED EXPERIENCE IN THE JUSTICE SYSTEM</u>

Racial bias in the criminal justice system continues to be one the most readily apparent examples of systemic racism. The over-criminalization of racialized and Aboriginal groups continues to be a heavily politicized issue in Canada and many other Western industrialized countries. Despite numerous government inquiries and judicial recognition, debate continues in Canada over whether or not some racial or ethnic groups are more involved in crime than others, whether there is systemic racism within the justice system, and whether people from racialized and Aboriginal communities have equal access to justice.[229] Compared to the United States and Europe, relatively fewer Canadian studies have directly addressed the complex, inter-related issues of race, crime and the criminal justice system.[230] Further, few studies have been conducted that have focused on race in isolation – without considering the simultaneous impact of other socially relevant variables. With the possible exception of policing, racial disparities at any one stage of the criminal process is not inclusive in the empirical findings;

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[226] Parks, *supra* note 137.
[227] [2006] O.J. No. 4457, 217 O.A.C. 269, 43 C.R. (6th) 175 (C.A.) (QL) [*Peart*].
[228] *Peart, supra* note 227.
[229] Scot Wortley, "Hidden Intersections: Research on Race, Crime, and Criminal Justice in Canada" (2003) 35:1 Canadian Ethnic Studies 99, 100 [Wortley, Hidden Intersections].
[230] For example, see B. Bowling and B. Phillips, *Racism, Crime and Justice* (Britain: Person Education, 2002); M. Mauer, *Race to Incarcerate* (New York: New York Press, 1999); J. Roberts and A. Doob, "Race, Ethnicity, and Criminal Justice in Canada" in M. Tonry, ed, *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives* (Chicago: University of Chicago Press 1997) at 469-522; *Commission of Systemic Racism, supra* note 142.

however, there are legal scholars and criminologists who argue that the cumulative effect of discrimination throughout the system has a major impact on Canada's racialized and Aboriginal communities.[231] A cursory overview of the practices of racial discrimination reveals that the process of racialization is in full operation in every facet of the criminal justice system in Canada.

3.3.1. - The Manifestation of Racism in the Justice System

3.3.1.1. - Interaction with the Police

i. Racial Profiling

For most individuals, the police are the first point of contact with the criminal justice system. It is this first contact that often influences the future of case. With respect to the issue of discrimination within the justice system, racial profiling is a divisive and polarizing issue, one that portrays those who acknowledge and seek to address it as "anti-police, pro-criminal, or soft on crime."[232] While a number of studies have suggested that, controlling for criminal conduct, race is not related to police decisions to arrest,[233] Canada's racialized and Aboriginal community has long argued that they are frequently the victims of racial profiling.[234]

There have been numerous attempts to formally define the practice of racial profiling, whether in reports, studies and/or in judicial decisions. In their External Report, *Paying the Price: The Human Cost of Racial Profiling*, the OHRC defines racial profiling as, "any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment."[235] Moreover, in their

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[231] See Wortley & McCalla, *supra* note 199 at 203.
[232] Maureen J. Brown, "In their Own Voices: African Canadians in the Greater Toronto Area Share Experiences of Police Profiling" Commissioned by the African Canadian Community Coalition on Racial Profiling (ACCCRP), (Toronto: African Canadian Legal Clinic, 2004) at 7 [ACLC].
[233] See William Wilbanks, *The myth of a Racist Criminal Justice System* (California: Brooks Cole 1987); D. Klinger, *Race, Crime, and the Law* (New York: Vintage Books, 1994); Wortley, Racializing Risk, *supra* note 198 at 176.
[234] See Tator & Henry, *supra* note 176.
[235] *Paying the Price*, *supra* note 182 at 10.

Report, the OHRC made the following observation: "racial profiling is a form of racial stereotyping. As racial stereotyping and discrimination exists in society, it also exists in institutions such as law enforcement agencies."[236]

The two leading cases on racial profiling *R. v. Brown*[237] and *Peart. v. Peel Regional Police Services Board,*[238] found that racial profiling is criminal profiling based on race. It involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group.[239] For greater clarity, racial profiling occurs when race, place of origin, religion, or stereotypes about offending or dangerousness associated with any of these characteristics, is used, consciously or unconsciously, to any degree in suspect selection or treatment outside the context of looking for a particular suspect who has committed an offence and who is identified, in part, by their race.[240] Judicial recognition of racial profiling has concluded that it exists and has greatly impacted racialized communities.[241] For example, in *Brown,* for the Court of Appeal, Justice Morden held:

> I quote from the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System: the Commission's findings suggest that racialized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), location, dress, and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped. This explanation is consistent with our findings that, overall, black people are more likely than others to experience the unwelcome intrusion of being stopped by the police.[242]

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[236] *Paying the Price, supra* note 182 at 9.
[237] (2003), 64 O.R. (3d) 16 [*Brown*].
[238] *Peart, supra* note 227.
[239] *Brown, supra* note 237 at para. 7; *Peart, supra* note 227 at para.89.
[240] See especial Law Enforcement Accountability Project, "What is Racial Profiling?" (University of Windsor, Faculty of Law, 2009) online: <http://www.uwindsor.ca/units/law/LEAP.nsf/inToc/CE286434A2781C7E8525754E00606D28?OpenDocument>; LEAP *R. v. Richards*, [1999] O.J. No. 1420, 24 C.R. (5th) 286 at para. 24 [*Richards*].
[241] *RDS, supra* note 225 at paras.46-47; *R.v. Campbell*, [2005] Q.J. No. 394, at paras. 32-33. *R. v. Golden*, [2001] 3 S.C.R. 6790, at para. 83; *Commission on Systemic Racism, supra* note 142.
[242] *Brown, supra* note 237 at para. 9.

Because of the particular subconscious and insidious nature of racial bias, the Courts have recognized the difficulties inherent in proving racial profiling. In *Brown*, the Ontario Court of Appeal stated:

> A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her direction to stop. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence. [243]

In the academic literature, racial profiling is commonly defined using these specific determinants: (1) significant racial differences in police stop and search practices (for example, driving while black); (2) significant racial differences in Customs search and interrogation practices; and (3) particular undercover or sting operations which target specific racial and/or ethnic communities.[244] In short, at a societal level, racial profiling exists when racial differences in law enforcement surveillance activities cannot be explained by individual differences in criminal or other illegal activity.

Numerous studies conducted in the United States and Great Britain, using a wide variety of research methodologies, have also demonstrated that racialized people are more likely to be stopped, questioned, and searched by the police than are their counterparts.[245] While numerous police leaders, unions and academics have questioned the validity of racial profiling studies and deny the existence of racial profiling among law enforcement agencies,[246] a large body of research maintains that racialized and Aboriginal communities are more at risk than Whites of experiencing discretionary police stops and searches. Studies have further shown that when

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[243] *Brown*, *supra* note 237, at para. 44.

[244] See Wortley & Tanner, *supra* note 214; D. Harris, "Driving While Black and All Other Traffic Offence: The Supreme Court and Pretextual Traffic Stops" (1997) 87 Journal of Criminal Law and Criminology 544-582.

[245] David M. Tanovich, *Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); D. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: The New Press, 2002); Wortley & Tanner, *supra* note 214; Paying *the Price*, *supra* note 182.

[246] See Thomas Gabor, "Inflammatory Rhetoric on Racial Profiling Can Undermine Police Services"(2004) 46:4 Journal of Criminology & Criminal Justice 457.

they are stopped, racialized and Aboriginal people are more likely to be subjected to rude or hostile police treatment.[247]

Cecil Foster, in his book documenting the experiences of Caribbean immigrants to Canada, maintains that the police frequently stop, question, and search people of West Indian descent.[248] Foster reflects on the belief, widespread among Canada's racialized, specifically the Black population, that law enforcement and Customs officials needlessly interrogate and harass racialized people solely because of their racial background.

In 2002, the *Toronto Star* began publication of a series of articles on the topic of race and crime.[249] The Star's analysis of arrest data from the Toronto Police Service revealed that African Canadians are highly over-represented in certain offence categories – including drug possession, drug trafficking, and serious violence. *The Star* maintained that this pattern of over-representation was consistent with the idea that the Toronto police engage in racial profiling and that racialized offenders are treated more harshly after arrest than their white counterparts.[250] The series of articles created a firestorm of controversy. In response, criminal justice officials vehemently denied all allegations of racial bias. Then Toronto Police Chief Julian Fantino, for example, declared "there is no racism. We don't look at, nor do we consider race or ethnicity, or any of that, as factors of how we dispose of cases, or individuals, or how we treat individuals."[251] Critics of *the Star* further argued that African Canadians were over-represented in arrest statistics not because of differential treatment, but because they simply engaged in much more criminal activity than people from other racial backgrounds.

In 2010 the *Toronto Star* updated their 2002 study and concluded that racialized youth were three times more likely to be stopped than white youths. The newspaper reached this

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[247] Wortley, Racialized Risk, *supra* note 198 at 176.

[248] C Foster, *A Place Called Heaven: The Meaning of Being Black in Canada* (Toronto: Harper-Collins, 1996) at 5.

[249] J. Rankin et al, " Singled Out: An Investigation into Race and Crime" *The Toronto Star* (19 October 2002) A14; "Police Target Black Drivers" *The Toronto Star* (20 October 2002) A1 [Rankin et al].

[250] Rankin et al, supra note 249.

[251] J. Rakin et al, "Singled Out: An Investigation into Race and Crime" *The Toronto Star* (19 October 2002) A14; See also Tator & Henry, *supra* note 176.

conclusion after examining 1.7 million contact cards filled out by Toronto police officers between 2003 and 2008.[252] Today, instead of denying that racial profiling occurs, the Toronto Police and other officials "admit it happens, imply it's normal, and go on to explain why the police practice of carding so many blacks is not something we should worry about."[253]

ii. The Arrest Situation

Early studies of police arrest practices suggested that racialized and Aboriginal groups are much more likely to be arrested for minor crimes, such as drug use, minor assault and vagrancy, than their counterparts. Compared to Whites, that research also found that racialized and Aboriginal groups were more likely to be arrested in cases where there was only limited evidence that a crime had occurred.[254]

However, evidence has suggested that racial bias in police arrest decisions may be declining. Observational studies of police-citizen encounters counted in the United States indicate that, after controlling for the seriousness of criminal conduct, race is unrelated to the police decision to arrest.[255] This research implies that regardless of their race, the police rarely arrest citizens unless there is evidence that a crime has been committed. On the other hand, a number of more recent American studies note that it is the race of the victim, not the race of the offender, which impacts the arrest decision.[256] There is considerable evidence to show that the police are more likely to arrest in cases involving white victims than racialized or Aboriginal.[257] Analysis suggests that after controlling for other legally relevant factors (including the strength of the case), crimes involving racialized offenders and white victims are likely to result in an arrest.

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[252] John Sewell, "Racial Profiling still has no place here" *The Toronto Star*, (11 February 2010) online: <http://www.thestar.com> [Sewell].

[253] Sewell, *supra* note 252. Carding is the process of filling out a 208 card of information on any individual stopped. The *Star* analysis of those cards revealed a disparity in who is carded.

[254] See B. Blowing and C. Phillips, *Racism, Crime and Justice* (Britain: Pearson Education, 2002).

[255] See Matt Delisi & Bob Regoli, "Race, Crime and Criminal Justice: The Declining Importance of Skin Colour" (1999) 27 Journal of Criminal Justice 549.

[256] *Ibid.*

[257] See K. Parker & T. Jones, "Urban Disadvantage and Types of Race-Specific Homicide: Assessing the Diversity in Family Structure in the Urban Context" (2002) 39 Journal of Research in Crime and Delinquency 277-303 [Parker et al].

For example, in 2004, Stolzenberg *et al* conducted an analysis of 145,255 violent crimes reported to the police in 182 American cities during 2000. The authors found that the category of crime most likely to result in an arrest were those involving Black offenders and White victims. By contrast, crimes involving Black victims, regardless of the race of the offender, were least likely to result in an arrest.[258] Some advocates have argued that this is direct evidence that the police put a higher premium of White victims and, in turn, devote more effort and resources to solving such crimes.[259]

Studies that examine the impact of both offender and victim race on arrest decisions have not been thoroughly conducted in Canada. However, Canadian evidence does show that race may influence police behaviour once an arrest has been made.[260] An analysis of over 10,000 Toronto arrests between 1996 and 2001 for simple drug possession reveals that Black suspects (thirty-eight percent) were much more likely than their White counterparts (twenty-three percent) to be taken to the police station for processing. A White accused, on the other hand, was more likely to be released at the scene.[261] Once at the police station, a Black accused was more likely to be held overnight for a bail hearing at twice the rate of Whites. These racial disparities in police treatment remained after other relevant factors, including age, criminal history, employment, and immigration status, were all taken into statistical account.[262] Studies that have examined the treatment of young offenders in Ontario have yielded very similar results. [263]

iii. Police Use of Force

Highly publicized American cases of police violence against racialized people (for example, Rodney King) serve to reinforce the perception that American police officers are

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[258] Lisa Stolzenberg et al, "A Multilevel Test of Racial Threat Theory" (2004) 42 Criminology 673-698. See also, Stewart D'Alessio & Lisa Stolzenberg, "Race and the Probability of Arrest" (2003) 81:4 Social Forces 1381;Parker et al, *supra* note 257;

[259] C. Mann, *Unequal Justice: A Question of Color* (Blooming: Indiana University Press, 1993.

[260] Wortley & McCalla, *supra* note 199 at 198.

[261] *Ibid* at 198.

[262] Rankin et al, *supra* note 249.

[263] See *Commission on Systemic Racism*, *supra* note 142.

biased against members of racialized communities.[264] However, high profile cases of police brutality involving racialized communities are not limited to the United States. While allegations of racial bias and the police use of force are extremely difficult to examine,[265] the names John Joseph Harper, Albert Johnson, Lester Donaldson, Michael Wade Lawson, Marcellus Francois, Dudley George, Sophia Cook and Neil Stonechild are frequently used to illustrate the use of force as a problem for racialized and Aboriginal groups in Canada.[266] According to Scot Wortley and Andrea McCalla, official documentation regarding citizens killed or injured by the police is not readily available to Canadian researchers.[267] An examination of news stories suggests that racialized communities, in particular African Canadians, are indeed highly overrepresented among those killed or injured by the police in Ontario.[268] For example, between 1978 and 2000, Scot Wortley and Andrea McCalla were able to identify, through media coverage, thirty-four separate shootings in which citizens were killed or severely injured by the police. Nineteen of those cases (fifty-nine percent) involved Black victims, ten (twenty-nine percent) involved Whites, and five (sixteen percent) involved people from other racial backgrounds. Additional analysis revealed that thirteen of the twenty-three people (fifty-seven percent) who were shot and killed by the police during this period were African Canadians.

Yet, for many observers, the findings by Wortley and McCalla did not constitute proof that the police are racially biased in their use of force. The fact that these cases resulted in few criminal charges or convictions against the police was also seen as evidence that these

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[264] Wortley &McCalla, *supra* note 199 at 197.
[265] Wortley & McCalla, *supra* note 199 at 197.
[266] See G. Pedicelli, *When Police Kill: Police Use of Force in Montreal and Toronto* (Montreal: Vehicule, 1998); Wortley & McCalla, supra note 196 at 197. In brief, John Joseph "JJ" Harper, Aboriginal leader was shot and killed by Winnipeg police in 1988. The *Aboriginal Justice Inquiry* concluded the officer used excessive force. Albert Johnson, Jamaican immigrant, was shot to death by an officer in 1979. In 1988, Michael Wade Johnson, Black seventeen -year-old, was shot in the back of the head by Peel police officer. In 1988, Lester Donaldson, Jamaican immigrant, was shot to death by the police following a confrontation at his home. In 1991, Marcellus François, Black, was shot in the head in Montreal. He had been mistaken for a different black youth who as wanted for attempted murder. In 1995, Dudley George was shot and killed when fired on Aboriginal posters occupying Ipperwash Park. Sophia Cook, Jamaican immigrant, was shot in the back and left paralyzed by Toronto police officer in 1980. Cook was in a reported stolen car with two men whom she accepted a ride from after missing her bus. The police would later confirm Cook was never involved in the criminal activity.
[267] Wortley & McCalla, *supra* note 199 at197. See C. Goff, *Criminal Justice in Canada*, 3d ed (Scarborough: Nelson Thomson, 2004).
[268] G. Pedicelli, *When Police Kill: Police Use of Force in Montreal and Toronto* (Montreal: Vehicule, 1998).

shootings were justified.[269] This interpretation is consistent with American research, which suggests that once situational factors (such whether the suspect had a gun or was in the process of committing a violent crime) have been taken into account, racial differences in the police use of force are dramatically reduced.[270] Although the numbers from the study are low, arguably the fact that Black citizens represented over half of those killed or injured by the police is disturbing, particularly "since during that time they only made up six percent of the population."[271]

A study by Scot Wortley found that Aboriginals are vastly over-represented in investigations conducted by Special Investigations Unit ("SIU") in the province of Ontario:

> Although Aboriginals represent 7.1% of all SIU investigations, they represent 7.7% of all investigations in which injury or death was directly caused by the police. According to SIU data, the Aboriginal residents of Ontario are also over-represented in policing shootings. Although Aboriginal people represent only 1.7% of the provincial population, they represent 6.8% of all civilians involved in SIU shooting investigations[272].

Wortley also found that Aboriginals represented eight percent of all deaths caused by police use of force. The Aboriginal rate of death by police use of force is seven times greater than their counterparts.[273] Regarding Aboriginal representation in SIU investigations in the Toronto area, Wortley noted, "a comparison of the Aboriginal rate (14.8) with the White rate (2.57) suggests that Aboriginal civilians are 5.7 times more likely to become involved in a SIU use of force investigation than their White counterparts."[274] Until much more detailed research is conducted within Canada, questions about the possible relationship between race and police violence will remain.

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[269] Wortley & McCalla, *supra* note 199 at 197.
[270] See J.J. Fyfe, "Police Use of Deadly Force: Research and Reform"(1988) 5:2 Justice Quarterly 165-205.
[271] Wortley &McCalla, *supra* note 199 at 197.
[272] Scot Wortley, "Police Use of Force in Ontario: An Examination of Date from the Special Investigation Unit" (prepared on behalf of the African Canadian Legal Clinic for submission to the Ipperwash Inquiry [Wortley, Police Use of Force]. In 1999, Ontario established the Special Investigation Unit (SIU) to investigate deaths or serious bodily harm that may have resulted from criminal fences caused by police officers. See also Mandy Cheema, "Missing Subjects: Aboriginal Deaths in Custody, Data Problems, and Racialized Policing (2009) 14 Appeal Rev Current L & L Reform 84, 90-91.
[273] Wortley, Police Use of Force, *supra* note 272.
[274] Wortley, Police Use of Force, *supra* note 272 at 20.

iv. Deaths in Police Custody

Studies, commissions and reports, including the 1991 *Royal Commission into Aboriginal Deaths in Custody,* have shown that many of the deaths of Aboriginals while in custody occurred as a result of police action or inaction. In recent years, Aboriginals have been found frozen to death following police encounters. The phenomenon of picking up Aboriginals, mostly males, and leaving them in the outskirts of the city is commonly referred to as the 'Starlight Tour'. A Starlight Tour is a non-sanctioned police practice of taking individuals to an isolated edge of town and abandoning them. The stories of such events date back a number of years.[275]

In 1990, Neil Stonechild, a seventeen-year-old Cree First Nation youth was found frozen to death in a field in the northwest section of the City of Saskatoon. Subsequent events raised questions as to whether the youth had been in police custody on the evening of his death. His friend, and last person to see him alive, maintained that Stonechild had been in police custody. It was suggested that he had been picked up after a complaint was made against him of disorderly conduct at an apartment complex. Saskatoon Police Services investigated the death and determined that there was no evidence of foul play.[276] Specifically, the police ruled his death was not suspicious, and claimed he was likely walking to an adult correctional facility when he froze to death in -28°C temperatures.[277] The case was closed.

During this time and later, complaints emerged against the Saskatoon Police Service that members were transporting Aboriginals to remote locations in and outside of Saskatoon. In 2000 the body of Lloyd Dusthorn was found frozen outside his locked apartment after he had been in police custody. That same year, the frozen body of Rodney Naistus was found on the

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[275] See Susanne Reber, *Starlight Tour: The Last Lonely Night of Neil Stonechild* (Toronto: Random House, 2005). For further discussion, see also Todd Gordon, "Cops, Crime and Capitalism: The Law-and-Order Agenda in Canada (Halifax: Fernword, 2006). "The number of complaints suggested that there has been more incidents of Starlight Tours than those few that had made news headlines."

[276] Saskatchewan, Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild (Regina: Queen's Printer, 2004) at 1 [*Neil Stonechild Inquiry*].

[277] *Neil Stonechild Inquiry, supra* note 276. See Tator & Henry, *supra* note 176 at 81 – 82.

outskirts of Saskatoon near a power station.[278] Days following Naistus death, Lawrence Wegner was reportedly last seen alive banging on the doors of a relative's home in Saskatoon. His frozen body was later found at the border of the city near a power plant. After Wegner's body was found, another man, Darrell Night, came forward. Night, a Saskatoon Aboriginal man, reported that he had been dropped off by the Saskatoon Police Service south of the City and left in -22°C temperatures.[279] He claimed that he avoided freezing to death when he found shelter in a nearby power station. Ultimately, two Saskatoon police officers were found guilty of unlawful confinement in Darrell Night's case and were sentenced to eight months in jail.[280]

That same year, the Royal Canadian Mounted Police ("RCMP") began to re-investigate Stonechild's death and the deaths of other Aboriginal individuals who had been found dead in remote locations. In 2003, Saskatchewan's Minister of Justice established a judicial commission to inquire into the death of Stonechild and the investigation carried out by the Saskatoon Police Service and the RCMP. The government announced the appointment of the Honourable Mr. Justice D.H. Wright to conduct the inquiry. The *Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* heard testimony from sixty-four witnesses over the course of forty-three days. The Commission delivered its final report and recommendations in 2004.[281]

Justice David Wright found that Neil Stonechild was in the custody of two police officers before he died. It was found that two Saskatoon Police Service members who answered the call of the disturbance attributed to Stonechild had taken him from the scene to the remote area of the city and abandoned him. Direct expert testimony revealed that injuries and marks on Stonechild's body were consistent with handcuffs. Most damaging, Justice Wright concluded that the police had prematurely closed the investigation because of their suspicion that the lead detective was aware that members of the police force could have been involved in Stonechild's

[278] See Tator & Henry, *supra* note 176 at 81 -82.
[279] *Neil Stonechild Inquiry*, *supra* note 276. See Tator & Henry, *supra* note 176 at 81 – 82
[280] See Tator & Henry, supra note 176 at 82.
[281] *Neil Stonechild Inquiry*, *supra* note 276 at 1.

death.[282] These facts magnify the extent to which race has been a critical factor in the custodial deaths of Aboriginals, rebutting the presumptions that police operate through a race-neutral lens. The discussion of Aboriginal deaths in custody should be understood in the broader context of the over-representation of Aboriginal people in the criminal justice system as a whole.

3.3.1.2 - The Courts

i. Pretrial detention

The bail decision is recognized as one of the most important stages of the criminal court process. Not only does pretrial detention represent a fundamental denial of freedom for individuals who have not yet been proven guilty of a crime, it has also been shown to produce a number of subsequent legal consequences. Police discretion extends from the street and into the courtroom – at least at the pretrial stage. After controlling for factors such as type of charge and criminal record, research shows that an accused that is denied bail is much more likely to be convicted and sentenced to prison than their counterparts who are released earlier in the process.[283]

American research has demonstrated that racialized groups are more likely to be held in pretrial detention than their counterparts. A similar situation exists in Canada. For example, the *Manitoba Aboriginal Justice Inquiry* found that Aboriginals are more likely to be denied bail and spend lengthier periods in pre-trial detention than White accused.[284] Similarly, two separate studies of the Toronto criminal courts found that African Canadians are much more likely to be denied bail and held in custody before trial than accused from other racial backgrounds. An examination of 1,653 cases from the Toronto courts, conducted on behalf of the *Commission on Systemic Racism in the Ontario Criminal Justice System*, revealed that Blacks were less likely

[282] *Neil Stonechild Inquiry*, *supra* note 276. See also Mandy Cheema, "Missing Subjects: Aboriginal Deaths in Custody, Data Problems, and Racialized Policing (2009) 14 Appeal Rev Current L & L Reform 84, 90-91.
[283] See B. Reaves & J. Perez, "Pretrial Release of Felony Defendants" (National Pretrial Reporting Program, 1992) online: <http://bjs.ojp.usdoj.gov/content/pub/pdf/NPRP92.PDF>; M. Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrate's Court* (Toronto: University Press, 1965).
[284] See Hamilton and Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The justice System and Aboriginal People*, vol 1 (Winnipeg, Queen's Printer, 1991) [*Manitoba Justice Inquiry*].

to be released at the scene and more likely to be detained following a show-cause hearing.[285] This disparity is particularly noticeable for those charged with drug offences. The study found that almost a third of Black offenders charged with drug offences (thirty-one percent) were held in detention before their trial, compared to only ten percent of whites charged with a similar offence. It is important to note, this profound racial difference remains after statistically controlling for other relevant factors, including criminal history.[286]

A second Toronto-area study conducted by Kellough and Wortley provides additional evidence of racial bias in pretrial decision making.[287] This research project tracked over 1,800 criminal cases appearing in two Toronto bail courts over a six-month period in 1994. Overall, the results indicated that thirty-six percent of Black accused were detained before trial, compared to only twenty-three percent of accused from other racial backgrounds. In this study, race remained a significant predictor of pretrial detention after statistically controlling for factors associated with both flight risk (such as, employment status, home address, and previous charges for failure to appear) and danger to the public (such as, seriousness of current charges, length of criminal record). Additional analyses also suggest that Black accused are more likely to be detained because they tend to receive a higher negative assessment from arresting officers.[288]

Kellough and Wortley's study showed that on average, police officers spend more time justifying the detention of a Black accused than they do for an accused belonging to other groups. Finally, the results of the study showed that rather than being used to manage the risk posed by the criminally accused, pretrial detention is a resource that the prosecution uses, along with over-charging, to encourage guilty pleas from accused persons. In contrast those

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[285] Wortley & McCalla, *supra* 176 at 199.

[286] J. Roberts and A. Doob, "Race, Ethnicity, and Criminal Justice in Canada" in M. Tonry, ed, *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives* (Chicago: University of Chicago Press 1997 [Roberts & Doob].

[287] G. Kellough & S. Wortley, "Remand for Plea: the Impact of Race, Pre-Trial Detention and Over-Charging on Plea Bargaining Decisions" (2002) 42:1 British Journal of Criminology 186-210 [Kellough & Wortley].

[288] Moral assessment refers to the subjective personality descriptions that the police frequently attach to show-cause documents.

accused who are not held in pretrial custody are much more likely to have all of their charges withdrawn.[289] Further, even when released on bail, racialized and Aboriginal accused are often subject to a greater number of pre-trial release conditions – including curfews, area restrictions, and mandatory supervision requirements.[290] Racial disparities in pretrial outcomes have a direct impact on the overrepresentation of racialized and Aboriginal groups in the Canadian correctional statistics.

ii. Sentencing

Given that racialized and Aboriginals are more likely to be arbitrarily stopped and investigated by the police and are subject to greater number of pre-trial conditions, they are much more likely to re-enter the system based on a charge of breaching such conditions.[291] The literature in the United States, Britain, Australia and Canada contain many references to the role that race plays in the over-representation of certain racialized and Aboriginal groups in the courts and correctional systems. In the United States and Britain, most references are to African Americans. Aboriginal peoples are the focus of much attention in Canada. In some provinces in Canada, attention has also shifted to include other racialized populations.[292]

American, British and Australian research on race and sentencing has revealed mixed findings. For example, some studies have found that Blacks and other racialized defendants are treated more harshly.[293] Other studies have noted no evidence of racial differences in sentencing outcomes.[294] In the case of Canada, minimal research has focused on sentencing outcomes of racialized groups. The *Commission on Systemic Racism in the Ontario Criminal Justice System* compared the sentencing outcomes of Whites and Black offenders convicted in

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[289] Wortley & McCalla, *supra* note 176.See also Kellough & Wortley, *supra* note 287.

[290] See Kellough & Wortley, *supra* note 287.

[291] See G. Kellough & S. Wortley, "Risk, Moral Assessment and the Application of Bail Conditions in Canadian Criminal Courts (Budapest, Hungary: Paper presented at the 2001 International Meeting of American And Society Association 2-7 July 2001).

[292] Roberts & Doob, *supra* note 286.

[293] See M. Mauer, *Race to Incarcerate* (New York: New Press, 1999).

[294] J. Lauristen & R. Sampson, Minorities, Crime, and Criminal Justice" in Michael Tonry, ed, *The Handbook of Crime and Punishment* (New York: Oxford University Press, 1998); B. Bowling & C. Phillips, Racism, Crime and Justice (Britain: Pearson Education, 2002).

Toronto courts during the early 1990s. This comparison revealed that Black offenders convicted of drug offences were more likely than non-white offenders to be sentenced to prison. This racial difference remained after other important factors, including offence seriousness, criminal history, age and employment, had been taken into statistical account.

Finally, bias at the sentencing stage may also help explain the over-representation of Aboriginals in prison statistics.[295] For example, in 1999, the Supreme Court of Canada's decision in *R. v. Gladue*[296] recognized the marginalized position of Aboriginal offenders in the criminal justice system. Utilizing section 718 (2)(e) of the *Criminal Code*, the Supreme Court added its voice to the public inquiries and reports that had recognized the high levels of Aboriginal over-representation, saying that it was a "sad and pressing social problem" and one that is "a crisis in the Canadian criminal justice system."[297]

3.3.1.3. - Corrections

As with other stages of the criminal justice system, there is no official data examining the treatment of racial minorities within the correctional system.[298] That said, consistent with studies on the police and the criminal courts, the research that has been conducted strongly indicates that racial bias exists behind prison walls. Racial discrimination explains the overrepresentation of racialized and Aboriginal individuals in correctional statistics. The *Commission on Systemic Racism in the Ontario Criminal Justice System* found that racist language and attitudes plague the environments of many Ontario prisons and racial segregation is often used as a strategy for maintaining order.[299] Commission researchers also found evidence of racial bias in the application of prison discipline. Black inmates, for example, were significantly overrepresented among prisoners charged with misconducts (particularly the type

[295] Wortley, Hidden Intersections, *supra* note 229 at 99.
[296] *Gladue*, supra note 141.
[297] *Glaude, supra* note 141 at paras 64-65.
[298] Wortley & McCalla, *supra* note 199 at 200.
[299] *Commission on Systemic Racism, supra* note 142.

of misconduct in which correctional officers exercises greater discretionary judgment). This fact is important, because a correctional record for such misconducts is often used to deny parole and limit access to temporary release programs. Indeed, exploratory research suggests that after controlling for other relevant factors, racialized and Aboriginal inmates are somewhat more likely to be denied early prison release.[300]

The most glaring evidence of racism in the criminal justice system is found in government studies reports and research which consistently show that Aboriginal people are disproportionately over-represented in correctional facilities across Canada. For instance, the *Report of the Manitoba Justice Inquiry* captured the experiences of systemic racism faced by Aboriginal people and concluded that the over-representation of Aboriginal people in the criminal justice system has deep historical and social roots.[301] According to Corrections Canada's own statistics, Aboriginal adults are incarcerated over six times more than any other group. A one-day snapshot of all offenders in this country's correctional facilities conducted in 2006 showed that although Aboriginals make up approximately 2.7 percent of the adult population of Canada they account for approximately 18.5 percent of offenders serving federal sentences. Approximately, sixty-eight percent of federal Aboriginal offenders are First Nations, twenty-eight percent are Métis and four percent Inuit. [302]

This over-representation is particularly acute in the West, but exists elsewhere across Canada. In Saskatchewan, Aboriginal people were being incarcerated at almost ten times the overall provincial rate; they were seventy-six percent of that province's inmate population. In Manitoba, sixty-one percent of inmates were Aboriginals; in Alberta, they constituted over thirty-five percent.[303] Aboriginal women are more over-represented than Aboriginal men in the criminal

[300] *Commission on Systemic Racism*, supra note 142.
[301] *Manitoba Justice Inquiry*, supra note 284.
[302] Tator & Henry, *supra* note176 at 81.
[303] *Ibid* at 81.

justice system, representing thirty percent of women in federal prison.[304] In 2000, statistics indicated that 41.3 percent of all federally incarcerated Aboriginal offenders were twenty-five years of age or younger.[305] As First Nations youth are the fastest growing demographic group in Canada, this will continue to have significant impact on the criminal justice system.

3.3.1.4. - Post-Incarceration

The *Commission on Systemic Racism* highlighted that rehabilitation programs do not adequately meet the cultural and linguistic needs of many racialized inmates.[306] The correction system, the Report argued, caters to Euro-Canadian norms. The treatment needs of racialized prisoners are either unacknowledged or ignored. Ultimately, inadequate or inappropriate rehabilitation services for minority inmates may translate into higher recidivism rates for non-white offenders – a fact that arguably further contributes to the overrepresentation of racialized groups in the Canadian correctional system.[307] Finally, Canadian research has yet to exclusively explore racial discrimination in parole decisions within federal correctional facilities.[308]

3.4. - SUMMARY

While the dominant view is that Canadian law is neutral, the fallacy of this approach becomes obvious when it is understood that historically the law has been used to oppress and subjugate racialized and Aboriginal communities. The lack of neutrality of law has been recognized by critical race theorists who challenge the dominant rule of law discourse. Racialized and Aboriginals are arrested, prosecuted, convicted and incarcerated in numbers disproportionate to their percentage of the population. A significant explanation is that racism against racialized and Aboriginals pervades the Canadian system of justice. The law exercised

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[304] See also Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (Research Paper Commissioned by the Ipperwash Inquiry) online: The Ipperwash Inquiry < http://www.ipperwsash.ca/policy_part/research/index.hmtl>.
[305] Canada, Correctional Service, "Facts & Figures: Strategic Plans For Aboriginal Corrections" , online: Correctional Canada <http://www.csc-scc.gc.ca>
[306] *Commission on Systemic Racism, supra* note 142.
[307] Wortley & McCalla, *supra* note 199 at 201.
[308] Wortley & McCalla, *supra* note 199 at 200.

in the criminal justice system is itself is influenced by racist ideology as its principles were developed in an era when the racialized and Aboriginals were historically barred from participating fully in society and oppressed in the justice system. In the end, the disparity in practices of criminal justice officials has been justified through the process of racialization.

Most Canadian legal scholars and criminologists acknowledge that much more research is needed in the area of systemic racism and the criminal justice system. For example, some criminologists have argued that future research on racism in Canada is hindered by the current ban on the collection and dissemination of crime statistics that track race. As well, focus on systemic racism requires a consideration of how both accused and victims are discriminated against.[309] Inquiries into systemic racism continue to have the potential to break down dichotomies between the crime control and due process models of the criminal justice system that have become more entrenched with the enactment of the *Canadian Charter of Rights and Freedoms*. The use of race as a proxy for criminality is a profound illustration of racial prejudice and "contravenes the most basic and fundamental principles of human dignity and equality."[310]

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[309] Kent Roach, "Systemic Racism and Criminal Justice Policy" (1996) 15 Windsor YB Access Just 237.

[310] David M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall LJ 2.

CHAPTER FOUR

LESSONS FROM THE CASE OF DONALD MARSHALL, JR:

TRANSCENDING RACE, WRONGFUL CONVICTIONS AND THE FAILURES OF THE CRIMINAL JUSTICE SYSTEM

4. - INTRODUCTION

The late Donald Marshall, Jr. has become a public figure – a symbol of when the criminal justice system goes very wrong. Marshall's conviction for a murder he did not commit evidenced the state of the criminal justice system in Nova Scotia and continues to be a prime example of the social reality of wrongful convictions in Canada. On the night of May 28, 1971, in Sydney, Nova Scotia, a seventeen-year-old Black man was stabbed to death in a local park. Less than one week later, seventeen-year-old Marshall was charged with second-degree murder. He was tried and found guilty. Sentenced to life imprisonment on November 5, 1971, Marshall spent the next eleven years in federal penitentiaries across Atlantic Canada all the while maintaining his innocence. While there are many people in the justice system who insist that they are not guilty, "hoping their claim will earn them their freedom,"[311] what happens when an individual is convicted for a crime they did not commit?

To claim that an innocent person has been wrongly convicted is a bold statement; a proposition that at times may be difficult to prove. However, the phenomenon of wrongful conviction has been exposed: "sometimes eyewitnesses make mistakes. Confessions are coerced or fabricated."[312] Likewise, defence lawyers are inept, prosecutors withhold evidence, and racial bias trumps the truth. Consequently, justice is essentially a system of social control, and historically it has favoured the interests of a few. As a result, there are some who have been targeted by a system of arrests, convictions, and punishment. The Marshall case forced a

[311] Barrie Anderson et al, *Manufacturing Guilt – Wrongful Convictions in Canada* (Halifax, Nova Scotia: Fernwood Publishing, 1998) at 8 [Barrie Anderson].

[312] Myriam S Denov & Kathryn Campbell, "Criminal Injustice: Understanding the Causes, Effects, and Responses to Wrongful Conviction in Canada" (2005) 21:3 Journal of Contemporary Criminal Justice 224-249 [Denvo & Campbell].

number of troubling questions about the fairness of the Canadian criminal justice system into the mainstream consciousness: was the criminal justice system inherently biased the against racialized and the poor? What is the role of the Crown, defence, and/or officials of the Attorney General to ensure 'justice' in the criminal process?

This chapter explores these questions by critically examining the wrongful conviction and exoneration of Donald Marshall, Jr. In Part I, a brief overview of the case is provided to better understand the reasons why Marshall suffered a miscarriage of justice. From the outset, the police response to the stabbing death was shrouded in bias. Marshall was the only individual targeted and cast as the unpopular accused. Ultimately, his exoneration would reveal that he was guilty of one thing, presumably not a crime, but being Mi'kmaq. Part II will then look at the period from Marshall's release to the announcement of the Royal Commission to discuss the factors that caused the Commission to be established. The mandate of the Commission is also explored. Having found that racism played a role in Marshall's wrongful imprisonment, Part III considers the level of racial awareness during the Marshall case and the subsequent commission of inquiry. The section concludes by examining whether the Mi'kmaq's historical and social position in Nova Scotia contributed to Marshall's wrongful conviction.

4.1. - PART I: THE CASE OF DONALD MARSHALL

4.1.1. - Brief History

What follows are the salient background facts of the case. Donald Marshall, Jr., the son of Grand Chief of the Mi'kmaq nation, lived on the Membertou reserve near Sydney, Nova Scotia. He was a product of alcoholism, poor housing, high employment and crime that has characterized most of Canada's reserve system.[313] He and his young friends were frequently in trouble with the law. As such, Marshall was known to the Sydney Police.

[313] Barrie Anderson et al, *supra* note 311 at 28.

i. The Incident

On May 28, 1971, Marshall, went out for a weekend dance at St. Joseph's Parish Hall in Sydney, Nova Scotia. Marshall testified that he had left another friend's home about eleven o'clock that night and met his acquaintance Sanford 'Sandy' Seale, a Black teenager, at Wentworth Park.[314] He was walking with Seale for a couple of minutes when they met another acquaintance. After leaving that associate, Marshall and Seale crossed a footbridge and headed towards Crescent Street. On Crescent Street, which borders the park, they met two men (later identified as Roy Ebsary, fifty-nine, and Jimmy MacNeil, twenty-five, both White). Marshall claimed that they had struck up a conversation with the two strangers. Following the brief conversation, allegations were that Marshall and/or Seale tried to rob Ebsary and MacNeil. This encounter resulted in Ebsary stabbing Seale in the stomach and slashing Marshall on the left forearm. Terrified, Marshall ran from the scene of the crime. Ebsary and MacNeil would also leave the park headed to Ebsary's residence (which was nearby).[315]

Marshall continued to run along Crescent Street until he came across a youth named Maynard Chant. Chant, was in Wentworth Park at the same time. He was attempting to get home after missing his bus. According to testimony, Marshall had told Chant what had happened, then flagged down a car in which he and Chant returned to Seale, who Marshall had left in the park. Before Marshall and Chant returned to the park, Seale had been discovered by a couple on their way home from the dance. Police and ambulance were called. Seale was taken to Sydney City Hospital where he died as a result of his injuries on the following day. Marshall was taken to the hospital by the police.[316] Marshall received stitches to close his wound, gave a brief description of the assailants to the police and was allowed to go home.

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[314] *R v Marshall*, [1983] N.S.J. No. 322, 57 N.S.R. (2d) 286 (N.S.R.) at para 11 [*Marshall*, 1983].
[315] Bob Wall, "Analyzing the Marshall Commission: Why It was Established and How it Functioned" in Joy Mannette ed, *Exclusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood, 1992) at 14 [Wall].
[316] See Wall, *supra* note 315 at 15; *Marshall*, 1983, *supra* note 314 at para 15.

ii. The investigation

Four Sydney police officers initially responded to the report of the stabbing. When the police first arrived on the scene Seale was still alive and conscious. No officer accompanied Seale in the ambulance. None of the four officers dispatched to the scene remained there to protect or search the area after Seale had been taken to the hospital.[317] The names of people in the park at the time of the crime were never recorded and people in the neighbourhood were not questioned about hearing or seeing anything unusual that evening.[318] Detective Michael MacDonald would interview Marshall at the hospital. Marshall described the assailants to the Detective, but did not tell the officer about the failed robbery. Detective MacDonald did not take a formal statement from Marshall or circulate a description of the assailants to other members of the Sydney police force. The police did not locate or talk to Chant.[319]

The following morning, May 29, 1971, John MacIntyre, Chief of Detectives of the Sydney Police, took over the investigation. Marshall was known to Detective MacIntyre as they had several run-ins in the past. Marshall voluntarily spent the next two days at the police station to offer assistance. Marshall repeated his account of the incident. Detective MacIntyre, like the officers before him, did not take a formal statement. Later that evening, Seale would die without identifying his assailant.

As the investigation began, the public would demand that Seale's killer be apprehended quickly. The recently created Nova Scotia Black United Front issued a statement calling for the "quick and speedy apprehension of the assailant or assailants."[320] Sydney's last homicide had gone unsolved and the community was "in no mood for a repeat situation."[321] The police were sensitive to this outcry and, in turn, it was imperative that an arrest be made. Two days after the

[317] Nova Scotia, *Findings and Recommendations of the Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: The Royal Commission, 1989) at 3 [*Marshall Inquiry*].
[318] Barrie Anderson, *supra* note 311 at 31.
[319] Wall, *supra* note 315 at 15.
[320] *Ibid.*
[321] Michael Harris, *Justice Denied: The Law versus Donald Marshall* (Toronto: Harper-Collins, 1986) at 67. See Barrie Anderson, supra note 311 at 32.

initial incident, Detective MacIntyre interviewed Maynard Chant, the fourteen-year-old, who encountered Marshall after he had been wounded. During this time, Chant was on probation in connection with a minor offence. Chant provided a statement indicating that he had not witnessed the stabbing. Chant described the scene as he had heard it from Marshall. Marshall would also repeat his story to another acquaintance John Pratico. Pratico, a mentally unstable sixteen-year old, was also brought to the police station where he first denied being in the park on May 28, 1971. All Pratico knew about the incident was what he had heard on the radio and what Marshall had told him the day after the killing.[322] Marshall would finally give his formal statement to Detective MacIntyre shortly afterwards.

The following week, Detective MacIntyre re-interviewed Pratico. Pratico would provide another statement "that he had seen Marshall stab Seale during an argument."[323] He described the scene as relayed to him by Marshall, "also adding a few imaginary details."[324] Detective MacIntyre then re-interviewed Chant, "reasoning that if Pratico had seen the stabbing, and Chant was also in the park as he had previously stated, he too must have seen the incident."[325] In his second statement, Chant would claim he had witnessed an argument between Marshall and Seale, which resulted in Marshall stabbing Seale. In his new statement Chant would also place Pratico at the scene of the crime. While these statements contained contradictory assertions, Detective MacIntyre presented these facts to the Crown Prosecutor, Donald C. MacNeil, and was authorized to obtain an arrest warrant for Marshall on a charge of second degree murder.[326] Marshall was picked up at his home, handcuffed and driven back to Sydney.

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[322] Barrie Anderson, *supra* note 311 at 32.
[323] *Marshall Inquiry*, *supra* note 314 at 3.Wall, *supra* note 315 at 15.
[324] Wall, *supra* note 315 at 15.
[325] *Ibid* at 15.
[326] Barrie Anderson, *supra* note 311 at 34.

Marshall would maintain his innocence.[327] He was held in the county jail until his trial on November 2, 1971.

Between Marshall's arrest and before his trial, additional information obtained by Detective MacIntyre was a statement from a then fourteen-year-old Patricia Harris.[328] Harris stated that she had seen Marshall on Crescent Street shortly before the incident. Her first statement to the police noted that Marshall was with two other men whom she described in a manner similar to the description given by Marshall. A second statement asserted that Marshall and Seale were alone on Crescent Street when she saw them.[329] Two teenagers, George and Roderick MacNeil, had reported to the police that they had also seen two men fitting Marshall's description (of Rob Ebsary and Jimmy MacNeil) in the park around midnight.[330] The police would ignore eyewitness' reports that did not collaborate with the new statements of Chant, Pratico and Harris.

iii. Legal Proceedings

Marshall was tried before a judge and jury. The trial lasted three days.[331] The first statements of Pratico, Chant, and Harris, which tended to corroborate Marshall's account of the incident, were not used in the prosecution's case, and apparently were not known to the defence. Likewise, statements to the police from others in the park that mentioned two other men were also not used by either the prosecution or the defence.[332] The murder weapon was never found and no direct evidence of motive for the alleged stabbing was offered. Marshall's defence lawyer, C.M. Rosenblum, had been referred the case from the Department of Indian Affairs. For reasons unknown, C.M. Rosenblum did not interview any of the prosecution's key

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[327] Parker Barss Donham, "The Ordeal of Donald Marshall" (1989) Readers Digest 177, 185. See also, Barrie Anderson, *supra* note 311 at 34.
[328] *Marshall*, 1983, *supra* note 314.
[329] Wall, *supra* note 315 at 15-16.
[330] Barrie Anderson, *supra* note 311 at 34.
[331] Marshall, 1983, *supra* note 314 at paras. 34-38. Marshall's trial lasted three days - November 2 – 5, 1971.
[332] Barrie Anderson, *supra* note 311 at 33-35.

witnesses before the trial. As a result, he was unaware of the initial statements given to the police. For example, he knew nothing about Harris' original statement concerning the men seen with Marshall and Seale and, as such, did not pursue this line of questioning on cross-examination.

At the preliminary inquiry, Maynard Chant testified that he recognized Marshall and Seale as the two people in the park who were having a bitter argument. He also testified that he had seen Marshall take a knife from his pocket and stab Seale. At trial, Chant would give evidence that he thought he "heard two people arguing in the park but he did not know who they were."[333] He added that "he believed that one of the men had taken something from his pocket and drove towards the left side of the other man."[334] Due to his testimony, Crown Prosecutor MacNeil asked the judge to declare Chant a hostile witness. Judge Louis Dubinsky agreed to this request[335]. MacNeil put forward to Chant that the testimony he had given at the preliminary hearing was considerably different from his present recollection of events. He then refreshed Chant's memory by reading his original testimony to the court. Chant reverted back to his preliminary hearing testimony stating that he had seen Marshall stab Seale with a knife.[336]

John Pratico would also renege on his formal statement. While waiting to testify, Pratico would tell Simon Khatter, a member of Marshall's defence team, Crown Prosecutor MacNeil and Detective MacIntyre that he did not see Marshall stab Seale and that he had lied to the police and to the prosecution because he was scared.[337] When Pratico took the stand and MacNeil began to question him about the statement made in the corridor, Judge Dubinsky insisted that MacNeil confine his questioning to the events in Wentworth Park. In turn, MacNeil asked Pratico to tell the court what he had witnessed the night of May 28th. The youth would recount that he

[333] Barrie Anderson, *supra* note 311 at 36.
[334] *Ibid.*
[335] Barrie Anderson, supra note 311 at 36; *Marshall*, 1983, supra note 314 at paras. 17-19.
[336] *Supra* note 311 at 36.
[337] Barrie Anderson, *supra* note 311 at 37.

had seen Marshall kill Seale. On cross-examination, Pratico would admit to the recantation (in the corridor). However, Judge Dubinsky, citing a section of the *Canadian Evidence Act*, ruled that Khatter could not fully question Pratico on his corridor statement. Judge Dubinsky also did not allow the prosecution to ask Pratico why he had recanted his statement.[338]

The only other evidence that placed responsibility for the crime on Marshall was that of Patricia Harris. When prosecution key witness Patricia Harris took the stand, she initially testified that she had seen more than one person with Marshall the night of the stabbing. However, Harris quickly reverted back to her statement saying that she had seen no one except Marshall and Seale in the park.[339]

In response to Pratico's recantation, Marshall's defence lawyers put him on the stand. Marshall related the story of how he and Seale had met two men on Crescent Street and stopped to ask them for a light for a cigarette. Marshall testified that the men commented that they did not like Blacks or Indians and then assaulted him and Seale. After the defence and the prosecution gave their summations, the jury retired to consider its verdict. Four hours later, the jury found Marshall guilty of murdering Sandy Seale.[340] In order to reach this conclusion, the jury disbelieved the evidence of Marshall. Marshall was convicted on the basis of the testimony of the three teenagers. On November 5, 1971 the court pronounced the sentence of life imprisonment for non-capital murder pursuant to the section 206(2) of the *Criminal Code*.

Within a few days of the conviction, James MacNeil came forward to the police and confessed that he had been in the park the night of the stabbing with a man named Roy Newman Ebsary. MacNeil told the events of the murder to Detective MacIntyre. MacNeil's description of Ebsary "was almost identical to the man described by Donald Marshall."[341] MacNeil would report that he had seen Ebsary stab Seale. Three years later, in 1974, Donna

[338] *Marshall*, 1983, *supra* note 311 at paras. 27-28. See also Barrie Anderson, *supra* note 308 at 36.
[339] Barrie Anderson, *supra* note 308 at 36.
[340] *Marshall*, 1983, *supra* note 311 at para 34.
[341] Barrie Anderson, *supra* note 311 at 39.

Ebsary, the daughter of Roy Ebsary, told Sydney police that she had seen her father washing blood from a knife on the night of the murder. When she went to the Sydney Police with the information, she was told by an officer that the case was closed.[342] In both cases the information was not passed along to either the Crown or Marshall's defence team.

Marshall appealed his conviction to the Nova Scotia Court of Appeal alleging: (1) certain errors in the directions given to the jury by the trial judge, (2) the evidence did not establish guilt beyond a reasonable doubt and, (3) the conviction was against the weight of evidence and was perverse.[343] The Appeal Division found that there had been no error in the instructions given by the trial judge and that his charge had generally been very favourable to the accused.[344] The appellate court took the view that the jury had to decide which of the two versions of the killings they were to believe to support a finding of guilt against Marshall. The appeal court was satisfied that the jury was left with this decision and that there was evidence which, if believed, could support the conviction. On September 8, 1972, the Court of Appeal dismissed the appeal.[345]

iv. Re-investigation

Marshall would spend the next eleven years in prison maintaining his innocence and pressing his family and friends to keep searching for the identity of the real murderer. In 1981, Marshall learned of the name 'Roy Ebsary'. A friend, Mitchell Sarson told Marshall that Ebsary had confided to him that he had killed a Black man in Wentworth Park and wounded an Indian during the same incident. As a result, based on this information the Union of Nova Scotia Indians retained a new defence lawyer, Stephen Aronson, to follow up on Sarson's story. Following his own review of the matter, Aronson requested another investigation of the case.[346] It would take six months before the authorities began to act.

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[342] *Marshall Inquiry*, *supra* note 317 at 5.
[343] Marshall, 1983, *supra* note 314 at para 38.
[344] *R. v. Marshall* (1973), 4 N.S.R. (2d) 517. See also, *Marshall*, 1983, *supra* note 314 at paras 36-37.
[345] See *R. v. Marshall* (1973), 4 N.S.R. (2d) 517 [*Marshall*, 1973].
[346] Barrie Anderson, *supra* note 311 at 41.

By 1982 the re-investigation of the case by the RCMP determined that Chant, Pratico and Harris had given perjured testimony at Marshall's trial. Each witness now claimed that they had given their statements and testified as they did due to pressure from Detective MacIntyre.[347] The RCMP also gathered physical evidence that indicated that Ebsary's knife had been used to stab Sandy Seale.[348] The RCMP investigation led directly to Justice Minister Jean Chretien's decision to refer the Marshall case to the Nova Scotia Court of Appeal for hearing and determination.[349]

Marshall was released on parole and subsequently granted bail while waiting for a special reference to the Nova Scotia Court of Appeal. In 1983, the Court heard the case based on the fresh evidence of James MacNeil. MacNeil testified that on the evening of May 28, 1971, he was at the State Tavern, in the City of Sydney, where he met an older acquaintance Roy Ebsary.[350] When the two finished drinking together for the evening, near eleven o'clock, they cut through Wentworth Park and crossed the bridge on their way home.[351] According to MacNeil, Marshall and Seale had attempted to rob the two men and as a result Ebsary had stabbed Seale. During the initial investigation, Marshall had not mentioned the intended robbery. Maynard Chant and Patricia Harris would also recant their 1971 testimonies.[352] The RCMP forensic expert testified that the cloth fibers found on Ebsary's knife matched the jacket of Sandy Seale and Donald Marshall. Donna Ebsary would testify that she had seen her father washing blood from a knife the evening of the murder.[353]

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[347] Barrie Anderson, *supra* note 311 at 43.

[348] *Marshall Inquiry*, supra note 317 at 5. See also Barrie Anderson, *supra* note 311 at 43. Greg Ebsary, Roy's son, had shown RCMP inspector Wheaton a number of knives that his father had made before the murder. Wheaton sent them off to the RCMP laboratories. The lab report confirmed that one of the knives contained several fibers from Sandy Seale's jacket. There was also lesser number of fibers matching those of jacket worn by Marshall.

[349] *Marshall Inquiry*, supra note 317.

[350] *Marshall*, 1983, supra note 314 at para 44.

[351] Wall, *supra* note 315 at 16.

[352] *Marshall*, 1983, *supra* note 314 at para. 58. Pratico was not called before the court to give evidence. Evidence tendered in court showed that Pratico suffered schizophrenia. The medical opinion established that Pratico was wholly unreliable informant & witness.

[353] *Marshall*, 1983, *supra* note 314 at para 51.

As a result, the Appeal Court held that there was insufficient evidence to warrant a conviction of Marshall and found him not guilty. In its 1983 decision, however, the Court ruled that "no miscarriage of justice had occurred."[354] Though legally free, the judiciary concluded that Marshall was the author of his own misery, "any miscarriage of justice is, however, more apparent than real. There can be no doubt that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction."[355] The re-investigation resulted in charges being brought against Ebsary on May 12, 1983. In 1985, Roy Ebsary was convicted of manslaughter and sentenced to one year in prison.[356]

v. Compensation

After a protracted period of negotiation between Attorney General's Department in Nova Scotia and Marshall's lawyers, in 1984, Marshall was awarded $270,000 in compensation for his eleven years in prison.[357] Following the release of the Royal Commission Report in 1990, Marshall and his family received additional compensation. Marshall was awarded a life pension of 1.5 million in compensation. The nature of the case resulted in pressure by the media, opposition political parties, and private citizens on the government to set up an inquiry examining the justice system in Nova Scotia.[358] As a result, in 1986, seventeen years after Marshall's conviction and four years after he was exonerated, the provincial government established the *Royal Commission on the Donald Marshal, Jr. Prosecution* (the "*Marshall Inquiry*"

[354] Wall, *supra* note 315 at 16.
[355] *Marshall*, 1983, *supra* note 314 at paras. 79, 80-84.
[356] See Barrie Anderson, *supra* note 311 at 45. Roy Ebsary stood trial three times for the second degree murder of Sandy Seale. His first trial resulted in a hung jury; the second, in a conviction, which was overturned on appeal; the third, again in a conviction. On appeal his three year sentence was reduced to one year. He served seven months and died in his Sydney rooming house of a heart attack at the age of seventy-five.
[357] Note from that amount he paid his lawyers over 100,000 in fees.
[358] Wall, *supra* note 315 at 17.

4.2. - PART II – ANALYZING *THE MARSHALL INQUIRY*

To understand the implications of the *Marshal Inquiry* it is important to look at the origins of the Commission. As stated, after being convicted of murder in 1971, eleven years later, Marshall was acquitted on the basis that he had been wrongfully convicted. During this time, pressure on the government to call an inquiry increased. A Royal Commission was appointed under the *Public Inquires Act* to investigate the events of the case and into the administration of justice in the province of Nova Scotia. The government of Nova Scotia appointed the Commission by an order in council dated October 28, 1986. The Royal Commission was led by senior justices from other provinces – Chief Justice T. Alexander Hickman from Newfoundland, Associate Chief Justice Lawrence A. Poitras from Quebec, and The Honourable Mr. Gregory T. Evans of Ontario. On September 9, 1987 formal public hearings on the issues arising from the Marshall case started in Sydney, Nova Scotia and continued for over a year.

4.2.1. - Setting Up the Royal Commission

The RCMP re-investigation, which revealed that critical testimony at Marshall's 1971 trial was perjured, took place in early 1982. During this time, opposition politicians, members of the media, Mi'kmaq and Black organizations, members of the legal community, and individual citizens called for a public review of Marshall's case. Over the next four years, the government offered a variety of reasons why it could not, or would not; hold a public hearing concerning the circumstances surrounding Marshall's wrongful conviction and imprisonment.[359] For instance, in 1982, the province asserted that the matter was the subject of an ongoing RCMP investigation. Prior to the inquiry, the Nova Scotia Court of Appeal, which heard the special reference that resulted in Marshall's acquittal, arguably could have elicited testimony about the police investigation and conduct of the trial but chose not to do so.[360] In early 1983, the province claimed it was awaiting the decision from the Court of Appeal. Also in 1983, Sydney Police

[359] Wall, *supra* note 315 at 17.
[360] *Ibid.*

Chief John MacIntrye launched a libel action against the Canadian Broadcasting Company and freelance journalist Parker Donham.[361] The legal action by Detective MacIntyre was expected to cover the same issues as the public inquiry; "the suggestion was raised that it would be prejudicial to conduct an inquiry while this suit was in progress."[362] In the latter part of 1983 until 1986 the trials and appeals of Roy Ebsary were underway.[363] In addition, Marshall had launched a civil suit for damages against the City of Sydney and specific police officers. The ongoing case of Roy Ebsary and the civil suit was cited by provincial officials as an impediment to the public inquiry.[364] After Marshall dropped his action against the City of Sydney and its police officers in 1984, the province returned to its argument that Ebsary's ongoing appeals were a bar to the public inquiry.

Nonetheless, calls for a public inquiry continued. Reports during that time suggested that from the time of Marshall's exoneration, compensation for his imprisonment was a central concern for the province.[365] Arguably, an inquiry might have shown misconduct on the part of governmental officials and, in turn, would enhance Marshall's claim for substantial damages for his wrongful imprisonment. Taken as a whole, the assertions made by the province that delayed the inquiry suggests that, at least initially, the Royal Commission did not grow from a sincere desire on the part of the provincial government to understand what went wrong in the Marshall case or a broader look at the operation of the criminal justice system.[366] The longer the province delayed an attempt to determine the causes of Marshall's conviction, the more it appeared that the province and the entire justice system had something to hide. This appearance only increased with media speculation. Allegations of police misconduct, interference by officials at the Attorney General's office, and racist motives were the subject of daily coverage in the

[361] In a radio broadcast, it was alleged that then Detective MacIntyre pressured the three teenaged witnesses to commit perjury which resulted in Marshall's wrongful conviction.
[362] Wall, *supra* note 315 at 18.
[363] See Wall, *supra* note 315 at 18.
[364] *Ibid.*
[365] Wall, *supra* note 315 at 19.
[366] *Supra* note 315 at 20.

press.[367] The Union of Nova Scotia Indians was persistent in its calls for an investigation. The Black United Front, angered by Marshall's and other cases, where it alleged that racism existed in the criminal justice system, "joined the list of organizations demanding an inquiry."[368] Private citizens, frustrated by the situation, established a fund for Marshal's compensation. Detective MacIntrye's failed civil suit provided additional information for the media. Finally, Ebsary's trial, appeal and very light sentence, compared to Marshall's eleven years, only "added to the public outcry for an inquiry."[369]

With the mounting public and political pressure, that same year, the province appointed a one-person commission to examine the issue of compensation for Marshall. The commission, called the *Campbell Commission* after Justice Campbell of Prince Edward Island, was restricted to the issue of possible compensation for Marshall, rather than a broader look at the circumstances of the case.[370] As a compensation settlement was reached later that year, the *Campbell Commission* never held any hearings. By 1985, Detective MacIntyre had dropped his libel lawsuit and when Ebsary's last appeal was denied in 1986, the province announced that it would order an inquiry into the Marshall case.[371]

While all of the reasons cited by the provincial government for the long delay in instituting an investigation into the Marshall case have a "degree of reasonableness"[372], by 1983, it was legally clear that Marshall had not committed the offence. More than four years had elapsed before the province agreed to a formal public look at the circumstances that gave rise to Marshall's conviction. Given the importance of questioning how Marshall went through the system with all its alleged safeguards and was still convicted and imprisoned for eleven years, the province could have convened an inquiry as soon as it determined that a great error had

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[367] Wall, *supra* note 315 at 20.
[368] See Wall, *supra* note 315 at 20-21.
[369] *Ibid* at 21.
[370] Wall, *supra* note 315 at 18.
[371] *Ibid.*
[372] Wall, supra note 315 at 20-21.

been made.[373] The Court of Appeal's decision and the government compensation did not put to rest the public concerns regarding the handling of the Marshall case. The impetus for the public review of the case resulted primarily from pressure exerted by the media, Mi'kmaq and Black organizations, private citizens, and both federal and provincial political opposition.

4.2.2. - <u>The Royal Commission and its Mandate</u>

The *Royal Commission on the Donald Marshall, Jr. Prosecution* had a very limited mandate. The mandate directed the Commissioners to examine the events of May 28-29, 1971. The Commission was established:

> With the power to inquire into, report your findings, and make recommendations to the Governor in Council respecting the investigation of the death of Sanford William Seale on the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall, Jr., with that death; the subsequent conviction and sentencing of Donald Marshall Jr., for the non-capital murder of Sanford William Seale for which he was subsequently found to be not guilty; and such related matters which the Commissioners consider relevant to the Inquiry.[374]

As noted by author Bob Wall, the *Marshall Inquiry* was asked to find out "how things were done rather than why they had happened."[375] The Commissioners were not mandated to determine whether there were socio-economic conditions behind the treatment Marshall would ultimately receive. Rather, the Commissioners' job was to look at how the criminal justice system had acted towards one individual and recommend changes to the system based on what went wrong in that particular case. The focus on the mandate of the *Marshall Inquiry* highlighted the longstanding belief that the criminal justice system is neutral or value free - justice is blind. If anything goes wrong in the system the general response by officials is to address that particular part of the system which has been broken down. In turn, by focusing attention on the individual and what transpired *in the case*, criticisms of the broader aspects of the social structure surrounding the issues are

[373] Wall, *supra* note 315 at 18-19.
[374] *Marshall Inquiry*, *supra* note 317 at 7.
[375] Wall, *supra* note 315 at 22.

deflected.[376] As a result, in this case, a mandate focusing on the specific problems associated with the wrongful conviction of Marshall diverted attention away from the systemic problems in the justice system.

The mandate directed the Commission to inquire into four matters. First, there was the investigation of the death of Sandy Seale. Since the investigation of the death was conducted by Sydney City Police, this allowed the Commission to examine how the police functioned and investigated the circumstances of the stabbing. The second clause focused on the arrest and prosecution of Marshall with Seale's death. The Commission could examine the role of the Crown Prosecutor in reaching the decision to prosecute Marshall for the crime, what the charge would be, and how the prosecution was carried out during the trial. Under this mandate, the Commission could further investigate the relationship between the Crown and the Sydney Police, specifically Detective MacIntyre. The conduct of the defence lawyers would also be under scrutiny.[377]

The third clause examined the subsequent conviction and sentencing. This permitted the Commission to look at the trial proceedings; the evidence introduced; the testimony of the witnesses; the actions of the lawyers and judges; and the process by which the conviction was reached and the sentence imposed. Finally, the fourth clause "such other related matters which the Commissioners consider relevant to the Inquiry"[378] gave the Commissioners the discretion to include or not to include a wide range of items. It is this fourth clause, if deemed relevant to the Inquiry, that an investigation into the operation of criminal justice system as a whole could be justified. Commentators would contend the wording of the final clause was *carte blanche* for the Commissioners to widen their look at the justice system. Others, including then Nova Scotia Attorney General, held that the

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[376] R. S. Ratner, "Inside the Liberal Boot: The Criminology Enterprise in Canada," (1984) 13 Studies in Political Economy 145-167.
[377] Wall, *supra* note 315 at 22-24. See *Marshall Inquiry, supra* note 317 at 1-2.
[378] Wall, *supra* note 315 at 22-23.

phrase "relevant to the Inquiry" referred "only to the justice system at the time and place of the specific offence and was limited by the construction of the first three clauses of the mandate."[379]

There were some areas of the Marshall case that were not specifically designated in the mandate. The mandate did not contain any specific reference to the appeal process; the jury selection and function; the subsequent RCMP investigation; the role of the Halifax Attorney General's office; the years and treatment of Marshall while in prison; the circumstances surrounding the reference to Nova Scotia Court of Appeal; the treatment of Marshall prior to his exoneration; or what role racism may have played in the Marshall case.[380] The limited scope of this chapter precludes an examination of how the Commission chose to deal with all of these issues and other broader aspects of public policy raised by the wrongful imprisonment of Marshall. It was apparent from the beginning that the Commission intended to look beyond the events of May 28, 1971. In his opening statement at the 1987 hearing, Commission Chair, Chief Justice Alexander Hickman, stated clearly that the Commission would go far beyond the inquiry it was called to conduct, "it is not enough to examine minutely one incident, and from that to expect to suggest changes within a complex system of administration of justice."[381] The Commissioners had taken the very limited mandate, and in the face of public displeasure of government officials proceeded to expand it to include a wide range of political and social concerns.

4.2.2.1. - Principal Findings

On January 26, 1990, the *Royal Commission on the Donald Marshall, Jr. Prosecution* released its seven-volume report. In all, the Commission sat for ninety-three days in four locations. The Inquiry had granted full standing to fifteen parties, ranging from individuals actors

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[379] Wall, *supra* note 315 at 23.
[380] *Ibid* at 23.
[381] Wall, *supra* note 315 at 23-24. See also *Marshall Inquiry*, *supra* note 317 at 1.

to collective interests. It heard from 113 witnesses, some of whom testified more than once; recorded more than 16,300 pages of transcript and received close to 200 documents in evidence. The total cost of the Commission was eight million dollars.[382] After listening to two-and-half days of presentations from experts on the criminal justice system's treatment of Blacks and Aboriginals and on the role of the office of Attorney General, the Commissioners' Report concluded:

> The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for the murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by the evidence that this miscarriage of justice could – and should – have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native.[383]

The Commissioners found that the police investigation of the Seale's murder was "entirely inadequate, incompetent, and unprofessional."[384] The careless police work leading to Marshall's arrest was the result of perjured testimony from teenagers pressured into giving false evidence and Detective John MacIntyre's modus operandi, which reflected his own opinion of 'Indians.' The Commissioners concluded that Detective MacIntyre had decided very early in the case that Marshall had stabbed Seale in the course of an argument, "even though there was no evidence to support such a conclusion."[385] The Commissioners noted that Detective MacIntyre attempt to build a case against Marshall that "conformed to his theory about what happened went far beyond the bounds of acceptable police behaviour."[386] For example, the detective took Pratico to the murder scene, offered the youth his own version of the events and then persuaded Pratico to accept that version. The detective then pressured Chant, a teenager on

[382] Michael Harris, *Justice Denied: The Law versus Donald Marshall* (Toronto: HarperCollins Publishers Ltd, 1990) at 406. See also Barrie Anderson, *supra* note 311 at 48.
[383] *Marshall Inquiry, supra* note 317 at 1.
[384] *Ibid* at 2. See Barrie Anderson, *supra* note 311 at 48.
[385] *Marshall Inquiry, supra* note 317 at 3.
[386] *Ibid* at 3.

probation, not only into corroborating Pratico's statement, but also putting Pratico at the scene of the crime.[387]

Recognizing that the perjured evidence at trial did prove damning in court, the Commissioners also concluded that Marshall's wrongful conviction was the result of the failures of others – including both the Crown prosecutor and Marshall's defence counsel. The Crown prosecutor, Donald C. MacNeil, did not interview the key witnesses. The Crown also did not disclose to the defence the contents of witness's prior inconsistent statements.[388] Marshall's defence team failed to provide "an adequate standard of professional representation to their client."[389] In short, the lawyers conducted no independent investigation, did not interview any of the Crown's witnesses, and failed to ask for disclosure of the Crown's case. Railroaded, Marshall was also "denied a fair trial" by the trial judge.[390] The Commissioners concluded that Mr. Justice Louis Dubinksy made several errors in law. The most serious was his misinterpretation of the *Canada Evidence Act* which prevented a thorough examination of Pratico's recanting of his statement against Marshall. The Commissioners found that all of these events led to Marshall's conviction and sentence to life imprisonment.

James MacNeil coming forward with his new information was not disclosed to Marshall's defence team nor the Crown assigned to handle Marshall's appeal. As a result, this information was never presented during the 1972 appeal before the Nova Scotia Court of Appeal. The Commissioners also maintained that the Court of Appeal had a duty to review the complete trial record and ensure that all relevant issues were argued. The Commissioners found that the trial judge's errors were fundamental and that the Court of Appeal could have "ordered a new trial if it had been aware of those errors."[391]

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[387] Barrie Anderson, *supra* note 311 at 32-33. *Marshall Inquiry, supra* note 317 at 3.
[388] *Marshall Inquiry, supra* note 317 at 4.
[389] *Ibid* at 4.
[390] *Marshall Inquiry, supra* note 317 at 4.
[391] *Marshall Inquiry, supra* note 317 at 5.

Although ending in the confirmation of Marshall's innocence, the Commissioners concluded that the special reference hearing itself was flawed. The Court in the second appeal was excoriated by the Commission for, among other things, its unfounded accusations that Marshall had been involved in a robbery and then committed perjury, its defence of a faulty criminal justice system, and its refusal to admit that a miscarriage of justice had occurred. The Commissioners also concluded that the Court of Appeal made a serious and fundamental error when it used its 1983 acquittal of Marshall to blame him for the system's mistake. At the same time, the Commission found that the Court did not deal with "either the significant lack of disclosure by the Crown prior to Marshall's original trial, or the reasons for the perjured eyewitness testimonies, nor did it deal with the trial judge's error in limiting the cross-examination of Pratico."[392] The Commissioners concluded that the Court's decision amounted to a defence of the criminal justice system "at the expense of Donald Marshall, Jr" in spite of the overwhelming evidence that the system had failed him.[393] Finally, the Commissioners noted the Attorney General's Department did not treat Marshall fairly in its handing of his claim for compensation.[394]

4.2.2.2. - Principal Recommendations

The eighty-two recommendations of the Commission which were intended to prevent future miscarriages of justice covered several major fields. It is not possible to comprehensively address the many recommendations of such a massive report in this chapter. However, some recommendations should be mentioned. The Commissioners began with a section on how to better handle alleged cases of wrongful convictions and applications for compensation. Next, there was extensive advice on how to sensitize the criminal justice system to address discrimination faced by racialized groups, such as engaging government officials in cultural

[392] *Marshall Inquiry, supra* note 317 at 7.
[393] *Ibid.*
[394] H Archibald Kaiser, "The Aftermath of the Marshall Commission: A Preliminary Opinion" (1990) 13 Dalhousie L J 364, 366 [Kaiser].

training. Nova Scotia Mi'kmaq would, according to the Inquiry, benefit from the establishment of a Native Criminal Court, a Native Justice Institute and a tripartite forum on outstanding issues between Aboriginals and the federal and provincial governments. Aboriginals could be brought closer to the criminal justice system through consultation in Native Justice Committees, better connection with the Bar, and more Aboriginal personnel in the justice system. As well, the Inquiry recommended, that African Canadians should see changes in the *Human Rights Act*, better funding for the Human Rights Commission and more legal aid resources. Meanwhile, various Chief Justices and Judges have the responsibility to ensure fair treatment of racialized groups.[395]

The Commission suggested that the criminal justice system ought to be changed at many levels. A Director of Public Prosecutions should be added. There should be better policy guidelines for laying charges and staying prosecutions. Crown disclosure standards should be more liberal and there should be revisions in the policy governing plea and sentence bargaining. The final thirty-six recommendations dealt with policing. Departments were encouraged to be independent, to recruit members of racialized and Aboriginal groups, to develop policies on interviewing vulnerable people, to establish codes of ethics, to set standards for policing and to better plan and manage at the departmental level.[396]

The Marshall case ushered in major recommendations to change the provincial criminal justice system. Of the thirty–nine recommendations made by the Royal Commission related to the administration of justice in Nova Scotia seventeen had been implemented by the summer of 1990. The most enlightened reforms were the appointment of an Independent Director of Public Prosecutions aimed at removing politics from the justice system, more funds for legal education, and a new system to ensure the disclosure of crown evidence to defence attorneys. Shorty after

[395] Kaiser, *supra* note 394 at 365-366. See *Marshall Inquiry, supra* note 317 at 10-12.
[396] See Kaiser, *supra* note 394 at 366.

the release of the *Marshall Inquiry*, Nova Scotia's Attorney General apologized to Marshall and his family for the miscarriage of justice.

4.3. - PART III – RACE CONSCIOUSNESS IN *THE MARSHALL INQUIRY*

4.3.1. - Getting at the Racism

There was no outright or direct evidence of racial bias or discrimination against Marshall at the Inquiry. Testimony was never given where someone admitted to acting out of racial malice. However, the absence of direct racist conduct, does not rule out race as a factor in the Marshall case. As such, questions originally raised included, what role, if any, did racism play in the Marshall case? The *Marshall Inquiry* stated, at various points in its Report, "that the fact Marshall was a Native was a factor in his wrongful conviction and imprisonment,"[397] that "Marshall was denied justice because he is an Indian,"[398] that "the system does not work fairly or equally"[399] and that "justice is not blind to color or status."[400] To the *Marshall Inquiry* all of these statements seemed to be ways of saying the same thing: race was a factor and operated to Marshall's detriment.

Neither the Marshall case nor the Royal Commission operated independently of the society and culture in which it was situated. As the Commission began to acquire testimony and search for an understanding of the events which led to the conviction and imprisonment of Marshall, racism appeared as the dominant factor in the criminal justice system's failure. For example, the Union of Nova Scotia Indians' submission to the Royal Commission, prepared by Professor Bruce Wildsmith, concluded that:

> The overwhelming preponderance of evidence leads to the conclusion that the various checks and balances in the justice system would far more likely have worked for a non-Indian. Put bluntly, if any of the key actors in the justice system who touched his case in the period of 1971-1982 had fairly and competently applied their talents to whether Donald Marshall, Jr. was really guilty, the system had a chance of working. The fact

[397] *Marshall Inquiry, supra* note 317 at 275.
[398] *Marshall Inquiry*, supra note 317 at 162.
[399] *Supra* note 317 at 193.
[400] *Ibid.*

> that no one did and that the system failed had much to do with the fact that Mr. Marshall is a Micmac Indian.[401]

Before drawing the conclusion that Marshall, Jr. was a victim of racism, the Commissioners looked at a number of resources. First, it examined specifically how the criminal justice system in Nova Scotia operated in the Marshall case. Second, it compared the handling of the Marshall case with the way in which the system dealt with cases involving powerful and prominent public officials. Third, it commissioned an independent research study to find out how Aboriginals and Blacks were treated in the criminal justice system.[402] Whether indirectly or not the Commissioners would address the cultural climate that existed in Nova Scotia and the relationship between Aboriginal people and other racialized groups during this time. As noted in the previous chapter, the discrimination against Aboriginals in the criminal justice system cannot be divorced from the discrimination in the rest of society. In short, the criminal justice system does not operate in a vacuum. From the outset, the Commissioners heard allegations that the criminal justice system in Nova Scotia treated people differently based on their race and social standing.[403] An Aboriginal person in Sydney in 1971 was a member of a severely disadvantaged group. Socializing between Aboriginals and Whites "on equal footing was unknown in Sydney."[404] The testimony before the Commission confirmed that a racist environment existed in 1971 and, as a result Aboriginals were not valued as much as their counterparts.

4.3.1.1. - <u>Institutional Racism</u>

The Commissioners were not clear as to what element of the justice system pointed directly to racism against Marshall. Rather, the Commission, during the process of reviewing the events and actors involved in the case, identified several criminal justice officials who were

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[401] james youngblood 'sakej' henderson, "The Marshall Inquiry: A View of the Legal Consciousness" in Joy Mannette, ed *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood Publishing, 1992) at 42 [Henderson].
[402] *Marshall Inquiry, supra* note 317 at 16-17.
[403] *Supra* note 317 at 13.
[404] Henderson, *supra* note 401 at 42.

influenced negatively by Marshall's race.[405] The Commission had to infer the degree of racial bias that existed among the dominant players' from the outcomes and effects of their behaviours.[406] The Inquiry's method of isolating racism in action was controlled against the intentions in an ideal or hypothetical manner (for example, what a reasonable official should have been thinking about and what they should have done). It was by contrasting the actions, or lack of actions, of the criminal justice officials and the consequences to Marshall, that racism was defined in the Inquiry. Because of this, at times, the line was blurred between what appeared to be racist actions and simple incompetence and negligence in the case. Yet, the *Marshall Inquiry* would show that racism accounted for the systemic conduct of many of the criminal justice officials. For example, in determining why Detective MacIntyre focused immediately on Marshall as the only viable suspect, the Commission concluded:

> We believe that fact that Marshall was a Native is one reason why MacIntrye singled him out so quickly as a prime suspect without any evidence to support his conclusion. We are convinced that if Marshall had been White, the investigation would have taken a different course. We have no direct evidence to support this belief. It is our opinion based on our observation of many of the witnesses who appeared before us.[407]

As mentioned, to address the effects of racism against Marshall, the Commissioners relied on the actions of key actors in the case to derive meaning from the intent or purposes of their actions. The key players in the administration of justice in Nova Scotia would not directly admit to deliberate racial discrimination or prejudice. Discriminatory racial perceptions can be approached in many ways. Racial discrimination can be evidenced by unconscious, indirect, unintentional and systemic actions. James 'Sakej' Youngblood Henderson indicates one way the testimony of witnesses at the Inquiry confirmed that racism existed in Nova Scotia in 1971:

> Staff Wheaton of RCMP testified that he had originally disagreed with the characterization of Sydney, Nova Scotia, as having a 'redneck atmosphere.' But after his investigation with a cross section of people (for example, educators, lawyers,

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[405] Bruce H Wildsmith, 'Getting at Racism: The Marshall Inquiry", (1991) 55:1 Sask L Rev 106 [Wildsmith].

[406] Henderson, *supra* note 401 at 41.

[407] *Marshall Inquiry, supra* note 317 at 3.

doctors, merchants, and others) about racism in Sydney in 1971 he found that such an atmosphere existed and may have played on the jury's mind. When asked what he meant by redneck, Wheaton stated that it connoted racial problems similar to those endured by African Americans in the southern United States.[408]

The clearest admission of racism in the Inquiry was the advice given to Felix Cacchione from the Attorney General's Department.[409] Cacchione was Marshall's attorney when, after his release from prison, Marshall sought compensation from the government for his wrongful imprisonment. Cacchione's testified that Robert Anderson, Director of the Criminal Department in the Nova Scotia Attorney General's office, advised him, "Felix, don't put your balls in a vice over an Indian."[410]

Having found that racism played a significant role in Donald Marshall, Jr.'s wrongful conviction, the *Marshall Inquiry* recognized that many of the causes of discrimination were rooted in institutions and social structures outside the criminal justice system. Sworn testimony showed that the common perception that was underscored in the prosecution of Marshall was one held by the dominant society.[411] Despite the ideology of equal application and protection of the law, the police in Sydney were the protectors of dominant society and served to maintain social order. Testimony at the Commission would reveal that Marshall was arrested and convicted because he was viewed as an Indian who refused to accept a subordinate role assigned to him. In short, "he did not know his place."[412] At that time, the police regarded Aboriginals who hung around the public park as trouble-makers. Detective MacIntyre discounted Marshall's version of events. It was not Marshall's first interaction with the local police. The police first sought to charge Marshall with giving liquor to a minor and with knocking over the MacIntyres' gravestone.[413] Detective MacIntrye clearly considered Marshall a troublemaker.

[408] See Barrie Anderson, *supra* note 311 at 49.
[409] Henderson, *supra* note 401 at 40-41.
[410] *Ibid* at 41.
[411] Henderson, *supra* note 401 at 41.
[412] *Ibid.*
[413] Henderson, *supra* note 401 at 48-49.

Direct evidence noted that Aboriginal youth in Sydney in 1970s were constantly being picked up by the police because they looked 'Indian.' Testimony presented the Mi'kmaq youth as warlike, "broken arrows" and "wagon burners."[414] They were often referred to as "redskin" or "squaws".[415] Many of these youth were often told, "to get back on the reservation" where they belonged.[416] Many of those who testified felt that the police wanted to assert their authority.[417] Local prosecutors and judges complained that the "Indian youth did not know their place in society." In this way, the "Indians did not belong in Sydney and merely came to upset the peace and quite."[418] For example, it was alleged by a court worker that a local judge stated in court that a fence should be built around a reserve so that the 'Indians' could not get out and come to Sydney where they cause problems.[419]

In such testimony, it was clear that the criminal justice system officials defined their relationship to the Nova Scotia's Mi'kmaq in terms of categories of race which are connected with certain images of the primitive and savage. This belief that connects 'Indians' with savages makes otherwise insidious discrimination appear reasonable. The myth of the inherent Aboriginal criminality remains entrenched in Canadian consciousness. The cross-examination before the Commission followed up these particular expressions of value and belief.[420] In this context, it is not surprising that, as was noted by Marshall's trial attorney, "the jury must have said to itself, 'he's an Indian and most likely he would've have done it. He's a bad Indian. He probably commit[ted] it.'"[421] It was an interesting comment on the justice system that a young Mi'kmaq was sentenced to life in prison for a crime for which an older non-Aboriginal later received a one year sentence.

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[414] Henderson, supra note 401 at 39, 42-43.
[415] Henderson, *supra* note 401 at 39.
[416] *Supra* note 401 at 43.
[417] *Ibid.*
[418] *Ibid* at 43.
[419] *Ibid.*
[420] Henderson, *supra* note 401 at 44.
[421] Henderson, *supra* note 401 at 49.

4.3.1.2. - The Treatment of Others

In order to test the allegation that the criminal justice system in Nova Scotia dealt with people differently based on their race, the Commission investigated how the system functioned in cases involving those who might be considered to a have power and influence and compared it to the treatment given to Marshall. The Commission looked at two specific cases involving members of the Nova Scotia Government – Roland Thornhill and Bill Joe MacLean (both White) to determine if there was a different standard in Nova Scotia, "depending on one's race or social standing."[422]

After becoming a member of the Government, Roland Thornhill reached an agreement with four Canadian chartered banks to settle his outstanding indebtedness to them by paying twenty-five cents for every dollar he owed. At that time, section 110(1)(c) of the *Criminal Code* indicated that a government official or employee who received a benefit without the consent in writing of his or her superior is guilty of an offence. An initial RCMP investigation into whether Thornhill could be charged as a result of this agreement was abandoned in early 1980 after a preliminary inquiry. The officers decided that they could not proceed because they did not know if Thornhill was a member of the Government at the time the offence was committed. However, in April 1980, the RCMP decided to take up the case again and concluded that there was prima facie evidence against Thornhill. After a preliminary report was forwarded to the Department of the Attorney General, Deputy Attorney General Gordon Coles instructed that a directive be issued forbidding the RCMP to have any contact with local prosecutors on the case until the investigation was completed and a report filed to the Attorney General.[423]

The RCMP filed a final report in September 1980 recommending that at least one charge be laid against Thornhill.[424] However, without further consultation with the RCMP, then Attorney

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[422] *Marshall Inquiry, supra* note 317 at 5.
[423] *Ibid* at 5.
[424] *Marshall Inquiry, supra* note 317 at 13.

General, Harry How, announced in October 1980 that there had been no criminal wrongdoing by Thornhill. Attorney General How testified that he relied on and accepted the recommendations of his Deputy, Gordon Coles. The Commissioners in the *Marshall Inquiry* concluded that the Thornhill matter was not handled in the normal way, either by the RCMP or the Attorney General. The Commission found the Department's disinterest in pursuing an investigation against the political figure disturbing and believed this was a result of Thornhill's high profile within Government. In short, the Commission argued that Thornhill received preferential treatment.[425]

In another case the Commission examined, Billy Joe MacLean was convicted of four charges of uttering forged documents in connection with expense claims he submitted as a member of the Legislative Assembly and as a provincial Cabinet Minister. The case began in 1983 when the provincial Auditor General asked the RCMP for advice on MacLean's expense claims. According to the letter from the Auditor General to the Deputy Attorney General, the RCMP determined that "there is justification to take the matter further."[426] Deputy Attorney General Coles again assumed direct charge of the Department's response and provided analysis and advice to the Attorney General. The allegations against MacLean were dismissed as "accounting irregularities."[427] The Department argued that no further investigation or prosecution was warranted. Then Attorney General Ron Gifffin testified that he followed the advice of his Deputy which was a hands-off policy because of the sensitive political nature of the issue.[428]

The Commission determined that although the RCMP had originally concluded that the matter should be investigated further, no action was taken until 1985 when then Liberal Leader, Vince MacLean, directly requested the RCMP to investigate. The Commissioners concluded

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[425] *Marshall Inquiry, supra* note 317 at 14.
[426] *Supra* note 317 at 14.
[427] *Ibid.*
[428] *Ibid.*

that the RCMP's reluctance to proceed with political criminal investigation without clear authorization from the Department of Attorney General was "a dereliction of duty and a failure to adhere to the principle of police independence."[429] Further, they argued that the "justice system's response indicated an undue and improper sensitivity to the status of the person being investigated."[430]

While a better comparison to the *Marshall* case would possibly have been a poor, young, white person who was charged with murder, the differential treatment in these two cases did lend weight to the Inquiry that the reasons for Marshall's conviction were due in part because of racism. Having concluded that special treatment was accorded in both of the above investigations, the Commission determined that "there is a two tier system of justice – that the system does respond differently, depending on the status of person investigated."[431] The Inquiry stated:

> Officials in the Department of Attorney General are more concerned about the career of a politician than the reputation of an Indian; they are quick to write superficial and unprofessional opinions that support not investigating or charging a politician yet search for reasons to limit the compensation paid to an Indian for years of wrongful imprisonment; and they require substantially more likelihood of conviction before charging a politician than an Indian.[432]

4.3.1.3. - Additional Studies

The Commission contracted various research studies in several areas of social science. The Commission established a special study by Scott Clark on the Mi'kmaq and Black experience in the criminal justice system in Nova Scotia.[433] The Commission launched the research program because in its view "the public hearing process was not a suitable forum for a discussion and analysis of complex issues of discrimination and racism."[434] Its purpose was "to

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[429] *Marshall Inquiry, supra* note 317 at 15.
[430] *Ibid* at 15.
[431] *Marshall Inquiry, supra* note 317 at 220.
[432] *Ibid.*
[433] Nova Scotia, Royal Commission on the Donald Marshall, Jr. Prosecution, *The Mi'kmaq and Criminal Justice System in Nova Scotia: Research Study by S. Clark*, vol. 3 (Halifax: Province of Nova Scotia, 1989).
[434] *Marshall Inquiry, supra* note 317 at 149.

take an analytical look at whether – or to what extent – race is a factor in the criminal justice system in Nova Scotia."[435] It was "to determine whether what happened to Seale and Marshall could also happen to two teenagers in a similar situation in 1990."[436]

Relying on the studies, statistics, comments of others, and complaints and feelings of those from racialized communities to answer their questions, the Commission was left with the view that race was a significant factor in the Marshall case, and racism would continue to be a significant issue in the criminal justice system until the "government at all levels devise firm anti-racism policies."[437]

4.3.2. - Historical Racism

While addressing the implications of racism in the Marshall's case, the history of discrimination and exploitation against the Aboriginal population was overlooked by the Commissioners. The historical account of racism was not seen by the members of the Inquiry as a general premise that explained how the criminal justice system came to validate race in Nova Scotia in 1971. This was a methodological problem in the Inquiry. The legal history of discrimination and exploitation is the historical backdrop that gives explanation as to what had happened to the Mi'kmaq population and why Marshall's wrongful conviction occurred. In short, the legacy of racism is interwoven with Canadian culture, core values, ideals and norms. What takes place in the criminal justice system, such as stereotypical assumptions about crime, and those who commit, has historical roots. The exclusionary practices that Aboriginals faced historically in accessing public life are present in the forms of measures and legislation that operated to reinforce the beliefs of the past.

The Commission ignored the problems that surrounded Marshall and others attempts to integrate into Sydney's society. While the testimony evidenced the stratified society and

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[435] *Marshall Inquiry, supra* note 317 at 149.
[436] *Ibid.*
[437] *Marshall Inquiry, supra* note 317 at 150.

negative police attitudes towards racial integration, the Commission, for example, never looked into the historical context of the public policy of assimilation. If it had, the Commissioners would have been better able to identify, clearly, the use of police and the courts in punishing those who attempted to integrate into Sydney's dominant society.[438] If such historical background had been explored, it is argued that the activities of the criminal justice officials would not only have been viewed as an injustice to Marshall, but also a deeply entrenched systemic problem.

4.3.2.1. - The Legacy of Discrimination

What follows is a brief, non-exhaustive historical overview in order to understand the context of racism and racial discrimination against Aboriginal people. Historically, policies and practices towards Aboriginal persons have been based on assumptions that they were inferior and incapable of governing themselves. Other patterns of interaction were characterized by a desire to assimilate, displace or segregate Aboriginal persons or suppress their culture.[439]

As noted in the previous chapter, race is a biased way of classifying and identifying people. In brief, race is a socially constructed historical phenomenon that has been explained through critical race analysis. The historical construction of race has been given a contemporary reality and the social importance of race has manifested in the operation of the justice system. In this way, what made Marshall an 'Indian,' was that dominant society identified him as such. Not once did testimony of a non-Mi'kmaq mention the particular tribe that Marshall belonged to. Throughout his ordeal, Marshall was always considered simply an Indian. There was no mention of his nationality – only his race. Under the *Indian Act*, the designated Minister generally had the power to define for legal purposes who is an 'Indian.'[440] The term Indian was used to accept the European colonial view of racial inferiority.

[438] Henderson, *supra* note 401 at 45.
[439] *Policy and Guidelines on Racism and Racial Discrimination* (Toronto: Ontario Human Rights Commission, 2005), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy> at 8.
[440] *Indian Act*, RSC 1985, c I-5 s. 5-17.

The continued use of the term 'Indian' throughout the Inquiry only further illustrated colonial thought in Nova Scotian society and the justice system. It raises questions as to why race became a key indentifying category in the Marshall case. The conception of Aboriginal as primitive, inferior and uncivilized finds its roots in colonialism. In direct testimony, the term 'crazy Indian' was used by residents; the Sydney police referred to Mi'kmaq as 'broken arrows' and 'wagon burners'. 'Indian' became a word that emphasized race and excluded Aboriginals from equal participation in Canada. For instance, history reveals that the Department of Indian Affairs had reclassified certain individuals involuntarily as non-Indians, automatically giving them formal equality with others. This enfranchisement policy, forced upon educated Mi'kmaq and those seeking employment off the reserves. Additionally, during this time, the *Indian Act* provided that a Mi'kmaq woman, by marrying a non-Indian man, irrevocably lost her status as an Indian. The practical effect of this definition of Indians was a subtle attempt to undermine Aboriginal society.[441] This was not a hidden purpose; it was candidly explained by Canada's Deputy Superintendent-General of Indian Affairs in 1920: "[o]ur goal is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question and no Indian Department, [and] that is the whole object of the 'Indian Act.'"[442]

The *Indian Act*, first enacted in 1876, gave the federal government control over Mi'kmaq political structure, resources and economic development and every important aspect of their lives. The segregation of the Mi'kmaq on the reserves appeared late in Canadian history in the 1940s. To enforce centralization policy, the Department of Indian Affairs introduced the *Criminal Code* to the Mi'kmaq. The criminal law was used to force Mi'kmaqs onto reserves, such as Membertou (where Marshall resided).

To accelerate the civilization and political socialization process, the Department of Indian Affairs removed Mi'kmaq children from their parents to residential schools. Historical accounts

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[441] Henderson, *supra* note 401 at 46.
[442] *Ibid.*

note that in these residential schools Mi'kmaq children were imprisoned, beaten for speaking their own language, and often forbidden to communicate with their families.[443] Faced with resistance against centralizations, problems of overcrowding, and poverty by the 1949, the Department of Indian Affairs ceased its centralization policy and began its policy of formal assimilation into provincial society. This was the operating policy under which Marshall and his peers grew up. By 1969, the federal government sought to officially terminate the special and political status of Indians.

The formal process of assimilation of Aboriginals began with the 1969 White Paper. In its 1969 White Paper, the federal government's unspoken assimilation policy became explicit. The government maintained that equality was the key ingredient in the solution to the problems facing the Indians. The goal of equality was to be achieved by terminating the Aboriginal and treaty rights. It was under this political context that Marshall and other Mi'kmaq youth began to meet their counterparts in public schools and the parks in Sydney. Contrary to the policy at the time, numerous witnesses before the *Marshall Inquiry* revealed that local police sought to have Indians removed and placed back on their reserves. From the sworn testimony and the actions of the police, they believed it was their job to maintain racial separation and not to promote integration. The evidence showed, at the Inquiry, that it is these same attitudes that allowed the police to fabricate eyewitness testimony in the Marshall case in order to rid the town of the Indian troublemakers.

At the time of Marshall's trial, the White Paper was withdrawn by the federal government, and the era of self-determination among Aboriginals began. Nonetheless, Aboriginals were still viewed as being at the "bottom of the social totem pole."[444] There had not been an Aboriginal employed on the Sydney police force, or elected to city council.[445] Between

[443] Henderson, *supra* note 401 at 47.
[444] Henderson, *supra* note 401 at 42.
[445] *Ibid.*

1958 and 1988 an Aboriginal person had never been employed by the city, as a secretary, fire fighter, or teacher,[446] practiced law or worked in the courts.[447] In short, Aboriginals were economically discriminated against.

At the time Aboriginal people were not "worth as much as Whites."[448] Overall, this view was shared by most in Sydney's White community. Maintaining the social and racial order could explain many of the administrative errors in the Marshall case. Testimony at the Commission exposed that the local police refused RCMP assistance at the beginning of the case.[449] The Deputy Police Chief testified that the Marshall case was the only time he remembered that the RCMP was not brought in on a murder investigation.[450] Second, the Chief of Police spread the fear of a racial war among the members of the police force. According to direct testimony, the Chief stated that "the Negro community was going to take out their vengeance on the Indians and the Indians were going to take out their vengeance on the whites, who were lying against Marshall."[451] Third, evidence contrary to the police theory of the crime was continually suppressed.[452] For example, Pratico's confession; James MacNeil's confession that Roy Ebsary was the actual killer; and Donna Ebsary's confirming statements in 1974 that her father committed the murder were never disclosed to Marshall's defence team. This historical account explains the attitudes and responses at the time of Marshall's case. In the end, the cultural climate in 1971 provides insight into why Donald Marshall became the focus of the police investigation from the moment Seale was stabbed.

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[446] Henderson, *supra* note 401 at 42.
[447] *Ibid.*
[448] *Marshall Inquiry*, *supra* note 317 at 3.
[449] Henderson, *supra* note 401 at 49.
[450] *Supra* note 401 at 49.
[451] *Ibid.*
[452] *Ibid.*

4.4. - SUMMARY

The Marshall case brought public attention to how the criminal justice system worked and raised a number of questions about the fairness of the criminal justice process, especially for Aboriginal people. The Commission's review and assessment of the criminal justice system in Nova Scotia revealed serious shortcomings. The Commission's recommendations were intended to remedy those shortcomings and promote a system of administration of justice that responds to everyone fairly, despite race and/or social standing. Forty years later, the Marshall case demonstrates how, within the Canadian context, systemic racism and social disadvantage may contribute to miscarriages of justice.[453]

[453] Denvo & Campbell, *supra* note 312 at 232.

CHAPTER FIVE

THE UNOFFICIAL STORY: THE OTHER FACES OF WRONGFUL CONVICTIONS

> It wouldn't surprise me if race entered into it. They probably looked up my record and saw my past conviction. An Indian guy with a prior. What's more juicy than that?[454]

> I do not mean to imply that a mistaken conviction of black men is any worse than of white men. But I do worry that just being black makes the mistake all that much more likely in the first place.[455]

5. - INTRODUCTION

While racial discrimination in the criminal justice system is, to say the least, morally troubling, the prospect of incarcerating an innocent person is simply unthinkable. What happens when these two phenomena coincide? Is there a connection between race and wrongful convictions? This research examines what has been included within the concept of wrongful convictions and specifically questions where are the experiences of racialized defendants in the narratives and reports on wrongful convictions in Canada. Certainly race and racism are not entirely missing from the discourse. In the United States, for example, attention has been given to the subject with research showing that racial disparities found elsewhere in the criminal justice system also appear in the conviction of the innocent. However, since the 1990 *Royal Commission on the Donald Marshall Jr,. Prosecution*, when one explores the mainstream discourse on wrongful convictions and how to prevent them, the racialized experience is relatively absent.

Following the previous chapters, this section seeks to broaden the scope of inquiry by rethinking the study of miscarriages of justice to investigate the connection between racism and the conviction of the innocent. This chapter is divided into four parts. Part I begins by examining race and innocence since the *Royal Commission on Donald Marshall Jr., Prosecution*. Building

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[454] *Quote from William Mullins-Johnson, a Toronto man who was wrongfully convicted of killing his four-year-old niece; Joe Friesen, "It ripped my soul out" *The Globe and Mail* (13 September 2005), online: The Globe and Mail <http://www.globeandmail.com> [Friesen].

[455] Andrew Taslitz, "Racial Blind Sight: The Absurdity of Color-Blind Criminal Justice" (2007) 5:1 Ohio St J Crim L at 33 [Taslitz].

on existing American scholarship the section provides a more complete picture in measuring the impact of race in wrongful conviction cases. Part II, briefly draws on a few cases since *R. v. Marshall* to illustrate that the issue of race in wrongful convictions in Canada has been silenced or decontextualized. Part III explores the reasons why the experiences of racialized people have virtually been ignored in the discourse on wrongful convictions. One explanation is that the same systemic barriers that racialized defendants encounter in the criminal justice system also exist in addressing racism as a contributing factor in wrongful convictions. Further, at times, lawyers have failed to engage in race talk and the judiciary has resisted adopting appropriate critical race standards. Part IV makes the case for a particular type of reform in the discourse on wrongful convictions – the development of critical race strategy in order to address racial biases in the administration of justice. Finally, the chapter concludes by offering preliminary thoughts on the future study of wrongful convictions.

5.1. - PART I: BEYOND *THE MARSHALL INQUIRY*

5.1.1- The Big Picture

The discourse on wrongful conviction has a long scholarly history. A number of writers, mostly lawyers, journalists and activists have documented the convictions of the innocent and described their causes and consequences. Yet, recently, a critical mass of criminologists, social scientists and legal scholars has emerged in studying wrongful convictions.[456] As a result, there is a great deal more of scholarship on the topic than ever before. The newfound interest in wrongful convictions is more than likely related to developments in the political and social context. In the past decade, there has been an increase in newspaper stories, magazine articles, and general coverage on the plight of the wrongfully convicted.[457] With the proliferation of innocence projects and organizations dedicated to addressing wrongful convictions

[456] Richard A. Leo, "Rethinking the Study of Miscarriages of Justice" (2005) 21:3 Journal of Contemporary Criminal Justice 201, 202 [Leo].

[457] For example, most recently, the cases of Robert Baltovich; William Mullins-Johnson; Anthony Hanemaayer; Sherry Sherret-Robinson; and Tammy Marquardt.

throughout the country, the public is more familiar with the high profile cases of the wrongly convicted. As a result, there is greater recognition across the spectrum that wrongful convictions are a real and ongoing social and legal problem. In short, these are important times to be researching and writing about miscarriages of justice. However, despite the increasing academic and political attention given to the problem, the study of wrongful convictions is arguably still in its infancy.

This research challenges the causes of wrongful convictions as they are generally understood. This is achieved by asking why racial bias has only been discussed in very limited ways in the dominant discourse. The examination of wrongful convictions in Canada and the review of literature on the subject illustrates that there has been a failure among scholars to produce a method that might adequately examine the nexus between wrongful convictions and racial discrimination. In general, the legal causes of wrongful convictions are well-known. The literature has summarized the contributing causes as: (1) eyewitness misidentification; (2) tunnel vision; (3) prosecutorial misconduct; (4) unreliable scientific evidence (junk science); (5) perjury and jailhouse informants; (6) inept defence work; (7) false confession; and (8) police misconduct. This thesis does not dispute the importance of the above causes for wrongful convictions, nor in any way minimizes the injustices caused to past victims of such errors and misconduct. Rather, this research argues that further examination is required to expose whether racial discrimination is a distinct and identifiable cause of wrongful convictions in Canada.

5.1.2. - Race and the Innocent

Despite several public inquires on wrongful convictions, judicial recognition of racial profiling, and evidence of racial disparities across every stage of the Canadian criminal justice system, no legal scholar has yet critically examined the role of racism in the study on wrongful convictions. As well, the leading organization dedicated to addressing and preventing miscarriages of justice – the Association in Defence of the Wrongly Convicted (AIDWYC) has,

until recently, only adopted homicide cases where strong proof of factual innocence is present (usually in the form of exculpatory DNA evidence).[458] As a result of this narrow criterion, many cases of miscarriages of justice have been excluded. With limited cases to investigate, there has been a silencing in the study of wrongful convictions as it relates to racial discrimination.

In 1990 the *Royal Commission of Donald Marshall, Jr. Prosecution* (the "*Marshall Inquiry*") challenged the longstanding belief that the criminal justice system is neutral or value free, that is, the notion that justice is blind. In 1971 Donald Marshall, Jr. was charged, tried and convicted for a murder he did not commit. Marshall, a Mi'kmaq, would spend eleven years incarcerated. His subsequent struggle with the government for compensation drew a great deal of interest from the general public. The mishandling of his case brought the criminal justice system under severe criticism. The case raised a number of disturbing questions concerning the fairness of the justice system, particularly for Aboriginal people. A royal commission of inquiry was created to investigate the circumstances surrounding Marshall's wrongful conviction and imprisonment. The Inquiry went beyond the specifics of the individual case and found that many of the errors were rooted in institutions and social structures outside of the criminal justice process. At the time of Marshall's trial a racially stratified society existed in the City of Sydney, Nova Scotia. The Commission concluded that "the criminal justice system failed Donald Marshall, Jr. at virtually every turn" and that racism was a factor in his wrongful conviction.[459]

Since the *Marshall Inquiry* the issue of race in wrongful conviction cases in Canada has been relatively ignored. If and when racial discrimination exists, it is not well-documented and, in turn, it is denied. There have been approximately thirty high profile wrongful convictions uncovered in Canada.[460] To date, AIDWYC has been involved in approximately nineteen

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[458] The case of Anthony Hanemaayer, a London, Ontario plead guilty part way through his 1989 trial for sexual assault of a fifteen-year old Toronto girl to avid a stiffer sentence, provided a successful test for AIDWYC.
[459] See Nova Scotia, *Findings and Recommendations of the Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: The Royal Commission, 1989) [*Marshall Inquiry*].
[460] See Association in Defence of Wrongful Conviction, online: AIDWYC < http://www.aidwyc.org/AIDWYC_Cases.html> [AIDWYC].

exonerations and yet racial discourse in wrongful convictions has not been developed in a coherent fashion. Recent research accumulated by legal scholars and social scientists in the United States points to the conclusion that racial discrimination in wrongful convictions do happen and they occur in cases where the stakes are the highest – cases in which the public's interest in apprehending and punishing the wrongdoer is at its height.

5.1.3. - The Race Effect on Wrongful Convictions

5.1.3.1. - Confronting Race – The American Experience

The focus of wrongful conviction literature has been on how to correct flaws in the criminal or police investigatory procedures that allow factually innocent people to be convicted. In the last few years, there has been an emergence of scholars who have studied race and ethnic differences in the frequency of criminal behaviour and in arrests by police, adjudication by prosecutors, decisions by jurors and sentencing by judges. In the United States, these race scholars, have been turning their attention regarding the racial and ethnic disparity in the criminal justice system to the study of wrongful convictions. Studies on wrongful convictions published over the past twenty years have shown that racial disparities found elsewhere in the American criminal justice system also appear in the conviction of the innocent.

Early studies on wrongful convictions in the United States consistently found that racial discrimination was a primary reason for errors in capital cases.[461] Most studies to date that have examined the relationship between racial discrimination and innocence have focused primarily on the role the race of the defendant played in contributing to their conviction and/or the disproportionate representation of African Americans on death row and among the wrongly convicted. In general, studies on wrongful convictions in the United States support the conclusion that the race of the offender is a significant factor that contributes to the errors that result in a wrongful conviction.

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[461] See J Frank & B Frank, Not Guilty (Garden City, NY: Doubleday, 1957); E S Gardner, The Court of Last Restort (New York: William Slane Associates, 1952); E D Radin, The Innocents (New York: William Morrow, 1964).

One landmark study conducted by Bedau and Radelet in 1987 assembled the most extensive database of cases of wrongful convictions in American history.[462] The researchers compiled information on 350 cases of wrongful convictions (326 homicide and 24 rapes) across American jurisdictions from 1900 to 1985. Bedau and Radelet concluded that among the 350 cases, approximately forty-three percent involved Black defendants. These findings led them to conclude that "the risk of a miscarriage of justice falls disproportionately on blacks when compared to their representation in the population, but not in comparison to their arrest"[463]:

> Since the proportion of blacks in the general population in this century [the twentieth] has been about 10%, the data suggest that blacks are much more likely than whites to be erroneously convicted of a potentially capital crime. Because black Americans are more likely than whites to be arrested and indicted for felony offenses, it appears that the risk of a miscarriage of justice falls disproportionately on blacks when compared to their representation in the population, but not in comparison to their arrest rates.[464]

In their 1992 book, *In Spite of Innocence*, Michael Radelet, Hugo Bedau and Constance Putman updated the sample of defendants believed to be wrongfully convicted in capital or potential capital cases to include 416 cases. The study supplies narrative-style descriptions of cases in which race was found to be an influential factor in the conviction of innocent defendants.[465] The authors found that Black Americans were more likely than their counterparts to be wrongfully convicted of capital crimes and that the probability of wrongfully convicting racialized persons occurred disproportionately in relation to their representation in the U.S. population.

Two more studies in the United States broaden the connections between wrongful convictions and race. Both these investigations focused on erroneous convictions in various felony cases. In the first study, Huff *et al* interviewed judges, prosecutors, public defenders, and

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[462] Hugo Adam Bedau & Michael L. Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987) 40 Stan L Rev 21 [Bedau & Radelet].
[463] Bedau & Radelet, *supra* note 462 at 39.
[464] Bedau & Radelet, *supra* note 462 at 38.
[465] Michael L. Radelet, In Spite of Innocence: Erroneous Convictions in Capital Cases (Boston: UPNE, 1992) at 119-38.

exonerated inmates in order to construct a database of wrongful convictions.[466] The authors established 205 erroneous convictions for various felonies. While precise racial classifications of the defendants in those cases were not reported, the authors found evidence of racial disparities; "many convicted innocents are white, some are even middle-class, but a disproportionate number of them are black and Hispanic." [467] In the second study, Barry Scheck *et al* examined sixty-two cases in which prisoners had been cleared by DNA evidence.[468] Of the sixty-two cases, twenty-nine percent of the defendants were white and fifty-seven percent were Black. Similar to the previous studies conducted, the authors found that miscarriages of justice and wrongful convictions fell disproportionately on Blacks as compared to their counterparts.

In the last decade, additional studies in the United States have linked race to the conviction of the innocent. William Holmes' study in 2001 offered an empirical analysis that examined the race and other social characteristics of those wrongfully convicted of capital crimes.[469] Holmes' study focused on cases of wrongful conviction where the capital cases were overturned by appellate courts and sent back to trial court, only to have the charges dropped by the prosecutor or the defendant found not guilty on retrial. Based on 6,228 cases collected by the U.S. Bureau of Justice Statistics of prisoners on death row from 1970 to 1992, Holmes examined characteristics such as race, ethnicity, gender, marital status, education, and the most serious offense charged for those who were wrongfully convicted. He found that ethnicity, level of education, and the seriousness of the offense were associated with the rates of wrongful convictions. Holmes concluded that these factors ultimately predict a likelihood of those defendants at a greater risk of wrongful conviction in capital cases. This study noted that

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[466] Ronald Huff et al, *Convicted But Innocent: Wrongful and Public Policy* (California, Sage Publications, 1996) at 80 [Huff et al].
[467] Huff et al, *supra* note 466.
[468] Barry Scheck et al, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongful Convicted* (New York: Random House, 2000).
[469] William M. Holmes, "Who are the Wrongful Convicted on Dealth Row" in Saundra Westervelt & John Humphrey, eds, Wrongly *Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 99-113.

ethnicity is an important consideration in addition to other social characteristics in cases of wrongful convictions.

In 2001, Karen F. Parker *et al* in *Racial Bias and Conviction of the Innocent in the Wrongly Convicted* depicted the disadvantages faced by racialized people in the American criminal justice system and offered explanations for why racialized defendants were disproportionately being wrongful convicted.[470] Parker's study moved beyond existing research and proposed both individual and structural explanations for racial disparities in the conviction of the innocent. The authors claimed that race continues to be an influential element in the operation of the American criminal justice system and society. As for explanations, the authors proposed that the following reasons made racialized people easier targets: (1) overt and intentional racial behaviour; (2) the increased probability of errors when making eyewitness identification across races; (3) stereotyping of minorities by their counterparts (that is minorities are more likely to be seen to conform to a criminal stereotype and thus be convicted based on weaker evidence); and (4) the lack of resources minorities are able to access.

In her most recent study, Parker builds on earlier concerns of racial disparities in the conviction of the innocent by providing empirical data and analysis of the linkage between race, region, and wrongful convictions in death penalty cases.[471] Finally, Talia Harmon's 2004 study examined the impact of the race of the defendant and the race of the victim in contributing to the erroneous convictions and concluded that the race of the defendant and the victim is a significant predictor of a case outcome.[472]

While limited, the American literature does demonstrate that systemic racism and social disadvantage can contribute to wrongful convictions. The existing literature on race and

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[470] Karen F Parker et al, "Racial Bias and Conviction of the Innocent in the Wrongly Convicted" in Saundra Westervelt & John Humphrey, eds, *Wrongly Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2005) at 114-129 [Parker et al, 2005].
[471] Karen Parker et al, "Race, the Dealth Penalty, and Wrongful Convictions" (2003) 18: 1 Criminal Justice Magazine [Parker et al, 2003].
[472] Talia Roitberg Harmon, "Race for Your Life: An Analysis of The Role of Race in Erroneous Capital Convictions" (2004) 29:1 *Criminal Justice Review* 76.

miscarriage of justice provides the foundational knowledge to link systemic racism with the conviction of the innocent and a means of measuring the impact of racial bias in cases of miscarriage of justice.

5.1.3.2. - The case of the Central Park Jogger

What might be at stake in expanding the scope of the inquiry of miscarriages of justice to include race? Take the case of the Central Park 5 as one illustration that race should be scrutinized as a legitimate and documented cause in the study of wrongful convictions. In 1989, in New York City, a female investment banker took a nightly jog through Central Park.[473] Nearly four hours later, she was found comatose lying in a puddle of her own blood. Locals in the park discovered her body. She had been viciously raped, stripped of her clothes and repeatedly beaten with a rock. Her skull was fractured and her left eye socket was crushed. She had lost eighty percent of her blood. After a lengthy hospital stay, the woman recovered, but had no memory of what had happened. The same evening of the attack, thirty or more teenagers in the park, implicated in a series of separate muggings, were interrogated in connection to the rape.

Five teenagers, from Harlem, ranging from age fourteen to sixteen, were interviewed.[474] Under police questioning, lasting as long as twenty-eight hours, each of the teenaged boys confessed, in written statements and on videotape, to involvement in the attack.[475] None of the boys confessed to actually raping the victim, each would blame the rape on one or more of the others. Shortly thereafter, the five teenaged defendants recanted their stories claiming that they

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[473] S Davies, "The Reality of False Confession – Lessons of the Central Park Jogger Case" (2006) 30 N.Y.U. Rev. L. & Soc Change 209, 210 – 213 [Davies].

[474] The accused: Fourteen year-old Kevin Richardson, fourteen-year-old Raymond Santana, fifteen-year-old Yusef Salamm, fifteen-year-old Antron McCray, and sixteen-year-old Kharey Wise. For more information, see Elaine Cassel, "The False Confession in the Central Park Jogger Case: How They Happened, and How to Stop Similar Injustices From Happening" (17 December 2002) online: Findlaw <http://writ.news.findlaw.com/cassel/20021217.html>; Steven A. Drizen et al, "The Problem of False Confession in Post-DNA World" online: <http:/iilab.utep.edu/Drizin_2004_NCLR.pdf>; The People of State of New York v. Richardson, 202 A.D.2d 227 N.Y.A.D. 1 Dept., 1994.

[475] N Jeremi Duru, "the Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man" (2004) 25 Cardozo L Rev 1315, 1316 [Duru].

had been intimidated, lied to, and coerced into making the statements.[476] There was no physical evidence linking them to the crime – no blood match, no semen. Due to the jogger's injuries, she was unable to identify her attacker(s) and no other eyewitness placed the youths at the scene of the crime. Notwithstanding their claims of innocence, all five defendants were convicted and ultimately served sentences ranging from nine to thirteen years.[477]

In 2002, a serial rapist and murderer, serving thirty-three years-to-life in federal prison, signed a sworn statement confessing that he alone had brutalized and raped the female jogger in 1989.[478] His DNA would match the semen found in the woman.[479] Based on this new information, the five convicted defendants petitioned the New York State Supreme Court to vacate their guilty verdicts and requested to be granted proper relief. In response to the defendants' motion, the Manhattan District Attorney's office filed a memorandum with recommendations that the convictions of the Central Park 5 be vacated. Through its own investigation, the District Attorney's office found that the 2002 rapist confession accurately described the crime scene and the jogger's injuries, while the youths' confessions were inconsistent with each other and with the physical evidence. The New York State Supreme Court would follow the recommendations and vacate the convictions.[480]

With contradictory confessions and no physical evidence linking the five teenagers to the crime, why were the boys convicted in the first place? Why would five teenagers, with no criminal records, admit to a crime of this nature? What went wrong? And why? Journalists and legal commentators largely agree that the case was mishandled. The Central Park case is characterized by the known legal causes of wrongful convictions: mistreatment of evidence,

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[476] Elaine Cassel, "The False Confession in the Central Park Jogger Case: How They Happened, and How to Stop Similar Injustices From Happening" (17 December 2002) online: Findlaw <http://writ.news.findlaw.com/cassel/20021217.html> [Cassel].
[477] Davies, *supra* note 473 at 213, 219-220.
[478] Duru, *supra* note 475 at 1315.
[479] Chris Smith, "Central Park Revisited" New York Magazine (14 October 2002), online: New York Magazine <http://nymag.com/nymetro.nes/crimelaw/fetures/n_7836/> [Smith].
[480] In 2003, three of the five young men sued the City of New York for malicious prosecution, racial discrimination and emotional distress. Nine years later, the city of New York has yet to settle the multi-million dollar lawsuit.

false or coerced confession, and prosecutorial and police misconduct. That said, these causes do not tell the complete story. The teenaged boys were Black and Latino. The female jogger was White.

The extraordinary turn of events in this high-profile case provides important reason to consider the role racism plays in the administration of justice. Since the police did not obtain the defendants' confessions in good faith, that is, without coercion it is reasonable to conclude that the race of the defendants contributed to their wrongful convictions. Had the police arrest of the five teenagers following the attack been novel, one might be tempted to explain the teen's decision to confess as an aberration. There was nothing particularly 'unusual' in the manner in which the police originally interrogated the five youths of the rape. Rather, what was troubling with the police investigation of the case was the heightened racially charged climate concerning the brutality of the assault. From the moment the teenagers were arrested, the violent attack was transformed in the public discourse into a dialogue regarding the link between race and crime. Further, the District Attorney's office was determined to win convictions in the high profile case as public interest grew and concerns over the city's safety mounted. The brutality of the crime fueled a moral panic. The Central Park case resonated with a growing concern about urban violence not only against the poor – but with the assault of an investment banker –against the city's middle and upper class.[481] Commentators on the case noted "the race factor trumped a search for the truth. The idea of a roving gang of racialized youths brutally beating and raping a white woman fit the schema of the public's fear of black and Latino communities and teenage gangs."[482]

Situating the case in the context of New York City in the 1990s reveals that the case was fueled by racial bias. Racially coded terms such as 'beast', 'savages', 'wolf pack' set the

[481] Lynn Chancer, "Before and After the Central Park Jogger: When Legal Cases Become Social Causes" (2005) 4:3 Contexts 38 [Chancer].

[482] Cassel, *supra* note 476.

tone in the media and the public following the case.[483] The inflammatory images had the effect of linking a particular racialized group to the crime well before the defendants were even tried and convicted. In turn, racial stereotypes hindered a fair prosecution of the case. According to lawyer William Kunstler: "[t]he identity of the victim and the attacker racially, and even her economic identity, played against the defendants from the start to the finish. It permeated the judge, jury, the press, the people on the street [...]"[484] Ultimately, the teenagers' false confessions dominated academic discourse; however, the case of Central Park 5 should have forced scholars in the field of wrongful convictions to critically explore whether wrongful convictions and their commonly cited causes are conceptualized in a manner that captures the experiences of racialized individuals.

Similar to the case of Donald Marshall, Jr., the Central Park 5 quickly became notorious both because of the nature of the crime and, given the larger social context, as a symbol of racial discrimination in the administration of justice. The case of the Central Park Jogger is a compelling example of the need to address the effect of race in wrongful conviction cases.

5.2. - PART II – QUESTIONABLE JUSTICE

5.2.1. - Silencing of Race - The Canadian Experience

It has been over two decades since the *Marshall Inquiry* examined wrongful convictions in Canada and tackled the issue of racism and its implications in the criminal justice system in Nova Scotia. As noted, the most significant finding of the Commission was that Marshall, a Mi'kmaq, was a victim of racism. Since the *Marshall Inquiry* there have been approximately seven noted miscarriages of justice in which the defendants claiming innocence were from racialized communities. What follows is not an exhaustive list, but briefly highlights some of the salient facts. The information available in many of the cases is limited; nonetheless, these seven

[483] Chancer, *supra* note 481 at 39-40. See also Duru, *supra* note 475.
[484] Chancer, *supra* note 481 at 40.

cases symbolize the larger social problems and the concerns of the correlation between race and wrongful convictions.

i. Wilson Nepoose

In 1987, Wilson William Nepoose,[485] a member of the Samson Cree Nation, was sentenced to life imprisonment for the strangulation death of a woman in Ponoka, Alberta. He appealed his conviction to the Alberta Court of Appeal and the case was dismissed in 1988. Nepoose spent five years in prison before two key Crown witnesses recanted their testimony that convicted him. In 1991, a section 690 (now section 696 of the *Criminal Code*) application resulted in Nepoose being released on bail. The Honourable Mr. Justice W.R. Sinclair of Alberta was appointed to investigate the merits of the application. After hearing twenty-three witnesses and the entering of ninety-seven exhibits, the Court released a two-volume report finding that there was a miscarriage of justice. A new trial was ordered in 1992. Nepoose had begin preparing for a civil suit against Corrections Canada and the RCMP when he was reported missing.[486] The trial was stalled when the skeletal remains of Nepoose were discovered in 1998. The re-trial never continued.[487] The civil suit was filed by his family, but there still remains no resolution.[488] Supporters and family members continue to call for a public inquiry into the case.

The notable causes of Nepoose's conviction included police misconduct, inept defence work and coerced testimony of eyewitnesses. Years later, Nepoose's conviction is remembered as highlighting the inadequacy of the legal aid system and systemic racism in Canada's law enforcement and criminal justice institutions. Today, commentators note, "the most significant aspect of the case is that it is, depending on your perspective, one of the worst or one of the

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[485] *R. v Nepoose*, [1992] A.J. No. 220, 125 A.R. 28 [Nepoose].

[486] Rudy Haugender, "Wilson Innocent?" (1990) 8:4 Windspeaker 2 [Haugender].

[487] See AIDWYC, *supra* note 460.

[488] Haugender, *supra* note 486.

best examples of an injustice can happen to a Native Canadian and it just sort of slides away."[489]

ii. Herman Kaglik

This case received virtually no publicity. Herman Kaglik, Aboriginal, was exonerated, by DNA evidence, of a violent sexual assault. In 1992, Kaglik was living in Inuik, North West Territories, when he was convicted of raping his niece.[490] Based on the testimony of the complainant, Kagilk was sentenced to four years in prison. In 1993, the term was increased to ten years after his niece accused him of three additional sexual assaults. In 1997, the complainant in a dying declaration informed the police that Kaglik was innocent and that she had fabricated her story. The police failed to disclose the complainant's declaration.[491] In 1998, the Court of Appeal entered an acquittal based on DNA testing of a semen sample taken six years earlier proving Kaglik was innocent. In 2001 Kaglik was awarded 1.1 million dollars by the federal government for his two wrongful convictions.[492]

iii. Donzel Young

In 1991, Jamaican immigrant Donzel Young was convicted of killing two drug dealers in Toronto, Ontario. While maintaining his innocence, Young had numerous supporters.[493] In 1994, AIDWYC made a formal request, a section 690 application (now 696 of the *Criminal Code*), to re-open Young's case after uncovering evidence, it argued, that proved that he did not commit the crime. There was evidence that the murder had been committed by another man, who had allegedly confessed before killing himself. In 1995, the Justice Department was in the process of reviewing his case when Young was fatally stabbed to death in federal penitentiary, while trying

[489] Paul Barnsley, "AFN pushes for inquiry into RCMP" Windspeaker (November 1999) online: The Aboriginal Multi-Media Society <http://www.ammsa.com>
[490] R. v. Kagilk, [1992] N.W.T.J. No.211 [Kagilk].
[491] Janice Tibbetts, "$1.1M award for false conviction. Alberta man jailed 5 years for rape he did not commit" Ottawa Citizen (19 December 2001) The Ottawa Citizen online: < http://fact.on.ca/news.news0112/oc011219.htm> [Tibbetts].
[492] Tibbets, *supra* note 491.
[493] *R. v. Young*, [1992] S.C.C.A. No. 474, 150 N.R. 398 [Young].

to break up a fight.[494] Justice Kaufman was appointed by the Minister to review Young's case. Today, critics maintain that the inquiry into Young's innocence has been particularly slow. As it stands, due to key witnesses disappearing, the case remains in limbo.[495]

iv. Kulaveerasingam Karthiresu

In 1991, Kulaveerasingam Karthiresu arrived in Canada as a convention refugee. Karthiresu, a Tamil from Sri Lanka, would spend nearly seven years in a federal prison after being convicted of second-murder in connection with a shooting at a Scarborough house party.[496] In 1993, the victim was shot and killed following a fight with a group of individuals which included Karthiresu. At his 1995 trial, Karthiresu maintained his innocence, claiming that one of the key Crown witnesses was in fact responsible for the murder. In 2000, Karthiresu's conviction was overturned by the Ontario Court of Appeal. He was granted a new trial when ten of the Crown witnesses later recanted their earlier testimony. Rather than retry him, the Crown withdrew the charge at Kathiresu's second trial.[497]

v. Salinder Singh Dhillion

In 2003, Salinder Singh Dhillion, freed from prison, was killed in the driveway of his Mississauga home. The murder of Dhillion had occurred just days before he was to be formally exonerated in the Ontario Court of Appeal for a 1992 murder of a prominent figure in the Sikh community.[498] Dhillion was convicted of first-degree murder on the basis of circumstantial evidence. His conviction centered on what has been called "problematic eyewitness identification."[499] Specifically, the Crown's key eyewitness' testimony was compromised. The

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[494] Linda Taylor, "Discrening the Legal facts of a Case and Wrongful Conviction in Canada Corrected with DNA Evidence" Canada and the World Backgrounder (1 December 1995) online :< http://findarticles.com/p/articles/mi_hb3211/is_199512 >.
[495] See AIDWYC, supra note 460.
[496] *R. v. Karthiresu*, [2000] O.J. No. 309, 129 O.A.C. 291.
[497] Chris Eby, "Man freed after murder conviction thrown out" *National Post* (28 March 2000), online: *National Post* <http:// www.nationalpost.com>.
[498] In 1992, the victim, Gurdial Singh Sandhu was at his home in Brampton with his family and friends. Around 9:30 p.m. a man rang the door bell and asked to see him. When Sandhu came to the door, the man, apparently a stranger to him, shot him to death. Dhillion was arrested the next afternoon as he left work and was charged with first degree murder. See *R. v. Dhillion*, [2002] O.J. No. 2775.
[499] *R. v. Dhillion*, [2002] O.J. No. 2775, [2002] 55 W.C.B. (2d) 130 [*Dhillion*].

first two witnesses identified Dhillion from photographs shown to them following the murder. However, all of the photographs were only of Dhillion.[500] Almost three months later, the third witness selected Dhillion from photographs from a proper line-up. Yet, testimony revealed that the third witness had been exposed to the same photographs on many separate occasions through media coverage.[501]

The Crown also presented evidence from a jailhouse informant. The informant testified that Dhillion confessed to him that he had murdered the victim. The informant met Dhillion in custody in 1992 and shared a cell with him for approximately three months. Both men spoke Punjabi. By the time of Dhillion's trial, the informant had a criminal record of forty-three convictions; thirty-four of them were related to offences of dishonesty.[502] The informant had also offered his service to be a police informant on at least one other occasion. In this particular case, he came forward a year after sharing his cell with Dhillion, claiming he wanted to do the right thing.[503] The Ontario Court of Appeal overturned Dhillion's conviction. Dhillion had been released from prison after ten years of incarceration. The Court had overturned his conviction fourteen months prior to his murder. There has been no arrest made in Dhillion's shooting.

vi. William Mullins-Johnson

Most recently, the exoneration of a thirty-seven-year-old Ojibway man from Sault Ste. Marie, Ontario would force wrongful convictions and its commonly cited causes back into mainstream consciousness. More than thirteen years after he was wrongfully convicted of the first-degree murder and sexual assault of his four-year old niece, the Ontario Court of Appeal acquitted William Mullins-Johnson.[504] At the time of his arrest, Mullins-Johnson was living with his brother, sister-in-law, and their three children. In 1993, the victim was found dead in her bed.

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[500] *Dhillion, supra* note 499 at para 16.
[501] *Dhillion, supra* note 499 at para 8.
[502] *Ibid* at para 16.
[503] *Dhillion, supra* note 498 at para 16.
[504] *R. v. Mullins-Johnson*, [2007] O.J. No. 3978, 87 O.R. (3d) 423 [Mullins-Johnson].

At trial, hospital pathologists testified that the victim had died as a result of asphyxia sometime between 8 and 10 p.m., which was during the time that Mullins-Johnson had been babysitting her. The Crown's theory was supported by leading pediatric forensic pathologist Dr. Charles Smith. Dr. Smith testified that the victim had been strangled to death and that she had been sexually assaulted within minutes of her death.[505] With no physical evidence linking Mullins-Johnson to the crime, Dr. Smith's testimony was essential to the jury's verdict. After deliberating for six hours, a jury found Mullins-Johnson guilty of first-degree murder and he was sentenced to life in prison.

After exhausting all of his appeals, Mullins-Johnson requested the assistance of AIDWYC. After examining the case, AIDWYC concluded that the expert evidence of Dr. Smith was flawed. Meanwhile, in 2002, Smith was reprimanded with a caution by the Ontario College of Physicians and Surgeons for his work on three suspicious death cases. In 2005, Ontario's Chief Coroner ordered a formal independent review of Dr. Smith's involvement in forty-four cases in which he performed an autopsy or offered an expert opinion. Thirteen of the cases had resulted in criminal charges and convictions. Two years later, a Commissioner's report determined major problems with twenty of the autopsies he conducted.[506]

In light of these developments, Mullins-Johnson's counsel applied to the Minister of Justice for a section 696 (*Criminal Code*) review of their client's murder conviction. The Ontario Superior Court of Justice granted bail pending the minister's decision after Mullins-Johnson had served twelve years. The case was referred to the Court of Appeal. The Court held that there was significant new evidence that cast doubt on Mullins-Johnson's 1993 murder conviction. Further, two experts, including Ontario's Chief Pathologist, testified that the child was never sexually assaulted or strangled. Rather, they argued she died of natural causes, possibly from

[505] The defence theory was that the child had choked to death on her own vomit while sleeping.
[506] See Ontario, *The Inquiry into Pediatric Forensic Pathology in Ontario*, vol 1 (Toronto: Queen's Printer for Ontario, 2008) [*Goudge Inquiry*].

chocking on her own vomit caused by a chronic stomach ailment. In 2007, Mullins-Johnson was acquitted by the Court of Appeal.[507]

Was race a factor in Mullins-Johnson's wrongful conviction and imprisonment? Advocates in the Mullins-Johnson case, including defence counsel, have been reluctant to suggest that his Aboriginality influenced the former pathologist's perjured testimony.[508] Rather, some have argued that what guided the pathologist was his belief that he was an avenger for children and not racial bias, conscious or otherwise. Smith's expert opinion had been employed in many cases where the accused were White. Further, the fact that the death occurred on a reserve, and all the participants in the case: the defendant, his mother, brother, sister-in-law, and the victim were Aboriginal added to their belief that Mullins-Johnson's race did not contribute to his wrongful convictions. On the other hand, supporters of the case are willing to accept that there were economic biases in Dr. Smith's work.

Shortly after being granted bail, Mullins-Johnson gave an interview to the newspaper *The Globe and Mail.* Asked his thoughts on why he felt he was wrongly convicted, Mullins-Johnson stated: "[i]t wouldn't surprise me if race entered into it. They probably looked at my record and saw my past conviction. An Indian guy with a prior. What is juicier than that?"[509] In the context of a history of colonialism and documented racist and paternalistic policies of assimilation that continue to have negative effects on Aboriginal people, from his arrest to his conviction, Mullins-Johnson's trial was more than likely less fair because of his Aboriginality than not. As evidenced by numerous commission reports, racial bias in larger society influences the police, defence counsel, prosecutors, the courts and the correctional system. As well, these reports have shown that racism and socio-economic considerations are closely interconnected.

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[507] In 2010, Mullins-Johnson received 4.25 million in compensation for his wrongful conviction and imprisonment.
[508] Mullins-Johnson was represented by James Lockyer and David Bayliss, lawyers from AIDWYC.
[509] Friesen, *supra* note 454.

vii. Tammy Marquardt

In 2011, the murder conviction of Tammy Marquardt, who is Aboriginal, was sit aside after she spent nearly fourteen years in prison for the 1993 murder of her two-year-old son. Like Mullins-Johnson, her conviction was based on the flawed testimony of pathologist Charles Smith.[510]

In 1993, Marquardt, a Scarborough, Ontario native, awoke from an afternoon nap, to find her toddler son tangled in his sheets. By the time paramedics arrived, the toddler had stopped breathing and was eventually taken off life support at the hospital. As a single mother of three, from a low income community, Marquardt came under police suspicion. Dr. Charles Smith, who conducted the autopsy, declared that the toddler had died from asphyxia, likely the result of smothering or strangulation. At trial, Smith would discount the defence's theory that the toddler, who had numerous hospital visits for epilepsy, had instead died of a seizure. Based largely on Smith's evidence, Marquardt was convicted by jury of second-degree murder in 1995.[511] She was sentenced to life in prison with no possibility of parole for ten years. Her two other children were taken from her and put up for adoption.[512]

Marquardt consistently maintained her innocence from the time of her son's death. A 2008 review of the autopsy found that Smith's conclusions on the cause of death were not evidence based. In 2009, Marquardt appealed her conviction to the Supreme Court of Canada, which sent the case to the Ontario Court of Appeal. Marquardt was released on bail after a public inquiry discredited Smith's work in a litany of criminal cases. Two neurologists who independently examined the child's medical records found that his death was consistent with an epileptic seizure. The three judge panel ruled that Marquardt was entitled to a new trial in light of

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[510] *R .v. Marquardt*, [1995] O.J. No. 4154 [*Marquardt*, 1995].

[511] Michele Mandel, "Mom's murder conviction quashed" *Toronto Sun* (10 February 2011) online: *Toronto Sun* <http://www.torontosun.com> [Mandel].

[512] Mandel, *supra* note 511.

the inaccuracies later discovered in Smith's evidence.[513] Prosecutors agreed her trial had been faulty because of Smith's discredited testimony an recently withdrew the charge against her.

The problem in the seven noted cases is that the discussion on whether race contributed to their conviction was almost non-existent; whereas other causes, such as false confession, eyewitness misidentification, jailhouse informants and junk science continued to be legitimatized and documented. Maybe race played a role, maybe it did not in these cases. However, the silencing of race completely in wrongful convictions reinforces the inequalities in the entire operation of the criminal justice system.

5.2.2. - Revisiting Critical Race Theory

The foundation of a critical race theoretical paradigm is that race still matters.[514] Despite the scientific refutation of race as a legitimate biological concept, race continues to be a powerful social construct and signifier:

> Race has become metaphorical – a way of referring to and disguising forces, events, classes, and expressions of social decay and economic division for more threatening to body politic than biological "race" ever was. Racism is as healthy today as it was during the Enlightenment. It seems that it has a utility far beyond economy, beyond the sequestering of classes from one another, and has assumed a metaphorical life so completely embedded in daily discourse that it is perhaps more necessary and more on display than ever before.[515]

The significance of race need not be debated at length in this chapter. Our advanced ideas about race include the racialization of multiple cultural forms. As Toni Morrison argues, "race is always present in every social configuring of our lives."[516] CRT argues that racism is "normal, not aberrant" in society.[517] Because racism is so enmeshed in the fabric of social order, it appears both normal and natural to people. Indeed, racism is a permanent fixture in Canadian

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[513] *R. v. Marquardt*, [2011] O.J. No. 1619; See Linda Nguyen, "New trial ordered for mother jailed 14 years in son's death" (10 February 2011) National Post online <http://nationalpost.com/news/>.

[514] Gloria Ladson-Billings, "Justice What is Critical Race Theory, and What's It Doing in a Nice Field Like Education" in Laurence Parker, Donna Deyhle & Sofia Villenas, eds, *Race Is...Race Isn't Critical Race Theory and Qualitative Studies in Education* (Coorado: Westview Press, 1999) at 7 [Ladson-Billings].

[515] Toni Morrison, *Playing in the Dark: Whiteness and the Literary Imagination* (Cambridge: MA, Harvard University Press, 1992) 63 [Morrison].

[516] Morrison, *supra* note 515.

[517] Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (New York: New York University Press, 2001) at xiv.

life. Thus, the strategy becomes one of unmasking and exposing racism in its various permutations. At the heart of CRT is the belief that "legal discourse has not appropriately taken account of the social reality of race and racism and has ignored the fact that law is both a product and a promoter of racism."[518] Under a regime of laws designed to promote racial equality and discourse racial discrimination, racist presumptions and ideas are less likely to be expressed overtly. As activist Angela Davis explains, "when state actors openly expressed their racist views, it was easy to identify and label the invidious nature of their actions. But today, with some notable exceptions, most racist behavior is not openly expressed."[519] However, the absence of overt racism and prejudice does not translate into the absence of racial discrimination.

5.2.3 – <u>Challenging the Silencing of Race</u>

In Canada, where racism is more subtle than overt and is often unconsciously expressed, the legacy of colonialism and racialized laws do not live in the forefront of Canadian life as they once did. No reputable journalist or scholar in today's Canada, for example, would endorse the forcible removal of Japanese Canadians from their homes and their internment in camps, the removal of Aboriginal children to residential schools or the enslavement of African Canadians. Yet, the fear of racialized criminality is widespread and has been highlighted in studies and reports, where the relationship between the racialized, Aboriginals and the criminal justice system in Canada has been marred by discrimination, over-regulation, and unfair treatment.

What is the effect systemic racism has on the criminal justice system in Canada? Concerns of racial bias have long played an integral part in the debate over the administration of justice. While there are those who do not frame themselves in racial binaries, it is problematic to proceed as though race does not matter in the operations of justice in Canada; we continue to

[518] Carol A. Alyward, *Canadian Critical Race Theory: Racism and the* Law (Halifax: Frenwood Press, 1999) at 30 [Alyward].
[519] Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion" (1998) 67 Fordham L. Rev. 13, 33.

incarcerate Aboriginals and other racialized Canadians at alarming rates,[520] racial profiling at Canada's borders and on Canadian streets persists,[521] and the federal government continues to propose legislation that further entrenches the correlation between race, crime and the criminal justice system.[522] This already disadvantaged position is only heightened when criminal justice officials' perception of a particular groups' propensity towards crimes impacts upon their analysis of who, reasonably, should be considered a suspect in a decision to question, arrest, charge and imprison.

5.3. - PART III – THE UNOFFICIAL EXPLANATION

5.3.1. - Systemic Barriers

If arrest, conviction and sentencing are biased against the poor and racialized in Canadian society, it is "logical to assume that wrongful convictions will be shaped by the same social forces?"[523] While no sweeping generalizations are possible when dealing with such a complex issue, it is a fact that some racialized and Aboriginal groups point to the criminal justice system and argue that they continually encounter racial discrimination. The manifestation of this bias includes over and under policing, discriminatory bail, trial and sentencing outcomes, and mass incarceration. Each of these has been documented in study after study over the last twenty years.[524] It is not surprising, then, that those who are wrongfully convicted are the most marginalized in society, the same victims of the systemic biases inherent in the criminal justice

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[520] See David M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 S.C.L.R. (2d) 655, 657. See also Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (Research Paper Commissioned by the Ipperwash Inquiry) online: The Ipperwash Inquiry < http://www.ipperwsash.ca/policy_part/research/index.hmtl>.

[521] See David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006)

[522] See, for example, Bill C-2, *the Tackling Violent Crime Act*, S.C. 2008, c.6.

[523] Barrie Anderson et al, *Manufacturing Guilty: Wrongful Conviction in Canada* (Halifax: Fernwood Publishing, 1998) at 21 [Barrie Anderson].

[524] See *Report of the Ipperwash Inquiry* (Toronto: Queen's Printer, 2007); *Stolen Sisters: A Human rights Response to Discrimination and Violence Against Indigenous Women in Canada* (Ottawa: Amnesty International Canada, 2004); *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild*(Regina: Queen's Printer, 2004); *Legacy of Hope: An Agenda for Change* (Final Report from the Commission on First Nations and Metis People and Justice Reform) (Regina: Queen's Printer, 2004); *Paying the Price: the Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003); *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services, 1996); *Report of Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995); *Report of Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Volume 1) *and the Deaths of Helen Betty Osborne and John Joseph Harper* (Volume 2) (Winnipeg: Queen's printer, 1991).

system.[525] The same systemic barriers that racialized and Aboriginal defendants encounter in the criminal justice system may also exist in addressing systemic racism in wrongful convictions. Recognizing when racial injustice occurs requires players in the justice system to understand not only how race influences the experience of those convicted, but also how their own race shapes and determines their recognition of the 'other'.

5.3.2. - The Failure to Act

Another explanation for the lack of documented discussion of race in wrongful conviction discourse is largely due to the failures of trial and appellate lawyers to engage in race talk in the courts and the failure of the judiciary to adopt appropriate critical race standards when invited to do so.

5.3.2.1. - Silence in the Judiciary

In "The Charter of Whiteness" David Tanovich documents a number of key Canadian cases addressing issues such as bail, jury selection, and racial profiling, and how the courts have refused to adopt critical race standards or arguments when they were advanced.[526] For example, in *R.v. Hall*[527] the Criminal Lawyers' Association of Ontario ("CLA"), relying on the empirical evidence found in the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, made substantial submissions on the impact of race on bail decisions in section 11(f) of the *Charter of Rights and Freedoms constitutional* challenge to section 515(10)(c) of the *Criminal Code*. This section gives broad discretion to justices of the peace to detain accused who are not at danger of flight risk, but where a determination is made that denial of bail is necessary to maintain confidence in the administration of justice. The Commission found the following racial disparities in pre-trial detention decisions: (1) White

[525] Barrie Anderson, *supra* note 523 at 27.

[526] See David M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 S.C.L.R. (2d) 655, 657; Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall LJ 2 655 [Tanovich, 2008]

[527] [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.) [*Hall*].

accused were more likely to be released by the police or not detained following a bail hearing than Black accused; (2) White accused were treated more favourably even though they were more likely than Black accused to have a criminal record and to have a more serious record; (3) in drug cases, controlling for other variables, White accused were twice as likely to be released by police than Black accused. Black accused were three times more likely to be detained bail than White accused. The Commission concluded that "some Black accused who were imprisoned before trial would not have been jailed if they had been White, and some White accused who were freed before trial would have been detained if they had been Black."[528] The CLA submissions were not addressed in either the majority or dissenting opinions.[529]

In *R .v. Sawyer*[530], Sawyer, who is White, was tried together with Galbraith, who is Black, on a charge of assault. Following the conviction, a juror contacted Sawyer and told him that she had been under "undue pressure to come to a verdict and that certain racial comments were made by other members of the jury."[531] The accused argued that the common law jury secrecy rule needed to be altered under section 7 of the *Charter* to ensure that verdicts were not tainted by racism. The argument was rejected.[532]

Another example of the judicial reluctance to address racism in the justice system can be seen in *R. v. Spence.*[533] In *Spence,* the victim was South Asian and the accused was Black. The African Canadian Legal Clinic ("ACLC") argued that the racial background of the victim should be a part of the *Parks* challenge to ensure that racial partiality directed at the victim did not infect the trial process. The Court did not directly address the ACLC's argument. Instead, as Tanovich notes, "it focused on the issue from the perspective of the accused and on juror

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[528] See *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995). See also Gail Kellough & Scot Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42 Brit. J. Crim. 186.
[529] Tanovich, 2008, *supra* note 526 at 664.
[530] [2001] S.C.J. No. 44, [2001] 2 S.C.R. 344 (S.C.C).
[531] Tanovich, 2008, *supra* note 526 at 665.
[532] *Ibid.*
[533] [2005] S.C.J. No 74, [2005] 3 S.C.R. 458 (S.C.C) [*Spence*].

sympathy or empathy (for example, whether a juror would convict because of a race-based sympathy for the victim) rather than the broader question of partiality."[534]

In *Peart v. Peal Regional Police Services Board*[535] the ACLC argued for a reverse onus in civil cases involving racial profiling claims, that is, placing the burden of proof on the police. This argument was rejected. However, the Court appeared to have left the issue open. As Justice Doherty observed:

> [the submission] is based on the argument that racial profiling is so common that where it is alleged, placing the burden on the police to disprove racial profiling is more likely to achieve an accurate result than is leaving the onus on the party alleging racial profiling.
> .....
> The reality of racial profiling cannot be denied. There is no way of knowing how common the practice is in any given community. I am not prepared to accept that racial profiling is the rule rather than exception where the police detain black men. I do not mean to suggest that I am satisfied that it is indeed the exception, but only that I do not know.[536]

Tanovich has also documented cases where trial judges have been or appeared hostile when asked to adjudicate a race issue. For example, Tanovich examined a number of challenge-for-cause cases that were brought following the *Parks* decision in the Greater Toronto Area. In these cases, applications to challenge for cause were dismissed on the grounds that defence counsel had failed to establish that racism extended beyond the borders of Toronto.[537] A judgment from McMurtry C.J.O in *R. v. Wilson* acknowledged the problematic nature of such reasoning: "it is unrealistic and illogical to assume that anti-black attitudes stop at the borders of Metropolitan Toronto. The possibility therefore of anti-black racism taking root in communities outside the Metropolitan Toronto should be a matter of concern for the criminal justice system."[538]

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534 Tanovich, 2008, *supra* note 526 at 666.
535 [2006] O.J. No. 4457, 43 C.R. (6th) 175 (Ont.C.A) [*Peart*].
536 *Peart*, *supra* note 535.
537 See for example, *R. v. Eccleston*, [1996] O.J. No. 497 (Ont. Gen Div.); *R.v. Cinous*, [2000] J.Q. no 6, 143 C.C.C. (3d) 397 (Que. C.A.); *R.v. Drakes*, [1998] B.C.J. No. 127, 122 C.C.C. (3d) 498 (B.C.C.A.) Another issue that arose in the aftermath of parks in Ontario was whether the decision applied where the victim was Black.; *R. v. Willis*, [1994] O.J. No. 1059, 90 C.C.C. (3d) 350 (Ont.C.A).
538 [1996] O.J. No. 1689, 107 C.C.C. (3d) 86 at para. 14 [*Wilson*].

There are also times where the trial judge's resistance to racial litigation can be implied from the manner in which the judge controls the proceedings. For instances, in *R. v. Brown*,[539] the Ontario Court of Appeal held that the trial judge's conduct raised a reasonable apprehension of bias. That conduct included in his reasons for sentencing that Brown should apologize to the officer for raising racial profiling:

> I should say as well that I do not know whether my tone this afternoon might have displayed my distaste for the matters that were raised during the course of the trial, but that really is not relevant to determining the sentence. I do not disagree with the officer's initial assessment of you. You dealt with him apparently in a polite and courteous way, and I had the impression when you were giving your evidence that you are that sort of person. So there is nothing inherently reprehensible about your conduct that I think should be treated as an aggravating factor when it comes to imposing sentence, which is not to say that it would not be nice if perhaps you might extend an apology to the officer because, I am satisfied, the allegations were completely unwarranted. But this is only my assessment. You are not required to share it and I will leave it to you to do what you think is right in that regard.[540]

There is no question that increasing diversity of the bench is one the most pressing issues facing the justice system and, in turn, would increase the cultural competency of the judiciary. While these few examples of judicial reluctance supports the theory of a resistance in advancing racial litigation, the courts are also not being asked on a regular basis to adjudicate race cases.

5.3.2.2. - Trial Silence

Litigation remains an important means of addressing racial discrimination. Passive tolerance of racial discrimination reflects a lack of awareness that race influences the justice system, "this exists when people responsible for the work of an institution fail to see evidence of racism in its practices."[541] In general, there has been a failure of trial and appellate lawyers to raise race once critical race standards have been established by the courts. In his research, Tanovich examined a small number of racial profiling cases that have been litigated following

[539] *R. v. Brown*, [2003] O.J. No. 1251, 173 C.C.C. (3d) 23 [*Brown*].
[540] *Brown*, supra note 539 at 53.
[541] Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice* (Toronto: Queens Printer for Ontario, 1995) [*Commission on Systemic Racism*].

the decision of the Ontario Court of Appeal in *Brown*. Since racial profiling emerged in mainstream discourse, Tanovich notes that no lawyer has challenged the legitimacy of *R. v. Ladouceur,*[542] the case that has provided the police with a racial profiling "writ of assistance."[543] Tanovich also found that there has not been a post-*Pearson* challenge to the reverse onus for drug offences at bail hearings given the findings and recommendations of the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System.* [544]

5.3.2.3. - Silence on Appeal

Appellate lawyers have also failed to raise the issue of race on appeal. For example, no argument of race was raised on appeal in the case of *R. v. Harris.*[545] In *Harris,* the officer stopped a vehicle for a purported improper turn with Harris, an African Canadian, in the front passenger seat. The officer asked Harris for identification. While Harris was not wearing a seatbelt, the trial judge concluded, based on the officer's testimony that the purpose behind the request for identification was to conduct a Canadian Police Information Centre ("CIPC") check. The check was to determine, in his words, "whether persons were on probation or bail, or whether they were under some 'level of surveillance.'" The officer testified this was routine practice and that he always asked passengers for identification in order to conduct a CPIC check during a routine traffic stop. Tanovich points out that when looking with the proper social context lens of racial profiling, arguably these facts illustrate a finding of racial bias policing.[546] That is, "it is not consistent that an officer would conduct a CPIC" on every passenger.[547]

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[542] [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.) [*Ladouceur]*.

[543] The decision held that police can stop a vehicle at any time without any requirement of individualized suspicion. The police simply have to assert that the stop was check for vehicle maintenance or to ensure that the driver was licensed and the car insured.

[544] The Commission specifically identified reverse onus for drug offences contained in section 515(6)9(d) of the Criminal Code, R.S.C. 1985, c C-46 as contributing to the disparity in bail hearings. The Commission recommended the section be abolished. See Recommendation 5.8, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) at 158. The reverse onus was upheld in *R. v. Pearson*, [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.), but at the time neither the Court nor counsel had the benefit of the Commission's data or analysis.

[545] [2007] O.J. No. 3185, 225 C.C.C. (3d) 193 [*Harris*].

[546] Tanovich, 2008, supra note 526 at 672.

[547] *Ibid.*

Why is race silenced? Tanovich in "The Further Erasure of Race in Charter Cases" suggests that the silence of race talk in Canadian courtrooms is largely because lawyers are either not seeing the issue or are uncomfortable discussing race:

> [Race is] not being raised because some lawyers are not seeing the issue, while others are uncomfortable engaging in race talk before our courts. Other lawyers, who are aware of the issue, may shy away from raising race because they believe that they have a strong argument using traditional constitutional principles or because they are simply not sure of how to factor in race and racial profiling into a framework analysis under the *Charter*.[548]

With regards to not seeing the issue, deeply seated racist views often reside in the subconscious, meaning the person that engages in these views may be oblivious to its impact. Frances Henry and Carol Tator argue "racist beliefs and practices are frequently invisible to everyone but those who suffer from them."[549] Consequently, "well-intended people who would be appalled by the notion that they would be seen as behaving in a racist or discriminatory manner," may be unconsciously engaged in racism.[550] Tanovich argues this occurs because "for the most part, Whites do not see themselves as a race or everyday conduct as White privilege."[551] This point is further made by Professor Coker, who notes that the:

> [p]roblem for confronting white complacency (or encouragement) of race disparities in the criminal justice system is the invisibility (to whites) of white privilege. Whites seldom think of themselves through the lens of race; whiteness is invisible to most whites. Rather, whites see themselves and other whites as individuals. Because they cannot see the privilege that protects them from police maltreatment and suspicion, they have difficulty believing that such treatment in not in same way invited or provoked when it happens to others.[552]

Avoiding race talk in the criminal justice system inadvertently makes race matter even more. Engaging in race talk and developing legal race standards are crucial as colour-blind due

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[548] David M. Tanovich, "The Further Erasure of Race in Charter Cases" (2006) 38 C.R. (6th) 84, 93 [Tanovich, 2006].

[549] Frances Henry et al, *The Colour of Democracy: Racism in Canadian Society*, 4th ed (Toronto: Nelson Thomson, 2009) at 121-147 [Henry et al].

[550] Henry et al, *supra* note 549.

[551] Tanovich, 2008, *supra* note 526 at 675.

[552] Donna Coker, "Foreword: Addressing the Real World of Racial Injstuice in the Criminal Justice System (2003) J. Crim. L & Criminology 827, 870.

process policies continue to disproportionately disadvantage racialized and Aboriginal groups.[553] While there have been significant victories for racialized and Aboriginal people in the courts, these gains have not made their way to the discourse on wrongful convictions. The refusal of judges to act and the lack of race consciousness by lawyers are having a direct impact on the ability to measure the influence of race in wrongful conviction cases. Overall, this may explain the lack of research on racial bias in wrongful convictions in Canada. How do we discuss the remedies in wrongful conviction cases without naming the inequalities and systemic issues that exist? It is useful to consider how an assessment of race might affect the study on wrongful convictions.

5.4. - PART IV – RETHINKING THE STUDY OF WRONGFUL CONVICTIONS

When one is able to gain insight into the inner workings of the justice system, stories of the wrongfully convicted definitely shake "the integrity, prestige, reputation, credibility, and effectiveness of the entire criminal justice system."[554] If we were to take seriously the experience of racialized and Aboriginal people with the every-day operation of the criminal justice system, the implications of race in wrongful conviction cases would naturally develop.

5.4.1. - Developing Critical Race/Anti-Race Strategy

Critical race theory is a logical place to address whether race is a distinct legitimate cause of wrongful convictions because CRT is an intellectual and social tool for understanding relations of unequal power in accessing justice. Critical race theorists challenge the neutrality and objectivity of laws that oppress racialized communities. The theory can be utilized as a way to frame discussions about the role of the justice system in reproducing the current practice of silencing the experience of a wrongly convicted defendant.

In order to better understand the reality that marginalized groups face, a critical race agenda facilitates the examination of broader experiences of Aboriginals and racialized

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[553] Tanovich, 2008, *surpa* note 526 at 686.

[554] Scott Christianson, *Innocent: Inside Wrongful Conviction Cases* (New York: New York University Press, 2004) at 9.

Canadians to the interpretation of substantive equality. A broader interpretation requires the courts to recognize historical racial inequalities and stereotypes that are produced and reproduced in larger society adequately to determine the cause of the unequal treatment. Thus, the first step in a critical race strategy is to acknowledge the history of racism in Canadian society and how the racialization of crime plays in perpetuating racial oppression. CRT indicates that one way of obtaining this understanding is through "a consciousness-raising approach."[555] The *R.D.S.* case is a prefect example of conscious-raising. The social context argument put forward in the *R.D.S.* case acknowledged that the experience of Black youth with racism, the police and the criminal justice was different from their counterparts.[556]

Secondly, a critical race perspective is applied to deconstruct legal rules and principles and challenge the neutrality and objectivity of laws or policies that have historically oppressed targeted groups. In this way, an analysis of race in wrongful convictions requires an examination of the surrounding circumstances and the drawing of inferences. For example, questions raised should include: what biases are at play? What were the grounds to interrogate, stop or detain the suspect? Was the decision of the criminal justice officials' influenced by sub-conscious stereotypes or assumptions about racialized or Aboriginal criminality? If so, did these assumptions affect the way in which the officers, the Crown, or defence asked questions or made decisions? Did the criminal justice process take into account the individual's historical disadvantaged position in Canadian society? Questions such as these should supplement rather than replace the types of questions the courts are currently asking. This approach ensures that due process standards are adequately established to address systemic racism. It also ensures that judges and lawyers are not left out in the cold upon considering race in a particular case. Another advantage of studying this issue through the lens of critical race theory is to encourage thinking of discrimination not only as a category but as a social phenomenon

[555] Aylward, *supra* note 518 at 134 -135.
[556] *Ibid* at 135-136.

that is far more insidious because it infects the police, prosecutors, defence lawyers, judges and jurors.

While there is little jurisprudence to guide how racial discrimination impacts wrongful convictions, the discourse should be interpreted with a critical race or anti-racist lens to substantiate claims of systemic racism. The significance of racial litigation gives credence to the impact systemic racism has on the criminal justice system. Notable in both the cases of William Mullins-Johnson and Tammy Marquardt is the courts' failure to turn their mind to these questions and to critically inquire as to the existence of racial discrimination. Had a critical race approach been adopted in cases where racialized defendants or victims were involved there is a good reason to believe that the study of wrongful convictions would be further evolved.

Despite the resurgence of scholarship and popular interest in the phenomenon of wrongful convictions, there are a number of gaps in our knowledge of the problem and our understanding of miscarriages of justice. As mentioned earlier, part of the formula of much of the wrongful conviction scholarship has been to discuss the causes of wrongful convictions. Writers may vary as to how they exactly name these causes, but they all fall into the same general categories.[557] The unexamined assumption in virtually all of the wrongful convictions literature is that these are actual causes, and once they are identified, we will know how and why the problem of wrongful convictions occurred. This list of rigid causes has impeded theoretical understanding and development in the study of wrongful convictions. As a result, the characterizing of errors leading to wrongful convictions has continued to replicate findings from earlier studies. Not surprising, as one prominent American scholar, Richard A. Leo, recently contended, the time has come to move past the familiar causes within all studies of wrongful

[557] For example, (1) eyewitness misidentification; (2) false confession: (3) perjured testimony; (4) forensic or scientific fraud; (5) police (6) prosecutorial misconduct, and (7) ineffective counsel.

convictions if we "wish to advance scholarship and develop a more sophisticated body of theoretically informed and policy-relevant knowledge" on the topic.[558]

5.4.2. - The Future

To understand the deeper causes of miscarriages of justice and to start to re-conceptualize the study, it is important to rethink the current assumptions, approaches, and consequences of wrongful convictions in Canada. This preliminary research questioned how the dominant conceptions of wrongful conviction do not address the experiences of racialized accused. This study is a starting point for further dialogue and investigation, particularly into the hegemony of factual innocence in popular and legal understanding of wrongful conviction. To date, there have been seven public inquires into wrongful convictions in Canada and while they have provided invaluable insight into miscarriages of justice, there has been little deviation from the standard path of analysis. Since the 1990 *Marshall Inquiry*, the discourse on wrongful convictions, in some ways, has largely stood still. Had there been some deviation in the dialogue it might have yielded some interesting results.

5.5. - SUMMARY

The research on race and wrongful convictions brings together the analysis of race-crime dynamic within the study of miscarriages of justice. The connection between race and crime is made visible by the fact that racial injustice exists across multiple stages of the criminal justice system. Despite the relative recency of the research in this area, evidence reveals that the race-crime dynamic found in other areas of the criminal justice system can also be found in wrongful convictions. The legitimacy of the criminal justice system is based largely on both its effectiveness and its fairness. One of the worst errors that can, and does, occur is the conviction of a person for a crime that he or she did not commit. In the end, wrongful convictions are not only harmful to the innocent person who is convicted, but also serve an injustice to the victims

[558] Leo, *supra* note 456 at 207-208.

and the society at large. As such, more work needs to be done to examine the intersection of race in the context of wrongful convictions.

CHAPTER SIX

6.- CONCLUSION

The imperfections in the criminal justice process are reflected not only in the conviction of the innocent, but also in the discrimination Aboriginal and racialized communities continue to encounter at every stage of the criminal justice system. Several commissions have outlined the problems Aboriginal and racialized peoples face when confronting the justice system and have further shown that the process of racialization is pervasive in the system of justice in Canada. These same studies on racial bias have tended to focus on the flaws and failures within the legal process itself, rather than the historical systemic factors that have shaped and influenced the legal system. The legacy of racism has become interwoven with Canadian culture and its core values, ideals and norms. Just as the research has established that racial discrimination affects every stage of the criminal justice system, so it is true that race can be a contributing factor in cases of wrongful convictions. Given the seriousness of a miscarriage of justice, not only for the wrongly convicted, but for the system as a whole, this problem demands further exploration.

Little is known about the influence of systemic racism in wrongful conviction cases in Canada. As such, this research tried to fill the gap in the existing knowledge since *R. v. Marshall* and the public inquiry that it occasioned. A body of research and literature identified the legal causes of wrongful convictions in order to facilitate further research in this area. The purpose was to provide a theoretical explanation of Critical Race Theory in order to move beyond the current methods and approaches to achieve a deeper understanding of the legitimate causes of wrongful convictions. Despite the safeguards in the criminal justice system, the recognition of systemic racism casts doubt on the study's ability to effectively identify and remedy wrongful convictions. While societal focus is often on other, more publicized issues within the criminal justice system, such as lenient sentencing or the release of violent offenders on parole, the

purpose of this thesis is to demonstrate that the undocumented experiences of racialized defendants who have been wrongfully convicted is also a serious problem and is in need of greater recognition from legal scholars and, in turn, policy-makers.

The examination of wrongful conviction in Canada and the review of literature on the subject illustrates that there has been a failure among scholars to produce any method that might adequately examine the nexus between wrongful convictions and racial discrimination. It is clear that legal community must take the lead on this issue. We can no longer abdicate responsibility to the media and/or community organizations to tackle and highlight this subject. Developing a critical race standard can allow the judiciary and lawyers to more openly engage in race talk in the courtrooms. The perceptions of neutral and colour-blind laws are working disproportionately for racial and Aboriginal groups, as such it is critical for lawyers to raise claims of racial discrimination when necessary. Another advantage is that a study of race in wrongful convictions encourages future law students to consider how the various stages and institutions of the criminal process interact and can work to the disadvantage of vulnerable groups.

The goal of this thesis has been to rethink the study of wrongful convictions to systematically develop a more sophisticated and insightful approach that expands the study to include a discussion of other social variables that can contribute to a miscarriage of justice. To this end, the field needs to move beyond current assumptions, methods and approaches to achieve a better understanding of the causes, patterns, characteristics, and consequences of wrongful convictions in the Canadian criminal justice system.

The examination of the wrongly convicted has challenged some of the most fundamental assumptions about the Canadian criminal justice system and procedures. Wrongful convictions are more than just an aberration; rather it should be viewed as one of the worst aspects of the criminal justice system, especially in instances where defendants are faced with double

injustices. The conviction of a factually innocent person based on racial discrimination is morally troubling as it goes against the principles of equal to justice for all.

BIBLIOGRAPHY

Legislation

Charter of human rights and freedoms, RSQ c C-12.

Criminal Code, RSC 1985, c C-46.

Indian Act, RSC 1985, c I-5.

Jurisprudence

R v Brown (2003), 173 CCC (3d) 23 (Ont CA).

R v Dhillon, [2002] OJ No 3451, 55 WCB (2d) 130.

R v Gladue, [1999] SCJ No 19, 1 SCR 688.

R v Golden, [2001] 3 SCR 679.

R v Kagilk, [1992] NWTJ No 211.

R v Karthiresu, [2000] OJ No 309, 129 OAC 291.

R v Marquardt, [1995] OJ No 4154.

R v Marshall, [1983] NSJ No. 322, 57 NS. (2d) 286.

R v Mullins-Johnson, [2007] OJ No 3978, 87 OR (3d) 425.

R v Parks, [1993] OJ No 2157, 15 OR (3d) 324, 84 CCC (3d) (CA).

Peart v Peel Regional Police Services Board, [2006] OJ No 4457, 217 OAC 269, 43 CR (6th) 175 (CA).

R v S (RD), [1997] 3 SCR 484, 10 CR (5th) 1, 118 CCC (3d) 353.

R v Spence, [2005] S.C.J. No. 74. [2005] 3 S.C.R. 458.

R v Williams, [1998] 1 SCR 1128, 124 CCC (3d).

R v Young, [1992] SCCA No 474, 150 NR 398.

Secondary Materials: Books

Anderson, Dawn & Barrie Anderson. *Manufacturing Guilt: Wrongful Convictions in Canada* (Halifax: Fernwood Publishing, 1998).

Aylward Carol A. *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999).

Backhouse Constance. *Colour --Code: A Legal History Racism in Canada, 1900-1950* (University of Toronto Press, Osgoode Society for Canadian Legal History, 1999)

Borchard Edwin M. *Convicting the Innocent*: Sixty-Five Actual Errors of Criminal Justice (New York: Garden City Publishing, 1932).

Boyd, Susan et al, eds. *Using Power; the Canadian Experience* (Halifax: Fernwood Publishing, 2001).

Brandon R & C Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London: George Allen and Uwin, 1973).

Chan, Wendy & Kiran Mirchandani. *Crimes of Colour: Racialization and the Criminal Justice System in Canada* (Peterborough: Broadview, 2002).

Christianson, Scott. *Innocent: Inside Wrongful Conviction Cases* (New York: New York University Press, 2004).

Crenshaw, Kimberle et al, eds. *Critical Race Theory: the Key Writings that formed the Movement* (New York: The New Press, 1995).

Dalal, Farhad. *Race, Colour and the Process of Racialization: New Perspectives from Group Analysis, Psychoanalysis and Sociology* (New York: Brunner-Routledge, 2002).

Foster, C. *A Place Called Heaven: The Meaning of Being Black in Canada* (Toronto: Harper-Collins, 1996).

Gabbidon, Shaun L & Helen Taylor Greene, eds. *Race, Crime and Justice: A Reader* (Abingdon: Routledge, 2005)

Gould, Jon B. *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System* (New York: New York University Press, 2008).

Harriott, Anthony et al, eds. Crime *and Criminal Justice in the Caribbean* (Kingston, Jamaica: Arawak Publications, 2004).

Harris, Michael. *Justice Denied: The Law versus Donald Marshall* (Toronto: Harper-Collins, 1986).

Henry, Frances et al. *The Colour of Democracy: Racism in Canada Society*, 4th ed (Toronto: Harcourt Canada, 2009).

Huff, Ronald C & Martin Killas, eds. *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008).

Huff, Ronald C et al. *Convicted but Innocent: Wrongful Convictions and Public Policy* (California; Sage Publications, 1996).

Kennedy, Randall. *Race, Crime, and the Law* (New York: Pantheon Books, 1997).

Mannette, Joy. *Exclusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood, 1992).

Martin, Kirk. *Redrum the Innocent* (Toronto: Pengium Group, 1998).

Martinot, Steve. *The Rule of Racialization: Class, Identity, Governance* (Philadelphia: Temple University Press, 2003).

Miles, Robert. *Racism* (New York: Routledge, 1989).

Mosher, Clayton James. *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice System, 1892-1961* (Toronto: University of Toronto Press, 1998).

Omi Michael & Howard Winant, *Racial Formation in the United States: From 1960s to 1990s*, 2d ed (London: Routledge, 1994).

Radelet, Michael L. *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Boston: UPNE, 1994).

Roberts, Julian V & Michelle G Grossman, eds, 3ed. *Criminal Justice in Canada* (Toronto: Thomson Nelson, 2008).

Scheck, Barry et al. *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongful Convicted* (New York: Random House, Inc., 2000).

Tanovich, David M. *Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006).

Tator, Carol & Frances Henry. *Racial Profiling in Canada: Challenging the Myth of a Few Bad Apples* (Toronto: University of Toronto Press, 2006).

Walker, Samuel et al. *The Color of Justice: Race, Ethnicity, and Crime in America*, 3d ed (London: Wadsworth, 2004).

Walls Maria A. & Siu-Ming Kwok, eds. Daily *Struggles: The Deepening Racialization and Feminization of Poverty in Canada* (Toronto: Canadian Scholars' Press, 2008).

Westervelt Saundra & John A. Humphrey, eds. *Wrongly convicted: Perspectives on Failed Justice* (New Jersey: Rutgers University Press, 2005).

Secondary Material: Articles

Bandes, Susan A. "Framing Wrongful Convictions" (2008) 5 Utah L Rev 2.

Bedau, Hugo A et al. "Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference" (2004) Drake L Rev 587.

Bedau, Hugo A & Michel L Radelet, "Miscarriage of Justice in Potentially Capital Cases," (1988) 41:4 Stan L Rev 161.

Billings, Gloria Ladson. "Just What is Critical Race Theory and What's it Doing in a Nice Field Like Education" (1998) 11:1 Qualitative Education.

Braiden, Patricia & Joan Brockman. "Remedying Wrongful Convictions Through Applications to the Minister of Justice section 690 of the Criminal Code" (1999) 17:3 Windsor YB Access to Just.

Campbell, Kathryn & Myriam Denov. "The Burden of Innocence: Coping with a Wrongful Imprisonment" (2004) 46:2 Can J Criminology & Crim Just 140.

——. "Criminal Injustice: Understanding the Causes, Effects and Responses to Wrongful Conviction in Canada" (2005) 21:3 Journal of Contemporary Criminal Justice 224.

Castelle, George. "Feature: Lab Fraud – Lessons Learned from the Fred Zain Affair" (1999) 23:12 Champion 1.

Chancer, Lynn. "Before and After the Central Park Jogger: When Legal Cases Become Social Causes" (2005) 4:3 Contexts 38.

Cranston, Marla, ed. "Reflections: 20 years after the Marshall Inquiry" (2009) 27:4 Society Record.

Colvin, Eric. "Convicting the Innocent: A Critique of Theories of Wrongful Convictions" (2009) 20 Criminal Law Forum 173.

Davis, Angela. "Prosecution and Race: The Power and Privilege of Discretion" (1998) 67:13 Fordham L Rev 1.

Drizin, Steven A & Richard A Leo."The Problem of False Confession in Post-DNA World" (2004) 82 NCL Rev 891.

Duru, Jeremi N. "The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man" (2004) 25 Caradozo L Rev 1315.

Findley, Keith. "Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions" (2002) 38 Cal W L Rev 333.

Findley, Keith et al. "The Multiple Dimensions of Tunnel Vision in Criminal Cases" (2006) Wis L Rev 291.

Garret, Brandon L. "The Substance of False Confessions" (2010) 62:4 Stan L Review 1051.

Green, Bruce A et al, "Prosecutorial Discretion and Post-Conviction Evidence of Innocence" (2009) 6 Ohio St. J. Crim L 467.

Griffin, Lissa. "The Correction of Wrongful Convictions: A Comparative Perspective" (2001) 16 Am U Intl L Rev 1241.

Gross, Samuel R. "Convicting the Innocent" (2008) 4 Annual Review of Law and Social Science 1.

Grounds, Adrian. "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46:2 Can J Criminology & Crim Just 165.

-----. "Understanding the Effects of Wrongful Imprisonment" (2005) 32 Crime & Just 1.

Haugender, Rudy. "Wilson Innocent?" (1990) 8:4 Windspeaker 2.

Harmon, Talia Roitberg. "Race for Your Life: An Analysis of The Role of Race in Erroneous Capital Convictions" (2004) 29:1 *Criminal Justice Review* 76.

Head, W. "The Donald Marshall Prosecution: A Case Study of Racism and the Criminal Justice System" (1991) 7:1 Currents: Readings in Race Relations.

Henry, Frances et al. "Perceptions of Race and Crime in Ontario: Empirical Evidence from Toronto and the Durham Region"(1996) Can J Criminology 469.

Hickman, T Alexander. "Wrongful Convictions and Commissions of Inquiry: A Commentary" 46:2 Can J Criminology & Crim Just 183.

Horan, D. "The Innocence Commission: An Independent Review Board for Wrongful Convictions" (2000) 20 N Ill U L Rev.

Howden, Peter H. "Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post- Appellate Conviction Review Process" (2002) 21 Windsor YB Access Just 569.

Huff, Ronald C. "Wrongful Convictions: The American Experience" (2004) 46:2 Can J Criminology & Crim Just 107.

Huff, Ronald C et al. "Guilty Until Proven Innocent: Wrongly Convicted & Public Policy" (1986) 32 Crime and Delinquency 518.

Kaiser, H Archibald. "The Aftermath of the Marshall Commission: A Preliminary Opinion" (1990) 13 Dalhousie L J 364.

Kassin S M & G H Gudjonsson. "The Psychology of Confessions" (2004) 5 Psychological Science in the Public Interest 33.

Kellough G & S Wortley. "Remand for Plea: the Impact of Race, Pre-Trial Detention and Over-Charging on Plea Bargaining Decisions" (2002) 42:1 British Journal of Criminology 186.

Kennedy, Jerome P. "Writing the Wrongs: The Role of Defence Counsel in Wrongful Convictions – A Commentary" (2004) 46:2 Can J Criminology & Crim Just 197.

Kim, Claire Jean. "Unyielding Positions: A Critique of the 'Race' Debate" (2004) 4:3 *Ethnicites* at 345.

Knepper, Paul. "Rethinking the racialization of crime: the significance of black firsts" (2008) 31:3 Ethnic and Racial Studies 507.

Kramer, John & Darrell Steffensmeir. "Race and Imprisonment Decisions" (1993) 34:2 Soc Q.

Leo, Richard A. "Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction" (2005) 21:3 Journal of Contemporary Criminal Justice 201.

Leo, Richard A & Jon B Gould. "One Hundred Years Later: Wrongful Convictions After A Century of Research" (2010) 100:3 J Crim L & Criminology 101.

------. "Studying Wrongful Convictions: Learning From Social Science" (2009) 7:7 Ohio St LJ 7.

Leo, Richard & R Ofshe. "The Consequence of False Confessions: Deprivation of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88 J Criminology & Crim L 429.

Little, Rory K. "Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence of Capital Statutes" (2009) 37 Sw UL Rev.

MacFarlene, Bruce A. "Convicting the Innocent: A Failure of the Justice System" (2006) 31 Man L J 403.

Malleson, Kate. "Appeal Against Conviction and the Principle of Finality" (1994) 21:1 Journal of Law and Society 151.

Manishen, Jeffrey R. "Wrongful Convictions, Lessons Learned: The Canadian Experience" (2006) 13 Journal of Clinical Forensic Medicine 296.

Martin, Dianne L. "Lessons About Justice from the 'Laboratory' of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence" (2002) 70 UMKC L Rev.

Medwed, Daniel. "Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions" (2006) 51 Vill L Rev 101.

-----. "Emotional Charged: The Prosecutorial Charging Decision and the Innocence Revolution" (2010) 31:6 Cardozo L Rev.

-----. "Inncentrism" (2008) 5 U Ill L Rev 1549.

------. "Innocence Lost and Found: An Introduction to the Faces of Wrongful Convictions Symposium Issue" (2006) 37 Golden Gate UL Rev 1.

Parker, Karen F et al. "Race, the Death Penalty, and Wrongful Convictions" (2003) 18:1 Criminal Justice Magazine.

Raeder, Myrna S. "See No Evil: Wrongful Convictions and the Prosecutorial Ethic of Offering Testimony by Jailhouse Informants and Dishonest Experts" (2007) 76 Fordham L Rev.

Ramsey, R & J Frank. "Wrongful Conviction: Perceptions of Criminal Justice Professionals regarding the Frequency of Wrongful Conviction and the Extent of System Errors" (2007) 53 Crime & Delinquency 437.

Rizer, Arthur L. "The Race Effect on Wrongful Convictions" (2003) 29 Wm Mitchell L Rev 845.

Roach, Kent. "Inquiring into Causes of Wrongful Convictions" (1999) 35 Criminal Law Bulletin 152.

-----. "Understanding and Preventing Wrongful Convictions" (2007) 52 Crim LQ 125.

-----. "Wrongful Convictions and Criminal Procedure" (2004) Brandeis LJ 349.

Roberts, Julian V & Anthony N Doob. "Race, Ethnicity and Criminal Justice in Canada" (1997) 21 Crime & Just 469.

Roberts, Stephanie & Lynne Weathered. "Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission" (2008) Oxford J Legal Stud 1.

Ruck M D & S Wortley. "Racial and Ethnic High School Students' Perceptions of School Disciplinary Practices: A Look at Canadian findings " (2002) 31 Journal of Youth and Adolescence 185.

Saguil, Paul J. "Improving Wrongful Conviction Review: Lessons from a Comparative Analysis of Continental Criminal Procedure" (2007) 45 Alta L Rev 117.

Sanders, R. "Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards" (1984) 12 Am J Crim Law 189.

Schehr Robert Carl & Jamie Sears, "Innocence Commissions: Due Process Remedies and Protection For the Innocent" (2005) 13 Critical Criminology 181.

Schoenfeld, H. "Violated Trust: Conceptualizing Prosecutorial Misconduct" (2005) 21 Journal of Contemporary Criminal Justice 250.

Scullion, Kerry. "Wrongful Convictions and the Criminal Conviction Review Process Pursuant to Section 696.1 for the Criminal Code of Canada" (2004) 46:2 Can J Criminology & Crim Just 189.

Smith, Earl & Angela J Hattery "Race, Wrongful Conviction & Exoneration" 2010 J Afr Am St .

Stenning, P. "Policing the Cultural Kaleidoscope: Recent Canadian Experience" (2003) 7 Policing & Society 21.

St Lewis J. "Racism and the Justice System" in Carl E James *Perspectives on Racism and the Human Service Sector* (Toronto: University of Toronto Press, 1996).

Tanovich, David M. "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 Sup Ct L Rev (2d) 656.

——. "The Further Erasure of Race in Charter Cases" (2006) 38 C.R. (6th) 84.

Taslitz, Andew E. "Racial Blind sight: The Absurdity of Color-Blind Criminal Justice" (2007) 5:1 Ohio St J Crim L 1.

——. "Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: the Informants Example" (2008) 37 Sw UL Rev 101.

——. "Wrongly Accused: Is Race a Factor in Convicting the Innocent?" (2006) Ohio St J Crim L 121.

Wells, Gary L. "What Do We Know About Eyewitness Identification? (2003) 48:5 American Psychologist 553.

Wildsmith, Bruce H. "Getting at Racism: The Marshall Inquiry", (1991) 55:1 Sask L Rev 97.

Wilson, Paul R. "When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia" (1989) 24:1 Australian Journal of Social Issues 5.

Wortely, Scot. "Justice for All? Race and Perceptions of Bias in the Ontario Criminal Justice System – A Toronto Survey" (1996) 38:4 Can J Criminology 439.

——. "Hidden Intersections: Research on Race, Crime and Criminal Justice in Canada" (2003) 35:3 Canadian Ethnic Studies Journal 99.

Wortley S & J Tanner. "Data, Denials and Controversy: The Racial Profiling Debate in Toronto" (2003) 45 Journal of Criminology and Criminal Justice 267.

Wright, Ronald F & Marc L Miller. "Dead Wrong" (2008) 1 Utah L Rev.

Zalman et al, "Officials' Estimates of Incidence of 'Actual Innocence' Convictions" (2008) 25 Justice Quarterly 85.

Secondary Sources: Other Materials

"Group behind Truscott victory mulls widening focus to non-murder convictions," *The Canadian Press* (10 July 2008).

Bajer, Robin et al. "Wrongful Convictions in Canada" (Paper delivered at 22nd International Conference of International Society for the Reform of Criminal Law, Ireland, 11-15 July 2008), [unpublished].

Bell, James et al. "An Indian Guy with Prior: What's More Juicy Than That? Race and Wrongful Conviction" (Paper delivered at American Society of Criminology, Atlanta, Georgia, 14 November 2007) [unpublished].

Canada, Department of Justice. Addressing Miscarriage of Justice: Reform Possibilities for Section 690 of the Criminal Code. A Consultation Paper (Ottawa: Communications Branch, Department of Justice, 1998).

Cassel, Elaine. "The False Confessions in the Central Park Jogger Case: How They Happened, and How to Stop Similar Injustices from Happening," *Findlaw* (17 December 2002).

Cole, David & Margaret Gittens. *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Ontario: Queen's Printer for Ontario, 1995)

Eliminating Racial Discrimination in Canada (Ottawa: Multiculturalism and Citizenship Canada, 1989).

Fontaine, Phil. "Modern Racism in Canada" (Donald Gow Lecture in Public Studies, delivered at Queen's University, 24 April 1998) [unpublished].

Green, Melvyn. "AIDWYC Submission to the Lamer Report" (Toronto: Association in Defence of the Wrongly Convicted, 2003).

Hamilton A.C. & C.M. Sinclair. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: Government of Manitoba, 1999).

Lewis, Stephen. *Report to the Premier of Ontario* (Ontario, 1992).

MacFarlane, Bruce A. "Wrongful Convictions: the Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System" [Paper prepared for *the Inquiry into Pediatric Forensic Pathology in Ontario*, 2008) [unpublished].

Mandel, Michele. "Mom's murder conviction quashed" *Toronto Sun* (10 February 2011).

Manitoba. *Report on the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: Attorney General, 2007).

Manitoba. *Report on the Inquiry Regarding Thomas Sophonow: the Investigation, Prosecution and Consideration of Entitlement of Compensation* (Winnipeg: Attorney General, 2001).

Nova Scotia. *Report of the Royal Commission on the Donald Marshall Jr. Prosecution*, vol 1 (Nova Scotia: The Commission, 1989).

Ontario. *Paying the Price: the Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003).

Ontario. *Policy and Guidelines on Racism and Discrimination* (Toronto: Ontario Human Rights Commission, 2005).

Ontario. *The Commission on Proceeding Inquiry into the Guy Paul Morin Inquiry*, vol 1 (Toronto: Ministry of the Attorney General, 1998).

Ontario. *The Inquiry into Pediatric Forensic Pathology in Ontario*, vol 1 (Queen's Printer for Ontario, 2008).

Parkes, Debra. "Race, Gender and Identifying Wrongful Convictions: Are We Missing Women?" (Paper delivered at the Law and Society Association, Berlin, Germany, 25 July 2007) [unpublished].

Rakin, Jim. "Race Matters Series" *The Toronto Star* (6 February 2010).

Rankin, Jim, et al. " Race and Crime, Part 1: Singled Out" *The Toronto Star* (19 October 2002)

-----. "Race and Crime, Part 2: Police target black drivers" *The Toronto Star* (20 October 2002).

-----. "Singled Out: An Investigation into Race and Crime" *The Toronto Star* (19 October 2002) A14.

Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, vol1 (Ottawa: Supply and Services Canada, 1996).

Rosen, Philip. "Background Paper: Wrongful Convictions in the Criminal Justice System" (Ottawa: Library of Parliament Research Branch, 1992).

Saskatchewan. *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, vol 1 (Saskatoon: Attorney General, 2006).

Smith, Chris. "Central Park Revisited," *New York Magazine* (14 October 2002).

Submissions of AIDWYC and the Mullins- Johnson Group (Paper prepared for *Inquiry into Pediatric Forensic Pathology in Ontario*, Association in Defence of the Wrongful Convicted, Toronto, 2007).

The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, and Randy Druken (St John's: Office of the Queen's Printer, 2006).

Tibbets, Janice. "$1.1M awarded for false confession. Alberta man jailed 5 years for rape he did not commit," *Ottawa Citizen* (19 December 2001).

Tyler, Tracey. “Peel man cleared in slaying is buried” *The Toronto Star* (17 November 2003).