7

Racism and Prejudice

7.1 Introduction

The role of racism was often neglected in American wrongful conviction discourse and scholarship, particularly in the early years of DNA exonerations in the 1990s and 2000s. This is a curious omission, given the increased attention that was paid during this time to the overrepresentation of Black people in American prisons (Alexander, 2010; Cole, 1999; Kennedy, 1997). Thoughtful commentators who are part of the innocence movement, including false confession expert Steven Drizen and California Innocence Project director Justin Brooks, have questioned analogies between the American innocence movement and the civil rights movement (Brooks, 2023: ch 9; Norris, 2017: 172). Robert Norris in his excellent 2017 study of the innocence movement concluded that while the innocence movement touched on racism and inequality, its "agenda does not appear poised to address such broad issues" (2017: 172). Although the founders of the Innocence Project were well aware of how racial discrimination contributed to wrongful convictions and devoted a chapter of their 2000 book *Actual Innocence* to racism (Scheck, Neufeld and Dwyer, 2000: ch 10), the early focus in wrongful conviction scholarship and courses (including in my own work; Roach, 2006, 2007b) was on the immediate causes of wrongful convictions and not the role of systemic and direct discrimination.

The focus away from race in the early days of American DNA exonerations was strategic. Scheck and Neufeld prefaced their chapter on race with a quote from the United States Supreme Court's majority decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987) rejecting claims of anti-Black racism in the administration of the death penalty on the unconvincing floodgates rationale that "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty" (Scheck, Neufeld and Dwyer, 2000: 250). Moreover, the shift from discrimination to innocence resulted in real successes. They included a Republican Governor of

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Illinois imposing a moratorium on executions in 2000 and the subsequent abolition of the death penalty in Illinois. As suggested in the last chapter, the traditional American focus on proven innocence as opposed to broader understandings of miscarriages of justice has always had a populist appeal. At the same time, it is vulnerable to failures to prove innocence, innocence denials and an insensitivity to issues of racial discrimination.

Distinctions are often made between intentional and unintended or systemic discrimination. The United States Supreme Court's majority decision in *McCleskey v. Kemp* (1987) was based on the idea that while there was clear evidence that Black people who killed white victims in Georgia were much more likely to receive the death penalty than others, there was no evidence of intentional discrimination. This chapter will question the sharpness and utility of distinctions between intentional and systemic discrimination in the context of stereotypes associating certain racial groups with crimes, including in the paradigmatic American DNA exoneration cases of Black men being wrongfully convicted for sexually assaulting white women.

The chapter will also question whether American proven innocence requirements fit the circumstances that many racialized minorities find themselves. Although the focus on innocence has helped reduce support and the use of the death penalty (Baumgartner et al., 2008), it may have detracted attention from other harms that Black people suffer in the criminal justice system, including overpolicing, racial profiling, underrepresentation on juries and disproportionate imprisonment, especially with respect to drug crimes. The United States Supreme Court in 2009 granted Troy Davis, who, like Warren McCleskey, was a Black man convicted of murdering a white police officer in Georgia, an original writ of habeas corpus to give him an opportunity to establish his innocence. Alas, a Federal court judge found that Davis had not proven his innocence by clear and convincing evidence even though almost all of the witnesses who testified against him at his trial had retracted their testimony (*Re Davis* 2010 U.S. Dist. LEXIS 87340). Despite international condemnation, Georgia executed Davis, just as it had executed McCleskey. The American focus on proven innocence only results in justice for some.

In this chapter and Chapter 8 on gender and sexism, reference will be made to how juries and other justice system participants make decisions. A good deal has been written about the importance of narrative in how people organize masses of information that they are typically confronted with in criminal investigations and trials. Dan Simon, an expert on psychology and law, has commented that "it's all about subtext." Mental

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shortcuts affect police investigations and decision-making by witnesses, judges and jurors (Simon, 2012). All humans use mental shortcuts or heuristics that can include stereotypes, attributions, bias and prejudice (Hafdahl, Edwards and Miller, 2022). In Chapter 8, it will be argued that stereotypes help explain many wrongful convictions of women, which in both the United States and the United Kingdom are disproportionately for crimes that never happened. Our increased awareness of the limits of human reasoning makes it even more important that innocence movements not discount the role of racism, prejudice and stereotypes in many wrongful convictions.

This chapter will also examine how anti-Indigenous racism has affected wrongful convictions in settler colonial societies. Canada's first public inquiry into a wrongful conviction concluded that discrimination against a seventeen-year-old Indigenous man, Donald Marshall Jr., by police and even his own lawyers played an important role (Nova Scotia, 1989). This opened up the possibility for a broader approach to miscarriages of justice than was happening in the United States that could include other justice system failures including disproportionate imprisonment and victimization of racial groups (Roach, 1999a) and barriers in providing access to justice, including remedies for wrongful convictions (Roach, 2015a; Thorp, 2005). The Marshall Inquiry also tentatively linked the wrongful conviction to the harms of Indigenous justice systems being displaced by colonial systems and the need to revive Indigenous justice systems, an opportunity that Canada has not always taken up (MacMillan, 2018). A focus on the role of anti-Indigenous racism in wrongful convictions in Australia, Canada, New Zealand and the United States also narrows the distances between intentional and unintentional discrimination.

The important role of racism in explaining many wrongful convictions raises questions whether innocence movements should confine themselves to wrongful conviction reforms or whether they should adopt broader agendas including racial justice and Indigenous self-determination. If innocence movements embraced anti-racism and anti-colonialism, they could provide justice for more.

7.2 Recognition of the Role of Racism and Prejudice in Older and Pre-DNA Wrongful Convictions

Given the explosion of interest and knowledge about wrongful convictions in the post-DNA era, there is a tendency to ignore what can be learned from the past. Before I started research for this book and

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despite teaching and writing about wrongful convictions for decades, I neglected some of the rich and still relevant history of much older wrongful convictions. An exception to the ahistorical nature of much scholarship on wrongful convictions is an article written by a leading Australian judge, Michael Kirby, arguing that the "root cause" of Alfred Dreyfus's two wrongful convictions was antisemitism. Justice Kirby wisely warned that the Dreyfus case was not ancient history and that all "stigmatized minorities" remain especially vulnerable to miscarriages of justice (Kirby, 2006: 37).

7.2.1 Voltaire's Innocence Project on Behalf of Jean Calas

Voltaire was France's most famous public intellectual of the eighteenth century. He wrote on religious tolerance and put this to the test in his defence of Jean Calas, who he believed had been wrongfully convicted of murdering his son because Calas was part of France's Protestant minority. The prosecutor had invoked religious animus by arguing that Calas killed his son because he planned to convert to Catholicism. Before the twentieth century, often no real distinction was drawn between religious and racial prejudice in many European societies. Prejudice can play a role both with respect to imagined crime and wrongful perpetrator wrongful convictions. Jean Calas's wrongful conviction was for a crime that never happened because Calas's son likely took his own life. Stereotypes can be used to create a crime from nothing.

Jean Calas was tortured on the wheel and by what today would be called waterboarding. He did not confess, perhaps because he knew that a confession would doom the surviving members of his family who were present when his son likely committed suicide. After the family appealed to him, Voltaire maintained a campaign for Calas between 1762 and 1765. During this time, Voltaire published a famous book on religious tolerance that started with an account of Calas's "murder" by execution. Somewhat like Dworkin (1985: ch 3) three centuries later, Voltaire admitted that if the risk of death is distributed equally (as in war), "the death is no longer a shock and even pity is lessened." Calas's wrongful conviction did not, however, fall into this category because he was "an innocent father delivered into the hands of error, passion and fanaticism" (Voltaire, 1763). Voltaire argued that "the whole town" of Toulouse, France, where Calas was tried "was convinced that for Protestants a father and mother had a religious duty to kill their child when he wanted to change his faith. When passions are aroused, they do not stop" (1763). He believed the conviction

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at a secret trial was a national embarrassment and more fitting of the inquisition than the Enlightenment (Nixon, 1961: 154).

Voltaire used some of the profits from his treatise on religious tolerance to promote an eventual overturning of Calas's conviction by forty judges at Versailles who declared the murder charge "null and void," two years after Calas's conviction in 1762. The judges also exonerated other family members who were present at the time of the oldest son's death (Nixon, 1957: 545). As will be seen in Chapter 8.2, the same appellate body in Paris also played a role in overturning wrongful convictions in medieval witch trials (Goodare, 2016: 324–326).

Calas's appellate exoneration did not help him because he had already been executed, the last man to be executed in France by being broken on the wheel. Voltaire explained Calas's post-humous exoneration on the basis "at Paris reason dominates fanaticism, however powerful it be; in the provinces fanaticism almost always overcomes reason" (Voltaire, 1763). This raises the uncomfortable question of collective accountability and guilt for injustice. As will be seen later, a 1989 commission of inquiry into the wrongful murder conviction of an Indigenous teenager raised questions whether a small, racially segregated town was in part responsible for the injustice and the exclusion of Indigenous and Black people from the all-white jury that convicted an Indigenous teenager (Roach, 1995). A focus on the universal immediate causes of wrongful convictions can discount the role of local cultures. It can also encourage a search for individual fault when collective responsibility may be more appropriate.

Voltaire praised the judges at Versailles for rejecting the idea that the "Calas family ought to be sacrificed to the honour of the magistrates." Here, Voltaire pinpointed the complicity of the judicial system in miscarriages of justice, something that increases when the focus is placed on discrimination, which tends to focus more on systems than bad apples. Voltaire called for all those who convicted and executed Calas to apologize and admit "they were misled by ambiguous evidence and the clamour of an enraged populace." He did not focus on immediate causes of wrongful convictions such as torture but argued that judges should act "without passion, without prejudice, and above all … consonant with reason" (Voltaire, 1763).

7.2.2 Alfred Dreyfus

Alfred Dreyfus's wrongful treason convictions in passing secret information to Germany are a case of a wrong perpetrator wrongful conviction, as it is now generally accepted that another French army officer, Ferdinand

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Esterhazy, was guilty of the treasonous act of passing secrets to Germany, which had recently defeated France in a war.

Dreyfus came under suspicion because he was the only Jewish officer in the French army, and he came from an ethnically German area of France, Alsace. A Paris newspaper reported his arrest and paranoidly and wrongly predicted: "the affair will be hushed up because the officer is a Jew" (Snyder, 1973: 19). Although Dreyfus's own published account of his ordeal did not mention antisemitism, he told one of his interrogators "my only crime is being a Jew" (Samuels, 2024: 42). Although France had granted Jews full citizenship, antisemitism was increasing in part in response to 50,000 Jews migrating from Alsace-Lorraine to Paris between 1870 and 1880 (Bredin, 1983: 26). A focus on the role of racism in wrongful convictions requires consideration of the larger political, economic and social context of trials (Friedland, 1984).

Dreyfus's military trial was unfair because it involved secret evidence that Dreyfus and his lawyers never saw. Alphonse Bertillon, described as a "notorious anti-Semite" but also the founder of many forensic sciences (Bredin, 1983: 73), identified the handwriting on the document that passed the secrets as belonging to Dreyfus. He did so in a convoluted manner that alleged that Dreyfus has tried to disguise his own writing. Prejudice may place the accused in a no-win situation where their actions and demeanour, whatever they are, are judged as indicative of guilt. Bertillon's attitude became clear when he subsequently matched Esterhazy's writing with that of the written evidence at trial. When told that the sample had been written since Dreyfus was imprisoned in cruel conditions on Devil's Island, Bertillon replied: "Then it is because the Jews have trained someone in the course of a year to imitate his handwriting" (1983: 161–162). Racism can add cohesion to implausible stories (Simon, 2012: ch2) and solidify confirmation bias. As Michael Kirby (2006: 37) has suggested, one of the lessons of the Dreyfus affair is that officials "must never join a popular bandwagon" and that "society must maintain a questioning attitude towards officialdom."

Esterhazy was acquitted in an 1898 military trial, despite strong evidence that he had passed secrets to the Germans. There were antisemitic riots in seventy French towns throughout Esterhazy's trial in support of Dreyfus's conviction and Esterhazy's innocence (Bredin, 1983: 241; Samuels, 2024: 96). The full impact of racism cannot be appreciated unless attention is paid to both the treatment of the disfavoured and favoured groups. The military officers deliberated for only five minutes before acquitting Esterhazy. As Emma Cunliffe (2014) has suggested, such "fast" thinking is more conducive to the use of stereotypes.

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In a manner not dissimilar to Voltaire, Emile Zola, France's leading writer at the time, wrote an open letter, *J'accuse*. It proclaimed Dreyfus's innocence and criticized the irrationality of his conviction. Zola wrote: "He knew several languages. A crime! He carried no compromising papers. A crime! He would occasionally visit his birthplace. A crime!" He added "[t]he public, naturally, was taken in. No punishment could be too harsh." He related "the ghastly miscarriage of justice" to "the 'dirty Jew' obsession that is the scourge of our time" (Zola, 1898). Provoking a defamation suit, Zola alleged that high-ranking military officials knew that Dreyfus was innocent. Satellite civil litigation can provide an alternative to the stubborn emphasis on the finality of criminal convictions.

Unsuccessful attempts were made to have the executive and the legislature provide a remedy for Dreyfus (Bredin, 1983: 346). Dreyfus was eventually brought back from Devil's Island to face a new court martial trial in 1899. The military judges refused to adjourn the seven-week trial after one of Dreyfus's lawyers was shot in the back by an attempted assassin. Dreyfus testified to his innocence. Bertillon repeated his testimony that the handwriting was Dreyfus's, despite being contradicted by other experts. After 90 minutes of deliberation, five judges found Dreyfus guilty of treason but "with extenuating circumstances." Two officers, however, dissented and would have acquitted Dreyfus. The court martial ordered that Dreyfus serve ten more years rather than life imprisonment, his original sentence. This demonstrates the danger of reductions of punishment as a means of mitigating unsafe convictions. Dreyfus himself questioned the verdict: "since when, have there been 'extenuating circumstances' for treason?" (Snyder, 1973: 336).

The verdict triggered an early version of an international innocence movement (Godsey, 2017), albeit one focused on French injustice. The *London Times* denounced the new verdict as the "most appalling prostitution of justice the world had witnesses in modern times" (Snyder, 1973: 343). Teddy Roosevelt, then Governor of New York, commented that "it was less Dreyfus on trial than those who tried him…It was due in part to bitter religious prejudices of the French people" (1973: 343–344). The Black academic and civil rights activist W. E. B. DuBois compared the Dreyfus case to the way Blacks were treated in the United States and explained that it gave him sympathy "to the plight of other minority groups" (Samuels, 2024: 125). In the last part of this chapter, it will be suggested that DuBois's comments are still relevant in terms of drawing links between national innocence movements through a common focus on equality and anti-racism while also being attentive and respectful of local differences.

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International criticism of the guilty with extenuating circumstances verdict on the eve of a global exhibition in Paris led the elected executive to pardon and release Dreyfus within two weeks of his second conviction. The Minister of War recommended the pardon, citing Dreyfus's "seriously compromised" health and "a higher political interest" (Snyder, 1973: 346–347). Dreyfus would only accept the pardon on the condition that he could still contest his guilt. He wrote that his liberty "is nothing to me without honour. I wish that everyone in France should know by a final judgment that I am innocent" (1973: 348). Both Dreyfus and Zola opposed a subsequent law that, in an attempt to place the divisive matter to rest, granted an amnesty from any crimes committed by anyone in the affair. Dreyfus argued, "the right of the innocent is not clemency but justice." Zola similarly stated: "I want to be judged" (Bredin, 1983: 441). Ruth Harris (2010: 5) has argued that the amnesty benefited those who wrongfully convicted Dreyfus. It also reveals resistance to accountability for those who are responsible for miscarriages of justice that continues to this day.

In 1906, Dreyfus's conviction was finally quashed by a civilian court of forty-nine judges. This was the same court that had acquitted Jean Calas after his execution and, as will be seen in Chapter 8.2, the same court frequently overturned convictions in medieval French witch trials. Appellate courts have the potential to be sober second thoughts, especially when trials are influenced by prejudice. Esterhazy now admitted he wrote the document conveying the secrets, but claimed he did so under orders (Bredin, 1983: 477). The judgment acquitting Dreyfus was by judicial order to be published in fifty newspapers of Dreyfus's choice as a means of rehabilitation (1983: 480). Dreyfus was re-instated in the Army recognizing the importance of non-monetary compensation and re-integration (Bazelon, 2018a). Despite an early retirement because of his ill health related to his imprisonment on Devil Island's, Dreyfus fought for France during World War I. He was no traitor to France.

Antisemitism played a role in other wrongful convictions. Oscar Slater was convicted of murder by a 9–6 majority jury verdict in Scotland in 1909 after the judge told the jury that the German Jewish immigrant was not deserving of the presumption of innocence in part because "we do not know where he was born, where he was brought up…" (Toughill, 1993: 106). Slater did not testify for fear of prejudice against his accent. Jews were blamed for much crime in Glasgow, and Slater was believed by many to have lived off the earnings of prostitution. Slater called himself the "Scottish Dreyfus" and told the court after his conviction: "My Lord, my father and mother are poor old people. I came on my own account

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to this country…You are convicting an innocent man" (Braber, 2003; Toughill, 1993: 2, 109).

The author Arthur Conon Doyle defended Slater arguing: "The facts are on one side … the very strong prejudices upon the other." The witness descriptions of the perpetrator focused on the perceptions that the suspect was Jewish causing Doyle to remark: "To the Northern eye, all swarthy foreigners bear a resemblance" (Doyle, 1912). Another Jewish immigrant Israel Lipski was convicted of murder by a London jury in 1887 after eight minutes of deliberation (Friedland, 1984: 99, 195–203).

7.2.3 The Wrongful Conviction and Lynching of Ed Johnson

In the midst of a perceived "black crime wave" in Chattanooga, Tennessee, a white woman, Nevada Taylor, was raped in 1906. She was at first unsure of the perpetrator's race, but soon after described him as Black (Curriden and Philips, 1999: 31). Ed Johnson was arrested on a tip from a white person who was looking for the $350 reward offered in this case of a shocking stranger rape. The local press described the crime by "a Negro brute" as "an example of the crimes which heat southern blood to the boiling point and prompt law abiding men to take the law into their own hands and mete out swift and horrible punishment" (1999: 33). Johnson was initially saved from lynching by a mob when Sheriff Joseph Shipp moved him to a Nashville prison until his trial. In addition, Judge McReynolds (who would preside at Johnson's trial) promised an angry crowd of about 1,500 white men that he hoped "the rapist will be convicted … and executed according to law before the setting of Sunday's sun" (1999: 49).

Although both Judge McReynolds and Sheriff Shipp spoke to the mob, they subsequently told a grand jury that they did not recall any person in it. A Black newspaper commented that the sheriff and the judge forgot "the faces they saw and the men they talked to" because they "want to be elected again" (1999: 173). The local election of police chiefs, prosecutors and judges in much of the United States can intensify the racism of white majorities. A Mississippi judge who was the only judge to dissent in an unsuccessful 1999 appeal of Levon Brooks, a Black man, was successfully defeated in his next election because "a well-financed opponent" used "slick television ads" that labelled the judge "the only justice who voted to reverse the conviction of the murderer of a three-year-old girl" (Grisham and McCloskey, 2024: 91). Brooks served sixteen years in jail before someone else confessed to the crime (National Registry, Levon Brooks).

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Ed Johnson had court-appointed white lawyers. They unsuccessfully asked Judge McReynolds for a change of venue and a delay so that they could investigate the case. Nevada Taylor identified Johnson when shown two suspects at the Nashville jail and subsequently identified him in court (Curriden and Philips, 1999: 87). When recalled by the jury at the end of the trial, she said that she would "not swear" that Johnson was the man who attacked her but also that "before God, I believe this is the guilty Negro." This latter identification caused one of the jurors to lunge at Johnson saying: "I'd tear his heart out right now" (1999: 109). Mistaken cross-racial eyewitness identification should be viewed in the larger social context of racism.

Johnson maintained his innocence and had a strong alibi that he was working at the Last Chance Saloon at the time of the crime. Many witnesses supported Johnson's alibi. The prosecutor who was also running for re-election alleged that the alibi witnesses from the saloon were "less than honorable" and were lying (1999: 111).

Johnson's defence lawyer told the jury he would not have taken the case "were I not convinced of the absolute innocence of the negro sitting over there" (Thomas, 2008: 126). This recognized that proven innocence rather than reasonable doubt was the only thing that could possibly lead to the acquittal of a Black man charged with raping a white woman. The all-white jury was initially split 8:4 for conviction. After spending a night at home with their families, the jury unanimously convicted Johnson, who was sentenced to die a mere seventeen days after the crime had been committed (Curriden and Philips, 1999: 119–121).

Johnson's white lawyers then tried to waive his right to appeal, telling their client that delay would result in his lynching. Johnson's father then convinced two Black lawyers to represent his condemned son. They sought habeas corpus in Federal court alleging both a violation of Johnson's due process rights and his right under the 14th Amendment to equal protection of the law, given that none of the prospective jurors were Black and that Black men convicted of raping white women received much harsher sentences than white men convicted of rape (1999: 158, 166).

The writ of habeas corpus was denied by the Federal District Court judge the day it was argued. Quick decisions were again the order of the day. The judge maintained that Johnson had not proven that Black people had intentionally been excluded from his jury. In 1987, the United States Supreme Court would use similar reasoning to reject clear evidence that Black men who killed white people were much more likely to receive the death penalty in Georgia (*McCleskey v. Kemp*, 1987). The focus on the

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lack of proven intentional racism when racism was obvious can be seen as a form of American extralegalism in which American courts attempt to legitimate injustice "with dubious claims of legality" (Roach, 2011: 164). Other concerns that Johnson's new lawyers raised were dismissed on the basis that the fair trial rights in the Sixth Amendment did not apply to state proceedings (Curriden and Philips, 1999: 168). Deference to the states remains a means to condone racism in local proceedings in the United States.

Justice John Harlan, who had dissented from the Supreme Court infamous separate but equal decision upholding legal apartheid in the south (*Plessy v. Ferguson*, 163 U.S. 537 1896), stayed Johnson's execution so that the case could be decided by the full Supreme Court. He informed both Sheriff Shipp and Judge McReynolds of the decision (Curriden and Philips, 1999: 194).

Johnson was lynched the next night after Sheriff Shipp took the night off, despite widespread rumours that a lynching was imminent, given anger over any delay in the execution. Ed Johnson's last words before he was lynched were "God bless you all. I am innocent" (1999: 213). As with the unsuccessful first lynching attempt, none of the participants in this lynching was ever charged (1999: 233). Racism plays a role in both impunity and wrongful acquittals (Roach, 2019b; Walker, 1999) as well as wrongful convictions. The Equal Justice Initiative has estimated that a quarter to a half of over 4,000 racial terror lynchings in the United States were based on allegations that a Black man had sexually assaulted a white woman. Lynching as a statement "of race terror and white supremacy was largely reserved for Black suspects" (Equal Justice Initiative, 2017: 30–32).

Justice Harlan told his colleagues in an emergency meeting that he believed Johnson was innocent (Curriden and Philips, 1999: 196). This reflected the American focus on proven innocence discussed in Chapter 6. He later told reporters that "Johnson was tried by little better than mob law before the state court…. There was reason to believe that the man was innocent." Only the more distant Supreme Court had a potential to counteract local prejudice. Justice Oliver Wendall Holmes added "in all likelihood, this was a case of an innocent man improperly branded a brute…" President Teddy Roosevelt remarked that the lynching was contempt of court and "cannot go by without proper action being taken" (1999: 222–223). The Johnson case continued to be litigated but more because the mob had defied the Supreme Court's authority than because of Johnson's innocence or his racist lynching.

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Charges of contempt of court were brought against Shipp and some of his deputies. The Supreme Court confirmed that it had jurisdiction to try the contempt charges regardless of whether it had jurisdiction over Johnson's habeas corpus petition. The contempt of court charges meant that the Court and not a jury would decide whether Sheriff Shipp was guilty. Juries can be a vehicle of racism. The Court convicted Shipp because he "not only made the work of the mob easy, but in effect aided and abetted it," adding "if the life of anyone in the custody of the law is at the mercy of the mob, the administration of justice becomes a mockery" (*US v. Shipp* 214 U.S. 386 at 423, 425 (1909)). Three dissenters argued that Shipp was an "honoured and respected citizen" and that his imprisonment would be "disgraceful" (*US v. Shipp* 214 U.S. 386, 426–427). In the end, Shipp was only sentenced to ninety days in prison (*US v. Shipp* 214 U.S. 386: 334–335). This was a rare act of half-hearted accountability for widespread lynching at the time. It was done more to affirm the Court's authority than to recognize Johnson's innocence or punish the racist lynching.

George Thomas III (2008: 143) has presented the Johnson case as an early recognition of a wrongful conviction of an innocent person. He argued that jurors "cannot 'see' the truth when their minds are warped by prejudice" (2008 at 128). He also noted that a decade earlier, the United States Supreme Court overturned the conviction and death sentence of a nineteen-year-old Cherokee man for killing a federal marshal because the trial judge had not been "calm or impartial" and created a legal presumption of guilt for the jury from the accused's flight from authorities (2008: 112–114; *US v. Hickory*, 160 U.S. 408, 423 (1896)). As Professor Thomas argues, the Federal courts would not likely intervene so aggressively today. It should not be assumed that progress on racism or miscarriages of justice is linear or inevitable.

In 2000, with the consent of the prosecutor, Ed Johnson's rape conviction was overturned. The presiding judge commented that "there was a rush to find somebody to convict and blame," adding "something I don't believe the white community really understands is that, especially at that time, the object was to bring in a black body, not necessarily the person who had committed the crime. And I think that's what happened in this case" (New York Times, 2000). The collective harms of wrongful convictions caused by racism may require collective and historical forms of reparation.

There are other early American cases where prejudice was recognized as a cause of wrongful convictions. Ben "Frenchy" Ali was convicted of murder in 1891 when a woman was found murdered in the same hotel

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where he lived. Ali was from Algeria and tried to defend himself at trial by stating, "Allah is great. I am innocent. Oh, Allah save me. Allah Akbar." The interpreter mimicked Ali's statements so that the jury was "convinced them that Ben Ali was a fanatic, if not a raving lunatic" (Nash, 2008: 91). Without commenting on possible prejudice against Ali, Edwin Borchard (1932: 69) reported that "Frenchy made a bad witness, at times appearing to understand English and again pretending not to understand questions even when interpreted in his own tongue" while noting that he consistently denied the murder. He also noted "there was little disapproval of the verdict" (1932: 70). New evidence emerged implicating another man in the murder, and the New York Governor granted Ali a pardon in 1902. After having served ten years in Sing Sing and with funds provided by the French government, Ali returned to Algeria.

Issues of translation played a role in other wrongful convictions. Three Hungarians were convicted of murder and sentenced to death in Pennsylvania in 1891. They were only saved from the gallows when Andrew Carnegie intervened on their behalf because he believed it was unfair that the trial was conducted in a language that the accused could not understand. He provided compensation for the three white men from his own considerable funds. New evidence eventually emerged, and the men were subsequently pardoned on grounds of innocence (Borchard, 1932: 415–416). In 1947, the United States Supreme Court overturned a guilty plea made in 1925 on the basis that the eighteen-year accused, who was a recent immigrant from Italy, had not validly pled guilty because he did not understand English (*Marino v. Ragen*, 332 U.S. 561 (1947)). Despite this Supreme Court decision, at least two wrongful convictions were obtained in 1954 and 1958 when Santos Rodriguez and Ahmed Kassim, both of whom did not understand English, signed murder confessions written in English (Nash, 2008: 417). In the post-DNA era, however, inadequate translation has not generally been recognized or studied as an immediate cause of wrongful convictions.

Maurice Mays was convicted of indecently assaulting and murdering a woman in Knoxville, Tennessee, in 1922. An all-white jury convicted him on the basis of weak identification evidence after only eight minutes of deliberation. A second trial was held because the jury had erred by not deciding whether a death sentence was warranted. This second jury rejected Mays' claims of innocence and voted that he receive the death penalty after thirty minutes of deliberation. The decision of the trial judge to exclude evidence that similar crimes were committed after Mays was arrested and imprisoned was upheld on appeal on the basis that it was not

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relevant to whether Mays was guilty (*Mays v. State* 238 S.W. 1096, 1103 (S.C. Tenn.)). The appeal court also discounted the testimony of a Black man who worked with the police that one of the arresting officers had a grudge against Mays because the man was "very much biased on behalf of Mays and his testimony is not entitled to credit" (2008: 1101). It also rejected a challenge to the jury because one juror had said that it would not have mattered if Mays had been lynched (2008: 1101). Mays was executed in the electric chair even though three judges who had dismissed his appeals asked for a delay. Mays proclaimed his innocence throughout and before his execution stated: "I am dying to satisfy a few Republican politicians…. I am as innocent as the sun shines" (Paine, 2007: 33). Attempts to exonerate Maurice Mays continue to this day.

7.2.4 The "Irish" Wrongful Convictions

The most well-known English wrongful convictions are of Irish people convicted of terrorism in the 1970s during bombing campaigns by the Irish Republican Army (IRA). The stories of the Birmingham Six, Guildford Four and Maguire Seven exonerees are well known, but the focus here will be on how concerns about discrimination against the Irish dominated the long and ultimately successful campaigns for their freedom and exoneration.

All but one of the seventeen persons convicted in the three groups were Irish. The only exception was Carole Richardson, the seventeen-year-old English girlfriend of one of the Irish suspects. False confessions obtained from the Guildford Four led to the identification of the Maguire Seven and their eventual conviction on the basis of false confessions and faulty forensic evidence that they had been making bombs. The police beat and tortured the suspects into confessions. Gerry Conlon recalled that while he was beaten, the police said: "You murdering, Irish SCUM, you're an ANIMAL…. A murdering Irish ANIMAL!…" (Conlon, 1990: 74). He explained: "I wanted to please the police just so I wouldn't be beaten any more, screamed at, abused with dirty names" (1990: 88). The police discounted the Guildford Four's alibis. They continued to do so after another group in 1977 took responsibility for the bombings that killed seven people. Racism can sustain and cement tunnel vision or confirmation bias.

The Birmingham Six were wrongfully convicted of a pub bombing that killed 21 and left 162 injured. They were arrested as they were leaving England for Northern Ireland to attend a funeral of an IRA member that they knew. Guilt by association can be a vehicle for racist terrorism

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wrongful convictions. They were held under an emergency law enacted after the bombing. This law gave police special powers to detain and exclude from England those associated with the IRA or other proscribed groups associated with Irish terrorism. As suggested in Chapter 2.2, English law professor Clive Walker's (1993) broad definition of miscarriages of justice was influenced by his expertise in how British antiterrorism laws of the time violated many of the rights of terrorist suspects even when they did not result in wrongful convictions (Roach, 2019c). There were also attacks on Irish people and businesses in Birmingham in the wake of the pub bombing, suggesting a willingness to assign collective guilt to the entire minority.

The campaigns for the Birmingham Six often stressed issues of prejudice and discrimination against the Irish. For example, a 1990 submission by the International Association of Democratic Lawyers led by a South African refugee stressed that "there is a long history, well documented, of prejudice within Britain against the Irish." It noted that the 1974 emergency law "applied to all Irish political suspects" and "effectively abolished the right to silence which is available to the rest of the population" (Gilligan, 1990: 219–220). Concerns about equality and discrimination were central to the ultimately successful campaign. Paddy Hillyard wrote about how in the aftermath of the 1974 emergency legislation that the Irish in England became a "suspect community" (Hillyard, 1993: 191–193) subject "to the same type of policing that the black community has experienced in the United States" (Hillyard and Percy Smith, 1988: 271–272). Like W. E. B. DuBois's response to the Dreyfus case (Samuels, 2024: 125), this drew analogies between the treatment of minorities subject to discrimination throughout the criminal justice system including, but not limited to, wrongful convictions. Professor Hillyard criticized the Runciman Commission for not examining either the "Irish" wrongful convictions that prompted its appointment and for not examining discrimination against the Irish even while it studied criminal justice discrimination against Black and Asian people (Hillyard, 1993: 53).

Writing in 1999, Helena Kennedy and Keir Starmer observed that even after the reversal of the Irish wrongful convictions, "the judiciary and the legal profession clearly did not feel they had any accounting to do. Far from being humbled by these experiences, there are still members of the judiciary who are resentful and angry that they have come under scrutiny at all" (Kennedy and Starmer, 1999: 373). A concern about the role of racism in wrongful convictions often demands remedies that go beyond the release and compensation of the individual victims. Conversely, ignoring

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racism promotes a more individualistic approach that too often dismisses wrongful convictions as the result of bad apples.

The Runciman Commission's major recommendation for the creation of a CCRC can be seen as promoting a forensic focus on the immediate causes of wrongful convictions and the safety of convictions. Both Hannah Quirk (2013) and Marny Requa (2014) have commented on the limits of the CCRC and the Northern Irish Court of Appeal in reviewing miscarriages of justice in terrorism cases from Northern Ireland that were conducted under even more rights-invasive anti-terrorism laws than used in England.

The professional and legalistic discourses brought on by the advent of the CCRC in England and DNA exonerations in the United States have been at the expense of earlier discourses that focused on the dangers of discrimination and prejudice. Concerns about discrimination may have a "lay" appeal not altogether different from the "lay" appeal of concerns about factual innocence (Naughton, 2013). In other words, the turn towards the courts and the CCRC for justice may have repressed a discussion of racism and related rights violations that often dominated earlier political campaigning.

7.2.5 Rubin "Hurricane" Carter

The conviction of Rubin "Hurricane" Carter and John Artis for murdering three white people in a bar in Paterson, New Jersey in 1966 is separated by more than half a century from Ed Johnson's wrongful conviction and lynching. Despite the time span and some progress for Black people in the United States, anti-Black racism played a critical role in both wrongful convictions. The role of anti-Black racism was recognized in Judge Lee Sarokin's 1985 decision overturning the two wrongful convictions (*Carter v. Rafferty* 621 F.Supp.533). As such, the Carter and Artis wrongful convictions fit into the pre-DNA exonerations pattern of highlighting the role of racism.

Peter Neufeld has provided an intriguing link between Carter's wrongful conviction and his later important work in co-founding the Innocence Project. The New York native told an interviewer that "going back into the 80's … there were tons of people in New Jersey," who thought that Carter was guilty even though Neufeld believed he was innocent and been clearly exonerated. Neufeld explained that this scepticism about Carter's innocence motivated the Innocence Project's concern with finding cases "that are simply non-controversial, where everybody agrees – prosecutors,

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judges, the defence – that they people are stone-cold innocent" (Norris, 2017: 56). As discussed in Chapter 6, the Innocence Project had much success in achieving bipartisan support. This may affirm the wisdom of Neufeld's search for a non-controversial consensus. But it also raises questions about the viability of that consensus after Trump and whether downplaying the role of anti-Black racism was one of the prices paid for a bipartisan consensus that may, in any event, no longer be possible.

Carter and Artis were convicted on the theory that they sought racial revenge for the shooting earlier in the night of a Black owner of another bar in Paterson by a white person. The racial revenge theory was fuelled by awareness that Carter was a supporter of Malcolm X. Carter and Artis were proactively stopped by the police twice on the night of the killings. To the extent that such stops were discriminatory forms of profiling, they could be seen as miscarriages of justice, at least under Clive Walker's (1993, 1999) broad rights-based definition discussed in Chapter 2.2. Overpolicing and racial profiling can contribute to wrongful convictions though they are not identified as immediate causes and have not been the focus of the American innocence movement's concerns.

Carter and Artis became suspects even though a surviving person from the bar could not identify them even in a suggestive show up. Carter and Artis passed lie detector tests and volunteered to take gun residue tests, which were never taken by the police. The narrative of racist revenge led to inadequate police collection of evidence, something that also happens when the police do not take crimes against racial minorities seriously (Roach, 2019b). With no physical evidence, the police and prosecutor relied on two dubious white witnesses, one who was in the vicinity of the killing acting as a lookout for a robbery and another who was a friend of one of the Paterson police officers (Wice, 2000: 11–15). The trial judge assumed that inconsistent statements by one of the witnesses were the result of him being scared and threatened by Carter (2000: 54). To classify these two white witnesses simply as incentivized or lying witnesses discounts the pervasive role of racism in the trial. As will be seen later, a Canadian trial judge made a similar irrational and racist assumption that white witnesses who tried to retract their lies in a 1971 murder trial did so because they were threatened by an Indigenous accused, who, like Carter and Artis, was in pre-trial detention at the time (Roach, 2025a: xx).

The jury selection took three weeks in April 1967. In fear of another racial riot, the Paterson courthouse was surrounded by armed police. Even though both Artis and Carter had twenty peremptory challenges compared to the prosecutors' twelve peremptory challenges, only one

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juror out of fourteen selected was Black (Wice, 2000: 46). Everyone in the courtroom was white except Carter, Artis, their families and friends, one of their lawyers, one of the jurors and their alibi witnessses (Hirsch, 2000: 54). The one Black juror was among the two alternative jurors randomly excluded from the twelve-person jury that convicted Carter and Artis of murder. The excluded Black juror subsequently told reporters that he would have acquitted both men (Wice, 2000: 64). The racial revenge theory resulted in racially polarized views about the case.

The trial judge said he agreed with the all-white jury's guilty verdict. He sentenced Carter to two consecutive life terms, stating that the killings were "a cold-blooded massacre of innocent victims" (2000: 65). This sentence deprived Carter of any chance of parole, while Artis would be eligible for parole because his multiple life imprisonment sentences would run concurrently. The sentence singled out Carter, a professional boxer, for his religion and his outspokenness. In 1969, the New Jersey Supreme Court rejected Carter's appeal in a 7:0 decision. Any legal error was considered harmless, and Carter's sentence of two consecutive life terms was justified (*State v. Carter* 255 A.2d 746 (1969)).

The trial judge rejected two motions for a new trial, despite recantations by the two eyewitnesses, which he dismissed as untrue and new investigative reporting raising concerns about the case (Wice, 2000: 84). Carter was not surprised by the result and told the press: "I wasn't looking for anything – not from him – if he set a new trial, it would be like investigating himself" (2000: 84).

By 1974, a campaign for Carter supported by Bob Dylan, Muhammad Ali, Johnny Cash and Harry Belafonte had been mobilized. The campaign emphasized racism as much as innocence with Dylan's *The Hurricane*, calling out the police stops of Carter earlier in the night in what today would be called racial profiling (2000: 91). In 1976, the New Jersey Supreme Court reversed the trial judge's denial of orders for a new trial on the basis of a lack of disclosure of benefits provided to the state's key witness for his testimony (*State v. Carter* 354 A 2d 627 (1976)). Many attributed this new order for a second trial to the campaign for Carter (Wice, 2000: 90). Carter and Artis were released on bail and picked up from prison by Muhammad Ali (Chaiton and Swinton, 1991: 63).

The second trial was held in 1976 before sixteen jurors including two Black jurors (Wice, 2000: 110). The prosecution again stressed the racial revenge theory, stating that "no group, no class, is immune from hate and we know that revenge is one of the most powerful motive any human being can have" (2000: 155). The trial judge rejected defence arguments

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that the racial revenge motive would be prejudicial, causing one of the defence lawyers to accuse the judge of turning the trial into a "racial nightmare" (2000: 130).

Carter did not testify because of concerns that his prior criminal record and his autobiography would be used against him (2000: 141). The jury convicted both men shortly before Christmas 1976. Carter was again sentenced to two consecutive life terms after having told the judge before sentence, "the only evidence is that two black people did the crime, but contrary to some opinions, your Honor, all black people do not look alike" (2000: 148). After the trial, the judge rejected allegations by one of the jurors that the jury had false information that Carter had failed a polygraph; that jokes were made among jurors using derogatory Italian terms for Blacks and that one of the guards protecting the jury had raised racial issues and referred to Carter and Artis as "those bastards" (2000: 156). Carter was back in prison, where he refused to eat prison food or participate in prison life because that would be "admitting I am guilty" (Chaiton and Swinton, 1991: 66).

The New Jersey Supreme Court dismissed an appeal from the second conviction in a 4:3 decision (*State v. Carter* 449 A.2d, 1286 (1982)). The majority rejected the challenge to the racial revenge theory by stating "defence counsels err when they insist that the state's theory impermissibly casts all blacks by being motivated to seek retribution when a black person is murdered by a white person. There is no place in the courtroom for any such labelling" (1991: 1292). This suggested that the defence challenge was a form of reverse discrimination that avoided the criminal trial's focus on the guilt of Carter and Artis as two presumably raceless individuals. The dissenters did not take on the majority's convoluted and defensive reasoning. They would have ordered a new trial on the basis of a failure to disclose the state's witnesses' many inconsistent statements. There are many ways to correct wrongful convictions. Calling out racism may not be the safest or most convincing approach for either lawyers or judges to employ.

Having exhausting all remedies in the state system, Carter and Artis, like Ed Johnson in 1906, filed for habeas corpus relief in the Federal court. Litigation in Federal court would move the case away from state systems where judges were often elected. In a risky tactic, Carter and Artis moved for summary judgment on the habeas corpus motion. They had been developing new factual evidence but eventually abandoned this route because it would have to be tested first in New Jersey courts, adding more delay and more litigation before state courts that had not been sympathetic to them.

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In granting habeas corpus relief, Judge Lee Sarokin started his judgment by denouncing the prosecutor's racial revenge theory as having "a highly inflammatory and prejudicial effect on the jury" and being based on a "stereotyped supposition as to how a particular group would react in a given situation" (*Carter v. Rafferty* 621 F.Supp.533, 540 (1985)). Judge Sarokin was a Jimmy Carter appointment who supported affirmative action for Blacks in the face of attacks by the Reagan Administration (Hirsch, 2000: 255). Eschewing the formal equality approach taken by the majority of the New Jersey Supreme Court, he questioned whether a racial revenge would be accepted in a case of a white accused (1985: 544). He stated, "the prosecutor's theory invokes race for a purpose that has very slight or uncertain logical validity, and does so at the distinct risk of stirring racially prejudiced attitudes" (1985: 546). He would not defer to a state conviction "which rests upon racial stereotypes, fears and prejudice" (1985: 560). This was a remarkably forceful recognition of the role of racism at the time. It contradicted Harvard law professor Paul Bator's argument that Federal court should trust state courts to treat Black people accused of a crime fairly (Bator, 1963). Judge Sarokin's judgment became the focal point in Norman Jewison's 1999 film *The Hurricane*. The film won the Black Reel best film award but was not nominated for an Oscar. The fact that many may have silently disagreed with Judge Sarokin's calling out of racism may also help explain Peter Neufeld's comments that many people in New Jersey still believed that Carter was guilty.

Judge Sarokin's judgment was among the 3 per cent of 8,000 federal habeas corpus applications that succeeded in 1985 (Hirsch, 2000: 246). The prosecution's appeal to the Third Circuit was denied. However, the appellate court focused only on the state's disclosure violations. In a telling silence, it did not discuss Judge Sarokin's acceptance that the prosecution's racial revenge theory was an improper appeal to racial prejudice (*Carter v. Rafferty* 826 F.3d 1299, 1987). The judges may well have defensively rejected any idea that his conviction had been tainted by racism, and some may have believed that Carter was still factually guilty.

The New Jersey prosecutor, who subsequently became a state judge, continued to argue that Carter was "a dangerous and violent assassin. He always has been and always will be" (Hirsch, 2000: 295, 338). Peter Neufeld was correct that some people would never accept Hurricane Carter's innocence (Norris, 2017: 56). This, however, begs the question of whether some of these people would have accepted his innocence even in the face of a DNA exclusion and whether an American innocence movement should be dominated by a desire to convince innocence sceptics and deniers (Bazelon, 2018a).

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7.2.6 Summary

The above-mentioned five cases have been discussed in detail to demonstrate how issues of prejudice and discrimination were often central to discussions of prominent wrongful convictions in France, England and the United States before DNA exonerations. To be sure, the immediate causes of the wrongful convictions, such as unreliable witnesses, false confessions, and faulty forensics, can be identified in all these cases. Nevertheless, it is striking how often campaigners and, in Carter's case, Judge Sarokin identified racism and prejudice as the main cause of these wrongful convictions (*Carter v. Rafferty* 621 F.Supp.533, 1985). Perhaps, these explanations did not persuade everyone, but it is not clear that the more professional and technical wrongful conviction discourse promoted by DNA exonerations in the United States or by the CCRC in England has also resulted in universal acceptance. In a subsequent section, Trump's call for the execution of the Black and Hispanic teenagers of the Exonerated (Central Park) Five and his apparent denial of the innocence after their DNA exoneration will be examined.

7.3 The Downplaying of Racism in the Early American Innocence Movement

This section will examine how and why the American innocence movement in the 1990s and 2000s downplayed the anti-Black racism revealed by many of its DNA exonerations. Some reasons were strategic after the Supreme Court shut down claims of discrimination in a 5:4 decision in 1987. Others were the happenstance that the historical "first" DNA exonerations involved white men. What is clear, however, is that the focus was on the immediate causes of wrongful convictions, especially mistaken eyewitness identification, rather than the role of anti-racism. This section also examines the 1991 and 2010 executions of Black men for killing white police officers in Georgia, despite their claims that they were innocent and victims of discrimination.

7.3.1 McCleskey v. Kemp

In 1978, Warren McCleskey, a Black man who had attended segregated schools in Atlanta, was convicted by a jury of murdering a white police officer during an armed robbery of the Dixie Furniture Company. He was convicted on the basis of testimony from accomplices and jailhouse

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informants. Witnesses, who could not identify him in a photo line-up, identified him in court as the perpetrator (Kirchmeier, 2015: ch 2).

McCleskey engaged in post-conviction litigation alleging disclosure and right to counsel violations. In 1991, the Supreme Court rejected his right to counsel claim on the basis that he was too late in raising it. They would not waive his procedural default because McCleskey could not "demonstrate" that the constitutional violation "caused the conviction of an innocent person" (*McCleskey v. Zant*, 499 U.S. 467, 502 (1991)). Justice Thurgood Marshall dissented on the basis that the majority had engaged in an "unjustified assault on the Great Writ" (1991, 507). As outlined in Chapter 6.5, the Supreme Court's 1991 decision that led to McCleskey's execution was a start of a movement in both the courts and Congress to restrict federal habeas corpus that has produced a complex but very restrictive jurisprudence that often required proof of innocence. The intellectual start of this move to innocence was Harvard law professor Paul Bator's (1963) arguments that Federal courts should not use habeas corpus because Black people could receive fair trials in the American South (Bator, 1963).

McCleskey's first and best argument was not innocence: it was discrimination. In 1987, the Supreme Court rejected McCleskey's claim of racial discrimination in a controversial 5:4 decision. A contemporary and sophisticated regression study known as the Baldus study was presented to the Court. It examined the race of both the accused and the victim in over 2,000 capital cases in Georgia in the 1970s, controlling for 230 factors. It found that Black people who killed white victims were twenty-two times more likely to receive the death penalty than Black people who killed other Black people and seven times more likely than white people who killed Black people (*McCleskey v. Kemp*, 481 U.S. 279, 326 (1987)). The study was also supported by more anecdotal evidence. Six of the seven persons executed by Georgia after it enacted a new and more restrictive death penalty in 1976 were Black. They were all convicted of killing white people (1987). In 1861, the Georgia Penal Code mandated the death penalty for a Black man convicted of raping a white woman while providing that white men who raped Black women were subject to a fine or imprisonment at the court's discretion (Kirchmeier, 2015: 131). History can often illuminate racism that may seem less overt today.

Despite all this evidence, Justice Powell concluded for the majority that the evidence "is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose" (*McCleskey v. Kemp*, 481 U.S. 279, 1987). He recognized that McCleskey's claim of systemic discrimination could apply to many facets of the

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American criminal justice system, noting that "taken to its logical conclusion" it "throws into serious question the principles [of discretion] that underlie our entire criminal justice system" (1987: 314–315). This focus on lack of proof of intentional discrimination was the reasoning used by a Federal District court in 1906 to reject Ed Johnson's equality-based challenge to his conviction by an all-white jury for raping a white woman (Curriden and Philips, 1999: 168).

The majority's decision was criticized as "the Dred Scott decision of our time" in reference to the Court's infamous decision constitutionalizing slavery (Kirchmeier, 2015: 162–163). Nevertheless, it effectively ended the viability of discrimination claims with respect to the death penalty. This encouraged the nascent American innocence movement strategically to focus on a new "innocence frame" (Baumgartner et al., 2008). Innocence claims soon won more media attention and bipartisan political support than had previous claims focused on anti-Black racism (2008).

Georgia killed Warren McCleskey in 1991 by the use of the electric chair. This was done despite two jurors saying that they would not have voted for the death penalty had they known of the benefits provided to an accomplice who testified that McCleskey had shot the officer. The execution proceeded despite Nelson Mandela's letter to the Georgia Pardon Board arguing "there is far more that reasonable doubt in the case of Warren McCleskey, and I believe that his execution would represent a tragic miscarriage of justice" (Kirchmeier, 2015: 185). Mandela, as a lawyer who established South Africa's first Black owned law firm before his imprisonment by the apartheid state, focused on reasonable doubt and miscarriages of justice rather than proven innocence. Mandela was also familiar with the racist administration of the death penalty. Apartheid South Africa hanged 121 Black people convicted of rape, but no white people convicted of rape (New York Times, 1979).

7.3.2 The Move from Racism to Innocence

After Warren McCleskey's execution, use of the death penalty as well as American prison populations increased. Michael Dukakis lost his 1988 Presidential campaign in no small part because a Black man, Willie Horton, raped a white woman and stabbed her husband while on a prison furlough. Bill Clinton presided over the execution of Billy Ray Rector, a Black man with severe mental disabilities, in his successful 1992 Presidential campaign. Congress passed crime control legislation in 1994 that dramatically increased the imprisonment of Black men. It followed

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this up with 1996 legislation, restricting the ability to seek federal habeas corpus in order to ensure a more "effective death penalty." In 1998, executions in the United States hit a high of 98. In a 1996 article called "My Black Crime Problem, and Ours," Princeton professor John DiIulio Jr. popularized the idea of "super predators" and warned that "the number of young black criminals is likely to surge" because by 2010 there would be 26 per cent more Black people under seventeen years of age. He argued that "for most Americans, especially for average white Americans," the fear "is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien" (DiIulio, 1996; Henning, 2021: 87–88). This was the type of hostile environment that explained why the innocence movement downplayed race and racism.

Even those who addressed anti-Black racism in the American criminal justice in the 1990s did not focus on wrongful convictions. David Cole's *No Equal Justice: Race and Class in the American Criminal Justice System* published in 1999 did not deal explicitly with wrongful convictions. One exception was Randall Kennedy's (1997) *Race, Crime and the Law*, which noted that "[s]tories surface annually of blacks released from prison after losing years of their lives as a result of wrongful convictions obtained by racially tainted prosecutions" (Kennedy, 1997: 127). At the same time, it only devoted three of its over 500 pages to wrongful convictions, focusing more on police, juries and the war on drugs. New critiques of how anti-Black racism affected American criminal justice, such as Michelle Alexander's *The New Jim: Mass Incarceration in the Age of Colorblindness* published in 2010, did not discuss wrongful convictions. Accounts of wrongful convictions and racism in American criminal justice may still be on separate tracks, despite the many linkages that could be drawn between these phenomena.

7.3.3 The First American DNA Exonerations: White by Chance

Another factor in the downplaying of racism was the happenstance that the historical "first" DNA exonerations involved white men.

Gary Dotson was released in 1987 after seven years in prison after the female complainant recanted her claim that Dotson had raped her. His case received much media attention, including coverage in *People* and *Time* magazines, national newspapers and interviews on national television. After DNA testing in August 1988 excluded Dotson, his conviction was overturned in August 1989 with the prosecutor's consent. In 2003, he received a pardon based on innocence. Dotson's case captured media

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attention and the public imagination in large part because of the complainant's recantation. She subsequently wrote a book about the experience called "I am sorry" and donated the proceeds to Dotson.

But Dotson may not have been the first person exonerated by DNA. David Vasquez was exonerated by the Virginia governor in January 1989 on the basis of being excluded by DNA from a rape murder. Vasquez was Hispanic and had a severe mental disability. He had falsely confessed and entered a guilty plea to second-degree murder to avoid a death sentence. In many ways, his case was more illustrative of the problems that wrongful convictions could reveal about the American criminal justice system than Dotson's case. Vasquez's case did not, however, receive national media attention. It remained "mostly a local event" (Norris, 2017: 51).

In the same year that Vasquez was exonerated, another Hispanic man, Carlos DeLuna, was executed by Texas based on a single cross-ethnic eyewitness identification and despite his claims that his companion Carlos Hernandez committed the robbery and murder. The jury rejected this defence, and DeLuna refused a plea deal that would have saved his life. The two Carlos looked so alike that even members of their own family mistook one for the other (Liebman, 2014). There has not been official recognition that Carlos DeLuna was wrongfully executed, despite Carlos Hernandez having subsequently confessed to the murder. Racist stereotypes can cement confirmation bias.

Kirk Bloodsworth, a white former Marine, was the first person exonerated by DNA from death row in 1992. After his release, Bloodsworth appeared on the Oprah Winfrey and Larry King shows and testified in Congress and state legislatures (Junkin, 2004: 264). He also received a pardon on the basis of innocence in 1993 (2004: 265). His message to Congress had bipartisan appeal as he stressed that "it can happen to you. It can happen to your child, son, your daughter – it can happen to anybody" (2004: 269). Part of the 2004 federal *Justice for All Act* is named after Bloodsworth.

Errol Morris's 1988 film *The Thin Blue Line* is also credited with raising much initial awareness about wrongful convictions. It examined the wrongful conviction of another white man, Randall Adams, for the murder of a Texas police officer. Adams had his death sentence overturned by the United States Supreme Court in 1980 on the basis that Texas had overreached in its attempt to ensure that jurors were not opposed to the death penalty (*Adams v. Texas* 448 U.S. 38 (1980)). Adams' wrongful conviction was eventually overturned by the Texas Court of Criminal Appeals after twelve years' imprisonment.

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In 2002, the 100th DNA exoneration occurred. It also involved a white man, Roy Krone, who, like Bloodsworth, had previously been honourably discharged from the military. He went on to form Witness to Innocence with Sister Helen Prejean that campaigns for death penalty abolition.

The most prominent and first DNA exonerations from 1988 to 2002 happened to involve white men, even though Black men constituted 57 per cent of the DNA exonerations and Hispanic men constituted 8 per cent of them (Innocence Project, 2025; "DNA exonerations in the United States").

7.3.4 Death Row Exonerations and the Focus on Their Immediate Causes of Wrongful Convictions

The decision to focus on the immediate causes of wrongful convictions was related to the understandable need to understand these causes, as they might apply to the majority of criminal cases where DNA was not available (Scheck, Neufeld and Dwyer, 2000). At the same time, it inadvertently made it easier to ignore the role of racism.

The 2002 Illinois Report on Capital Punishment appointed in the wake of thirteen death row exonerations and a moratorium on executions imposed by a Republican Governor focused on the immediate causes of wrongful convictions. The word racism was not mentioned, and the word racial only appears nine times in the 207-page report. Although the majority of those on death row in Illinois were Black and those who killed a white victim were more likely to receive the death penalty, the Commission found no evidence that Black people were more likely to receive the death penalty once aggravating factors were considered in a study of 5,000 capital cases from 1988 to 1997 (Illinois, 2002: 196–197). At the same time, twelve of those exonerated from that state's death row were Black, and four of them were victims of Chicago police officer Jon Burge's "Midnight Crew," who tortured and beat over a hundred suspects on Chicago's South Side until they confessed. In announcing his 2000 moratorium, Governor Ryan paid more attention to racism, noting that three-quarters of those on death row were Black and thirty-five Black men on death row had been convicted by all-white juries. Ryan's "lay" discourse (Naughton, 2013) was more sensitive to racism than that of the legal professionals on Illinois's Commission.

A 2005 report by an Innocence Commission for Virginia similarly focused on the immediate causes of wrongful convictions. It mentioned difficulties of cross-racial eyewitness identifications but did

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not recommend specific reforms about this phenomenon (Innocence Commission of Virginia, 2005). The report used the word racism once and only used the word racial four times. A close reading of the report's case studies, however, revealed that even if anti-Black racism was not called out, it was very much in play. Five of its eleven case studies involved Black men wrongfully convicted of raping white women. Marvin Anderson was wrongfully convicted of rape in 1982 by an all-white jury and largely on the basis that he was the only Black man that the investigating officer knew who lived with a white woman (2005: 13–14, 70). He was denied relief in 1988 even after another person had confessed to the rape. Another Black man, Julius Ruffin, was wrongfully convicted of raping a white woman even though she had initially identified a photo of another man before identifying Ruffin in the street. Her original description was that the rapist was "dark skinned," while the report described Ruffin as "light skinned" (2005: 17–18). Juries at Ruffin's first two trials deadlocked along racial lines before he was convicted by an all-white jury at a third trial after the prosecutor had used peremptory challenges to exclude Black people from the jury (2005: 18). The report, however, made no recommendations about the discriminatory use of peremptory challenges, despite the role they played in Ruffin's wrongful conviction.

Jon Gould (2008: 34), one of the authors of the Virginia report, devoted two pages in his monograph about the Commission to discussing how eight of the eleven cases it studied "were of minorities who have been wrongly convicted" and that "several of these cases were rapes, with white women inaccurately accusing black men of assault." He commented that this "only rekindled odious images from the Commonwealth's past in which similar charges would have been met by a lynch mob" while also stressing "the Virginia of 2000 was a much more diverse state, particularly as its northern suburbs welcomed immigrants from a host of nations and ethnicities." The discounting of the contemporary impact of history can go hand in hand with the discounting of racism. Gould also advocated what he recognized as a "conservative agenda for reform" (2008: 230) that would not attempt to "'sell' changes on the basis of civil rights or due process" (Gould, 2014: 5).

The 2008 Maryland Commission on Capital Punishment did find racial disparity in the application of the death penalty in that state but focused on the risk of error and convicting the innocent (Maryland, 2008). The 2004 Massachusetts Commission on Capital Punishment focused on the idea that scientific evidence and closer attention to the immediate causes of wrongful conviction could help ensure that the innocent were not

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executed (Massachusetts, 2004). The premise of this endeavour, encouraged by Governor Mitt Romney, was that those who were truly guilty of capital murder deserved to be executed regardless of race or disadvantage.

Academics writing about wrongful convictions at the time, including myself (Roach, 2006, 2007b), largely ignored the role of racism and focused on immediate causes. A 2004 symposium on wrongful convictions focused on the immediate causes of wrongful convictions. One article described how a conservative judge convened the North Carolina Actual Innocence Commission on the understanding that the stakeholders on the Commission would not take a position on the state's death penalty (Mumma, 2004) even though the state's twelve death row exonerations included ten Black men and one Hispanic man (DPIC). As discussed more fully in Chapter 6.3, the Commission did important work, but it did not take on either the death penalty or racism. In 2009, however, North Carolina enacted a *Racial Justice Act* to combat racial disparity in the administration of the death penalty. Prosecutors were successful in having the law repealed in 2013 even though the courts had reduced the death penalty to life imprisonment in a number of cases after finding capital cases where prosecutors had excluded Black people from juries. It will be suggested later that innocence movements should be more willing to take both an abolitionist stance on the death penalty and to advocate for racial justice acts.

A 2005 symposium on wrongful convictions and the death penalty did contain some discussions of racism. To their credit, Sam Gross and colleagues addressed race directly in an article examining exonerations from 1989 to 2003. They highlighted that the DNA exonerations were heavily skewed to rape cases and that two-thirds of the exonerated were either Black or Hispanic. Black rape exonerees were 64 per cent of all rape exonerees while only constituting 29 per cent of the population most at risk, those imprisoned for rape. They stressed that half of the rape exonerations where the race of the accused and the complainant were known involved Black men wrongfully convicted of raping white women (Gross et al., 2005: 546–548). This duplicated some of the focus of the Baldus study by examining the race of both the accused and the victim. Even though their article was widely cited and discussed, their explosive findings of gross Black overrepresentation in DNA exonerations did not generate much attention.

Other contributions to the symposium denied that racism was in play. Joshua Marquis in a widely cited article questioned both the innocence of some exonerees and the idea that Black people were overrepresented

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among the wrongfully convicted. He concluded that Black people were underrepresented on death row in relation to those convicted of murder. Only 1.3 per cent of Blacks convicted of murder were sentenced to death compared with 2.8 per cent of whites (Marquis, 2005: 507). This ignored that both the Baldus study and the examination of DNA rape exonerations by Gross confirmed the importance of examining the race of both the accused and the victim. The flip side of anti-Black racism is white supremacy, which values the lives of white crime victims most highly than non-white victims. Marquis then concluded: "it may be shockingly politically incorrect to say, but the fact is that the most horrific murders-serial killings, torture murders, and sex crimes against children tend to be committed more frequently by white murderers than blacks" (2005: 507). This alluded to the focus on serial killers like John Wayne Gacy and Ted Bundy throughout the 1990s. Marquis was a prosecutor and one of the most prominent and aggressive sceptics about claims of innocence. Nevertheless, his denial of racism was also reflected in the contribution of some academics to the 2005 symposium. Ronald Allen and Amy Shavell (2005: 634) confidently concluded: "There was certainly a time when rampant discrimination against African-Americans occurred. Those times are gone."

In 2006, the late Andrew Taslitz, a law professor who taught at the historically Black Howard Law School, wrote an "informal essay," gently suggesting that the interaction of race and innocence was not being sufficiently researched. He ended the essay confessing the need for more knowledge and somewhat defensively stating: "I don't mean to imply that a mistaken conviction of a black man is any worse than one of a white man. But I do worry that being black makes the mistakes all the more likely to occur in the first place" (Taslitz, 2006: 133). Even a 2017 collection of essays on *Wrongful Convictions and the DNA Revolution* (Medwed, 2017) did not devote one of its nineteen chapters to racial discrimination though a few of the essays did make reference to racial discrimination especially in relation to the wrongful convictions of Black men for sexually assaulting white women (2017: 44–45, 294–298). Even when discrimination was not ignored, it was not the lead.

Jim McCloskey, who founded Centurion Ministries in 1983, which is generally credited as the first innocence project, told an interviewer that a focus on racism was "not part of our thought process. That's not what inspires me. That's not what I connect to" (as quoted in Norris, 2017: 168). This was a striking statement given that forty-one of sixty-five exonerees freed by Centurion Ministries have been Black (McCloskey, 2021). They

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included Elmer "Geronimo" Pratt, who was wrongfully convicted in 1972 of a murder of a white woman in Los Angeles after the FBI failed to disclose surveillance tapes because of Pratt's involvement with the Black Panthers, which supported his alibi that he was in Oakland at the time of the murder. After he was convicted, Pratt told the jury: "You're wrong. I didn't kill this woman. You racist dogs" with the jury foreman later telling the press that after nine days deliberation, the jury "did its utmost to find Mr. Pratt not guilty" (Nakano, 1985: 193–194). Black anger at the injustice of wrongful convictions was thus chastised.

Another Centurion exoneration was Clarence Brandley, who was wrongfully convicted of raping and murdering a sixteen-year-old white girl by an all-white jury. He, along with another janitor, found the girl's body. The police officer investigating the case told the two men that one of them was going to hang for the crime, and because Brandley was Black (not the word the officer used), "he was elected." Brandley was arrested before any witnesses were even interviewed (National Registry, Clarence Brandley). A Texas judge at a habeas corpus hearing in 1987 and after switching the venue from a small town known for racial tensions called out the racism that pervaded the investigation and trials in a manner similar to Judge Sarokin's 1985 decision in Rubin Carter's case discussed earlier (*Carter v. Rafferty* 621 F.Supp.533, 1985). As in the Carter case, the appellate court upheld the habeas decision, but side-stepped racism. The majority did note the police's "blind focus" on Brandley, "despite the fact that a Caucasian pubic hair, not belonging to the victim, was found near the victim's vagina" (*Ex parte Brandley* 781 S.W.2d 886, 890 1989). The dissenting judges did discuss racism but denied that there was intentional discrimination as required in *McCleskey v. Kemp* (1985: 926ff) (Grisham and McCloskey, 2024: 34–64; Radelet, Bedau and Putnam, 1992: ch 6).

To his credit, Jim McCloskey has recently elaborated on the role of racism in this wrongful conviction. Illustrating the importance of history, McCloskey noted that the town where Brandley was tried was "a microcosm of the South's worst racism" that included a 1922 lynching of a Black man falsely accused of raping a white teenager and a 1941 jury acquittal of a white man who shot a Black man in court who was charged with raping the shooter's wife (Grisham and McCloskey, 2024: 35–36). As suggested earlier, a focus on racism often requires attention to local context and collective responsibility. There is a danger that classifying egregious cases such as Brandley's as "wrongful convictions" understates the degree to which they were framed. Cases such as Pratt's and Brandley's scream

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of racism, but in the 1990s and 2000s, it was the new "innocence frame" (Baumgartner et al., 2008: ch 3) that was popular with the media, the general public and most judges and scholars.

7.3.5 Warren McCleskey Redux? Troy Davis and the Limits of Proven Innocence

This section started with the examination of Warren McCleskey's failed attempt to prevent his execution by arguing that he was an innocent victim of racial discrimination. It will end with a case almost two decades later with many parallels.

Like Warren McCleskey, Troy Davis was a Black man convicted by a Georgia jury of killing a white police officer. He was tried in Savannah in a county "where genteel manners and antebellum mansions mask the harsher truths of about the history of slavery and racism" (Jealous, 2009). Davis's request for a change of venue because of pre-trial publicity was denied. Prosecutors used eight of nine peremptory challenges to exclude Black jurors even though seven jurors at trial were Black. Savannah County has yielded 40 per cent of Georgia's death row exonerations (2009). A focus on racism requires attention to the particular and the local – on what Voltaire described as the importance of whether the trial is in Paris or the provinces –rather than a more abstract focus on the immediate causes of wrongful convictions.

The prosecution used a jailhouse informant to testify against Davis and argued that while Davis's lawyer called the informant a "jailbird," the informant had no "reason on earth to lie" and if you are going to talk to Davis "about what he did, you've got to be where Troy Anthony Davis is" (Covey, 2012: 122). The jury had also heard testimony that Davis had shot and pistol-whipped another man in the hour before he killed the off-duty police officer, firing a second shot while standing over the officer who had a two-year-old daughter and a six-month son. The jury convicted Davis after less than two hours deliberation, despite the jailhouse informant giving a different account than the prosecution's other witnesses.

Davis's appeal of his murder conviction was dismissed by Georgia courts on the basis of the need to defer to the jury (*Davis v. State*, 426 S.E.2d 844 (1993)). His first request for federal habeas corpus was denied. Because his constitutional claims relating to ineffective assistance of counsel and disclosure were rejected, Davis's innocence claim was not considered (*Davis v. Terry*, 465 F. 3d. 1249 (11th Cir. 2006) cert denied 551 U.S. 1145 (2007)). As suggested in Chapter 6.5, American Federal courts have generally used innocence claims not as an end in themselves but as a

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means if proven to allow them to consider procedurally defaulted habeas claims that constitutional rights have been violated.

Davis then went back to the Georgia courts with an extraordinary motion for a new trial based on new evidence that seven of nine eyewitnesses who testified against him at trial had recanted. The identifications by the witnesses had not been properly obtained (Garrett, 2017b: 206-208). One of the two who did not recant, Red Coles, was now being implicated by other witnesses for the murder. The other witness could not be located and had only made an in-court identification of Davis. Red Coles had been seen with the same calibre gun used in both shootings. One new witness testified that he saw Coles, not Davis, kill the officer. Three other witnesses testified that Coles had confessed the murder to them. In the face of all this new evidence, the majority of the Georgia Supreme Court denied relief, stressing that giving weight to witness retractions would open the floodgates and subvert the criminal justice system. It also excluded a statement that Coles had disposed of a handgun after the murder as obtained too late. The Court seemed confident that Davis was guilty, noting that he was known by the nickname "rough as hell" (*Davis v. State* 660 S.E. 2d 354 (2008)).

Because of the United States' unique system of state and Federal courts and post-conviction relief, Davis had many more chances to challenge his conviction than in other countries (Roach, 2013a). Davis next sought a second round of habeas litigation in the Federal courts. The 11th Circuit in a 2:1 decision held this was precluded by the 1996 *Anti-Terrorism and Effective Death Penalty Act* because Davis could have argued innocence in his first round, and there was no clear and convincing evidence of a constitutional violation and actual innocence. One judge dissented on the basis that the police had not investigated the case against Red Coles, and no court had decided Davis' innocence claims (*Re Davis* 565 F.3d.810).

In August 2009, the United States Supreme Court granted Davis an original writ of habeas corpus for the first time in fifty years. The majority assumed, without deciding, that due process would be violated by Davis's execution if he could clearly establish his innocence on the basis of evidence that could not have been obtained at the time of his original trial (*Re Davis*, 130 S.Ct.1 (2009)). Justices Scalia and Thomas dissented on the basis that due process did not prevent the execution of the innocent, and the 1996 legislation would preclude relief even if there was new evidence that would prove Davis's innocence.

The District Court in Savannah decided that given new DNA testing laws that it would be unconstitutional to execute a proven innocent person. At the same time, it required clear and convincing evidence of innocence. It decided that Troy Davis has failed to establish his innocence on such a high

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standard (*In Re Davis* 2010 US Dist. Lexis 87340). Like other courts that heard the case, the District Court was not persuaded by witness recantations even though there was evidence that the police had pressured witnesses to identify Davis. In convoluted reasoning, the judge rejected claims of police pressure on the witness by pointing to weaknesses in the trial testimony that led to Davis's conviction. In other words, the weakness of the identification of Davis at trial now worked to his disadvantage. Evidence that Coles was seen with a gun was discounted on the grounds that others were also seen with weapons. New testimony from a witness that he saw Coles kill the officer was dismissed as not credible. New evidence that different guns may have been used in the two shootings was dismissed as not proving Davis's innocence. In the end, the judge stressed that a refusal to defer to the jury "would wreck [sic] havoc on the criminal justice system," noting that memory, unlike the use of science and DNA testing, does not improve with time (*In Re Davis* 2010 US Dist. Lexis 87340 at para 214). This conclusion underlined how DNA exonerations had raised the bar for exonerations. No claims relating to racial discrimination in the administration of Georgia's death penalty were made, despite the fact that many of the findings of the Baldus study were still valid (Stevenson, 2014 ch.7). The five-judge majority in *McCleskey v. Kemp* had effectively killed the racism argument, leaving Troy Davis with only a proven innocence claim that was very difficult to establish in a non-DNA case.

The Supreme Court declined to hear an appeal from the District Court's denial of habeas corpus. Troy Davis was executed on September 21, 2011, despite support from former President Jimmy Carter, Archbishop Demond Tutu, Pope Benedict XVI, Nelson Mandela and a former Director of the FBI. This case demonstrates both the limits of the proven innocence paradigm and a continued lack of concern about anti-Black racism in the administration of the American death penalty as manifested by *McCleskey v. Kemp* 481 U.S. 279 (1987).

7.4 Racism and Black Men Wrongfully Convicted of Sexual Crimes

The United States Supreme Court only stuck down the death penalty for rape in 1977 (*Coker v. Georgia*, 433 U.S. 584 1977). There was no mention of race in the decision, causing American law professor Sam Gross to write: "If you didn't know better, you could read it and never realize that there is more than one race in the United States" (Gross, 2011: 1910). Between 1870 and 1950, of the 771 men executed for rape in the United States, 701 of them

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were Black (Kirchmeier, 2015: 133). Between 1930 and 1968, 91 per cent of the 455 men executed for rape were Black (Johnson, Griffith and Barnaby, 2013: 290). This was a more racist record than apartheid South Africa. Between 1947 and 1966, apartheid South Africa hanged "only" 122 of 844 Black men convicted of raping white women, while not hanging any of the 300 white men convicted of raping Black women (Owusu-Bempah, 2021: 165). Added to these shocking statistics is the historical weight of thousands of Black men who were lynched in the United States on suspicion of any sort of involvement with white women. Stereotypes associating Black men with sexual violence have a long and ugly history. They challenge the idea that such stereotypes are simply unconscious forms of bias.

The founders of the Innocence Project, Peter Neufeld and Barry Scheck, were well aware of the pervasive role of anti-Black racism in the American criminal justice system. They devoted a chapter to racism in their 2000 book *Actual Innocence*. It tells the story of a Black man in Georgia, Calvin Johnson, Jr., wrongfully convicted of raping a white woman even after she failed to identify him in a line-up explaining that "I just refused to let myself look at him anymore, and I just picked another person" (Scheck, Neufeld and Dwyer, 2000: 256). Johnson was convicted by an all-white jury after forty-five minutes of deliberation with the jury rejecting his alibi witnesses who were Black. He was only acquitted when new DNA evidence was introduced that the pubic hair found at the scene was not his, and despite the prosecutor's argument that "summoned the mewing ghosts of segregation: a white woman could catch Negroid hairs from the toilet seat" (2000: 271).

This DNA exoneration of a Black man wrongfully convicted of sexually assaulting a white woman was not an aberration. Brandon Garrett's work records that, in 71 of the first 250 DNA exonerations, white women misidentified Black men. In 49 per cent of all the DNA exonerations, there was a cross-racial and mistaken eyewitness identification even though almost 90 per cent of all sexual offences do not have a cross-racial element. Black and Hispanic men constituted 75 per cent of all rape exonerees even though they constituted 30–40 per cent of those convicted of the offence (Garrett, 2011a: 73). In 2022, these discriminatory patterns were confirmed over the broader data set provided by the National Registry. They found that Black men were eight times more likely than white men to be wrongfully convicted of sexual assault. Moreover, "the major cause of this huge racial disparity is the high danger of misidentification of Black suspects by white victims of violent crime." Forty-four per cent of all sexual assault exonerations involved white women misidentifying Black men

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even though they estimated that crimes with such characteristics constituted only 11 per cent of all sexual assault convictions. The Black exonerees served on average 13.5 years in prison compared to 9.4 years served by the white exonerees (Gross et al., 2022: iv, 19, 23).

Despite these shocking figures, anti-Black racism was not stressed by the early American innocence movement. It did not figure among the canonical immediate causes of wrongful convictions that the DNA exonerations were said to reveal. The two best documented cases of the exonerations of Black men for raping white women will be examined in this section. My intent is not to be critical of the women who suffered the severe trauma of sexual assault, being a witness in a criminal trial and subsequently discovering that the wrong person was convicted (Cook, 2022). Rather by drawing on the brave writings of these two women, I hope to contribute to a better understanding of the subtle but significant role of racism of such wrongful convictions.

7.4.1 The Wrongful Conviction of Ronald Cotton

Jennifer Thompson's 2009 book *Picking Cotton* was written with Ronald Cotton, the Black man she mistakenly identified as the person who broke into her apartment and raped her and who served eleven years in prison before his exoneration. The book recounts how Thompson, then a twenty-two-year-old university student, identified Cotton first from a photo line and then a physical line-up in 1984. She was "positive" about the identifications: "there was no doubt in my mind" (Thompson, Cotton and Torneo, 2009: 33, 37). The police told Thompson that Cotton "liked white woman" and was "a real scumbag" (2009: 44). Thompson recalled that when she testified: "I just wanted to nail [Cotton]. I wanted to make him go to jail for ever and ever and ever." She wrote: "I was getting an A with flying colours in being a witness. I knew it was the most important test I would ever have" (2009: 47). She later explained how she could not watch basketball player Scottie Pippen on television because "he looked so much like Ronald Cotton to me" (2009: 195).

Ronald Cotton was wrongfully convicted twice by North Carolina juries. His lawyers encouraged him to plead guilty in light of Thompson's identification, but Cotton told his lawyer: "I'm not pleading guilty to something I didn't do" (2009: 92). The first jury took only forty minutes to convict Cotton of the rape of Thompson and another woman, despite the lack of any forensic evidence, linking him to the two rapes. Unlike Thompson, the other woman had failed to identify Cotton in a seven-person line-up.

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Cotton was sentenced to life imprisonment, plus fifty years. Thompson had a champagne celebration of the conviction and harsh sentence with her parents and prosecutors (2009: 71).

After an appeal that was successful because the trial judge had erred by preventing Cotton from producing evidence about an alternative suspect (*State v. Cotton* 351 S.E.2d 277), Cotton was convicted in a second trial. Prosecutors used peremptory challenges to exclude four Black prospective jurors, at which point Cotton wrote he became "very worried" (2009: 123–124). He was right to be worried because the all-white jury convicted him after one hour's deliberation even though Cotton believed his lawyer "did a great job, in my mind, of showing that Poole [the real perpetrator] had committed this crime" (2009: 133). Cotton received an even harsher sentence upon his second wrongful conviction: two life sentences, plus 180 years (2009: 139–142). This respected the United States Supreme Court's 1977 decision in *Coker v. Georgia*, 433 U.S. 584 that the death penalty was no longer justified for rape, but just barely. The inhumane harshness of Cotton's endless sentences was not discussed in *Picking Cotton*.

Also not discussed was that the trial judge at Cotton's second trial refused to allow him to call an expert witness on eyewitness identification who was prepared to testify about the frailties of such identification, especially given its cross-racial nature, poor lighting, stress and the multiple identification procedures used. The North Carolina Courts of Appeal acknowledged that such expert testimony was relevant and had "potentially substantial weight in favour of the accused." Nevertheless, it deferred to the trial judge's discretion to exclude such evidence (*State v. Cotton* 394 S.E. 23 456 at 460,461, 1990).

One judge, Clifton E. Johnson, one of the first Black judges in North Carolina, dissented. He would have ordered a third trial on the basis that the prosecutor had introduced prejudice in the trial with evidence that Cotton has talked about sex and touched two white waitresses that he had worked with in a restaurant. Like Judge Sarokin in Rubin Carter's case, Judge Johnson expressed concerns that the use of such evidence resulted in a "racially motivated trial" (1990: 464). On a subsequent appeal, the North Carolina Supreme Court concluded that while the race of the waitresses was irrelevant and should not have been admitted, "the prejudicial effect of this testimony should have been slight" (*Cotton v. State* 407 S.E.2d 514 (1990)). Judge Johnson had a more acute appreciation of the prejudice that could be caused when the jury heard about Cotton's interactions with white women.

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Ronald Cotton's convictions were overturned when DNA analysis revealed that the alternative suspect Poole, who had testified at his second trial, matched the DNA samples found in the rape kits of the two victims. Cotton was North Carolina's first DNA exoneration. He eventually received $110,000 in compensation for his eleven years in jail but only after Thompson supported new legislation raising compensation from a total cap of $5000 to a cap of $10,000 per year of wrongful imprisonment (Thompson, Cotton and Torneo, 2009: 257). Both Ronald Cotton and Jennifer Thompson suffered immensely as a result of Cotton's wrongful conviction. Thompson became a key figure in the innocence movement and formed a group Healing Justice to deal with the aftermath of wrongful convictions for both crime victims and exonerees. Consistent with much of the tenor of the early innocence movement and despite its racially subtexted titled, *Picking Cotton*, downplays the role of racism and the larger context of Cotton's wrongful conviction.

7.4.2 The Wrongful Conviction of Anthony Broadwater

In the spring of 1981, Alice Sebold was eighteen years old and finishing her first year at Syracuse University when she was raped by a Black man. Sebold subsequently wrote a book about the experience called *Lucky* and later a best-selling novel, *The Lovely Bones*, based on a somewhat similar fictional story that was also made into a movie.

Alice Sebold identified Anthony Broadwater in the fall of 1981 after he approached her on a street in Syracuse and said: "Hey, girl. Don't I know you from somewhere?" Sebold wrote that "he had no fear. It had been nearly six months since we'd seen each other last… He was laughing because he had gotten away with it…He was walking the streets, scot-free" (Sebold, 1999: 103). Broadwater's comments to Sebold did not result in his lynching as occurred after Emmitt Till talked to a white woman in 1955. It did, however, start a process that resulted in a wrongful conviction and sixteen years in prison. He was only exonerated and no longer required to register as a sex offender in 2021.

Sebold initially picked out another Black man in a line-up of five Black men. She later explained: "I had been so afraid, I had chosen the man who scared me the most, the one who had been looking at me" (1999: 139). After consulting with the police, Sebold then said she had made a mistake and identified Broadwater. Because they thought Broadwater had asked that the man Sebold originally selected be placed in the line-up, the police, the prosecutor and Sebold thought she had been tricked by

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Broadwater into identifying the other Black man (1999: 140). Sebold later described Broadwater and the man she initially identified as "identical twins" (1999: 186).

Mistakes in cross-racial eyewitness identifications are often related to a lack of familiarity with the faces of those of other races. Sebold was questioned about this at Broadwater's trial. She testified that she saw more than fifty young Black men each day (1999: 195), thus minimizing concerns about a faulty cross-racial identification. Sebold also recounted that Broadwater's lawyer had pointed out after Sebold identified him in court that Broadwater was the only Black man in the court. Sebold later wrote: "I was guilty for the race of my rapist, guilty of the lack of representation in the legal profession in Syracuse, guilty that he was the only black man in the room" (1999: 195).

In *Lucky*, Sebold discusses how she handled her initial identification of another Black man in the five-person line-up. She wrote: "If I told the truth, I could say that the moment I picked number five I knew I was wrong and had regretted it. That everything after that from the mood in the lineup room … confirmed my mistake. If I lied … I knew I would be perceived as telling the truth in my confusion between four and five" (Sebold, 1999: 186). Sebold explained:

> On television and in the movies, the lawyer often says to the victim before they take the stand, "Just tell the truth" What it was left up to me to figure out was that if you do that and nothing else, you lose. So I told them I was stupid, that I shouldn't have walked through the park…. And I was so good, so willing to accept blame, that I hoped to be judged innocent by them …. I drew on my resources: performing, placating …. As I left that courtroom, I felt I had put on the best show of my life. (1999: 152)

Like Thompson, Sebold remembered her testimony like a test that she had passed.

Some of the background not discussed in *Lucky* was that Syracuse "has long been a deeply segregated city. In 1981, 16% of the population was African American, but only 2% of police officers were Black" (Dowty and Knauss, 2022). The prosecutor in the case was a young lawyer in a recently formed sex crimes unit that would be disbanded a few years later after a string of overturned convictions. The prosecutor had sidelined one of the grand jurors who had questioned the indictment because Sebold had not initially picked Broadwater.

Anthony Broadwater was convicted of rape in a judge-only trial after he waived his right to a jury trial because if his concerns that his jury might be all-white. The judge had four daughters and chatted with Sebold and

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immediately convicted Broadwater after closing arguments (Aviv, 2023). Sebold urged the authorities to give Broadwater the maximum sentence: "I knew my best hope to be heard was by making the point that a maximum sentence would make the men who sentenced him look good … Whatever skills I had, I used" (Sebold, 1999: 201). Broadwater was sentenced to 8.5 to 25 years in prison.

Broadwater's appeal was rejected with the appeal court concluding the fact that "the victim of this rape confused defendant with another person in the lineup affects only the weight to be accorded to two other identifications she made of defendant." It also concluded that after "viewing the evidence in the light most favorable to the prosecution," it cannot be said that no jury could have convicted (*People v. Broadwater* 105 A.D. 2d 1065 1985). Although the frailties of cross-racial identification were raised as a ground of appeal, they were dismissed without the appellate judgment even discussing them. Broadwater was denied parole five times because he maintained his innocence.

Broadwater was only exonerated in 2021 after a producer of a film based on Sebold's *Lucky* became convinced of his innocence and hired a private investigator. The investigator established that there was no collusion between Broadwater and the person next to him in the line-up as the police, prosecutor and Sebold believed. In other words, "if not for Sebold's fame, Broadwater would still be convicted" (Dowty and Knauss, 2022). The prosecutor eventually joined in the motion to vacate Broadwater's conviction.

Eight days after his release, Sebold issued an apology to Broadwater stating that

> that 40 years ago, he became another young Black man brutalized by our flawed legal system. I will forever be sorry for what was done to him… I will continue to struggle with the role that I unwittingly played within a system that sent an innocent man to jail. I will also grapple with the fact that my rapist will, in all likelihood, never be known, may have gone on to rape other women, and certainly will never serve the time in prison that Mr. Broadwater did.

She added that "[t]oday, American society is starting to acknowledge and address the systemic issues in our judicial system that too often means that justice for some comes at the expense of others. Unfortunately, this was not a debate, or a conversation, or even a whisper when I reported my rape in 1981…" (Sebold, 2021). As suggested in the first part of this chapter, however, concerns about anti-Black racism in the criminal justice system were more than a "whisper" in American society before 1981.

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Broadwater subsequently received a $5.5 million settlement from New York for the sixteen years he spent in prison. He said he was grateful for Sebold's apology and that "she was a victim and I was a victim too" (New York Times, 2023).

7.4.3 Summary

Mistaken identifications of Black men by white witnesses too often reflect fear and a lack of familiarity with Black men. There is a "distinct group that is at acute risk for misidentification: the young, urban, African American men depicted in police mug shots, who are likely to be displayed to eyewitnesses in a photo array" (Doyle: 2021: 255). A 2012 study found evidence that faces that were seen as stereotypically Black were also associated with criminality in a manner that is "automatic and culturally entrenched" (Kleider et al., 2012: 1204).

A 2022 meta-study of 159 published research studies confirmed robust evidence of cross-racial bias in facial recognition (Lee and Penrod, 2022). Some studies have shown that white participants made more mistakes than Black participants. A 2022 report by the National Registry of Exonerations comments that "in experimental studies, white subjects show stronger 'own race bias' than Black subjects – they tend to be worse at identifying members of other races. This is not surprising. As members of the majority group, many white Americans have little contact with Black people, but almost all Black people have regular dealings with white people" (Gross et al., 2022: 20). As Jasmine Gonzales Rose (2017: 2294) has explained many factors including "white flight" and "personal preferences have caused racial isolation." In the context of the many DNA exonerations of Black men for sexually assaulting white women, I would add racist stereotypes and fears associating Black men with sexual crimes and noble cause corruption in avenging stranger rapes of white women that cannot be easily disassociated from the legacies of slavery and lynching rooted in a sense of white supremacy.

It may be tempting to dismiss the wrongful convictions of Cotton and Broadwater as ancient history, and to some extent, they are. Both physical line-ups were conducted in a manner that today would be seen as improper. The innocence movement has fought with considerable success to have line-ups conducted in a double-blind manner that tries to avoid the types of police confirmations that both Thompson and Sebold received. DNA testing was not available at the time of Cotton's 1985 convictions or Broadwater's 1982 conviction. Fortunately, DNA exonerations

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of Black men for sexually assaulting white women have declined, not so much because the American criminal justice system is less racist, but more because the police use DNA more as an investigative tool (Gross et al., 2022: 240–226).

7.5 The Exonerated (Central Park) Five and the Chicago Four

The focus on the immediate cause of wrongful convictions takes a scientific approach to understanding wrongful convictions, but one that can be too mechanical and too clinical. Ralph Grunewald: 7 has stressed the importance of narrative or stories in wrongful convictions. He writes "a crime narrative does not need to be true to be convincing" and that it "influences how police, prosecutors, juries, and judges construct reality and the evidence for it" (2023: 17). He recognizes that narratives based on race and gender affect the perceptions of accused and victims though "they are not part of the official legal narrative" (2023: 69). Grunewald makes a strong case that criminal justice actors "fill gaps" in the stories presented "by imagining what appears plausible" findings backed by cognitive psychology (2023: 66, 163). In both this chapter and Chapter 8 on gender, I will suggest that a focus on the immediate causes of wrongful convictions, whether they be mistaken eyewitness identification or faulty forensic evidence, obscures the role that prejudice and stereotypes about race and gender may play in wrongful convictions.

7.5.1 Trump and Anti-Black Racism

The wrongful conviction of the Exonerated (Central Park) Five may seem to be an exception to my thesis that the early American innocence movement downplayed racism. Four Black teenagers and one Hispanic teenager were convicted in 1989 of a shocking and well-publicized rape and brutal assault of a white woman jogger in Central Park.

In his infamous 1988 *New York Times* and *Newsweek* ads, Donald Trump called the Five a "roving band of wild criminals," alluding to the media's descriptions of them as involved in "wilding" and drawing on stereotypes associating Black people with jungles and sexual violence. He declared that he hated "these murderers … I no longer want to understand their anger. I want them to understand our anger. I want them to be afraid." He recalled with admiration seeing New York police rough up people in his youth and called for police to be "unshackled from the

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constant chant of 'police brutality.'" He ended with "BRING BACK THE DEATH PENALTY. BRING BACK THE POLICE!" (Trump, 1988).

Trump has never apologized for this hateful ad. He has criticized the $41 million settlement that the exonerated five received after their 2002 DNA exonerations, writing an op-ed in the New York Daily News stating "settling doesn't mean innocence … what about the other people who were brutalized that night other than the jogger?….Forty million dollars is a lot to pay … the recipients must be laughing out loud at the stupidity of the city. Speak to the detectives and try listening to the facts. These young men do not exactly have the pasts of angels" (Trump, 2014).

In the 2024 Presidential debate, Trump falsely said that the Five "pled guilty, they badly hurt a person – killed a person ultimately" before adding that a lot of people agreed with his 1988 ad (The Guardian, 2024a). Trump's lie about the Five was overshadowed in media reports by his references to Kamala Harris's race. The Exonerated (Central Park) Five subsequently sued him civilly for defamation, with his campaign dismissing the lawsuit as "just another frivolous election lawsuit filed by desperate leftwing activists" (The Guardian, 2024b). Trump may attempt to draw on increasing American extralegalism to claim that he is absolutely immune from the lawsuit (*Trump v. United States* 603 U.S. 593 2024) though his initial motion to strike out the libel suit has been dismissed (Reuters, 2025).

Although the Central Park case has deep historical significance, it was not a singular case. As will be seen, it was pre-dated by a year by very similar wrongful convictions of four Black teenagers in Chicago for murdering a white medical student. These cases speak to how Black youth are both dehumanized and criminalized in a way that makes them vulnerable to wrongful convictions, especially in cases where the victims are white (Henning, 2021).

7.5.2 The Exonerated (Central Park) Five

Raymond Santana Jr. and Kevin Richardson, both aged fourteen; Yusef Salaam and Antron McCray, both aged fifteen; and Korey Wise, then aged sixteen, were convicted by New York juries of the 1989 rape and attempted murder of a twenty-eight-year-old white female jogger in Central Park. They were convicted even though their DNA was not found on the victim, and the victim's blood (she lost almost 75 per cent of her blood) was not found on the five youth. Georgetown law professor Kristin Henning (2021: 86–88) has related these wrongful convictions to "American folklore about Black deviant hypersexuality" and the concerns raised soon after

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by Princeton professor John DiIulio Jr. (1996) about "super-predators" previously discussed in this chapter. The crime also occurred in the wake of George H. W. Bush's successful use of "the fear and suspicion of blacks as criminals" to defeat Michael Dukakis in the 1988 election after highlighting that a Black man, Willie Horton, raped a white woman while on furlough from prison in Massachusetts while Dukakis was Governor (Burns, 2011: 13–14).

Before the trials, the FBI identified DNA from an unknown male from the victim's cervical swab and a sock found at the crime scene (Burns, 2011: 113). This DNA did not fit into the narrative about the five accused being responsible, and it was largely discounted. This DNA was eventually identified in 2001 as the DNA of the true perpetrator who confessed after meeting Korey Wise when they were imprisoned together. Although DNA is a powerful scientific tool that has freed many, it cannot always defeat the power of what Sarah Burns (2011: xi) has described as the "deeply ingrained racism" that infected these investigations and wrongful convictions.

As many as five police detectives aggressively interrogated one of the five, Kevin Richardson, for three hours. They refused to believe that a scratch on his face was obtained when a police officer tackled him in Central Park while arresting him (2011: 40). In the hope of being allowed to go home, Richardson wrote a confession admitting to being part of the assault on the victim but denying that he raped her (2011: 41). Raymond Santana was interrogated with his grandmother present. There was no Spanish translation even though Santana's grandmother had limited English. Santana also confessed to an assault, but not the rape. Antron McCray confessed to the rape but placed it happening a half mile from where the crime actually occurred (2011: 43). Yusef Salaam's confession also placed the rape not at its actual location. He also denied raping the victim. An assistant US attorney who was mentoring Salaam was denied access to the interrogation by Linda Fairstein, the head of the Sex Crimes prosecutor unit (2011: 46–47). A lone dissenting judge on the New York Court of Appeals would have held this conduct to be a violation of Salaam's rights (*People v. Salaam* 83 N.Y. 3d 51 (1983)).

The Five unsuccessfully challenged the admissibility of their confessions, but a trial judge known to be favourable to the prosecution ruled that they waived their rights when they spoke to the detectives. In making this ruling, the judge cited that some of the youths were seen joking together in a holding cell as evidence of their mental capacity to waive their rights. The image of the youths joking fit into the image of "wilding"

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and "super-predator" youth (DiIulio, 1996) who took pleasure in random sexualized violence and expected to get away with it. The same judge ruled that all five could be tried as adults (Burns, 2011: 101).

McCray, Salaam and Santana were tried first. The jury was racially diverse, but the courtroom was racially divided with Black and Hispanic spectators seating behind the defence and white spectators seating behind the prosecution (2011: 132, 135). The prosecution admitted that only the DNA of an unknown male was found at the scene but argued that the three youth were non-ejaculating rapists. The victim was unable to identify any of the three. The jury, however, heard extensive evidence about the horrendous injuries she suffered as well as evidence from others who were assaulted and robbed that evening in Central Park. After a six-week trial and ten days of deliberation, the jury convicted the three. Salaam was the only accused to testify and said he did not participate in the rape. After his conviction, he told the court: "Why would I lie on or go against the Koran…I would never disrespect my own religion. I think my debt to society has been paid if this is the price of a black man living in America." The *New York Post* ran this under a headline "Salaam Baloney!" (2011: 160).

The second trial resulted in the conviction of Kevin Richardson and Korey Wise. Their videotaped confessions were featured as evidence. Korey Wise testified that he made the confession because "I wanted to go home." Another diverse jury convicted after twelve days of deliberations. Wise, who has a low IQ and hearing problems, received the longest sentence of the five even though the jury acquitted him of rape and attempted murder and convicted him of the less serious offences of first-degree assault, sexual abuse and riot. This harsher sentence was in part because of what the judge called his "strident and ardent behaviour" in telling the prosecutor after the verdict: "you bitch, you'll pay for this. Jesus is going to get you." Wise had expressed anger with the prosecutor who introduced evidence of his school truancy: "man, bringing up '85…. What does this have to do with Central Park?" (Burns, 2011: 172–175).

A sixth man, Steve Lopez, pled guilty to robbery and received the lowest sentence despite prosecutor Elizabeth Lederer's belief he was the ring leader (2011: 177). He also signed a false confession that was obtained without translation for his parents, who spoke Spanish. The Hispanic man's robbery conviction was only overturned in 2022 (New York Times, 2022).

An appeal court rejected Wise's appeal noting "there is no indication that defendant is retarded or otherwise incompetent" while admitting that there was some evidence that Wise was "learning disabled" (*People v. Wise*, 204 A.D.2d 133, 134 (N.Y. App. Div. 1994)). Appellate courts upheld

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the convictions despite requirements under New York law that confessions be corroborated with other evidence. In one case, an appellate court unanimously but circularly concluded: "the plethora of evidence that a rape was committed, even if it did not establish defendant's identity, amply corroborated his confession" (*People v. McCray*, 198 A.D.2d 200, 202 (N.Y. App. Div. 1993))

The appellate process failed the five until the real perpetrator came forward and confessed, and his DNA matched that found at the crime scene. When the convictions were eventually overturned in 2002, the court noted

> it is virtually self-evident that the newly discovered evidence, specifically, the confession of a self-admitted murderer and serial rapist, corroborated by physical evidence including scientific testing establishing that he was the sole source of DNA evidence connected to the Central Park jogger's rape to a factor of one to 6,000,000,000, would create the probability that had such evidence been received at trial, the verdict would have been more favorable to the defendants. (*People v. Wise*, 194 Misc. 2d 481, 493 (N.Y. Sup. Ct. 2002))

This decision demonstrates the power of DNA, but it is a mistake to focus only on DNA or the immediate cause of false confessions.

Trump was not the only person who was not persuaded by the DNA. After the exoneration, City Police Commissioner Raymond Kelly in 2002 argued that the five were not exonerated. Prosecutor Linda Fairstein demonstrated tunnel vision when she stated after the exoneration: "I think that Reyes (the perpetrator) ran with that pack of kids. He stayed longer when the others moved on. He completed the assault" (Burns, 2011: 201). Innocence project co-founder Peter Neufeld may have under-estimated the depth of anti-Black racism when he speculated that DNA could convince everyone of innocence (Norris, 2017: 56).

7.5.3 The Chicago Four

The Central Park Five case has historical significance in part because of Trump's shameful role in it, but it should not be dismissed as a singular case. One year before the five were wrongfully convicted, four Black teenagers were wrongfully convicted in a chillingly similar Chicago case involving the rape and murder of a white medical student. The Chicago case involved Calvin Ollins, fourteen years of age; Larry Ollins, fifteen years of age; Marcellius Bradford, seventeen years of age and Omar Saunders, then eighteen years of age. They all lived in the Cabrini-Green public housing project.

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An FBI profiler helped compile a list of ninety-two suspects, all of whom were young Black men. The police investigation was influenced by tunnel vision. It focused on the four even though the fingerprints found at the scene, like the DNA in the Central Park case, did not belong to them. The police also used long interrogations to gain false confessions from the teenagers. Jailhouse informers and faulty forensic testimony were also used at the trials. The case was a textbook example of the multiple immediate causes of wrongful conviction. Nevertheless, these multiple causes do not adequately capture the role of anti-Black racism and fear of young Black male teenagers as potential "super-predators" (DiIulio, 1996).

The trial judge accepted Calvin Ollins' confession despite his lawyer arguing it was a product of mental disabilities that saw him placed in a special education class. After his conviction, Ollins' aunt told reporters: "They didn't have no fingerprints, no blood, no nothing. All they had was a false confession forced on a retarded child" (Chicago Tribune, 1988a). Both state and Federal courts rejected Calvin Ollins' challenges to his confessions with the 7th Circuit concluding that "despite Ollins' documented IQ, he would have been able to understand the words and phrases police used to convey the *Miranda* warnings" (*Ollins v. Cooper* 2000 US App Lexis 178 at 7 (7th Cir, 2000)).

Omar Saunders was convicted by a jury in 1988 after less than two hours of deliberation. In sentencing one of the teenagers to life imprisonment without parole, a Cook County judge told him: "I want to make certain that you never walk the streets of this city, or any other city, again" to which Larry Ollins replied: "I didn't do it" (Chicago Tribune, 1988b).

DNA testing performed in 2001 and 2002 excluded all four from semen found on the victim. The DNA evidence was used in 2002 to arrest two adult men. They pled guilty and were sentenced to seventy-five years in prison, less than life sentence that the four teenagers received. The youth of the four Black teenagers did not save them from the harshest punishment (Stevenson, 2014).

When the four were exonerated by DNA evidence, the *Chicago Tribune* editorialized: "Thirteen people have been freed from [Illinois] death row. How many wrongfully convicted prisoners are serving 20 years, 30 years, life sentences?" (Chicago Tribune, 2001). Salim Muwakki (2001) in an op ed in the *Chicago Tribune* argued that while the case revealed police "laziness" in solving high-profile "heater" cases through false confessions, that "racism is another reason … race is the subtext of any story about the criminal justice system.… African-Americans by far are the dominant prison population, despite our minority status elsewhere in America." He noted that the *Chicago Tribune* had not covered and discussed racism in

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its extensive coverage of the case. The paper to its credit ran the piece, but under the misleading headline "Police injustice and wrongful convictions" (Muwakki, 2001). Racism literally did not make the headlines during the early American innocence movement of the 1990s and 2000s.

These wrongful convictions involved more than their immediate causes. One of the four, Omar Saunders explained: "the policeman was white, victim was white. The judge was white. The prosecuting attorney was white. Everyone was white that did this" (Jochnowitz and Kendall, 2021: 612). Jochnowitz and Kendall conclude: "The root sociological causes of conviction error were racism, justice system culture, plea bargaining, and snitch testimony. They added '[l]ike in the Central Park five case, the boys were accused as a pack…. The teens were stereotyped, and prosecutors arrived at conclusions against the weight of the evidence" (2021 at 613). An exclusive focus on the immediate causes of wrongful convictions obscures the role of racism.

7.5.4 The Need for a Broader Focus on Anti-Black Racism

Angela Hattery and Earl Smith (2023: 48–49) argue that a complete victimology of Black people would include not only wrongful convictions but racial profiling, unjust denial of bail and less attention to crime when Black people are crime victims. Such a broader focus reveals that "Black bodies, whether they are victims or perpetrators, rarely get justice; Black bodies are always undervalued." Another study based on interviews of Black and Hispanic exonerees similarly concluded that they "framed their wrongful convictions as extensions of pre-conviction lives that had been defined by experiences with poverty, racism, delinquency, and familial difficulties" (Umamaheswar, 2023: 545). As suggested in Chapter 2.2, a rights-based concept of miscarriage of justice can encompass a broad range of state-created injustices. It will be suggested at the conclusion of this chapter that the innocence movement should expand to consider these related forms of injustice and that innocence projects have expertise about much state misconduct that could contribute to a broader attack on racism (Stevenson, 2014).

Another recent study based on 1,690 American males wrongfully convicted of homicide and sexual crimes found a disproportionate amount of state misconduct in cases involving Black exonerees (Mogavero, Hsu and Bolger, 2022). The researchers concluded that: "cases that involved multiple forms of misconduct occurred three times more often among cases of Blacks compared to Whites" (2022 at 770). They added crimes against white victims "tend to produce anger and outrage in the community …

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In turn, prosecutors may feel more compelled to seek justice for the victim" (2022 at 772). Their holistic and contextual perspective, like the Baldus study rejected by the Supreme Court in 1987, factors in the race of the victim as well as the accused.

Hattery and Smith suggest that racial disproportionality in the National Registry of Exonerations needs to be broken down in an intersectional manner. This would mean that young Black men account for 50 per cent of exonerations but only 2 per cent of the population. The same group also suffer disproportionately from other injustices, including unlawful detention and police violence (Hattery and Smith, 2023: 47). They also apply the Baldus study methodology to reveal that Black men murdering white victims account for 56 per cent of exonerations but only 7 per cent of murders. In other words, focusing only on the race of the accused or the exonerated can obscure the full stories of racism, which is often revealed in cases with white victims. These more recent studies reflect a growing consciousness of racism in some scholarship about wrongful convictions.

The idea that anti-Black racism is a frequent cause of American wrongful convictions is hardly a revolutionary insight. A recent psychological study found that both Black and white participants placed more stigma on white as opposed to Black exonerees in an experimental study (Faison et al., 2023). The researchers found such initial findings to be counter-intuitive but replicated them in subsequent experiments. If one accepts the idea that anti-Black racism is a root cause of wrongful convictions that many people are aware of even if it is not often discussed, however, these results do not seem counter-intuitive. They may reflect an accurate awareness of the disproportionate risks that Black people face of being wrongfully convicted. As discussed in Chapter 1.8, Ronald Dworkin (1985, ch 3) has argued that while the risks of wrongful convictions cannot be reduced to zero, they should be distributed equally.

The move after *McCleskey v. Kemp*, 1987, from discrimination to the "innocence frame" of the innocence movement in the 1990s, 2000s and 2010s (Baumgartner et al., 2008) had significant bipartisan success. As discussed in Chapter 6.3, Congress enacted the *Innocence Protection Act* in 2004 designed to increase access to DNA testing and increase funding for defence counsel and prosecutors in death penalty cases. Some relatively conservative states including North Carolina and Texas have enacted a host of wrongful conviction reforms while retaining the death penalty. But a price of this bipartisan success was a repression of the role of anti-Black racism in many wrongful convictions. After Trump's capture of

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the Republican Party, however, it will be suggested in the last part of this chapter that the innocence movement has less to lose by embracing anti-racism more prominently (Norris et al., 2023).

7.6 Donald Marshall Jr.'s Wrongful Convictions and Anti-Black and Anti-Indigenous Racism

It would be unfair and misleading to leave any impression that racism is only an American problem. This section will focus on the role of anti-Indigenous racism in wrongful convictions in a number of countries, including Australia, Canada and New Zealand. Remedied wrongful convictions of Indigenous people in these three countries do not yet reflect the degree of gross Indigenous overrepresentation in the prisons of these three countries (Roach, 2015a). This is alarming because Black people are overrepresented in American exonerations when compared to Black overrepresentation in prison population, the population most at risk for wrongful convictions. The United States, to its credit, is providing more access to justice for Black people who are wrongfully convicted than Australia, Canada and New Zealand are providing for Indigenous people who are wrongfully convicted (Roach, 2015a). This may reflect that the United States has more innocence projects and conviction integrity units than the other three countries with a majority of exonerations being obtained by these professional exonerators. It may also reflect that Indigenous people may experience colonial legal systems as alien and have little faith that they will remedy their wrongful convictions.

Canada's first officially recognized wrongful conviction came to light in 1989 just around the time of the first American DNA exonerations. Given the similarities between Canada and the United States, it would not be surprising if the Canadian approach followed the trends of the early American approach of focusing more on the immediate causes of wrongful convictions rather than the larger structural role of racism. But just as the happenstance of the first American DNA exonerations involving white men, Canada's first widely recognized wrongful conviction happened to involve a seventeen-year-old Indigenous man, Donald Marshall, Jr., wrongfully convicted of murdering a seventeen-year-old Black man, Sandy Seale. The case did not involve DNA evidence but long-suppressed evidence that Seale's real killer was a white man known for his temper and racist views (Nova Scotia, 1989; Roach, 2023a: xvi–xxii).

Indigenous people in Canada constitute about a third of Canada's prison population but only about 5 per cent of the population. Of the

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ninety-one wrongful convictions recorded in the Canadian Registry, nineteen involve people known to be Indigenous. This is overrepresentation in relation to the percentage of Indigenous people in comparison to the population, but not the prison population (Roach, 2015a: 153). An Indigenous man who spoke Cree and had a grade two education unsuccessfully tried in 1968 to persuade the Supreme Court to allow him to retract a guilty plea that he made on the basis of inadequate legal advice that he risked execution (*R. v. Brosseau* [1969] SCR 181; Roach, 2025a: 6–9).

Indigenous women constitute about half of Canada's female prison population, but only three of the nineteen remedied wrongful convictions involve Indigenous women, and two of the three could be described as "white passing." There are many unremedied wrongful convictions of Indigenous women in Canada (Pate, 2022). The wrongful conviction of Indigenous women raises specific issues that will be examined in Chapter 8.7.

Anti-Black racism has also played a role in Canadian wrongful convictions. Six of ninety-one wrongful convictions in the Canadian registry involve Black people, which constitutes overrepresentation with respect to the population but under-representation with respect to the prison population most at risk. One of the cases involved mistaken eyewitness identification of a nineteen-year-old Black man, which was only corrected after litigation all the way to the Supreme Court that allowed for forensic testing and exoneration after twelve years' imprisonment (Canadian Registry, Leighton Hay). Another involved a DNA exoneration of an eighteen-year old wrongly convicted of statutory rape (Canadian Registry, Gerald Barton).

The other four cases all involved wrongful convictions of Black women and men for harming children in their care: crimes that did not happen. In 2014, two Black Muslim parents were convicted of manslaughter in relation to the death of their twenty-seven-month-old daughter. This conviction was subsequently overturned on appeal in 2020 with new expert evidence casting doubt on the expert evidence that the child died in part because of malnutrition as a result of a vegetarian diet that the couple followed because of their Islamic faith. The prosecutor abandoned a subsequent re-prosecution and stayed proceedings. This procedural move meant that the couple was not acquitted and will likely not receive compensation (Roach, 2025a: 309–311). Tamara Broomfield was wrongfully convicted of giving cocaine to her two-year-old son on the basis of drug testing later found to be faulty. There was much prejudicial press coverage in this case that involved stereotypes associating Black people with illegal drug use (2025a: 89–90). The other case involved O'Neil Blackett, who was

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charged with murdering a thirteen-month old in his care, but whose manslaughter plea was accepted despite rising concerns about the pathologist who denied that the death could be accidental. Blackett had already served fifteen months in pre-trial detention before he pled guilty (2025a: 32–36). Anti-Black racism as a cause of wrongful convictions is not limited to the United States. In four of the six remedied Canadian wrongful convictions, Black people were convicted of crimes that did not happen, raising concerns about the role of racist stereotypes in these imagined crimes (2025a: Part Two).

7.6.1 The Wrongful Conviction of Donald Marshall Jr.

Donald Marshall Jr. was a seventeen-year-old Mi'kmaw teenager when he was wrongfully convicted in Sydney, Nova Scotia, in 1971 by an all-white jury. He was charged with murder even though he had been stabbed and flagged down the police and described the actual killer to the police. His story was that the perpetrator made racist remarks to both him and Seale before stabbing them both. This account was disbelieved by the police, prosecutors, perhaps his own defence lawyers and eventually by the all-white jury that convicted him. One of the jurors later explained the verdict on the basis that Marshall and Seale because of their races were bound to have fought (Roach, 2023a: xxi).

A detective known not to like Indigenous people from a reserve just outside Sydney took control of the investigation. He convinced three young witnesses to say that they had seen Marshall stab Seale despite their initial truthful denials. One of the young witnesses had been hospitalized with a nervous breakdown before his testimony and would be hospitalized after his testimony. This witness told Marshall's father during the 1971 trial that his son was not guilty but this was not fully pursued in the trial. The prosecutor got a witness to change his mind by reading back his previous sworn testimony, where the witness had said he saw Marshall stab Seale. The trial judge assumed, wrongly, that the witness was hesitant to testify against Marshall because Marshall had threatened him (Roach, 2023a: xx). This did not make rational sense because Marshall had been imprisoned since his arrest. In other words, it was a racist stereotype. Other factors contributing to Marshall's wrongful conviction included his hesitant trial testimony in English and his "I hate cops" tattoo that the jury saw when they observed Marshall's stabbing wound (Roach, 2012: 1477).

The defence lawyers were well paid by Marshall's band, but they conducted no independent investigation to find the real killer and did not

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ask for disclosure from the prosecutor. On his first unsuccessful appeal, they subtly suggested that Marshall might have been the killer by arguing that the lesser offence of manslaughter – a form of homicide mitigated by intoxication or provocation – should have been considered at his trial (*R. v. Marshall* 1972 8 CCC(2d) 329).

Marshall's wrongful conviction should have been corrected even before his first appeal because Jimmy McNeil, who was with the real perpetrator, Roy Ebsary, told the Sydney police ten days after Marshall's conviction that Ebsary, not Marshall, had killed Seale. Both McNeil and Ebsary were white. This new evidence was not disclosed to Marshall but was subject to a cursory investigation that confirmed Marshall's guilt on the basis that Ebsary was able to pass a polygraph test. Marshall was imprisoned in an adult maximum security prison that he would remember for "the noise, the stench, the violence, the drugs, the gang rapes and the constant fear" (McMillan, 2018: 21).

7.6.2 The Very Reluctant Correction of Marshall's Wrongful Conviction

Marshall only received a second appeal when the elected federal Minister of Justice exercising the residue of the royal prerogative of mercy ordered one in 1983. The prosecutor conceded that in light of Jimmy MacNeil's new (but actually twelve years old) evidence, an acquittal was appropriate. A special five-judge panel of the Nova Scotia Court of Appeal, which included a person who had been Attorney General at the time of Marshall's conviction, overturned the conviction (*R. v. Marshall* (1983) 57 NSR(2d) 286). It did so with great reluctance concluding that "any miscarriage of justice was more apparent than real" because they accepted MacNeil's story that Marshall and Seale had been attempting to rob him and Ebsary. It concluded that "by lying" and denying the purported robbery, Marshall "helped secure his own conviction," even warning that Marshall could still be charged with perjury. The Court of Appeal disbelieved Marshall's testimony and accepted a narrative that Marshall and Seale were trying to rob the two white men they encountered at night in a park. The only evidence to support such conclusions was MacNeil's testimony. The Court of Appeal's prejudicial conclusions about Marshall meant he only received $270,000 compensation for almost eleven years of wrongful imprisonment. Moreover, Marshall had to testify at three trials before Ebsary, who continued to argue that he was acting in self-defence during an attempted robbery, was finally convicted of manslaughter and

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received a one-year sentence (McMillan, 2018: 32). Again, racism is often better revealed by considering the race of both the accused and the Black victim, Sandy Seale.

7.6.3 The Royal Commission on Donald Marshall Jr.'s Wrongful Conviction

In 1986, in response to pressure from Indigenous and Black organizations (2018: 35), the Nova Scotia government appointed a public inquiry composed of three experienced trial judges from other Canadian provinces. The use of out-of-province judges allowed for the inquiry to cast a critical eye on the entire Nova Scotia justice system. The inquiry's mandate was to investigate the wrongful conviction and "such other related matters which the Commissioners consider relevant to the Inquiry" (Nova Scotia, 1989: 301). The inquiry expanded its mandate because of a belief that an exclusive focus on the facts of Marshall's wrongful conviction would not reveal the extent of the problems in Nova Scotia's administration of justice. It granted standing and funding to both the Union of Nova Scotia Indians and the Black United Front (Nova Scotia, 1989: xii). Its hearings examined Marshall's wrongful conviction in detail but also compared it to aborted investigations into prominent white politicians (1989: xiii). This allowed a comparative examination so often missing from investigations that focus exclusively on wrongful convictions. The full extent of racism may often only be apparent when the miscarriages of justice experienced by racialized individuals are compared to the treatment of non-racialized people.

The inquiry also held two and a half days of roundtables on anti-Black racism and Indigenous rights. One roundtable reached "agreement that Native self-government, and a Native criminal justice system within that, might be an appropriate goal" (Nova Scotia, 1988: 45). A roundtable on the Black experience in Nova Scotia started with the legacy of slavery and how Black children, like Indigenous children, were often taken into public care (1988: 60). It also discussed the need to have more Black people in the legal system from law schools to the bench (1988: 63–64). It identified "a generalized negativity towards Blackness that links Black skin to criminality" (1988: 68). One participant observed that if a Black person resisted police profiling, they would be "labelled lippy and uppity and charged with obstruction of justice" (1988: 71). One activist at the roundtable commented that he was surprised that the provincial government allowed the discussion of racism to occur (1988: 95).

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These roundtables were also supported by two detailed research studies, one on the Mi'kmaq experience and another on the Black experience of criminal justice. The study on the Mi'kmaq experience examined the history of colonialization, Treaty rights, as well as discrimination that Mi'kmaq people experienced throughout the justice system and especially with respect to the lack of translation and with defence lawyers. It stressed the need for Indigenous justice systems and Indigenous self-government and to this end recommended a Mi'kmaq Justice Institute (Clark, 1989). The study on the Black experience stressed issues of poverty and a lack of trust by Black people of the police, courts and prisons and a lack of Black lawyers and judges. It also called for educational and economic reforms (Head and Clairmont, 1989).

The Union of Nova Scotia Indians filed fifty pages of hard-hitting written final submissions. It argued that Marshall's case could not be understood apart from discrimination throughout the justice system and society (Wildsmith, 1988: 3). Sydney was "a red-neck town" (1988: 4), where Indigenous people were not hired by white businesses and had never been police officers or otherwise employed by the town (1988: 10). The police would call Indigenous people "wagon burners" and "broken arrows" and tell them to "get back on the Reservation where you belong." They would warn white girls from mixing with Indigenous youth (1988: 11–12). Indigenous people were often denied interpreters in court. This was a problem because the closest word to "guilty" in the Mi'kmaq language was related to the fact of being blamed (1988: 19). The Union argued Marshall was wrongfully convicted because "he was just another Indian" (1988: 27). It also recommended that a "Micmac Tribal system" including police and courts be created and have an exclusive role on reserve and a role with respect to investigations, translation and sentencing in off-reserve cases involving a Mi'kmaq person even if the victim was not Mi'kmaq (1988: 46–47).

The Black United Front (1988: 3, 7) in its closing submissions expressed concerns that it had not been allowed during the lawyer-dominated adjudicative hearings to examine witnesses with respect to their possible racist attitudes or to lead evidence on police shootings of Black people. Bruce Wildsmith, who was the Union of Nova Scotia's lawyer, was similarly frustrated about not being allowed to question Ebsary, or others involved in the wrongful conviction about racism (Wildsmith, 1991: 98–99). Writing two years after the final report, he suggested that over the three years of the inquiry, the three white judges who served as commissioners came to better appreciate the experiences of Indigenous and Black people

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in the criminal justice system (1991: 117). This view was not universally held. Indigenous law professor Sakej Henderson (1992: 41) criticized the inquiry for not fully exploring the role of racism and for creating "a hazy line between racism and incompetence and negligence."

In its final report, the inquiry identified a lack of disclosure, lying witnesses and inadequate defence counsel as immediate causes of Marshall's wrongful conviction. This was similar to the American approach to wrongful convictions in the 1990s and 2000s. What was different, however, was that the inquiry also asked larger questions about why Marshall was wrongfully convicted. "Was it because he was a Native? Was it because he was poor?" It concluded that Marshall had been wrongfully convicted and failed by the police, prosecutor, judge, all-white jury and his own lawyers "in part, at least, because he was a Native person" (Nova Scotia, 1989: 17). It admitted that its finding that "racism played a role in Marshall's conviction and imprisonment is one of the most difficult and disturbing findings that this Royal Commission has made" (1989: 148). Its finding was made easier because it could appeal to established Canadian equality law that, unlike American law (*McCleskey v. Kemp*, 1987), stressed that discrimination could occur in the absence "of any evil intention" (Nova Scotia, 1989: 151).

Among the inquiry's recommendations were the creation of a program to encourage Black and Indigenous people to attend Nova Scotia's only law school, the development of affirmative action and anti-racism policies for police, prosecutors, court workers, interpreters and defence counsel and the creation of a Cabinet committee on race relations. It also recommended the creation of a Mi'kmaq Justice Institute to conduct research on Indigenous law, increased use of Mi'kmaq interpreters, that all courts sit on reserves and the creation of a "community-controlled Native Criminal Court." This stopped short of the Union of Nova Scotia Indians recommendations. Nevertheless, the inquiry made many recommendations that were not limited to addressing the immediate causes of Marshall's wrongful conviction.

The inquiry was not perfect. In 1991, much more ambitious recommendations for Indigenous justice systems were made by the Manitoba Aboriginal Justice Inquiry, which included an Indigenous judge, the late Murray Sinclair, as one of the commissioners. This inquiry and a 1996 report of the Royal Commission on Aboriginal Peoples, unlike the Marshall Commission, identified colonialism and not simply discrimination as the root of the problem and proposed Indigenous justice systems as the solution (Manitoba Aboriginal Justice Inquiry, 1991; Royal Commission on Aboriginal Peoples, 1996).

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The Nova Scotia inquiry only devoted one page in its final report to juries. It tersely noted that "no Native has ever been on a jury in Nova Scotia. We were given no explanation for this" (Nova Scotia, 1989: 177). The Commission urged counsel "not to automatically exclude Natives simply because they are of the same race as the accused" (1989) but made no formal recommendations about juries. This avoided submissions by the Union of Nova Scotia Indians that Marshall's lawyers had worried that jurors "might think: He's an Indian and most likely would have done it" (Wildsmith, 1988: 39–40). It also ignored submissions that Indigenous people should be able to select trial by a judge alone and question prospective jurors about whether they had racist views (1988: 49). Although it was prepared to find racism among other justice system participants including Marshall's defence lawyers, the Commission was not prepared to criticize the all-white jury that convicted Marshall. It would take a wrongful acquittal of a white man for killing an Indigenous man for Canada to abolish peremptory challenges in 2019 (Roach, 2019b). It will be suggested in the last part of this chapter that innocence projects have expertise with respect to juries and jury reform that can be used to anti-racist ends.

Jane McMillan (2018) has documented the difficulties that the Mi'kmaw had in implementing even the Marshall Commission's modest recommendations. A Mi'kmaw justice institute was only formed in 1996. Its inadequate budget led to its demise (2018: 99, 127). Similarly, an Indigenous police service was not continued after its five-year funding agreement came to an end (2018: 107). Even Donald Marshall Jr. had his request for collective reparation turned down. He subsequently used some of his own compensation money to fund and run a program for Mi'kmaw youth (MacMillan, 2018: 93–94). Collective reparations may have a particular role to play with respect to miscarriages of justice suffered by Indigenous people and perhaps other racialized groups.

Donald Marshall Jr. was subsequently charged with fishing without a license but successfully argued all the way to the Supreme Court of Canada that he had a Treaty right to fish. Although a hero to his community and an eventual winner in the colonial legal system, Marshall's desire for a Mi'kmaw justice system has still not been realized (McMillan, 2018). The problems of Indigenous overrepresentation among prisoners, the wrongfully convicted and crime victims persist in Canada. That said, the Marshall Commission (Nova Scotia, 1989) demonstrates that public responses to wrongful convictions during the early days of the innocence movement need not have focused exclusively on the immediate causes of wrongful convictions or ignored issues of racism and systemic discrimination.

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7.7 Racism and the Wrongful Conviction of Indigenous Men

The wrongful conviction of Donald Marshall Jr. demonstrated how racist stereotypes associating Indigenous and Black people with crime can lead to wrongful convictions. It also demonstrated how the race of the crime victim, as underlined by the Baldus study on racial discrimination in the administration of the American death penalty, can aggravate the effects of racial discrimination. In what follows, the common role of racism in the remedied wrongful conviction of Indigenous men (Roach, 2015a; Vijaykumar, 2018) will be examined. The remedied wrongful convictions of Indigenous women will be examined in Chapter 8.7.

7.7.1 New Zealand

A New Zealand judge and former prosecutor Sir Thomas Thorp published a research report in 2005 raising concerns about the lack of Indigenous people applying to the elected executive for a second appeal to correct miscarriages of justice. He observed that only 9 per cent of applicants between 1995 and 2002 were Maori even though 50 per cent of the prison population was Maori at the time (Thorp, 2005: 53, 93–94). He stressed that Maori people may have particular reasons not to have confidence in the New Zealand justice system (2005: 57). As noted in Chapter 5.6, New Zealand in 2019 created a Criminal Cases Review Commission with statutorily guaranteed Maori representation to respond to the access to justice concerns documented in the Thorp report. About 40 per cent of the applications it has received since starting in 2020 are from Maori applicants. It has received just over 200 applications from both white and Maori applicants as of the end of 2024 (New Zealand Criminal Cases Review Commission). This is still an underrepresentation compared to the even higher percentage of prisoners who are Maori, but it is an improvement. There is a need for culturally and linguistically appropriate outreach and support for Indigenous person seeking relief for miscarriages of justice (LaForme and Westmoreland-Traore, 2021).

There have been some high-profile remedied wrongful convictions of Maori men in New Zealand. They feature false or implausible statements obtained from the accused, with two involving new evidence relating to brain damage caused by fetal alcohol-spectrum disorder (FASD). All involve sexual violence against white women.

Teina Pora, a Maori man, was twice wrongfully convicted of the rape and murder of a white woman. He was convicted on the basis of

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confessions he made to the police at seventeen years of age. Like Black teenagers (Henning, 2021), Indigenous teenagers like Pora and Marshall are especially vulnerable to wrongful convictions based on stereotypes associating them with crime. Pora had been arrested on car theft charges and had been associated with a gang. The police charged him on the one-year anniversary of the woman's shocking murder. Pora's confession was missing details, and he had been unable to identify the house in which the woman was murdered. It may also have been influenced by the police telling him about a financial reward for assistance with the unsolved murder. Pora volunteered his DNA, and it did not match that found at the crime scene. Like the Exonerated (Central Park) Five, however, he was prosecuted in any event.

Teina Pora was first convicted of murder by a jury in 1994 at a trial where payments to some of the prosecution's witnesses including Pora's aunt were not disclosed. This led to a second trial in 2000, where Pora was again convicted by a jury. Like Donald Marshall Jr. in Canada, he was sent to an adult maximum security prison at seventeen years of age to serve a sentence of life imprisonment. He was denied parole twelve times because he maintained his innocence but was eventually granted parole in 2014. In 1999, another man was convicted of raping the white victim on the basis of a DNA match, but police maintained that he had committed the crime with Pora even though the two were members of rival gangs. Racist stereotypes can be a glue that allows for the persistence of confirmation bias and tunnel vision.

Even after twenty-one years in prison and leave being granted by the Judicial Committee of the Privy Council in England, the New Zealand courts held they had no jurisdiction to grant Pora bail (*Pora v. R.* [2014] NZHC 598). In 2015, the Privy Council in one of its last appeals from New Zealand held that new evidence about Pora's FASD was admissible. The diagnosis was only made after Pora's confessions were televised and watched by a doctor with expertise with FASD. The Privy Council did not order a new trial after quashing the conviction (*Pora v. The Queen* [2015] UKPC 9 at para 40). The government apologized to Pora and cited his case as a reason for the creation of New Zealand's Criminal Cases Review Commission. Pora's wrongful conviction would not have likely been corrected without volunteer assistance from a former police officer and investigative journalists. Despite calls for one by the Maori Party and the New Zealand Police Association, no judicial inquiry was held into this case. This is unfortunate because such an inquiry would likely have had to grapple with issues of anti-Indigenous racism, as did Canada's Marshall inquiry.

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Another New Zealand wrongful conviction of a Maori man has striking parallels to Teina Pora's case. It involved Mauha Fawcett, a Maori man who was associated with the same Mongrel Mob gang as Pora. Like Pora, Fawcett made confessions to the police that he subsequently retracted. He attempted without success to have those statements excluded from his trial (*R. v. Fawcett* 2013 NZHC 3266). Fawcett fired his defence lawyer on the basis that the lawyer did not believe in his innocence but that lawyer was allowed to act as an amicus and advance alternative and inconsistent defences to Fawcett's claim that he had no involvement in the murder. This case has echoes of how Donald Marshall Jr. was poorly represented by his non-Indigenous lawyers who may also have disbelieved their client's claim of innocence.

New evidence was accepted on appeal that Fawcett had FASD, with the Court of Appeal noting that the case "has certain parallels with Pora" (*R. v. Fawcett* 2017 NZCA 597 at [22]). At the same time, the difficulties of obtaining a FASD diagnosis should not be underestimated (Rudin, 2022: ch 7). There is a danger of making such a medical diagnosis the standard for cultural accommodation.

The Court of Appeal ordered a new trial, but none was held after a trial court excluded Fawcett's confession as unreliable because it was difficult to tell whether Fawcett's "statements were based on reality and which were an artefact of his brain damage" (*R. v. Fawcett* 2021 NZHC 2406 at [300]). The prosecutor sought to withdraw the charges, leaving Fawcett open to subsequent prosecution. The judge dismissed the murder charges because Fawcett had been imprisoned or on restrictive bail conditions from the time he was twenty-one years of age until he was thirty-four years of age (*R.v. Fawcett* 2021 NZHC 2969).

In December 2023, the New Zealand Criminal Cases Commission referred Mikaeare Oketopa's 1995 conviction by an all-white jury for murdering and raping a white woman for a second appeal. The commission had engaged Dr. Gisli Gudjonsson, a leading expert on false confessions. It stated that defence counsel had failed to interview witnesses who could have provided an alibi. Again, as in the Marshall case, this indicates that Indigenous people may be vulnerable to under-representation by defence counsel in addition to false confessions. The Commission also stated: "Our investigation has identified a series of issues relating to the integrity of the police homicide investigation and the trial, which undermine Mr. Oketopa's convictions for rape and murder" including "a guilt presumptive mindset" (New Zealand Criminal Cases Review Commission, 2023). The Commission also noted that the Oketopa's two

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co-accused, who are also Maori, have always maintained that they did not know Oketopa (White, 2023a). This also points to the possible ability of stereotypes relating racialized men to sexual violence to fill in large gaps in the evidence.

The Commission, which as discussed in Chapter 5.6 has two Maori commissioners, was more sympathetic to Oketopa's claims than the courts have been so far. In 2000, the New Zealand Supreme Court had refused to grant Oketopa leave to appeal his conviction in part on the basis that the alibi witnesses he sought to call were available in the 1995 trial and may not have been called for tactical reasons (*Oketopa v. R* [2020] NZSC 75 at para 24). Two years after he was first imprisoned, Oketopa was involved in a riot at Christchurch's Paparua Prison, where six prison guards were taken hostage. One of their main demands was the creation of a Criminal Cases Review Commission (White, 2023a).

7.7.2 Australia

Indigenous people make up only 3 per cent of Australia's population but about a third of its prison population. One 2015 counting of miscarriages of justice in Australia showed that nine of seventy-one remedied wrongful convictions were of Indigenous people (Dioso-Villa, 2015). This is over-representation compared to the amount of Indigenous people in the population but severe under-representation of the population most at risk of wrongful convictions, those who are in prison (Roach, 2015a). Australia has resisted calls for the creation of a Criminal Cases Review Commission that was created in New Zealand in 2019 and in Canada in 2024 to replace the elected executive in ordering second appeals after appeals have been exhausted. Most Australian states have given accused the right to second and subsequent appeals if they have fresh and compelling evidence that establishes a substantial miscarriage of justice. As will be seen, one Indigenous person, Derek Bromley, has failed in his attempt to obtain relief under this new provision, which unlike commissions places an obligation on convicted persons to find new evidence.

Historical cases may be particularly important in revealing the role of racism in wrongful convictions. Rupert Maxwell Stuart, a twenty-seven-year-old Indigenous man, was convicted in 1959 by an all-white jury of the rape and murder of a nine-year-old white girl. The trial was conducted in English even though Stuart was only fluent in his Indigenous language. The police claimed Stuart had confessed, but Stuart told the court: "I cannot read or write. Never been to school. I did not see the

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little girl. I did not kill her. Police hit me. Choke me. Make me said these words. They say I kill her. That is what I want to say" (*Stuart v. The Queen* 1959 HCA 26 at para 9).

Stuart's appeal, including his application to admit new evidence that he did not speak enough English to make the confession that the police wrote down, was denied by the High Court of Australia. An affidavit was filed by an expert in Stuart's Indigenous language noted that the confession was written in "stilted legal-police language…that few ordinary Australians (still less illiterate Aboriginals) would use" (Kirby, 2002: 201). The High Court conceded that "certain features of this case have caused us some anxiety" but stressed that Stuart had not raised language concerns at trial (*Stuart v. The Queen* 1959 HCA 26 at para 5). The Court also stressed that there was no evidence to back up Stuart's claim that the police had threatened him with violence (*Stuart v. The Queen* 1959 HCA 26 at para 6). It also ruled that the prosecutor's reference to Stuart not testifying at trial was harmless.

Australian High Court Justice Michael Kirby writing in response to a film, *Black and White*, that publicized Stuart's case concluded that while some things had improved, the High Court still refuses to consider fresh evidence, including in cases of wrongful convictions (Kirby, 2002: 205–206). He recognized that it was media concern (led by a young Rupert Murdoch) and not the legal system that saved Stuart from wrongful execution. Justice Kirby argued that all lawyers and judges need to struggle against easy assumptions that "accused down-and-outs are guilty because, like Max Stuart, they have a black face or belong to some other minority whom we do not really know, understand or care for" (2002: 212).

Kelvin Condren, an Indigenous man, served seven years in prison before his wrongful murder conviction was overturned on the basis of new evidence relating to the victim having been seen alive after Condren had been arrested for public drunkenness. The court was also concerned that Condren's confession was related to Indigenous speech patterns, including gratuitous concurrence (*R. v. Condren* [1991] 1 Qd R. 578). Only one of the three judges would have acquitted Condren. The other two ordered a new trial, which was not held. A subsequent inquiry dismissed Condren's claims that he confessed because of a police assault. The inquiry recommended that Indigenous suspects be able to have "an interview friend" during interrogations (Roach, 2015a: 233).

Vincent Narkle was convicted of sexual offences against a teenage girl in 1993. The Indigenous man's appeal was dismissed including his claim that the police had beaten him, just as Stuart's and Condren's claims of

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police violence were not believed. Allegations of police misconduct are a recurring feature of many wrongful convictions and point towards the need for wrongful convictions to be considered in the larger context of police relations with Indigenous people. A second appeal was ordered under the royal prerogative of mercy as a result of an investigation of police misconduct. In 2006, Narkle's conviction was overturned on the basis of new evidence that the police had shown the complainant photos of Narkle before she identified him in a photo line-up. No re-trial was ordered in part because Narkle had already served his prison sentence (*Narkle v. Western Australia* 2006 WASCA 113).

In 2000, Frank Button, an Indigenous man, was wrongfully convicted of raping a thirteen-year-old Indigenous girl who lived at his home. DNA testing of biological material on the girl's bedsheets was initially not thought necessary. When it was performed, however, the material excluded Button and this new evidence was considered on appeal (*R v. Button* [2001] QCA 133). A subsequent inquiry found no misconduct by the police or the forensic scientist involved in the case (Roach, 2015a: 23).

Gene Gibson, a young Indigenous man from a remote community, was charged with murder and pled guilty to manslaughter and received a 7.5-year imprisonment sentence. He had been subject to extensive interrogation by the police. There was no interpreter, and there were only two qualified ones in the entire state of Western Australia (Tulloch, Blagg and Hill-de Monchaux, 2017). Harrison and Trounson (2021) suggest that the inadequate police interrogation of Gibson is quite similar to that in the Max Stuart case and demonstrates a lack of progress since the 1950s. Another comment on this case has moved beyond a focus on the immediate causes of wrongful convictions to larger issues of the need for Indigenous justice systems (Tulloch, Blagg and Hill-de Monchaux, 2017).

Dioso-Villa and Nash (2022: 174–175) have noted that Gibson pled guilty despite successfully having his false confession excluded as involuntary (*Gibson v. Western Australia* [2014] WASC 240). False guilty plea convictions made by Indigenous people may be a sign of a lack of trust in an alien and culturally inappropriate system. In 2017, the Western Australian Court of Appeal quashed Gibson's conviction after hearing new evidence about Gibson's cognitive issues and difficulties communicating with his lawyers. The under-diagnosed condition of FASD was also suspected, as it was in the two New Zealand cases examined earlier. Gibson was acquitted but had already served more than half of his sentence (*Gibson v. Western Australia* [2017] WASCA 141). Stratton and Sigamoney (2023) have argued that even while overturning Gibson's wrongful conviction, the Australian

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courts stressed procedural failures and Gibson's cognitive deficiencies and did not directly confront anti-Indigenous racism. They argue that "rather than addressing issue of race" wrongful convictions are assigned to immediate causes such as false confessions and false guilty plea (2023 at 264). As much as new evidence about FASD or other disadvantages faced by Indigenous accused can provide a remedy for wrongful convictions, it also presents a risk of pathologizing them and subtly blaming them, as opposed to colonial criminal justice systems, for their wrongful convictions.

The neglect of anti-Indigenous racism is also found in a 2023 decision of the High Court of Australia, where, in a 3:2 decision, the Court ruled against Derek Bromley, an Indigenous man who was part of the Stolen Generations of Indigenous children taken from their families. The majority held that Bromley failed to convince them he had fresh and compelling evidence that justified a second appeal. In 1986, the High Court had upheld Bromley's conviction of murdering a white man by stating that the jury was aware of the mental health issues of the state's critical witness (*R. v. Bromley* [1986] HCA 49). Two judges in the 2023 High Court decision would have admitted new evidence and warned that an innocent man may have been convicted (*Bromley v. The King* [2023] HCA 42).

Unfortunately, none of the High Court judgments discussed the risk of discriminatory and prejudiced justice in Bromley's original trial, despite oral argument from Bromley's lawyers that made reference to the dangers of cross-racial identifications. The majority also quoted without comment statements made by the prosecution's key witness that Bromley and his co-accused were either "bloody" or "bastard" "Aboriginals" (*Bromley v. The King* [2023] HCA 42: para 117). All of the judges formalistically focused on interpreting the restrictive South Australian legislation allowing second and subsequent appeals, which is based on earlier legislation that allows acquittals to be re-opened despite double jeopardy protections. Australia lags behind both Canada and New Zealand with respect to recognizing both the risks of wrongful convictions and of the impact of anti-Indigenous discrimination and other forms of intersecting prejudice on criminal verdicts (Roach, 2015a)

Bromley's case may also involve intersecting forms of prejudice because Bromley was alleged to have asked the white male victim for sex. The South Australian Criminal Court of Appeal, which like the High Court dismissed Bromley's appeal, allowed the prosecutor to introduce evidence of Bromley's 1981 conviction for indecent assault on a male even though the conviction was not entered into his 1984 trial. This illustrates how the prosecution may rebut attempts to find new evidence with evidence of

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their own that may in part be a product of overpolicing and other forms of systemic discrimination against Indigenous people. In its 2023 decision, the High Court did not rely on the 1981 conviction, but they would have been aware of it. The role of prejudice is rarely apparent on the face of the written record of judgments. Bromley was denied parole for maintaining his innocence but was finally granted parole in 2024 after forty years in prison (Roach, 2025a: 338–340). Like Mikaeare Oketopa, he had been involved in riots in protest of prison conditions. He successfully sued a prison guard for assaulting him during a 1987 riot in part because the assault was captured on video. Since that incident, Bromley had an exemplary prison record including being released to fight bushfires.

Dioso-Villa and Nash (2022: 176) have argued that well-documented systemic discrimination against Indigenous people in the Australian justice system makes them vulnerable to false confessions, false guilty pleas and wrongful convictions in general. Indigenous people may also suffer disadvantages in seeking remedies either from the elected executive or through second appeals that require the production of fresh and compelling new evidence. Australia continues to resist calls for the creation of a Criminal Cases Review Commission. Even if one were created, it is not clear that it would be structured to encourage applications from Australia's diverse Indigenous populations in the same way as the New Zealand commission. Australia's diverse Indigenous population has less political power than the Maori, who are about 17 per cent of New Zealand's population.

7.7.3 Canada

Stereotypes associating Indigenous men with sexual violence seen in many of the remedied wrongful convictions of Indigenous men in New Zealand and Australia are also seen in remedied wrongful convictions in Canada.

William Mullins-Johnson, an Anishinaabe Indigenous man, was convicted by a jury in northern Ontario of sexually assaulting and murdering his four-year-old niece. He was quickly charged by the police and convicted by a jury after only six hours of deliberation following a 2.5-week trial. He would later explain this speed on the basis, "An Indian guy with a prior. What's juicier than that?" (Roach, 2023a: 68). His first appeal was denied on the basis that legal errors were harmless, but with a strong dissent arguing that the evidence was weak. The Supreme Court of Canada then dismissed a subsequent appeal in 1998 without calling on the

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prosecutor to respond. In 2007, with the prosecutor's agreement, Mullins-Johnson's conviction was overturned on the basis of new evidence that what pathologists, including Charles Smith, diagnosed as evidence of anal rape was actually an artefact of death (Canadian Registry, Mullins-Johnson; Roach, 2023a: 68–74).

Mullins-Johnson was not the only Indigenous person wrongfully convicted of killing a child in cases involving the discredited pathologist Charles Smith. Richard Brant, a Mohawk man with prior convictions, pled guilty to aggravated assault in the death of his infant son. In 2016, sixteen years after his plea, he was acquitted with prosecutorial consent after consideration of new evidence that discredited the shaken baby syndrome (SBS) theory that Smith had relied upon (Canadian Registry, Richard Brant). Prior convictions may make Indigenous and other men the target of suspicion by both the police and forensic experts.

Similar wrongful convictions continued after Charles Smith no longer practised, thus belying the idea that wrongful convictions are simply a "bad apple" problem. James Turpin, an Indigenous man and member of the Eel River First Nation, was convicted in 2015 by a jury with no visibly Indigenous jurors of murdering his girlfriend's two-year-old daughter in 2004. Even though he sought help, he was suspected by a nurse of both drinking and sexually abusing the young girl. He was known to the police and interrogated in a guilt-presumptive manner but did not confess. Turpin was not charged after a pathologist determined that the young girl's cause of death was undetermined.

The Royal Canadian Mounted Police re-investigated the case, and Turpin was charged a decade after the girl's death. The prosecutor called twelve different medical experts at trial, but the conviction was overturned on appeal in 2019 as an unreasonable verdict. A new trial was started in 2021, but the prosecutor stayed charges in the fourth week of a new trial after its own pathologist admitted that an accidental fall could not be ruled out. The press coverage of the case was sympathetic to the white mother of the victim and did not view the case as a wrongful conviction. Turpin received no compensation in part because the prosecutor stayed charges, depriving him of an acquittal (Roach, 2023a: 80–84).

Four Indigenous men with limited facility in English were convicted of murder by an all-white jury in Winnipeg in 1974. Witnesses had only identified the perpetrators as being Indigenous and having long hair. Detectives were able to have the accused sign confessions, and the courts rejected claims that the police had threatened them and that they did not understand the confession written in English that they had signed. The

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Minister of Justice ordered new trials on the basis of new evidence that the confessions were not consistent with the men's understanding of English. The prosecutor consented to the acquittal of the men and apologized. The three surviving men are now suing the government and claiming racial discrimination (Roach, 2025a: 324–328).

Four of the other remedied wrongful convictions of Indigenous men involved sexual crimes (Canadian Registry, Allan Miaponoose, Gerald Barton, Herman Kaglik and Wilfred Beaulieu). Another involved an Indigenous man Wilson Nepoose, wrongly convicted of murdering an Indigenous woman despite alibi evidence. The police's inadequate investigation meant that the real perpetrator was never apprehended. Like Teina Pora's wrongful conviction in New Zealand, it might not have been corrected without volunteer investigative help by a former police officer (Roach, 2025a: 155–163).

7.7.4 The United States

The American Registry only records 28 exonerations of Indigenous people out of over 3,600 as of the end of 2024. This likely reflects access to justice problems, given that Native Americans are overrepresented in the American prison population at higher levels than Hispanic people. A few high-profile cases demonstrate how anti-Indigenous stereotypes associating Indigenous people with violence can influence wrongful convictions but also the possibility of placing wrongful convictions in the larger context of the relationship between Indigenous people and the police.

As in Canada, some of the exonerations relate to child sexual abuse, raising issues whether stereotypes associating Indigenous people with poor parenting and sexual violence played a role. Rommain Isham was convicted by a Wisconsin jury of sexually abusing the eight-year-old son of his girlfriend in 1990 and was sentenced to ten years' imprisonment. He was released from prison in 1999 when a separate investigation found out that the child had recanted his testimony in 1995 (National Registry, Rommain Isham). Edward Ghostbear was convicted by a Montana jury of sexually assaulting the seven-year-old daughter of his girlfriend in 2012. The conviction was reversed on appeal on the basis that therapy records of the girl not disclosed at trial revealed that she frequently lied (National Registry, Edward Ghostbear). Joseph Jefferson-Dust pled guilty to reckless endangerment in 2016 in Montana to avoid a possible 100-year sentence for sexually abusing the nine-year-old daughter of his girlfriend.

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He received a probation sentence. His conviction was overturned in 2024 after the complainant recanted.

The Fairbanks Four were four Indigenous men wrongfully convicted of sexually assaulting and murdering a fifteen-year-old boy in Fairbanks, Alaska. One of the four, Eugene Vent, was apprehended after he fled from the police. A false confession was obtained when the intoxicated Vent was interrogated in a guilt-presumptive manner for eleven hours. Another of the four, George Frese, was apprehended by the police when a suspicious nurse called police on the night of the murder. The four accused were tied together by a chain before their bail was set at $1 million for each accused. One letter to the editor of a Fairbanks newspaper stated that rising crime meant "we are truly savages now" and it was "open season" for crime (O'Donoghue, 2025). Alibi witnesses for the Fairbanks Four, who were also Indigenous, were interrogated by the police in a hostile manner and ultimately not believed by the jury. The four wrongful convictions involved false confessions, unreliable eyewitness error, jailhouse informants, lack of disclosure and in some cases inadequate defence lawyering. At the same time, the wrongful convictions were more than these immediate causes. The prosecutor argued that the Four had "taken down" the young victim "much like wolves take down a larger animal." The oldest of the Four, who was only twenty years old at the time and had a young daughter, was sentenced to seventy-seven years in prison (O'Donoghue, 2025).

Appeals and post-conviction relief were initially unsuccessful, despite findings that the jury had conducted its own experiments about the ability to identify people from a distance after they disbelieved testimony from an expert called by the defence (*Pease v. State* 214 P.3d 305, 2009). The Alaska courts also upheld a decision not to allow an expert on false confessions to testify for the defence (*Vent v. State* 2003 WL 294364). The convictions were vacated in 2015 but only after the real perpetrators confessed, and the Four had spent eighteen years in prison. Even then, the prosecution attempted to require the four men to waive compensation claims, a waiver that was subsequently held to be legally invalid. Although this case is an excellent example of how multiple immediate causes of wrongful convictions can combine, such an approach discounts how as Indigenous men, the Fairbanks Four, were subject to overpolicing and stereotypes associating them with sexualized violence.

Patrick "Hooty" Croy, a twenty-three-year-old member of the Shasta-Karok tribe, was convicted of murdering a police officer in rural California and sentenced to death in 1979. His conviction was overturned on appeal. He was able to change the venue for the second trial to San Francisco. At

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that trial, expert evidence was called to explain why Croy was afraid of the police and acted in self-defence. The jury acquitted. One juror started the trial thinking that the case against Croy "was so damning" at the end believed "the main issue was racism" (Ferry, 1992: 7). Another juror commented "you can't judge a book by its cover" and explained "if you don't understand a person's culture, how can you sit there and judge a person? You can't" (1992: 13). Croy's defence lawyer urged those representing all minority accused to take the time to understand the culture and history of their clients and to draw on members of the accused's community for assistance (1992: 12).

A more recent case involved an Indigenous man, Wassilie Gregory, who was stopped and physically beaten by a police officer in 2014 while walking in a parking lot in Bethel, Alaska. Gregory was charged with disorderly conduct, resisting arrest and second-degree harassment. He pled guilty to the harassment charge and received a suspended forty-five-day sentence. Gregory's charge was subsequently dismissed, and a $175,000 settlement was reached in his civil suit against the police in 2015 (National Registry, Wassilie Gregory). An Indigenous man similarly pled guilty to assaulting a police officer in 2017 before the conviction was overturned because of a failure to disclose the police officer's previous two suspensions from the local Minnesota police force (National Registry, Clarence Lozoya Jr). It will be suggested later that the innocence movements should be more willing to take on police misconduct, especially against racialized persons.

As in other countries, there are also cases of intersecting forms of discrimination. James Reyos, a gay or two-spirited Apache man, was convicted of murdering a Catholic priest in 1983 on the basis of a retracted and intoxicated false confession. Reyos had an alibi, and there was no physical evidence linking him to the crime. His lawyer urged the jury not to convict him "for being a homosexual," but he was convicted and sentenced to thirty-eight years' imprisonment. The conviction was eventually overturned in 2023 on the basis of clear and convincing new evidence of innocence. The new evidence included fingerprint evidence of alternative suspects who had since died, alibi evidence and new evidence relating to the weakness of an eyewitness identification and about false confessions (National Registry, James Reyos).

7.7.5 Summary

These wrongful convictions of Indigenous men in four different countries underline some common themes. False confessions are a frequent

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immediate cause, but they often stem from deeper issues involving violent police–Indigenous relations, mental capacity issues and Indigenous language and speech patterns. A generic focus on false confessions does not do justice to these cases. There is a danger seen in the New Zealand cases of requiring a diagnosis of FASD to cast doubt on the reliability of confessions. There is a danger in pathologizing intergenerational lived Indigenous experiences or requiring their medical validation. There are also dangers in discounting the disadvantages that Indigenous people may face in dealing with the police or testifying in their second or third language. In all of his legal proceedings, Donald Marshall Jr. testified in English and was not believed perhaps because of his hesitant speech patterns. At the inquiry, he testified with a Mi'kmaw interpreter. It was only then that the three judges believed him when he told them that he and Sandy Seale were not attempting to rob the man who killed Seale and stabbed Marshall.

Many of the wrongful convictions of Indigenous people involved deaths or the abuse of children. Such cases can tap into stereotypes of Indigenous people as poor and violent parents, which led to Indigenous children in all these countries being taken away from their parents and placed in boarding schools with the aim of assimilation. These wrongful convictions are part of the imagined crimes that constitute 40 per cent of all exonerations in the American registry and a third of the remedied wrongful convictions in the Canadian registry. Racist suspicions and stereotypes may play a significant role in such wrongful convictions.

Other wrongful convictions of Indigenous men are related to stereotypes associating them with violence including sexual violence. More research needs to be done with respect to other Indigenous peoples. In Chapter 10.2, a case will be discussed where five men wrongfully convicted of murder and rape were finally acquitted by the Indian Supreme Court after they had served fourteen years' imprisonment (*Ankush Maruti Shinde v. State of Maharashtra* (2019) 15 SCC 470). The men were members of a nomadic tribe that had been criminalized under colonial legislation and are still viewed in a contemporary Indian police manual as "suspicious characters" deserving of "special surveillance" (British Broadcasting Company, 2019). The men were convicted despite the fact that they lived 300 km away from the site of the crime, no fingerprint or DNA evidence linked them to the crime, and one of the witnesses identified other suspects and said they had spoken Hindi while the suspects spoke Marathi.

Some remedied wrongful convictions of Indigenous people in the United States are directly related to violent or aggressive encounters

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with the police. Patrick Croy's acquittal for murdering a police officer by a San Francisco jury in 1990 after running a cultural defence based on Indigenous experiences and fear of the police (Ferry, 1992) demonstrates some of the benefits of an Indigenous-specific defence. Because this was not a case of factual innocence, some innocence organizations would have rejected Croy's case. Others have warned innocence campaigners not to use "the language of defendant's rights" or appear "anti-police" if they are to achieve reforms (Gould, 2014: 6). This advice may have resulted in bipartisan reforms, but it also helps explain the downplaying of the role of racism in wrongful convictions.

7.8 The Future of Innocence Movements

Calls for a global innocence movement built around a right to claim and prove factual innocence (Garrett, 2017a; Godsey, 2017) reflect the experience of the American innocence movement. The successes of this movement are astounding in a hostile and punitive environment (Roach, 2024b). Nevertheless, times change, and as discussed in Chapter 6.9, the American innocence movement is evolving and placing more emphasis on anti-racism.

As it headed into its thirtieth year, the Innocence Project argued that "the cry for racial justice and equity," as represented by the protests against the police murder of George Floyd, "shows that the American public is acutely aware that the criminal legal system is in dire need of overhaul." It recognized that "many in poor, Brown and Black communities … bore the brunt of 'tough on crime' policies." It announced it would take a limited number of non-DNA cases and also challenge emerging technologies like facial recognition used "in overpoliced communities of color" and also hire a "special advisor on race and criminal justice" (Innocence Project, 2022). It has joined with other groups, including defence lawyers, in opposition to the "trial penalty," which helps explain why false guilty pleas are so frequent (Roach, 2025b). In my view, it makes sense for American Innocence Projects to take on a broader mandate, given the declining numbers of DNA exonerations that its founders have long predicted would occur (Scheck, Neufeld and Dwyer, 2000) but also increased political polarization in the age of Trump, which makes bipartisan consensus much less likely.

Public opinion polling suggests that the bipartisan concerns that drove much wrongful conviction reform in the 2000s may be breaking down. (Norris, Hicks and Mullenix, 2023) A 2023 study found that Black

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exonerees in Republican states served longer periods and waited longer for exonerations than white exonerees. The researchers related these findings to theories of cumulative racial disadvantage and public opinion research, suggesting less awareness and support for wrongful conviction reform in Republican states (Itskovich, Factor and Ohana, 2023). Trump himself may now claim to have been wrongfully convicted, but, as discussed earlier, he still denies the innocence of the Exonerated (Central Park) Five. He is the innocence denier-in-chief.

7.8.1 Anti-racism and Innocence Movements

Much could be gained if the American Innocence movement joined forces with a broader anti-Black racism movement that addressed broader aspects of systemic discrimination in the American criminal justice system, including racial profiling, police related deaths, unfair bail practices and overincarceration (Alexander, 2010; Cole, 1999; Kennedy, 1997). But some political support and charitable giving will be lost as a result of such a re-orientation. There are both potential gains and political risks from innocence movements more actively engaging with broader racial justice issues.

A broader and more energetic focus on state misconduct could help innocence organizations play a larger role in mass exonerations that, as discussed in Chapter 6.7, are often tied to police, prosecutorial and forensic misconduct. Innocence projects could lend their expertise and credibility to broader campaigns against police violence, police shootings, police deaths in custody and prosecutorial and forensic misconduct. One example is a 2022 study by an Innocence Project employee Laurie Roberts, who found high correlations between multiple complaints against New York City police officers involved with wrongful convictions listed on the National Registry. She recognized the utility of better police oversight not only to innocence claims but also to police conduct in general (Roberts, 2022). This follows the lessons of the Los Angeles Rampart scandal that resulted in not only individual exonerations but also increased civilian oversight of the Los Angeles police (Covey, 2012).

It is regrettable that more linkages were not drawn between Illinois's wrongful convictions of four Black men who falsely confessed to murder when tortured by Jon Burge's midnight crew of police officers and the innocence movement's early success in obtaining a moratorium on the death penalty and a commission of inquiry in Illinois. As suggested earlier, the influential Illinois commission downplayed racism

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in favour of a focus on the immediate causes of wrongful conviction (Illinois, 2002).

An alternative method of accountability that has received less attention was Illinois's Torture Inquiry and Relief Commission that investigates claims of police misconduct. As of 2023, it had referred sixty-seven claimants back to the courts, with prosecutions being dropped in nine cases and certificates of innocence issued in five cases (Illinois Human Rights Commission, 2023: 17). This commission does not simply focus on innocence but also on police misconduct. Such a commission could evolve into a Criminal Cases Review Commission but one with a wider mandate than North Carolina's commission, which is limited to claims of factual innocence. The University of San Francisco's Racial Justice Clinic has played a role both in exonerations and with re-sentencing and bail applications under California's Racial Justice Act (Bazelon, 2022). The American prison abolitionist Dorothy Roberts (2019: 117) has characterized the Chicago reparation ordinance discussed in Chapter 6.8 that responded to Burge's and other Chicago police reign of terror against Black men as a "nonreformist reform."

Another source of mass exonerations has been systemic forensic wrongdoing, often in drug labs. The two largest mass exonerations have come from Massachusetts, but there is no reason to think that forensic labs in other states are immune from both intentional and unintentional failings (Garrett, 2021). A recent and controversial study suggests that forensic pathologists may be influenced by their knowledge about the race of the suspect in making the cause of death determinations that are often critical in child death cases (Dror et al., 2021; Speth et al., 2021). There are risks for innocence projects in entering this debate. At the same time, they have accumulated great and deep expertise in understanding the frailties of forensic paediatric pathology (Findley et al., 2023).

One potentially risky topic for innocence projects is jury selection and jury diversity. All white juries featured in many of the remedied wrongful convictions discussed in this chapter. Innocence organizations may risk some support by taking on the need for jury diversity, but it may be worth it. Canada's 2019 statutory abolition of peremptory challenges was prompted by concerns about an all-white jury's acquittal of a white farmer who killed an Indigenous person on his property (Roach, 2019b). But it could have also been sparked by previous wrongful convictions of Indigenous men and women by all-white juries, and as suggested, one of the weaknesses of Canada's 1989 inquiry into Donald Marshall Jr.'s wrongful conviction is that it did not take on the need for jury reform.

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It is also important for innocence organizations to engage in the recognition of historical injustices. One of the main themes of this chapter is that while DNA exonerations started in 1989, wrongful convictions caused by racial prejudice did not. Indeed, such issues are often most visible and raw when viewed in a historical perspective.

In 2019, Florida pardoned the Groveland Four wrongfully convicted of raping a white woman in 1949. Thurgood Marshall successfully defended some of the Four, saving them from execution. Justice Robert Jackson argued that the conviction of the Four was "already dictated by the press and public opinion" and "Negroes were removed from the community to prevent their being lynched." He even suggested that if Black people had been included on the jury, they would have been intimidated into convicting (*Shepherd v. Florida*, 541 U.S. 50 (1951)). This case is another example of pre-DNA exonerations, identifying racism as a cause of wrongful convictions. The racist mob, however, won out with one of the Four, Ernst Thompson, being lynched, and another, Samuel Shepherd, was killed by a sheriff, while Shepherd was handcuffed. Addressing the past is, however, no excuse for ignoring contemporary issues. In 2023, Florida enacted laws that allowed the death penalty to be applied by an eight-person majority on the jury and to those convicted of sexual battery of children even though in 2000 it had issued a post-humous pardon to Frank Lee Smith for a sexual assault and murder of an eight-year old that had been resulted in a DNA exoneration.

Bryan Stevenson had done much important work with the Equal Justice Initiative. He started with wrongful convictions but over the years has expanded his focus to a more holistic focus on anti-Black racism by linking mass imprisonment with slavery and lynching and racial, youth and economic justice (Stevenson, 2014). He has written, "the presumptive identity of black men as 'slaves' evolved into the presumptive identity of 'criminal' and we have yet to fully recover from that historical frame." He also recognized that lynchings were a technique of "racial control" that victimized "the entire African American community, not just the alleged perpetrator of the crime" (Stevenson, 2017).

Centering racism into wrongful convictions will lead to a more systemic and collective form of reparations. Some amount of the over $4.5 billion that the United States has paid to individual exonerees (Gutman, 2025) might be transferred to more collective forms of reparation. The innocence movement needs to move away from individualistic framing whether it be directed to individual bad apple police, prosecutors or forensic experts or individual exonerees. Moving away from a focus on

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individuals also directs more attention to the accountability of organizations and society itself for miscarriages of justice (Roach, 1995).

Innocence organization may wish to reflect on whether they have traditionally repressed the role of racism as a cause of wrongful convictions and whether a greater focus on racism is now required. They should at the very least be supportive of other groups who are prepared to call out racism. As seen earlier, judgments like Judge Sarokin's 1985 decision (*Carter v. Rafferty* 621 F.Supp.533) identifying racism as a cause of Rubin "Hurricane" Carter's wrongful conviction discussed earlier in this chapter seem increasingly rare.

One recent exception deserves mention. The case involved Ronnie Long, who was convicted in 1976 by all-white jury in Concord, North Carolina, for the rape of a white woman. Long was imprisoned for forty-four years, despite a very weak case against him. There was no physical evidence linking him to the crime. Eyewitnesses described the suspect as a light-skinned Black man, whereas Long is dark skinned. The Fourth Circuit en banc finally overturned this wrongful conviction in 2020. The majority followed the innocence movement's focus on the immediate causes of wrongful convictions, including undisclosed, lost or ignored evidence, such as the taking of forty-three fingerprints from the crime scene, none of which matched Long. The Court ruled that Long satisfied the factual innocence requirement to bring a successive federal habeas corpus application and concluded "a man has been incarcerated for 44 years because, quite simply, the judicial system failed him" (*Long v. Hooks* 972 F.3d 422, 470–1 2020).

Six judges, including three appointed by Trump, dissented. They would have maintained Long's dubious conviction. They stressed that under the AEDPA their own opinion about Long's guilt or innocence was irrelevant as long as the denial of relief in state court was not clearly unreasonable. The dissenters also engaged in a difficult to rebut form of innocence denial by suggesting that "the absence of evidence is not proof of [Long's] absence" at the crime (2020 at 491). This decision demonstrates a type of American extralegalism – the use of legal form and power to condone injustice. Unfortunately, this will increasingly infect the American federal judiciary, as Trump continues to appoint more judges who revere Justice Scalia.

Racism was only raised by one judge in Ronnie Long's case. The judge was James Wynn Jr. He was the first Black judge to serve on the Fourth Circuit court. He retracted his 2024 retirement after it became clear that

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Trump would appoint his successor (Bloomberg Legal News 2024). Judge Wynn started his opinion by noting:

> The violent racial history of this country necessarily informs the background of this case: a Black man accused of raping a white woman is tried in 1976 by an all-white jury in a county with strong ties to the woman's family, because defense counsel feared that any attempt to relocate the case would land them instead in a county with significant controlling influence by the *Klan*. Those historical facts lend gripping context to the egregious constitutional violations at the heart of this case. (*Long v. Hooks* 972 F.3d 422, 488 (2020))

He drew parallels with the Ronald Cotton case discussed earlier in this chapter, adding "to say so suggests no ill will on the part of the victim; nor does it cast any doubt on the fact of the attack itself. Rather, it simply points to a deficit in human cognition: difficulty forming memories of faces we do not know, especially in a traumatic situation, and especially across racial lines" (2020: 474). In order to detect racism, it is often necessary to look at patterns in cases and examine both the race of the accused and the victim.

Judge Wynn strongly criticized police, prosecutorial and forensic misconduct in this case and related it to broader patterns. The dishonest withholding of exculpatory evidence at a time when rape was still punishable by the death penalty in North Carolina "takes on a particularly sinister meaning here, given our country's historical treatment of Black men accused of raping white women" (2020: 490). He recalled the history of lynching and the post-Civil War development of stereotypes that "black men were dangerous subhumans predisposed to rape" (2020). He noted that in the 1970s "the vast majority of white Americans" disapproved of interracial marriage, thus invoking some form of collective responsibility for the wrongful conviction (Roach, 1995).

Judge's Wynn's attention to the impact of local context and prejudices on wrongful convictions echoes back to Voltaire's argument that Jean Calas could never receive justice in Toulouse. It also echoes the decision made by the Nova Scotia government to have three judges from outside that Canadian province head the inquiry that would examine not only Donald Marshall Jr.'s wrongful conviction but also Nova Scotia's history of anti-Black and anti-Indigenous racism. Judge Wynn, like Voltaire, Zola and Judge Sarokin before him, recognized that racism and prejudice cause wrongful convictions and many other distinct but connected injustices. If the American innocence movement becomes part of a "civil rights movement" (Norris, 2017), it needs to employ more of this form of analysis even at the cost of bipartisan support.

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7.8.2 *Innocence Movements and Indigenous Self-determination*

Innocence organizations and litigators in a number of settler colonial states throughout the world can do important work in seeking remedies for Indigenous people who are wrongfully convicted. As seen earlier, Indigenous people seem particularly vulnerable to a number of the immediate causes of wrongful convictions, including false confessions, inadequate defence lawyering and wrongful convictions for imagined crimes that did not happen but that reflect stereotypes associating them with violence, sexual violence and the mistreatment of children in their care. These stereotypes need to be named and confronted if they are not going to continue to play an insidious role in the wrongful conviction of Indigenous people. Very few innocence lawyers have the necessary cultural competence to engage with Indigenous clients (Eades, 1996). They need to understand Indigenous speech patterns and understand the historical alienation that can lead to false guilty pleas. The particular vulnerability of Indigenous women to false guilty pleas will be examined in Chapter 8.7.

At the same time, there is a danger that wrongful conviction reforms will be what my colleague at the Canadian Registry, Amanda Carling, has called "band aids" on a colonial system imposed on Indigenous peoples without their consent (Carling, 2017), As recognized in British Columbia's First Nations Justice Strategy, both wrongful convictions reforms and even reforms directed at Indigenous overincarceration and disproportionate deaths at the hands of police should be seen as a form of mitigating the damage of colonial criminal justice systems while retaining the ultimate goal of recognizing Indigenous justice systems (British Columbia, 2020). There is a need for justice centres staffed by Indigenous people to effectively address the broad range of miscarriages of justice that Indigenous people experience at the hands of a colonial justice system. This should be recognized as needed damage control, and the ultimate goal of Indigenous justice systems must be maintained.

The 1989 inquiry into the wrongful conviction of Donald Marshall Jr. was a small and tentative step towards Indigenous justice systems, as well as a more sustained attempt at damage control. It was soon followed up by more ambitious proposals for Indigenous justice systems and police services (Manitoba Aboriginal Justice Inquiry, 1991; Royal Commission on Aboriginal Peoples, 1996). At a minimum, those who work to rectify the wrongful convictions of Indigenous people should seek alliances with advocates for greater Indigenous self-determination. In the United States,

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the Fairbanks Four enjoyed support from both Alaskan tribes and the Alaska Innocence Project. The Alaska Innocence Project's website features its alliances with various Indigenous and other civil society groups. This is a good start.

Jane McMillan (2018) has traced the impact of the Marshall inquiry on Mi'kmaw justice initiatives and Donald Marshall Jr.'s subsequent role as an Indigenous leader and accused in a case that became a controversial landmark case in establishing Mi'kmaw fishing rights (*R. v. Marshall* [1999] 3 SCR 533). She noted that the Union of Nova Scotia Indians and other Indigenous groups used the inquiry report as a resource both to mitigate the damage of the colonial system and to recover Mi'kmaw laws and justice (McMillan, 2018: 60). Despite such a program being denied as part of his compensation, Marshall used some of his compensation to fund and run a wilderness camp to help youth "respect their Mi'kmaw identity." Marshall believed "a reinvigoration of the traditional laws…would be the best way to keep kids out of jail and to help families heal together" (2018: 93–94). Unfortunately, this camp, as well as the creation of an Indigenous police service and the creation of a Mi'kmaw Justice Institute, wound down from a lack of sustainable funding (2018: ch 8).

After his premature death at fifty-six years of age, Marshall's family and lawyers supported Mi'kmaw justice initiatives that included the creation of an Indigenous court in 2018 named the Donald Marshall Jr. Centre for Reconciliation and Justice (2018: ch 9). This recognized that Indigenous laws and justice systems will serve all Indigenous people better than the existing colonial system. Donald Marshall's wrongful conviction and the inquiry exposing it have rightly been credited with raising awareness about wrongful convictions in Canada and how Indigenous people are especially vulnerable to them. Australia, New Zealand and the United States and likely many other states with Indigenous populations could benefit from a similar inquiry. At the same time, what Donald Marshall Jr. ultimately wanted was not simply to be free from discrimination but respect for and recognition of Indigenous laws and justice system (McMillan, 2018). There is a need to place the exoneration of wrongfully convicted Indigenous people in a larger context and keep such victories in perspective. Collective reparations and Indigenous justice systems are the ultimate goal, one that has yet to be achieved. There is a need to connect the harms that Indigenous people suffer from wrongful convictions and other miscarriages of justice and relate them to many other harms that colonialization has caused to Indigenous people.

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7.9 Conclusions

This chapter has sought to reveal how the focus on immediate causes of wrongful convictions such as mistaken eyewitness identification obscured and downplayed the role of racism in many of wrongful convictions revealed by DNA exonerations. The frequent mistakes made by white victims of sexual violence in identifying the wrong Black men as the perpetrators were generally not related to the American experience of slavery and lynching. In the first 330 DNA exonerations in the United States, there were double the number of Black than white exonerees (Garrett, 2017b: 45). Until quite recently (Innocence Project, 2022), however, the American innocence movement did not explicitly align itself with larger movements to eradicate the effects of anti-Black racism with respect to policing and overincarceration. Such broader alliances might have threatened the bipartisan success that the movement enjoyed in getting many states and the federal government to enact many reforms tied to the immediate causes of wrongful convictions. There is also much more support in the United States for over $4.5 billion in compensation that has been paid to individuals who have been exonerated since 1989 (Gutman, 2025) than collective reparations tied to slavery, Jim Crow, lynching or Indigenous dispossession.

Wrongful convictions caused by racism cause both individual and collective harm. There is a need to respect the decisions of individual victims such as Alfred Dreyfus's decision to accept a pardon in order to be reunited with his family and the decision of many innocent people in the United States to enter *Alford* pleas (Findley et al., 2022), while at the same time recognizing that racist miscarriages of justice also cause collective harms and require systemic remedies. At the very least, innocence movements need to support those who justifiably call out racism. Attempts to place wrongful convictions into the larger context of racism, such as those of Judge Sarokin's 1985 decision in Hurricane Carter's case or Judge Wynn's judgment thirty-five years later in Ronnie Long's case, are much too rare. They should be celebrated and honoured. Innocence organizations and other assisting the wrongfully convicted should be more candid about the role of racism in wrongful convictions. They should respect and contribute where possible to larger structural changes of the justice system that go well beyond the limited menu of wrongful convictions reforms previously examined in Chapter 3.

The overrepresentation of Indigenous people both in jail and among the wrongfully convicted calls for both individual and systemic remedies.

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It is important that the lawyers who represent Indigenous people have the type of cultural competence and engagement that was demonstrated by the lawyers who mounted a successful self-defence claim by Patrick "Hooty" Croy in 1990 for his killing of a police officer (Ferry, 1992). This case, as well as the difficulty of definitely refuting the existence of imagined crimes that never happened, underlines some of the limits of the American proven innocence model, a theme that will also be taken up in Chapter 8 regarding the wrongful convictions of women and sexual minorities (Beety, 2022; Parkes and Cunliffe, 2015).

Research on the barriers faced by Indigenous people (and others) in receiving remedies for wrongful convictions should be encouraged (Thorp, 2005). This research played an important role in New Zealand's 2019 creation of a Criminal Cases Review Commission (Public Act 66 of 2019), which has guaranteed Maori representation, significantly increased the number of Maori requesting its assistance and has started its first systemic inquiry. Australia, Canada and the United States all seem to be lagging behind New Zealand in this respect. It is unfortunate that the Canadian government when creating its Miscarriages of Justice Review Commission at the end of 2024 ignored recommendations that the commission by statute should include at least one Indigenous and one Black commissioner or its proposals that the new Commission be able to consider claims about excessive sentences (LaForme and Westmoreland-Traore, 2021).

Canada's 1989 inquiry into Donald Marshall Jr.'s wrongful conviction stands out in the early innocence movement for examining not only the immediate causes such as lying witnesses and lack of disclosure but also the role of anti-Indigenous and anti-Black racism in that wrongful conviction (Nova Scotia, 1989). It is connected to other Canadian inquiries that went more deeply into a larger range of harms and miscarriages of justice suffered by Indigenous people. The correction of many and varied miscarriages of justice suffered by Indigenous people is a necessary form of damage control, but it should not come at the expense of recognizing the injustice of colonial criminal justice systems and the need for restoration of Indigenous justice systems.

Increased political polarization including Trump's continued denial of the innocence of the Exonerated (Central Park) Five suggests that the early innocence movement's search for a bipartisan consensus through DNA exonerations may have been overly optimistic. In the face of such polarization, innocence movements should re-visit any desire not to "'sell' changes on the basis of civil rights or due process" or to appear

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"anti-police" or "anti-prosecutors" (Gould, 2014: 5–6). They should consider championing broader police reforms and the abolition of the death penalty. A future direction of innocence movements in different parts of the world would be to centre anti-racism and anti-discrimination in their strategies. Such a focus would likely encourage innocence projects to branch out from wrongful convictions to other related forms of miscarriages of justice, including unlawful detention caused by racial profiling, unjustified denials of bail and unjustified shootings or deaths of racial minorities in police custody. Innocence organisations have both the skills and experience to take on a variety of forms of state misconduct. But such broader agendas in the American political context at least and perhaps elsewhere may cost innocence organisations some political and financial support.

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