MA MAJOR RESEARCH PAPER

THE IMPACT OF MINORITY STATUS ON WRONGFUL CONVICTIONS: A CASE STUDY ANALYSIS OF DONALD MARSHALL JR. AND LEIGHTON HAY

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The Major Research Paper Proposal is submitted in
partial fulfillment of the requirements for the degree of
Master of Arts

Criminology and Social Justice
Ryerson University
Toronto, Ontario, Canada

August 14, 2020

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Dedication

This MRP is dedicated to a few special people who made this project possible.

First, I dedicate this to Kim Ashby, an incredible Criminology lecturer from the University of Western Ontario (UWO). I had the privilege of taking five courses taught by Kim Ashby, four of which were created by her. Her courses were why I chose to attend UWO for my undergraduate studies and they strongly contributed to my growing knowledge of Criminology. She is the reason why I wanted to pursue future studies in the field and her course “Wrongfully Convicted” was the inspiration for this paper. Thank you for everything you do Kim, for myself and for all of the fortunate students you continue to share your knowledge with.

I also dedicate this MRP to my parents, Mirian and Giancarlo Sansalone, who were supportive of my passions and dreams throughout all of my academic and personal endeavours. You have both granted me the freedom to pursue my studies in the field of my choice and the university of my choice, while rallying behind me through every success and challenge. Thank you, Mom and Papa, for the unconditional kindness and love. I am eternally grateful to be your daughter.

Lastly, I offer thanks to my lifelong friend, Melissa Arlotto. Melissa has stood by my side throughout two years of elementary, all of secondary and post-secondary school and now through my graduate studies. She has always offered her time to me, even when she was a full-time student working multiple part-time jobs. Whether it is an ear to listen, a hug, or a coffee, I can always rely on Melissa when I am in need. She is an exceptional woman and friend and I am so fortunate to have her in my life.

Introduction

A wrongful conviction is considered not only a miscarriage of justice, but a failure of justice, meaning that an individual has been charged with and convicted of a crime they did not commit as proven in a court of law (Innocence Canada, 2019). Cases of wrongful convictions is an international problem, affecting individuals from a variety of racial and ethnic backgrounds, across the gender spectrum. Nevertheless, it is a well-known fact that racial minorities and Indigenous[1] populations compose a disproportionately large percentage of the wrongfully convicted (Statistics Canada, 2019). Minority status is often not considered a causal factor in the discourse on the subject and, when it is, the concept of causality poses complex methodological challenges. This essay does not aim to make an argument based on claims of causality in the sense that "but for" the defendant belonging to a marginalized group, the wrongful conviction would not have occurred. Nevertheless, causality and the impact of race and racism will be discussed in the larger context of inequalities within the criminal justice system and greater society and how this greatly contributed to wrongful convictions.

I argue that the existing literature on wrongful convictions has discussed the subject matter extensively but discuss racism in conjunction with other factors or causes of wrongful conviction. Despite the high frequency of racism mentioned by various scholars, academics and news reporters when reviewing or discussing the cases themselves, there is large disagreement regarding the role racism plays. It is a critical factor, but is not discussed individually and separate from other causes and it is not examined how race influences other causes of wrongful conviction. For this reason, I will be using two unique Canadian case studies on individuals who

[1] This essay uses the terminology "Indigenous" or "Indigenous peoples" to collectively acknowledge the First Nations, Métis and Inuit groups in Canada and when the group they belong to is unknown.

have been exonerated, one Indigenous and one Black. Doing so allows me to demonstrate the prominent impact marginalized status (race and Indigenous status) has regarding why and how these individuals became a suspect and, eventually, are convicted. They are used only as examples to demonstrate the importance of analyzing race in any case when investigating causes of wrongful convictions. In addition, this status makes these individuals highly distinct from white people and different from each other. A majority of the wrongful convictions in Canada alone consist of white males (Statistics Canada, 2019), furthermore the reasons for the wrongful conviction of racialized individuals make them unique and distinct from the majority. There are a variety of experiences of racism felt by Black, Indigenous and People of Colour (BIPOC) who have similar experiences but are also very different. This essay will use these similarities and differences to demonstrate how this makes them different from the majority in Canada (white) as well as how Indigenous people experience different forms than Black people. We are in a society of rapid change and the importance of the role of race in Canada cannot be ignored.

Before beginning this paper, I want to acknowledge my privilege when writing about a subject such as inequality in the area of wrongful convictions. I identify as a white, cis-gender female who is third-generation Italian and second-generation Canadian. I am fortunate to have never experienced the instances described in this paper, i.e., systemic racism, othering, or being wrongfully accused of a felony. Most likely, I will never experience it because of my white privilege. However, this is an important subject to discuss because history is currently repeating itself; what happened to Donald Marshall Jr. back in the 1970s also happened to Leighton Hay in the early 2000s. These parallels have been narrowly discussed in the news media and unless they are acknowledged, this injustice will continue in the future. It is crucial to identify and acknowledge racial inequality occurring within the society we live in, as well as, understanding

why it happens overwhelmingly to people of colour and not to white people. It is important to be a voice for individuals who become victims of a miscarriage of justice on the micro and macro levels of the justice system. I cannot speak to my own experiences of discrimination, but I can help make the voices heard, of those who have and reinforce their importance and significance in society today. It needs to be discussed and acknowledged by those in privileged positions, such as myself who was granted access to a master's degree program in Toronto. BIPOC must be offered the same opportunities as I have been and, when offered such opportunities, their voices need to be acknowledged, heard and uplifted. I tried to gather as much relevant research from these sources as I could find, given the nascent state of the literature.

This essay will proceed as follows. The first section is a brief literature review on the ways systemic racism in Canada's criminal justice system is hidden and denied and how the current research frames this secrecy. Next, I introduce both case studies: Donald Marshall Jr., an Indigenous Mi'kmaq male, and Leighton Hay, a Black male. This section will provide background and demographical information and why they were selected. Following, I examine two central themes discussed and debated by various academics and authors on the subject matter. The first theme is the pre-existing problems in the communities where the wrongful convictions occur. By problems, I mean, not only historic and perpetual racism, but poverty and acts of "othering". Both cases offer unique insights into the racial tensions in the communities within which they lived in and how those tensions, in turn, aggravated the circumstances of trying to prove their innocence. A second theme is systemic racial biases in the justice system. Here, within positions of authority, the courts, sentencing, the jury and the police are institutions which exacerbate and perpetuate racism and it becomes evident in cases of wrongful convictions. A large body of the literature that will be discussed was written by American authors, based on

cases which took place the United States. Nevertheless, they are appropriate for the purpose of this paper because racialization is universal and the themes to be discussed cross international borders. We can learn a lot about the significance of racial status and its role in wrongful convictions from these texts. I will conclude with my final thoughts on the subject as well as policy implications and critiques.

Literature Review

There is an abundance of scholarly articles discussing systemic racism on an international scale. For the purposes of my thesis, I will only focus on research involving components of the Canadian criminal justice system with a focus on anti-Indigenous and anti-Black racism, including by police and in courts. As described by the Department of Justice (2015), Canadian research has not extensively covered issues of racism and crime and racism nor best practices to resolve discrimination and hate-crimes. Benoit et al (2019) explain that researchers who are focusing on racism do not explore various levels of systemic racism when making their claims, which does not capture the entire scope of racism in Canada (p. 2). This section will analyze scholarly research on systemic racism within Canada, specifically how its existence is denied, ignored and hidden by the government. Regardless of who the active Prime Minister and Members of Parliament are, the Government of Canada uphold the narrative that systemic racism is not a serious problem and that we are a multicultural, diverse, accepting nation.

A recurring theme throughout this body of literature is the concealment of systemic racism in Canada, yet there are varying perspectives on how it presents itself. One form is the lack of race-based data collection in Canada. Race-based data is important to collect because it can identify if a certain law, policy or practice is disproportionately targeting a specific group of people, if unequal treatment is experienced by minorities in Canada and consistent allegations of

discrimination or systemic barriers (Ontario Human Rights Commission, 2005). Furthermore, it can also help to develop solutions to resolve racism in the justice system (Ontario Human Rights Commission, 2005). Khenti (2014) raises attention to race-based data, but does so in relation to the war on drugs in Canada. They claim that Canada's war on drugs disproportionately targets both Black and "Aboriginal" Canadians (Khenti, 2014, pp. 190-1). While they use official data sources (prison and police records) to provide statistics on race and police encounters, Khenti (2014) addresses the problem by stating this data is inaccurate and underrepresents true numbers of Black and Indigenous peoples (p. 190). By attributing this issue to the lack of race-related data collected throughout the Canadian criminal justice system, "the full extent of the war's impact" on both Black and Indigenous peoples is difficult to determine (Khenti, 2014, p. 190). Khenti (2014) further supports their claims by referencing data from multiple inquiries, such as the Commission on Systemic Racism in the Ontario Criminal Justice System of 1995 (p. 193).

Similarly, Wortley (2003) discusses race-related data as problematic when studying race in conjunction with other factors, referred to as "intersections" of race and crime (p. 103). Both studies call for race-based data to be collected and made mandatory within the criminal justice system (Khenti, 2014, p. 193; Wortley, 2003, pp. 109-110), but have different explanations on how its absence is a method of concealment. Khenti (2014) states that the criminal justice system hides systemic racism by not presenting the true numbers of Black and Indigenous Canadians experiencing racism. Wortley (2003) explains why its exclusion is used as a tool to conceal systemic racism in Canada (p. 110). However, Wortley (2003) expands on this call for inclusion by providing claims of opposition to race-crime data that are likely to arise if it were mandated. They specifically claim that the criminal justice system would object to it because its exclusion is, "used as a convenient excuse for not investigating charges of racial bias in policing, the courts

and corrections" (Wortley, 2003, p. 110). Wortley (2003) also bolsters his argument by using sociological theory to provide alternative explanations (pp. 101-2).

Wortley & Owusu-Bempah (2011) also examine racial bias in Toronto, Ontario and state the difficulty of researching the existence of racial bias in Canada due to the ban on collecting race-crime data (p. 395). While using a similar methodology as Khenti (2014) to gather race data, Wortley and Owusu-Bempah (2011) describe concealment in the same way as Wortley (2003). They explain that the ban on race-based data aids the criminal justice system to, "deflect allegations of racial bias" and "reduce accountability within the criminal justice system" (Wortley & Owusu-Bempah, 2011, p. 404). Owusu-Bempah and Millar (2010) also discuss race-related data collection's exclusion in the Canadian justice system as problematic but frame their argument by giving anecdotes from Canadian justice officials countering its exclusion. The Toronto Police Services Board called for a ban on race-based data because they "correlate ethnic groups with crime and are contrary to fundamental values in society" (Owusu-Bempah & Millar, 2010, p. 99). The researchers argue that this defacto ban had the opposite effect the Toronto Police stated and explain that it increases the likelihood of visible minorities being perceived as criminals and criminalized (Owusu-Bempah & Millar, 2010, p. 100). Like Khenti (2014), they show that data under-represents visible minorities with criminal records in Canada and argue that gathering justice statistics according to racial background will provide more accurate information on these numbers (Owusu-Bempah & Millar, 2010, p. 101). Moreover, Owusu-Bempah & Millar (2010) expand their claims by comparing Canada's lack of race-based data collection to the United States and Great Britain's outcomes from gathering such information (p. 98). The ability to examine victimization, fear of crime, perceptions of components of the justice system as well as claims of discrimination allow for future improvements of these components (Owusu-Bempah

& Millar, 2010, p. 98). However, in Canada, this lack of data does not allow for improvement and the injustices will continue (Owusu-Bempah & Millar, 2010, p. 98). When taken together, all four studies demonstrate that excluding race-based data is a way Canada's criminal justice system actively attempts to hide their racist practices.

Another form of denial and concealment of systemic racism in Canada occurs when specific incidents of overt racism by criminal justice actors are publicized and highly scrutinized by the general public. This can lead to externalization of blame onto individual actors (often called "bad apples") instead of acknowledging the criminal justice system itself is inherently racist. Tanovich (2006) discusses multiple forms of racism in Canada's justice system, including racial profiling. However, unlike the previous authors, he explains that the discourse surrounding racial profiling is the denial of its existence by the Canadian government (Tanovich, 2006, p. 111). Additionally, when racial profiling is acknowledged by police officials, it is being attributed to the actions of, "'bad apples' rather than as a systemic problem" (Tanovich, 2006, p. 50). Tanovich (2006) explains that this occurs, in-part, to the false and widely shared belief that racism does not exist in Canada (p. 50). He supports this claim by quoting Prime Minister Paul Martin who said racist people are 'un-Canadian' (Tanovich, 2006, p. 50). However, he does not expand too much on this and discusses overt and unintentional racism and its roots more in depth (p. 14). This is another prevalent theme in Kitossa's (2014) article as she describes the common discourse of blaming racial profiling on, "bigoted individual police officers i.e., bad apples" (p. 76). Kitossa (2014) critiques various individuals who contest this view, but repeatedly mentions Alan Gold's research and commentary on the Toronto Star report on police officers in 2002 (pp. 75-6). They also argue that Gold, along with multiple scholars in the Canadian Journal of Criminology and Criminal Justice, blame racial profiling on the victims and these attitudes help

uphold the discriminatory, Eurocentric justice system (Kitossa, 2014, p. 82). By using commentary of other researchers and scholars, she presents a unique perspective on how systemic racism is upheld and denied by its actors.

Recent scholarship has explored anti-racism and anti-colonialism discourse made my political leaders which appear progressive, yet do nothing to change systemic racism in the criminal justice system. Many scholars explain that this is a strategy of upholding the system that benefits white people and harms minorities while simultaneously trying to appear like they are trying to end systemic racism. This is frequently called "hollow performance" (Daigle, 2019, p. 703) or "performative politics" (Butler, 2015; Daigle, 2019, p. 711). Simpson (2016) explores the formal apology made by Prime Minister Stephen Harper in 2008 to Indigenous people regarding the residential school system (p. 438). The article structure begins with quoting Harper's full statement, then chronologically addresses issues with the statement and quoting other scholars, i.e. Alyosha Goldstein (2014), to support her perspectives. A primary issue is the temporality of the language Harper uses, such as "we now recognize that it was wrong", because it strongly suggests that anti-Indigenous racism as an event of the past that no longer occurs in the present (Simpson, 2016, pp. 438-9). Similar assertions are made by Daigle (2019), who states that by only referencing colonialism through residential schools, Canada insists colonialism is in the past, which is false (p. 707).

Simpson (2016) further supports her claims by recalling that less than one and a half years prior to making this statement, Harper verbally denied any history of colonialism in Canada (p. 439). This chain of events is described as the "presumed eventful-ness of colonialism that settler governance now needs", where the Government of Canada accepts mistreatment of Indigenous peoples as a historic event in addition to denying it even occurred (Simpson, 2016,

pp. 439-440). Like the former, Daigle asserts that claims of reconciliation and restoration of Indigenous relations made by the government of Canada are simply a "spectacle of reconciliation – a public, large-scale and visually striking performance" describing the hardships faced by Indigenous peoples combined with "white settler mourning and recognition" (p. 706). These acts of performatively effectively "secure, legitimates and effectively reproduces white supremacy and settler futurity in Canada" (Daigle, 2019, p. 706). However, she differs from Simpson (2016) because Daigle (2019) explains that performative "spectacles" on Canadian university campuses reproduces colonial power in the same way that public apologies made by Canadian Parliament does (pp. 708-9). Both actions create a false belief that reconciliation is taking place when it actually is not (Daigle, 2019, p. 711). Apologies are also critiqued by Gulliver (2018) as "easing the guilt of those giving the apology" and to liberate individuals from their ancestors' colonial actions and crimes against Indigenous persons in Canada (p. 73). He used content-analysis with texts discussing critical discourse and addressing the delegitimization of "gendered, racialized and classed people" (p. 74). This methodology allows Gulliver (2018) to examine multiple perspectives on the same subject, which not only strengthen their central argument, but can examine these perspectives across a large timeline. Doing so, substantiates Gulliver (2018)'s claims that racism in Canada is a past and present-day phenomenon (pp. 83-4).

The literature, as well as the ongoing current events in Canada's justice system, such as the murders of Regis Korchinski-Paquet and D'Andre Campbell, police brutality involving Dafonte Miller, Chief Allan Adam and many more[2] and political responses to these cases indicate the existence, persistence and subsequent denial of systemic racism. Racism is prevalent at every stage in the Canadian criminal justice system when there are victims and defendants

[2] For a comprehensive list, visit: https://www.pyriscence.ca/home/2020/5/29/cdnpolice

who are Indigenous or racial minorities. This paper will narrow its focus on wrongful convictions and minority defendants and how the justice system has continued to operate in such a biased manner over 30 years. These biases are twofold: they are brought into the court room through pre-existing racial tensions and othering, and they operate through the normal functioning of the courts and the police forces. The following two themes will discuss concrete instances of systemic racism in Canada through the lens of colonialism and anti-Black racism through two case studies: Donald Marshall Junior and Leighton Hay.

The Cases

Below are brief descriptions providing background information on both cases: explaining what happened, where it happened and why it happened along with the verdict.

Leighton Hay

Leighton Hay's case took place in Scarborough, Ontario at the HHMS nightclub. A group of four males and one female attempted to enter without paying the cover charge and as a result, a fight broke out between the group and two club organizers (R. v. Hay, 2013). They eventually left, but less than 30 minutes later, two men forced their way into the club carrying handguns. They shot both club organizers, Colin and Roger Moore, resulting in the death of Colin Moore (Innocence Canada, 2019). The license plate number of the shooter's vehicle belonged to Leighton Hay's mother, which led the police to arrest him on July 6, 2002 ((Innocence Canada, 2019). In 2004, the jury found him guilty of first-degree murder and was given a life sentence. He spent 12.5 years in prison before he was exonerated (Innocence Canada, 2019).

Donald Marshall Jr.

On May 28, 1971 in Sydney, Nova Scotia, Donald Marshall Jr. asked Sandy Seale, the victim, if he wanted to "make some money", by panhandling or robbery, to which Seale agreed (Katz, 2011, p. 36). They encountered two men named Roy Ebsary and Jimmy MacNeil, who Marshall attempted to rob. This resulted in Ebsary stabbing Seale in the stomach and slashing Donald Marshall in his arm with a knife. Marshall ran from the scene to find help and 911 was called, but Sandy Seale died of his injuries (Katz, 2011, pp. 37-8). During police investigations, two individuals who "witnessed"[3] the crime identified Donald Marshall as the assailant, so he was charged and arrested. The jury found him guilty of second-degree murder and he was sentenced to life imprisonment, exonerated after 11 years in jail (Katz 2011, p. 44).

Both cases were selected because they are males belonging to minority populations, belonging to groups who are overrepresented in the prison system, relative to their population size. Since a majority of Canadian wrongful convictions are composed of white males (Statistics Canada, 2019), I specifically chose these two cases. Together, they exemplify how belonging to a minority group in Canada played a role in their wrongful conviction, which will be explored throughout the two themes discussed below.

Theme 1: The Communities where the Wrongful Convictions Occurred

The two cases, as well as many cases of wrongful conviction, frequently occur in communities characterized by physical and social conflict because they allow for increased crime to occur, but also stigma, violence, racism and lack of cohesion among residents. This disorder

[3] Witnessed is in quotation marks because Chapter two of Anderson and Anderson (2010) explain that those individuals only saw the aftermath of the crime, witnessed from afar or heard it. More about those witnesses are discussed in the section on police.

includes issues of high racial tensions, which are only exacerbated when criminal acts occur. Another part of this political neglect is the act of "othering", typically occurring in areas of poverty and such that poverty can be seen as an act of "othering". Othering is defined as an undesirable objectification of another person or group of people (Macquarrie, 2010). More specifically, it is a method of, "differentiating individuals and groups and relegating them to the margins according to a range of socially constructed categories", including gentrification and ghettoization, using racially based stereotypes and discriminatory laws and practices (Valdivia, 2017, p. 133). An example of context for othering is in Germany during World War Two. It was utilized by white Anglo-Saxons who classified racialized individuals as, "a dangerous and uncivilized people who directly threatened the nation" (Smith, 2019, p. 3). They were understood as being biologically, politically and culturally underdeveloped and residing low on a "hierarchal assessment" (Smith, 2019, p. 4). Terminology used to describe Black people, "Aboriginals[4]" and non-white Europeans includes, "savage, primitive, brutish and underdeveloped" (Smith, 2019, p. 3). In short, it is the labelling of certain individuals as "undesirable" by others. Within the context of this essay, it will be applied to othering based on race and Indigenous status. Marginalized groups are the first to blame, first to stigmatize and the easiest to ignore.

Racial Tensions

The communities in which wrongful convictions occur are characterized by high racial tensions, typically the majority against the minority populations (or vice versa), but can also persist among minority groups. In Smith and Haggerty's text *Race, Wrongful Convictions and Exoneration*, they discuss the treatment of black males in American communities. Specifically,

[4] Quotation marks used because I use Indigenous in place of Aboriginal throughout the paper, yet multiple sources throughout use the terminology "Aboriginal" as the term reflects the law as it currently exists.

they reference the Winston-Salem community in North Carolina, as well as, the race relations in the state of Carolina, overall. Carolina is described as a dichotomy of 'whites as good and blacks as evil and repeated offenders' (Smith and Haggerty, 2011). Examined here are two cases of white individuals who deliberately murdered their family members and then blamed Black men for their crimes, who were subsequently convicted. In these communities, Black people are seen as "interchangeable", meaning once a Black individual is accused of a crime, law enforcement's focus is finding any Black man to arrest and convict. Whether they committed the crime or not is irrelevant (Smith and Haggerty, 2011). Therefore, it is clear that poor race relations in Carolina have resulted in numerous wrongful convictions by purposely blaming someone else.

These findings can be compared to the Canadian context through Bullen's dissertation titled "Facing Intolerance: Toronto Black University Students Speak on Race, Racism and Inequity". The section "Racism: Part of the Culture of Young Black Students' Everyday" describes Toronto, Ontario as a culture in which racism towards Black people is "embedded" in the operation of society. This is because this ideology is associated with non-white individuals and is legitimized by the structure and organization of that society (Bullen, 2007, pp. 157-8). In other words, the societal norms of the city of Toronto are plagued with the mistreatment of people of colour and, in this case, specifically black people. Examples provided include name calling, teasing, taunting of blacks by, what they call, "white society" (Bullen, 2007, p. 159). A limitation of the Bullen (2007) content is that it does not discuss how racism causes wrongful convictions, which is why their article compliments the literature by Smith and Haggerty (2011), described above, well. It also provides context to the community conditions where Leighton Hay was wrongfully convicted. By understanding such, the reason why he was charged and convicted of the homicide becomes clear.

Anderson and Anderson in *Manufacturing Guilt: Wrongful Convictions in Canada* also describe the community context as causing wrongful convictions. They explain that if the defendant is a visible minority, it is a significant factor in their case because if they are a member of a marginalized minority group, they are presumed guilty, instead of innocent until proven guilty (Anderson and Anderson, 2010, p. 42). The difference between their perspective and the other two texts, are that Anderson and Anderson (2010) reference Indigenous populations in Canada[5]. Another difference is, while Smith and Haggerty (2011) speak about racial tensions causing the exonerees' to become a suspect, Anderson and Anderson (2010) discuss this, as well as, how it influences a verdict.

The primary evidence in the prosecution's case against Hay was the eyewitness account of Leisa Maillard, who claims she focused on the second gunman for around 16 seconds and identified him as having "two-inch picky dreadlocks" (Innocence Canada, 2019). However, when Hay was arrested, he did not have dreadlocks and claimed his hair has been short for over a year. The police then found hairs in an electric razor next to his bed and created the narrative that Hay must have shaved off the dreadlocks once he returned from the shooting in order to disguise himself, and flushed those hairs down the toilet (Innocence Canada, 2019). Smith and Haggerty (2011) and Bullen (2007), when taken together, explain how societies are not only intolerant of Black people, but the ignorance of their uniqueness. By comparing everyone against a White Anglo-Saxon Protestant measuring rod, any aspect that does not conform to this is ignored and perceived as deviant. When Hay claims that he used the razor to shave his face and the hairs found in the razor were facial hairs (Innocence Canada, 2019), there is no comparison made

[5] "Indigenous Canadians" or "Canada's First Peoples" is colonial language, some Indigenous peoples do not identify as Canadian (Vowel, 2016). This paper discusses Indigenous peoples who live in modern-day Canada.

between facial hair and head hairs of Black men. This is because the hair appears to be identical for white people, who are the majority race in the Greater Toronto Area. The police failed to acknowledge that dreadlocks could not be flushed down the toilet or that facial hair does not grow the same and cannot be cut the same as hair from the head. Thus, Hay's case exemplifies ignorance of Black culture in Toronto, Ontario and since this was the main "evidence" tying him to the case, the jury found him guilty.

In the case of Donald Marshall Jr., Sydney, Nova Scotia's society is described as "plagued with racism and bigotry" where community members, as well as, judicial members (majority white) held racist attitudes towards the Mi'kmaq population who lived there. According to Anderson and Anderson (2010), the racial tensions were so long-term and continuous, that there was a high likelihood of the jury holding these attitudes and thus influencing their decision in his case (p. 43). All three texts provide insight into how racial tensions residing in specific communities gets transferred into the legal system through the act of wrongful convictions. They emphasize the importance of paying attention to racism within the community context when investigating cases of wrongful conviction. As explained above, the Marshall case exemplifies how the normative racist attitudes towards Mi'kmaq and other Indigenous peoples in this particular society resulted in his conviction. Anderson and Anderson (2010) acknowledge it is impossible to label this miscarriage of justice as being caused only by errors on the bureaucratic level because Marshall was Indigenous in a society that manifested hatred and intolerance towards Indigenous peoples (p. 43).

Together, these cases demonstrate why paying attention to racial and Indigenous status is crucial in cases of wrongful conviction. Both men were visible minorities in the communities where their miscarriages occurred. Their lifestyles were stigmatized by the dominant white

society and thus, they were perceived as being criminals because they were minorities living within these societies. Uniquely, they tell us the same story but in different contexts, from different communities, from different backgrounds. This demonstrates that racial inequality and community racial tensions resulting in wrongful convictions are not confined to one particular group of BIPOC, one particular society, or even one nation. If Hay or Marshall belonged to the dominant social group, they would not be cast in a negative light or "othered" according to race and it is highly unlikely that they would have been charged in the very beginning.

Othering, Poverty, Inequality

In the field of Criminology, when assessing crime trends, one cannot ignore the neighbourhood context, where crime most frequently occurs and the living conditions of such areas. They are characterized by poverty disproportionately experienced by racialized people and racial segregation within specific areas of the city and neighbourhood. By examining the area within which a crime occurs or where the accused resides in, a better understanding of the motives behind an individual committing a crime or even repeated involvement in criminality can be established. For instance, areas with high levels of reported crime are mostly concentrated with poverty, even if situated inside a relatively wealthy city, because of the need to commit crime to survive as well as poverty being criminalized by law enforcement. This type of racial division frequently results in actions of "othering", where certain individuals are seen as "strangers" to the larger community and are forced into impoverished spaces where opportunities for upward mobility are blocked. Thus, crimes of all variety are committed. The experiences of being othered and facing inequality have become highly frequent in cases of wrongful conviction because the areas where the original crime occurred are highly populated by visible minorities. Before examining othering in wrongful convictions, it must be established that these are not

isolated incidents. Canada has an extensive history of covert and overt racism which must be discussed in order to understand why the community context is significant when examining the race/Indigenous factor in wrongful convictions. In the following two sections, details on the history of colonialism and anti-black racism in Canada will be briefed.

a) Colonialism in Canada

Colonialization is, "the process whereby abstract social locations become sites for concrete oppression" (Kempf, 2009, p. 16). Racial tensions, as described in the previous section, often result in colonialism, yet it goes beyond a "dislike" towards individuals. It involves the theft of land, the destruction of culture, and the denial of political and legal autonomy. This involves settlers, a non-Indigenous person living on Indigenous land, arriving to Canada from Eastern Europe in the sixteenth century (Lewis, 2015). These settlers not only took the land for themselves, but also forced Indigenous people to live on reservations and facilitated their mistreatment (Lewis, 2015). These reservations (or reserves) were used as sites for installing pipelines, tar sands and mining industries, which polluted and destroyed wildlife and plant life (Lewis, 2015). These projects were intended to improve Canada's economy, while harming the lives of Indigenous people, whose livelihood centers on hunting, agriculture, and farming.

Overtime, this pollution not only threatened their culture and livelihood, it also shortened their life expectancy and directly resulted in their deaths. The conditions of the reserves were described as human rights violations which were routinely ignored by governments at the municipal, provincial and federal levels (Maidment, 2009, p. 53). 93 Canadian First Nation communities as of 2015 had drinking water advisories, meaning their water has to be boiled to become un-contaminated and consumable (Mitchell and D'Onofrio, 2016, pp. 324-5). The Report on the Royal Commission of Aboriginal People's reveals that these

reserves continue to be overcrowded, have unsafe drinking water, extreme poverty and run-down housing contaminated with mold. These communities have the highest rates of unemployment, high-school non-completion, illnesses such as tuberculosis and lower life-expectancy rates compared to the national average (Maidment, 2009, pp. 53-4). Pipeline projects are still being proposed and approved by the Canadian government. More recently, the Supreme Court in British Columbia approved of the Coastal GasLink pipeline to be constructed and it would run right through the Wet'Suwet'en First Nation reservation. Coastal GasLink claims they received signed approval from the council of First Nations living along the planned route of the pipeline, but this was not true (Bogart, 2020). The pipeline is a physical invasion on land that does not belong to the company, or Government of Canada, but will further cause harm to the environment, as similar projects have (Bogart, 2020).

Land seizure is not the only way Indigenous peoples in Canada face mistreatment. They have historically (and currently) face racism, discrimination, violence and murder at the hands of the Canadian government and their institutions i.e., police forces. One example of physical and cultural genocide is the residential school system. Cultural genocide is unique from physical genocide because it involves, "destroying the specific characteristics of a group" including forcible transfer of children to a group separate from their own, forced removal of people who uphold and represent the group's culture, forbidding speaking their language publicly or privately, destroying texts written in their language and/or destroying historical or religious monuments, statues or artworks (MacDonald, 2019, p. 29). In 1927, Duncan Scott, the Deputy Superintendent General of Indian Affairs, approved of "Indian Residential Schools" (IRS) to be built in Canada (MacDonald, 2019, p. 3). These were schools made exclusively for Indigenous children and youth and their attendance was mandatory and upon arrival, the cultural genocide

began. Their hair was cut off and were given new clothes as their cultural garments were burned. They were forced to attend Catholic religious ceremonies and practice the Catholic faith and physical violence was used and threatened to be used in order to enforce compliance to the authorities of the schools (Reynaud, 2017, pp. 157-8). Each child was given a "Christian name" to replace their Indigenous name, were forced to speak and learn English or French, and were taught that "Aboriginals" were "damned savages" and "enemies of French-Canadians" (Reynaud, 2017, pp. 164-7). Their skin was bleached to make them look white, they faced physical and sexual abuse and were taught how to be white and ordered to practice white culture over their own. Many died because of the poor conditions of the schools (Reynaud, 2017, pp. 167-169). Similar actions occurred during the Sixties Scoop, when Indigenous children were removed from their families and "adopted" by white, middle class families (MacDonald, 2019, p. 96). They were, "entirely stripped of their identities" since they were raised to obey white culture and abandon their own traditions and cultural practices (MacDonald, 2019, pp. 104-5). Overall, these actions are indicative of genocide and eradication of Indigenous people and culture throughout Canada. The last residential school closed in 1996 (Reynaud, 2017, p. 86) and the sixties scoop is no more, however their mistreatment continues in the present day.

b) Anti-Black Racism in Canada

Anti-Black racism is defined by the African Canadian Legal Clinic as, "prejudice, stereotyping and discrimination that is directed at people of African descent and is rooted in their unique history and experience of enslavement" (Mullings et al, 2016, p. 23). It is entrenched in powerful institutions in Canada, such as the Criminal Justice System, law-making and governing bodies (Mullings et al, 2016, p. 23). Contrary to popular public belief, Canada had legal forms of slavery from 1628 to 1833 in both French (Quebec) and English (Ontario, New Brunswick and

Nova Scotia) Canada (Kihika, 2013, p. 37). Black people were officially, "property of a variety of individuals", i.e. the Catholic Church, and were forced to perform manual labour, agriculture and breeding of new slaves (Kihika, 2013, p. 37). Another historic example of anti-black racism in Canada is the destruction of Africville. Africville was a series of land areas in Nova Scotia where many black refugees arrived and settled following their release from slavery in the late 1800s (Clairmont and Magill, 1999, p. 28). It was described as a beautiful, interconnected community with close social-ties and bonds within (Clairmont and Magill, 999, p. 89). However, this view of Africville was not shared by those external to the community. For some, such as a field representative of a national human rights group, it was described as degenerate, impoverished and deteriorated and it was perceived as "a social problem" (Clairmont and Magill, 1999, pp. 89-90). This view began to spread and resulted in encroachment and calls for relocation of the land areas. Businesses, such as fertilizer plants, a rolling mill, landfills and slaughterhouses, were built and greatly contributed to pollution and environmental regression of the land areas (Clairmont and Magill, 1999, p. 93). It was well-known by the governing bodies that these industries were forbidden in white neighbourhoods due to their environmental impact, thus they were put into Africville, an entirely black neighbourhood (Mitchell and D'Onofrio, 2016, p. 323). In addition, the municipal governments refused to provide essential services and utilities, including an absence of running water, schools and education systems, as well as inadequate police and sewage services (Remes, 2018, p. 223). As the economic development increased in Africville, access to necessities decreased and external perceptions of Africville as a slum became widespread (Clairmont and Magill, 1999, p. 93).

Nevertheless, slavery and Africville were not isolated incidents of anti-Black racism in Canada. Black people were perceived as "morally inferior" compared to white people and in an

attempt to preserve their "white community", they were effectively denied immigration into Canada until the mid-1960s (Kihika, 2013, pp. 40-1). Despite being granted immigration at this point, Black people faced and currently experience inequality within the labour and job markets, being overrepresented in low-paying positions (Kihika, 2013, p. 41). Police officers disproportionately use carding in black communities against black individuals. Carding is the act of police officers stopping, questioning and recording person information from individuals who are not "directly suspected of committing a crime" but might appear suspicious or fit a broad description (Mullings et al, 2016, p. 23). African Canadians make up about 25 percent of the individuals carded from 2003 - 2008, and this proportion of Black males were 3.4 times greater than the population of African Canadian males living in Toronto (Mullings et al, 2016, p. 23). As the amount of carding overall decreased, the number of African Canadians carded increased (Mullings et al, 2016, p. 23), proving that black people were specifically targeted and classified in a negative manner, compared to their white counterparts.

c) Othering and Wrongful Conviction

After examining the history of mistreatment for both Indigenous and Black people in Canada, despite having unique experiences, both groups have a long history of mistreatment, resulting in being "othered". Anderson & Anderson (2010) explain that the state characterizes those who live in poverty, are unemployed, and are visible minorities as those who live on the "fringes" of society (p. 15). They are characterized as undesirables threatening the social order (Anderson and Anderson, 2010, p. 15). This action relates to wrongful convictions because these acts of stigmatizing or "othering" individuals according to their race and socioeconomic status creates a culture of othering that is shared by larger society. West and Meterko in "Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years"

also provide an explanation for individuals who plead not guilty, yet receive guilty verdicts. Specifically, the reason why multiple factors (i.e. eyewitness misidentification, false forensic science) occur together in cases of wrongful conviction is because of cognitive bias, defined as patterns of thought or behaviour leading to erroneous conclusions (West and Meterko, 2016, p. 732). In other words, if the society is instilled with racist attitudes, adding a marginalized defendant will result in a guilty verdict. People who belong to these minorities are automatically stigmatized and seen as violating the natural social order due to their appearance and status and are seen as "less than" the majority group. Thus, when a crime occurs, they are the first to blame. This is why the act of othering and poverty puts them at a high risk of being wrongfully convicted. All three works come to similar conclusions about the impact of race but analyze this impact from different stages in the process.

An alternative view of the effects of othering is provided by Smith and Haggerty (2011) who describe the case of Darryl Hunt, a black man wrongly convicted of the murder of Deborah Sykes. He was exonerated after 18.5 years in prison, yet he was not seen as a victim of the criminal justice system, which is how other authors[6] define exonerees. The perceptions of his exoneration shared by the town of Winston-Salem, North Carolina (mainly occupied by white people) believe that Hunt was considered a suspect due to "something wrong" he had done in the past, and he had "undoubtedly" committed other crimes, so he deserved his prison sentence (Smith and Haggerty, 2011). Here, an interesting perspective is presented because it shows how the act of othering occurs even after exoneration. Despite having his innocence proven, the stigma attached to Hunt persists because he is a black male living in a community that is

[6]Some examples of these authors are Maidment (2009), Anderson & Anderson (2010) and Innocence Canada (2019), but this claim is not limited to only authors referenced in this essay.

unaccepting and intolerant to his race. An article that sheds light on this is Tanovich's article "Moving beyond Driving While Black: Race, Suspect Description and Selection". Individuals are labelled as potential suspects frequently for the reason that they are defined as "out of place" within a society. An example provided of being "out of place" is a young, black male driving an expensive car (Tanovich, 2005, p. 340). Both texts, the impact of being othered is demonstrated, but are very different points. The former shares the impact after a wrongful conviction and the latter presents the impact prior to a charge or arrest. The commonalities are that acts of othering caused both instances to occur. If the individuals were not racialized or othered, they would not be considered a suspect and, consequently, convicted of a crime they did not commit.

James Doyle's essay "Orwell's Elephant and the Etiology of Wrongful Convictions" has similar and conflicting views on the subject. Like the previous authors, Doyle (2016) discusses racialized othering in the United States among African Americans and White Americans. He discusses American society as a socially constructed with specific areas he classifies as "elsewheres". Elsewheres are defined as places where "normal", a.k.a. 1st generation and white, Americans do not go because they are highly concentrated with African Americans and poverty. Further, the treatment of Black defendants living in these neighbourhoods by the legal system is more severe than defendants from "white immigrant" neighbourhoods, due to the fact that Blacks are seen as the "other", ones who are not equal to larger society (Doyle, 2016). However, he states that the action of othering is not a racist act because non-white individuals can still belong to the dominant group in society and not be seen as an "other" (Doyle, 2016). This is where Doyle (2016) presents his central argument, that the "etiology of wrongful convictions" must be recognized. In other words, racism and unequal, disproportionate treatment within the criminal justice system is embedded since it was designed to benefit white people, and thus is operating

exactly as it was intended to. Thus, when addressing the etiology of wrongful convictions, he argues that individual bias, human error and "bad apples" are not responsible for these past and present instances (Doyle, 2016). The causes of wrongful conviction are seen as tangible actions on part of the courts, such as Brady Violations or police actions, and by investigating "close calls", as well as findings of guilt, there are lessons to be learned to prevent them in the future (Doyle, 2016). While I do agree with the notions above, such as his argument that some racial minorities do not face discrimination as frequently as others, one cannot deny that "othering" is perpetuated by creating these social spaces of poverty and minorities. If an individual who is wrongfully convicted is a visible minority, this alone can subconsciously influence how the judge and jury perceive their character and, in turn, their guilt. If they are othered, they are automatically guilty. This becomes evident in research on the Cross-Race Effect (or Cross-Race Bias), which is especially prevalent in false eye-witness accounts.

The Cross-Race Effect (CRE), within eyewitness memory and identification, is defined as a phenomenon where, "individuals are more accurate at identifying photographs of someone of their own race than they are at identifying photographs of someone of, another, less familiar race" (Jackiw et al, 2008, p.1). Jackiw et al (2008) observe that the CRE occurs frequently among white people when identifying Black people. They hypothesize that the same phenomenon occurs among White-Canadians and First Nations[7] in Canada and test this through mock line-ups (Jackiw et al, 2008). After showing participants six photographs per racial group, they were given 12 line-ups and asked to identify the people from the six photographs in each line up. Their results indicate that, while both groups exhibited higher accuracy at identifying individuals of their own racial background, white participants were more likely to falsely-

[7] The authors identify participants as First Nations, this is reiterated to not misrepresent their original claims.

identify individuals from the line-up of First Nations people. They also found that, when given a line-up where none of the individuals from the 12 photographs were present, white people were more likely to select an individual than say they do not recognize anyone (Jackiw et al, 2008, p. 6). Similar findings are observed in a study by Corenblum and Messiner (2006) on Euro-Canadians (majority white and first-generation Canadians) and African Canadians and identifying other Euro-Americans and African Americans (p. 191). Their results match the findings by Jackiw et al (2008), when both groups identified "in-group members" (their own race) more accurately than the "outgroups members" (outside their race) (Corenblum and Messiner, 2006, p. 194). Therefore, both Indigenous and Black people were more likely to be falsely identified than white people.

Furthermore, since Indigenous and Black demographics are minority populations in Canada, it demonstrates how the CRE occurs disproportionately among these groups and is a major contributor towards their wrongful conviction. The CRE is not coincidental and is frequently manifested in false eyewitness accounts, which is evident in the Leighton Hay case. Although a photo lineup was not used in the Donald Marshall Jr. case, the results of the two studies above explore the idea of how belonging to a marginalized group increases your likelihood of being falsely identified. Generalizing the characteristics of an entire group to a few commonalities in physical appearance and personality is a form of stereotyping and othering, which facilitates and allows for multiple forms of injustice, such as a wrongful conviction. These two cases are examples of the impact of race on their false conviction, which demonstrate the realities of multiple racialized individuals who have experienced the same injustice.

Leighton Hay lived in a community where discrimination and racism were considered part of normal, everyday life for Black people. As described above, Black people are othered in

their communities where they constitute the minority racial group. Two separate photo lineups were prepared for eyewitness Maillard; the first time, she identified Hay as looking "similar" to the gunman, the second she did not identify him. At the preliminary hearing, she identified Gary Eunick, not Hay, as the gunman she saw that night, despite Eunick being taller and more muscular than Hay (R. v. Hay, 2013). Nevertheless, Hay was still found guilty by the jury because he belonged to the same race as the eyewitness' account, thus he was perceived as possessing the same criminal traits. It is also important to note that Maillard did not belong to the same racial group as Hay, which demonstrates how the CRE most likely contributed to his false identification. If he belonged to the same racial group as Maillard, or was white, it is unlikely that she would have identified him, or believed he looked "similar" to another Black man.

Marshall lived on the Membertou reserve in Sydney, Nova Scotia, an area which separated the "rich whites" from the "Indians". So-called Aboriginals[8] lived on their reserves, while the rich whites lived in the suburbs. They were frequently told to go back to "where they belonged", which was on the reservation, and that they "did not know their place" in society because they moved off of the reservation and interacted with white people. Some justice officials wanted to build a fence around the Eskasoni Reserve in order to keep its residents out of Sydney so they would not cause mischief (Maidment, 2009, 56). It is evident that an unpopular defendant is one of the most common causes of wrongful convictions[9] because they are stereotyped as having a "propensity to commit crime" or perceived as different from mainstream society. Among these unpopular defendants, BIPOC are found to fall victim to many of the

[8] See Footnote 4.

[9] Read the cases of Gregory Parsons and Guy Paul Morin for other examples of the "unpopular defendant". All can be found in Anderson and Anderson's (2010) text.

above stereotypes (Maidment, 2009, 35). The act of othering in Sydney, Nova Scotia casted any Indigenous person as an outcast, a troublemaker and unpopular.

Overall, if Marshall or Hay belonged to a group that was respected and seen as "normal" by their community, it is reasonable to conclude that their likelihood of initial arrest and finding of guilt would have been less likely to occur. These cases, when analyzed together, exemplify how the community context can turn race and Indigenous status into an aggravating factor when determining guilt or innocence. Racial tensions, along with acts of othering, contribute to our understanding of the reason why wrongful convictions happen, especially when racialized people are involved. Therefore, it is crucial to bring special attention to racial and Indigenous status in all wrongful convictions. By removing it from the discussion, it weakens our understanding of why wrongful convictions occur and how they can be prevented.

Theme 2: Systemic Racial Biases

In the previous pages, I discussed how racism on the community level contributes to individuals being wrongfully convicted. Now, I am focusing on racism within the system, and by "systemic", I am referring to occurrences within the Canadian criminal justice system which has been designed to benefit the racial and ethnic majority (white people) and disadvantage minorities. This goes beyond the attitudes and perspectives held by members of society, and extends into the judicial branch where authoritative individuals perpetuate racism in their behaviour. Black and Indigenous peoples in Canada disproportionately feel the effects of systemic discrimination and racism compared to other Canadians within four components of the criminal justice system: the courts, sentencing, juries and the police.

The Courtroom Setting

The court system, for the purposes of this essay not only consists of the attorneys, judge and jury (discussed in subsequent sections), but the nature of the legal system within the courts. West and Meterko make interesting claims about the role of race in wrongful convictions in the United States when they analyze plea deals. They state that guilty pleas by defendants are often made because of certain pressures, including knowledge of the racism within the system and fear of the death penalty or a longer sentence. When cross-referencing this with all people of colour (primarily African Americans) in the US, they found that the majority of individuals who pleaded guilty and were exonerated later, were racialized (West and Meterko, 2016, 726). Furthermore, many racialized individuals believe that the judge or jury will inevitably find them guilty on account of their race and the judge is likely to give them a lengthy sentence or assign the death penalty.

Maidment (2009) also analyses how individuals perceive their treatment by the courts but with a specific focus on "Aboriginal" populations. Indigenous legal scholars explain that there are inherent cultural differences between First Nations[10] populations and "western worldviews" and these differences have been construed negatively by the courts. For instance, the terms "guilt" or "please" are not known nor used in Mi'kmaq culture and this lack of understanding is often inferred as guilt by members of western society (Maidment, 2009, 55). Both texts acknowledge and describe the significant differences of minority populations and their treatment by the court system but, West and Meterko (2016) do so in different circumstances from those of the Hay and Marshall case because both males plead *not guilty* and are convicted in trial, while the researchers only focus on wrongful convictions involving *guilty* verdicts.

[10] See footnote 7.

Regardless of verdict type, their research sheds light on how racial and Indigenous identity play a role in how the courts operate through the defendant's knowledge of an increased likelihood of having an unequal trial because of their visible minority status.

Doyle (2016) briefly analyzes the courtroom atmosphere in his article "Orwell's Elephant and the Etiology of Wrongful Convictions". He explains that the courtroom is perceived as an environment that divides individuals into "collectives" whom are not seen as human first, but as "races, types and colours" (Doyle, 2016). Similar views are shared by Shute et al (2013) in *A Fair Hearing? Ethnic Minorities in the Criminal Courts.* When discussing racism in the courts, they focus on the role of judges, specifically their ignorance of the lifestyles of ethnic minorities, which leads to the mistreatment of racialized defendants within the courtroom by the judge, jury and attorneys. A specific example they provide is a judge referring to the black defendant's hair as his "hat"[11]. Additionally, they note the use of inappropriate language in the courtroom specifically with black people, i.e. calling them "nig-nogs" (Shute et al., 2013)[12]. Judicial misconduct has been a well-known cause of wrongful convictions; however, racial identity on its own (versus racism) is not something that is typically associated with this. When discussing other cases of judicial misconduct[13], judges are bound by legal precedent to examine all evidence presented by both the prosecution and defense attorneys (Larocca, 2018). They must make an impartial decision regarding admissibility and weighing the significance of evidence. However, this is subject to the *de facto* discretion of each individual judge and, at times, allow certain evidence to be presented and other evidence not to be (Larocca, 2018). The text by Shute et al. (2013) explicitly describes racial biases within the court system, showing more examples in the

[11] Page numbers could not be found because information was taken from an online eBook sample. The Information was found under Chapter 10 "A 'Cultural Change': Magisterial Perceptions".
[12] The information was found under "Mounting Concerns" in Chapter 1 of the text. See footnote 11.
[13] In the Anderson and Anderson text, "Chapter 6: The Case of Thomas Sophonow" Page 96

West and Meterko (2016) study. Together, these texts shed light on the importance of acknowledging race and racism within the court system. The difference between this book and Doyle (2016) is that Doyle only gives minor attention to the role of race and claims, as previously discussed, that race is not a primary factor, where Shute et al (2013) argue that it is. What is absent from all three pieces of research is how this is reflected in cases of wrongful convictions, which is where the case studies become useful.

Despite the case of Leighton Hay not being as well-known as other cases, it is evident that the strongest factor that made the members of the jury decide on a guilty verdict was the "supposed haircut", explained in depth above (Innocence Canada, 2019). It was allowed as evidence in his original trial without forensic testing being performed on the hair, which would have determined if a. they even belonged to Hay and b. if they were facial hairs, as Hay claimed, or head hairs, as the prosecution claimed. Lisa Hay, Leighton's sister testified in Hay's trial about the composition of dreadlocks and how they are made. She said, "deadlocks were hair 'twined together so tightly or knotted beyond where you can't pull it out. It's just knotted excessively'" (R. v. Hay, 2013). Regardless, the jury, like the police, were not knowledgeable on Black culture and chose to believe the legitimacy of the Crown's evidence (Innocence Canada, 2019). As described by Shute et al (2013), the misunderstanding of growth and styling of Black hair, especially deadlocks, is a common feature of the courtroom setting. To further emphasize this, the details of his appeal reveal the ignorance of the crown attorney. When the Association in Defense of the Wrongly Convicted (now Innocence Canada) took on his case, their attorneys wanted to send the hairs to the Centre of Forensic Sciences to determine their origin. The Crown not only disagreed with the test, but refused to release the hairs to the centre until ordered by the Supreme Court of Canada (Innocence Canada, 2019). Furthermore, it is clear

the crown attorney was ignorant of the significance of testing the hairs and refused to think otherwise. This becomes a racialized topic because the prosecution presented the hair as evidence, the judge allowed the hairs to be submitted into evidence and the jury accepted the prosecution's construction of events without DNA testing. If there was a greater understanding of Black culture, lifestyle and biology, the hairs would have either been tested prior to the trial being set. In addition, the defense would have been able to educate the jury about the uniqueness of head hairs versus beard hairs in black people, and the jury would have thought twice about the prosecution's construction of events. Nevertheless, the racialized treatment of Hay by the court system was evident in his case and supported by the literature.

The ignorance of Indigenous, specifically Mi'kmaq, culture is also found in the Donald Marshall Jr. Case. When he testified, he was covering his mouth with his hand and speaking softly, which is a known-reaction of Indigenous peoples when experiencing anxiety, yet the judge continued to ask him to "speak up" and "stop covering his mouth with his hand" (Katz, 2011, 52). Since his jury consisted of solely white people, they did not understand that this behaviour was not due to his guilt, but due to his anxiety at the possibility of being convicted of a crime he did not commit. Racism in his case also becomes clear when the trial of the real perpetrator, Roy Ebsary, occurs. Ebsary pleaded not guilty in self-defence and the jury deliberated for 10 hours yet could not come to a decision and a new trial was ordered. In both cases, there were eyewitnesses of the stabbing. Marshall's identity as an Indigenous person is relevant here because, with the same type of evidence, Ebsary was a white man tried by a white jury and Marshall was Indigenous and convicted in 45 minutes by an all-white jury (Katz, 2011, 53-4). Thus, the miscarriage of justice becomes clear when you assess the differences of treatment within the trial system: one of these men belonged to a visible minority and the other

did not. When taking the cases of Leighton Hay and Donald Marshall Jr. together, the different forms of systemic racism in the courtroom become clear. You cannot retell either of these stories without examining their culture and how it was understood in the courts. Whether it is the culture of appearance, like the Hay case, or behaviours, like the Marshall Jr. case, their differences from the majority population become apparent in the court, increasing the likelihood of their criminal convictions.

Sentencing

Sentencing disparity is a prominent factor of systemic racism within the criminal justice system. Sentencing disparity is a form of unequal and presumptively unjustified differences in the sentencing of persons convicted of similar crimes under similar circumstances (Jareborg, 1989). This act strongly suggests that sentences are created and given based on non-legal factors and not, "in accordance with legally relevant factors" (Jareborg, 1989, p. 1). There are a variety of non-legal factors which occur, such as gender, sexual orientation, race, and socioeconomic status. However, for the purposes of my central argument, I only focus on racial and Indigenous identity. I argue that the social construction of race and systemic racism has and is currently a factor when judges create sentences for Black and Indigenous peoples in Canada. They are given much harsher sentences than their white counterparts, in addition to a finding of guilt based on speculative and minimal evidence. The sentencing laws, as they are currently used, reinforce this disparity, especially with Indigenous groups and the case of R. v. Gladue (1999).

Singh and Sprott (2017) performed an experiment to determine if and how significant a role race plays in public perception of the fairness of specific sentences in Canada (p. 287). They gave identical scenarios to all their participants with the only difference being the race of the offender: Black or white (Singh and Sprott, 2017, pp. 287-88). Participants were asked to give a

sentence and rate dangerousness, likelihood of recidivism and culpability (level of guilt) and what their primary goal of the sentence was (denunciation, punishment, deterrence etc.) (Singh and Sprott, 2017, p. 296). They observed noticeable trends when comparing the results of the white offender to the Black offender. While harsher sentences were given to the violent crime versus the nonviolent crime, a, "significantly harsher sentence [was assigned to] the Black offender in both scenarios" (Singh and Sprott, 2017, p. 298). To be specific, community service, the most lenient sentence, was assigned to the white offender at almost double the rate as Black offenders and more than five years in prison, the most severe sentence, was given to Black offenders 14% more times than whites (Singh and Sprott, 2017, p. 298). Weinrath (2007) notes similar patterns when examining Indigenous populations in Canada when they are charged with driving under the influence of alcohol. By comparing "Aboriginals" and white Canadians, Weinrath (2007) observes major sentencing disparity (p. 21). While more leniency is granted to "Aboriginal" youth than white youth, it is not granted to "Aboriginals" of any other age group (Weinrath, 2007, p. 21). Specifically, "Aboriginal" men in their 30s and 40s are given longer sentences than white males of the same age group, regardless of having a, "lower risk driving profile" than white males (Weinrath, 2007, p. 25).

Studies in the United States[14] have analogous findings to Singh and Sprott (2017). For instance, Sweeney and Haney (1992) perform a "mock trial" experiment where jurors are asked to give a verdict as well as assign a sentence to Black and white defendants (p. 183). Specifically taking results from the non-black participants, the researchers found that, "Black defendants were punished significantly more harshly than white defendants" (Sweeney and Haney, 1992, p. 190). The researchers account this in-part to "pre-existing stereotypes" about the "perceived

[14] Due to the sparse amount of Canadian literature on the subject matter, studies based elsewhere were used.

dangerousness" of Black Americans and types of crimes they commit (Sweeney & Haney, 1992, p. 191). This is also supported by Weinrath (2007) who quotes the "drunken Indian stereotype" and chronic alcoholism of older "Aboriginal" males (p. 25).

The landmark case R. v. Gladue (1999), or the Gladue decision, was the first time the Supreme Court of Canada used and applied special considerations to Indigenous peoples. Subsequently, Canada's parliament amended the Criminal Code of Canada by adding section 718.2(e) (Parrott, 2017). This section states that all options besides prison should be contemplated when sentencing individuals, with a specific focus on the unique circumstances of Indigenous populations (Murdocca, 2014, p. 3). These circumstances include impact of residential schools, poverty and foster-care/adoption history (Hannah-Moffat and Maurutto, 2010, p. 273). While this decision seems efficient in theory, it has not significantly reduced incarceration and sentencing disparity for Indigenous peoples, who are overrepresented in provincial and federal prisons. R. v. Gladue (1999) does not reduce judge's discretionary power, but bolsters it since it is up to the judge to create a sentence (Murdocca, 2014, p. 81). For example, in R. v. Gladue (1999), the sentencing judge decided that section 718.2(e) did not apply to Jamie Gladue (the defendant) and gave her a carceral sentence of three years (Anthony et al, 2015, p. 54). Nevertheless, Anthony et al (2015) argue that this court case is "a step in the right direction" because Gladue reports are written by "Aboriginal Canadians" and are independent from factual evidence of the case (pp. 58-9). They make these claims by comparing Canada to Australia, pointing out the absence of an equivalent to the Gladue decision in Australia (Anthony et al, 2015, pp. 59-60). However, Murdocca (2014) argues that there are inherent issues with how judges apply this precedent and I agree with their criticisms.

One issue is highlighted by quoting Chief Justice Antonio Lamer's discussion with the Defense Counsel regarding the case. Lamer explains that there are "degrees of Aboriginality" determined by the court system according to physical, concrete differences (Murdocca, 2014, p. 81). Physical identifying factors will overrule any other aspect of Indigenous people, including their culture, practices and commitments (Murdocca, 2014, p. 82). Lamer does not acknowledge systemic racism and the historical mistreatment of Indigenous people in Canada (as explained in theme 1) as a unique circumstance to be considered when sentencing them under this precedent (Murdocca, 2014, p. 91). Hannah-Moffat and Maurutto (2010) agree with Murdocca (2014) by critiquing the pre-sentencing report process. Despite being performed by "Aboriginals", the primary focus of these reports are to assess "criminogenic risk and need" (Hannah-Moffat and Maurutto, 2010, p. 274). While the factors described above are not used to minimize the severity of the crime, the circumstances and the inter-generational detrimental impact these circumstances have had on Indigenous people are not of primary consideration (Hannah-Moffat and Maurutto, 2010, p. 274). To this day, Gladue courts are highly limited in their ability to help Indigenous peoples and there are various recommendations put forward on how to improve relations between the Canadian justice system and Indigenous peoples (Commission D'Enquête sur les Relations Entre les Autochtones et Certains Services Publiques, 2019). Furthermore, this provides context for why sentencing disparity continues to persist despite the apparent "progressiveness" of Canadian law.

In Canada, adults convicted on first-degree murder are sentenced to life imprisonment with no parole eligibility for 25 years (Department of Justice, 2018). Adults convicted of second-degree murder have sentences ranging from 10 to 25 years in prison "as determined by the court", with no parole eligibility until at least 10 years are served (Department of Justice, 2018).

Both Donald Marshall Jr. and Leighton Hay were given sentences of life imprisonment, which appear to be reasonably proportionate for their given crimes. However, since these are fixed sentences, early release and release on parole were not granted and this represents systemic racism in this phase of the criminal justice system. Hay had no prior criminal record, yet was not granted any form of early release or parole (Innocence Canada, 2019). Marshall Jr.'s case took place 28 years prior to the Gladue decision, therefore alternatives to sentencing as per section 718.2(e) could not apply. Nevertheless, he still experienced unfair treatment when seeking temporary release. For instance, he wanted to attend the funeral of his grandmother, but was not allowed to leave the prison (Butts, 2019). He was also not granted temporary passes and was only granted parole after the real perpetrator, Roy Ebsary, was charged with the crime (Butts, 2019). Thus, the criminal justice system exhibited racism towards Marshall Jr. and refused to grant him any visitation rights or furlough until Ebsary was charged and arrested. Similar acts are unlikely to occur to white males charged with murder of varying degree.

Juries

In a trial by jury, selection and composition of the jury pool is a major part of the court process and this alone strongly influences the verdict of a case, regardless of what evidence is or is not presented. When trial by jury is legally mandated, or chosen by the defendant, the decision to punish a defendant via a guilty verdict is inevitably in the hands of the jury members. Therefore, regardless of other forms of systemic racism, if the jury is biased, there is a good chance they will exercise guilt-presumption towards minority defendants. Subsequently, we can expect increased findings of guilt among racialized and Indigenous populations versus white defendants if jury pools are neither representative nor properly screened for bias. R. v. Parks 1993 CanLII 3383 (ON CA) created a new challenge for cause: a juror can be dismissed if they

present racial prejudice or racial biases. They can be addressed by both attorneys and/or the trial judge to ensure individuals' partiality is unaffected by such bias (Anthony and Longman, 2017, p. 34). However, this has not proven to be as effective in practice as biased jurors continue to be allowed onto the panel. In this context, the racialized status of the defendant and victim have a role in determining how the jurors will act, how they perceive the defendant, the weight placed on each part of evidence, and the verdict.

The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System of 1995 acknowledges that anti-Black racism occurs in juries (Commission on Systemic Racism in the Ontario Criminal Justice System, 1995). However, recognition of and efforts to address and prevent bias is primarily practiced in the Ontario Court of Appeal, and not in the provincial courts (Commission on Systemic Racism in the Ontario Criminal Justice System, 1995, p. 222). There is an attempt to reduce anti-Black racism. For instance, Justice Doherty advocates for Black defendants raising questions to the jury regarding any racist attitudes the jurors may hold, which most likely will impact their verdict (Commission on Systemic Racism in the Ontario Criminal Justice System, 1995, pp. 221-2). Nevertheless, systemic anti-Black racism continues to persist, despite this acknowledgement over 25 years ago.

Morrison et al (2016) examine Canadian jurors biases and how lawyers acknowledge this racial bias and use it to advance their preferred verdict. They had a primary focus on implicit bias, an internal, automatic process, versus explicit bias, controlled, intentional and outwardly expressed (p. 1130). Their results indicate that jurors in trials with Black defendants and white victims demonstrated higher implicit race bias, but only when these jurors were selected and kept by crown attorneys, not defense attorneys (Morrison et al, 2016, p. 1135). This behaviour is also evident in Schuller et al (2015), who examine racism in the community where the jury pool

comes from. Like the former theme, I discussed the ways that individual and community-level racism, versus institutional-level, has detrimental effects on BIPOC who are wrongfully convicted. Yet microsocial biases and racism influence the macrosocial institutions i.e. the courts when there are trials by jury.

Schuller et al (2015) critique the challenge for cause procedure in Ontario, Canada, when prospective jurors are asked specific questions to determine suitability i.e., conflict of interest or bias (p. 408). More specifically, they question the ability of a juror to self-identify their subconscious biases and if the triers (judges, attorneys) are "compelled" to exclude such jurors when the defendants are non-white minorities (Schuller et al, 2015, pp. 410-11). Their findings indicate that when asked a yes/no question regarding ability to judge "without bias, prejudice or partiality", less than 10% of jurors in the sample answered no, yet just under 40% answered no when multiple responses were given (Schuller et al, 2015, p. 414). Also, like Morrison et al (2016), jurors who were uncertain or did not elaborate when responding "yes" to the yes/no question were not all excluded by the triers (p. 415). Thus, these individuals could potentially hold bias and racially tinge the verdict, yet are allowed to be on the jury and are not questioned for their answer. This indicates that individuals and policies designed to prohibit biased jurors from entering the jury pool do not accurately screen and detect for bias.

Under-representation of BIPOC in jury selection is another common theme when discussing systemic racism in the court system and is also acknowledged by the 1995 Report of the Commission on Systemic Racism in the Ontario Criminal Justice System. The report explains the negative effects of this underrepresentation because it, "may convey particularly vivid images of 'white justice' in the court system" (Commission on Systemic Racism in the Ontario Criminal Justice System, 1995, p. 250). In other words, the intention of juries is to be a, "jury of

one's peers", and be representative of larger society (Commission on Systemic Racism in the Ontario Criminal Justice System, 1995, p. 250). If the jury is consistently composed of only, or primarily, white people, this strongly suggests that the system is designed to benefit white people and punish BIPOC. Little scholarly research has been conducted on Indigenous representation in juries until recently, yet comparable outcomes can be made between Indigenous and racialized people. Israel (2003) highlights the well-known fact that Indigenous peoples are grossly underrepresented among members of juries in Canada (p. 39). Historically, many First Nations[15] Canadians lost their right to vote due to their "status as "Indians", and the list of eligible voters is the primary list the Canadian courts use to find the jury pool (Israel, 2003, pp. 39-40). The Report of the Independent Review of 2013 has also noted a lack of representation of Indigenous people on Ontario jury panels. The Juries Act states that municipal residents' lists are also used by the courts to gather the jury pool (Iacobucci, 2013, p. 99). However, reserves were not included on these lists until 1973, when section 6(8) of the Juries Act was created to gather names of Indigenous people who reside, "in a county or district in which an Indian reserve is situate" (Iacobucci, 2013, p. 135). The primary source of this list was from Indian and Northern Affairs Canada (INAC), which was effective in increasing representation in the 1980s and 1990s but it became outdated by 2001 (Iacobucci, 2013, pp. 142). Nevertheless, Ontario continued to use the INAC lists after 2001 which resulted in a decrease of Indigenous representation (Iacobucci, 2013, pp. 142-144).

In addition, the Report on the Commission on Systemic Racism in the Ontario Criminal Justice System states that jury lists provided by the Ministry of Revenue collected data on house owners, and not tenants (Commission on Systemic Racism in the Ontario Criminal Justice

[15] See footnote 9.

System, 1995). Since many people renting a house were Black or Indigenous, this system inevitably excluded them from being members of the jury (Israel, 2003, p. 42). Anthony and Longman (2017) explain that this exclusion can also be attributed to a requirement of jury members to not hold a criminal record (p. 35). Due to over-policing and criminalization of poverty, BIPOC are disproportionately charged and convicted of crimes, meaning they cannot sit on a jury (Anthony and Longman, 2017, p. 35). As a result, increasingly more members are white, which raises many questions regarding the fairness of trial and if it is truly representative of the community and a community of the defendant and victim's peers.

While the jury composition is unknown for the Leighton Hay case, evidently his race reflects an ongoing trend of how Black people are treated with less leniency than white people. The fact that the victim, Colin Moore, was Guyanese Canadian residing in an area of Scarborough highly populated by Guyanese people (Small, 2012) aggravated the case even more than if Moore was a different race. Since the original trial took place in Toronto in 2002, it is unlikely that many of, if any, of the members were Black. Having Black jurors was extremely important in this case, since the hair sample was the strongest piece of evidence given it, "tipped the scales in support of the jury's verdict" (Innocence Canada, 2019). Black people know how dreadlocks are formed and would conclude that evidence was erroneous, as evident by Lisa Hay's testimony. However, the jury was convinced the hair sample originated from the scalp, so I can reasonably conclude that the jury lacked Black members. As Morrison et al (2016) observe, a racially biased jury is not uncommon with Black defendants (p. 1133). In addition, the instruction provided by the trial judge to the jury was determined by Hay's lawyers during his appeal as flawed (R. v. Hay, 2013). Despite this motion being rejected by the Court of Appeal, it is important to understand the fallibility of jury members and how they do not have any external

legal background or understanding. The trial judge does advise the jury to, "be very cautious about relying on eyewitness testimony to find either of the accused persons guilty" (R. v. Hay, 2013) and addressed the fact that Maillard's eyewitness account was weaker than the other accounts (R. v. Hay, 2013). Regardless, at the end of this speech, the trial judge told the jury,

> "you should look for confirmatory evidence to support the eyewitness identification evidence. If you find other evidence to support the eyewitness identification evidence, you may decide that the frailties associated with a conviction based only on identification evidence has been discontinued" (R. v. Hay, 2013).

Furthermore, it is reasonable to conclude that the jury will interpret this instruction as permission to convict, even if the eyewitness account is unreliable, so long as there is another piece of evidence that coincides with the account. As discussed earlier, the hair sample evidence was not forensically tested and was flawed, as well as Maillard's testimony (Innocence Canada, 2019). In addition to R. v. Parks (1993), a recent decision in R. v. Johnson (2020) allowed for "a series of more nuanced questions and multiple choice" to be posed to the jury in order to more effectively identify biased jurors and dismiss them. This is an attempt to uncover overt *and* convert racism. They ask multiple-choice questions such as "do you believe that black men are more likely than other men to commit certain types of violent crimes" with options "strongly agree, I agree but not strongly, I disagree but not strongly, I strongly disagree and I don't know" (R. v. Johnson, 2020). They also ask "might you be even slightly hesitant in your ability to judge the case fairly given that one of the individuals charged is a black man, one of the victims is white, and the other victim had a white mother and Latino father" with responses of "I would not, I might, I would or I do not know" (R. v. Johnson, 2020). Questions like these do not adequately screen for bias, since the questions ask about overt racism, which will not be admitted

out loud by many (Quan, 2020). The responses also do not allow for an accurate dismissal, as an individual who answers "I don't know" cannot be identified as biased or unbiased and is often not dismissed (see Schuller et al, 2015; Morrison et al, 2016; Quan, 2020). While R. v. Johnson (2020) is an improvement from R. v. Parks (1993) by expanding responses beyond a simple yes or no, it still does not accurately measure bias. It is a step in the right direction and should be celebrated as such, but it is still imperfect. In Hay's case both pieces of evidence used were racially tainted: the testimony and the cross-race effect and the hair evidence a. not being tested and b. a demonstration of the jury exercising cultural ignorance. In addition, the direction from the judge can also be understood as inadequate since this instruction is misleading and suggests for jurors to seek other evidence. If these jurors held bias, an instruction such as this would reasonably lead them to find any reason to convict, even weak, circumstantial evidence.

The jury composition for the case of Donald Marshall Junior is well-known and highly problematic. He was tried and convicted by a jury composed entirely of white people in 1971 (Katz, 2011, p. 54). Further, all-white juries continue to be selected and allowed into trials with Indigenous defendants or victims. Colten Boushie, a Cree male from Red Pheasant First Nation in Saskatchewan, was shot and killed by Gerald Stanley, a white male, because their vehicle had a flat tire and was being repaired on Stanley's property (Roach & Borrows, 2019, p. 15). Stanley was tried and subsequently acquitted by an all-white jury by conscious choice of the trial judge, which was subsequently supported by the Court of Appeal as justified (Roach & Borrows, 2019, p. 81). This occurred in 2018, forty-seven years after another all-white jury wrongly convicted Donald Marshall Junior. Unfortunately, these are not isolated cases and it has happened

numerous times[16] with Indigenous victims and defendants in Canada. As mentioned in the section on courtrooms, the ignorance of culture greatly contributed to his wrongful conviction. When focusing specifically on juries and not the broader courtroom setting, the all-white jury was a primary cause. The Report of the Royal Commission on the Donald Marshall Junior Prosecution (1989) highlights this issue of jury representativeness in Nova Scotia, where his trial was held. Evidently, for reasons explained above, Mi'kmaq peoples of Sydney were not included on the trial list (Royal Commission on the Donald Marshall Junior Prosecution, 1989). These reasons are inevitably racist and specifically impacted the absence of Indigenous persons on his jury. If there were Mi'kmaq or other Indigenous peoples on the jury, these individuals could properly interpret his behaviours i.e. covering his mouth, speaking softly, as factors unique to the Mi'kmaq and not as indicators of guilt. Without pointing specific attention to racism and anti-Indigenous prejudice among the members of the jury and jury pools, one of the central reasons why Marshall Jr. faced a miscarriage of justice is lost.

The Police

The institution of policing is a widely critiqued topic in the field of criminology and among society as a whole, especially when the treatment of racialized people is addressed. There is extensive literature on the subject so for the purposes of this part of the essay, I will only be focusing on texts which discuss police behaviour in cases of wrongful convictions. The police are almost always the very first point of contact between the accused and the criminal justice system. Unfortunately, this point of contact is typically negative, especially when it involves a racialized suspect and police misconduct is not uncommon and has adverse consequences. Some

[16] Read Chapter 3 of Roach and Borrow's book *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* for more cases.

of these instances are reviewed in Naughton's "Criminologizing Wrongful Convictions". They find, in multiple cases, such as the Birmingham Six from the United Kingdom, that the police use coercive tactics when interrogating suspects to make them confess[17], which lead to false confessions more often than true convictions (Naughton, 2014, 1154). These relate to the findings by West and Meterko (2016) mentioned above, in that the treatment of defendants by the courts and perceptions of systemic racism lead to guilty pleas. These texts complement each other well because they provide the same conclusion from different areas of the legal system.

The authors also describe the nature of police interrogations as guilt-presumptive, frequently using the Reid Technique which uses psychologically tactics to pressure a suspect into confessing (West and Meterko, 2016, 759). Parallels can be made when Naughton (2014) outlines the Cardiff Three case, where perjured testimony was provided by three main witnesses. Once the conviction of the Cardiff Three was overturned, the three witnesses admitted they were not only intimidated but were threatened by police officers into giving false evidence[18], breaching the Police and Criminal Evidence Act of 1984 (Naughton, 2014, 1156). However, I critique Naughton (2014) because they fail to mention race or racism in any analysis and does not disclose the reason for this anywhere throughout the paper. Even West and Meterko (2014) omit race in their section on police misconduct. Police officers are perceived internationally as enforcers of the law and hold a lot of power in society. With this power, inequality arises when it comes to treatment of community members, and this inequality is frequently associated with racial minorities. Evidence of this is provided in Tanovich (2005) which examines the use of racial profiling and racialized stereotypes used by police during the suspect selection process. He

[17] The article is British, so many of their examples are cases of wrongful convictions in the United Kingdom. A Canadian example of this type of police misconduct (found on InnocenceCanada.ca) is O'Neil Blackett.
[18] See Footnote 3.

explains that when law enforcement uses race to find a suspect, the actual perpetrator will not be caught because they do not match their description of a Black or "Aboriginal" person and thus, false positives are made (p. 303). One of the consequences of this "misuse of race" is wrongful convictions (Tanovich, 2005, 303-4). This literature reflects the importance of including race in an analysis of policing because of all the poor outcomes[19] that arise according to police misconduct. Thus, I question the other authors for choosing to exclude the topic from their articles but nevertheless, Naughton (2014) provides insight into the causes of police misconduct. With the use of the case studies, the content can be further analyzed through a racial lens.

Before the case studies are examined, I want to address an unconscious form of police misconduct called "tunnel vision", analyzed in MacFarlane and Cordner's book *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System.* The authors define this phenomenon as,

> "an overly narrow focus on a particular investigative or prosecutorial theory [that] has the effect of unreasonably colouring the evaluation of information received [which]…involves the unconscious filtering of evidence that will 'build a case' against a particular suspect while ignoring or suppressing evidence" (MacFarlane and Cordner, 2008, 34)

that could absolve the suspect of their guilt. In other words, once the police decide an individual is a suspect of a given crime, they develop a narrow focus on only that individual and gathering any incriminating evidence while eliminating contradictory evidence. When

[19] All of the poor outcomes are listed on page 304, but the focus is on Wrongful Convictions so, for the purposes of this paper, I did not mention the others.

determining how it occurs, the authors focus on psychological explanations, specifically cognitive biases, which are comparable to West and Meterko (2016) and their analysis of biases in the courtroom. Both authors examine how cognitive biases are manifested within actors of the legal system and how these actors use their personal biases and perspectives when making decisions[20]. Similar views are shared by Maidment (2009) in the case of Wade Skiffington. Due to the tunnel vision of the police force, Skiffington remained their only suspect, which allowed them to use any means necessary to elicit his confession, including the Mr. Big Sting[21], which inevitably led to his false confession (Maidment, 2009, 89). Here, Maidment agrees with the former two authors on the impact of tunnel vision in cases of wrongful conviction. Furthermore, tunnel vision and cognitive biases play primary roles here, but this role cannot be fully understood without the inclusion of racial and Indigenous status in the conversation.

When the police were investigating the crime scene, none of the witnesses identified Hay as one of the gunmen. The sole piece of real evidence tying Hay to the scene was his mother's car, identified by the owner of the nightclub, as being used by the perpetrators to escape (Innocence Canada, 2019). The rest of the evidence was fabricated by the police due to the "two picky dreadlocks" described by witness Maillard. Upon discovery that Hay did not have picky dreadlocks and finding short hairs in the garbage accompanied by an electric razor, the tunnel vision began. The police were convinced that Hay must have shaved his head following the shooting to disguise himself, even though there were no long hairs to be found and Maillard did not identify him as the shooter (Innocence Canada, 2019). Their tunnel vision was racially tinged because of which evidence the police chose to pursue and to ignore. Once the police learned that

[20] MacFarlane and Cordner (2008) p. 5, West and Meterko (2016) p. 732.

[21] Mr. Big Sting is an expensive, coercive, risky police-operated tactic in which they go undercover and coerce the suspect into a confession.

the shooter had dreadlocks, they presumed he must be black and when they found a suspect's hair that did not match the description, they presumed guilt and made up a story because he belonged to the same race. The car used to escape was not investigated further to make a stronger defense.

Tunnel vision and police misconduct played a large role in the Marshall Jr. case because the police decided he was guilty as soon as they learned he was at the crime scene. They did not search for other suspects, even when Marshall Jr. gave his statement to the police describing the perpetrator, which was not even recorded (Anderson and Anderson, 2010, 29). The crime scene was not secured or searched, witnesses in the park were not recorded and the citizens of the town were not questioned. The lead detective had had multiple run-ins with Marshall Jr. prior to the crime. Therefore, he decided that he was the suspect, despite not searching his house for the murder weapon (Katz, 2011, 39). The interrogations were described as coercive and intimidating. When youthful witnesses did not name Marshall Jr. as the perpetrator, they were accused of perjury and threatened with jail time if they "did not tell the truth" (Anderson and Anderson, 2010, 30-1). It is a known law regulating police practice to have a parent present when questioning youth, yet all three were interrogated alone and felt pressured to change their story so they could "escape" the interrogation (Katz, 2011, 40-1). Furthermore, the tunnel vision was evident because of the actions of the police during the investigation. However, it cannot be understood without learning why Marshall Jr. was singled out in spite of witnesses or physical evidence. As mentioned earlier, so-called Indians were stigmatized by the larger society as troublemaking and crime ridden. The systemic racism and anti-Indigenous attitudes plaguing Sydney, Nova Scotia was reflected through the attitudes of the police officers' behaviour. When Marshall Jr.'s Indigenous identity is discussed, it becomes very clear why it happened.

Since cognitive bias is an unconscious action, there is no way of determining what the biases are and how they cloud judgment hindering the ability to conduct an impartial, unbiased investigation. In order to do so, the biases must be observed in-action by examining behaviour. When taken together, these two cases demonstrate how cognitive biases and the resulting tunnel vision take very different forms, but the end result remains the same. Without identifying the cause of cognitive biases, the reasons why tunnel vision and, in-turn, wrongful convictions happen is unclear.

Conclusion

Race is an aggravating factor. Indigenous status is an aggravating factor. Through a close examination of the communities where they occurred and the systemic racism in the justice system, the role race had and continues to have in wrongful convictions becomes clear. The cases of Leighton Hay and Donald Marshall Jr. serve as examples of both racism in the community and in the criminal justice system, demonstrating that these are prevalent, recurring issues. More research should be done cross-jurisdictionally because these are not the only two cases where it has occurred. We can only learn more about the prevalence of the issue of racism by analyzing and making connections in international cases. It should also be performed on an intersectional level because understanding the multi-faced identities of human beings broadens the sources of injustice and inequality. When race or indigeneity is excluded from the discourse, the reasons why some of the legal and non-legal factors occur remains unclear. Its inclusion results in these reasons becoming more apparent leading to the development of preventative measures.

An example of a policy that is already in place but could be improved is relocation of a trial, which is only done in cases where the original location would result in the accused

receiving an unfair trial. However, this is typically done in high-profile, well-known cases where the general public is already tainted by the media coverage and case details. When race and racial tensions of a community are addressed, it presents probable cause that the accused and any evidence proving their innocence will not be analyzed objectively and bias will enter the courtroom. Thus, a case should be relocated to another area to ensure that the accused receives an unbiased trial and verdict. However, as exemplified in the Rodney G. King case, relocation does not always bring about the promise of an unbiased jury. King was beaten by at least four police officers. His case was moved from Los Angeles, having prominent Black populations, to Simi Valley, described as, "an overwhelmingly white, conservative community long known as a popular home for law enforcement officers" (Weinstein and Liberman, 1992). As described in the section on juries and othering, an all-white jury and a community composed of individuals upholding racist, conservative values will only allow for more unjust guilty verdicts for the wrongfully convicted and unjust not-guilty verdicts for others. Furthermore, the population composition of the trial, acknowledging systemic biases towards BIPOC, should be a primary concern when relocating. Arguably, this should be prioritized over media tainting of jurors, when making the decision to relocate.

As addressed in the section on juries, questions on bias and prejudice need to be expanded more than they already have by R. v. Johnson (2020). It is evident that they type of questions asked and the way they are phrased are not effective ways of measuring, qualifying nor detecting bias, regardless of whether the potential juror is aware of their biases or not. There is no single solution nor best solution to this problem, but there are improvements that can be made to address the biases before they enter the courtroom. First, the questions asked need to be improved so they accurately measure racism, anti-Black or anti-Indigenous bias. In turn, these

questions need to be asked individually, versus in front of the entire jury pool. As Quan (2020) explains, prospective jurors may not feel comfortable answering questions about their character and potential biases, regardless of if they know others in the jury pool or not. Instead of asking questions in front of everyone, allow each juror to enter a private room alone, without seeing who the others in the pool are. This way, if a juror is dismissed or kept, nobody else will be aware of this except for the individuals the prospective juror decided to tell about their jury selection i.e. current employer, significant other. Furthermore, allowing a juror to respond without added pressure of being called out or condemned by others inside or outside the court room, along with improved questions, will aid in resolving it. Finally, a more representative jury panel, as well as more updated methods of retrieving resident information for inclusion in the jury pool must be done. Lynch and Haney (2011) suggest that in areas where few racial minorities live, they should be oversampled in order to ensure their inclusion on the panel (p. 96). Despite this research being based on "affirmative jury selection" in the United States (pp. 95-6), this policy can definitely be applied to Canada while also oversampling Indigenous peoples, not just racial minorities.

While I acknowledged my privilege in the introduction, there needs to be a massive increase in research by BIPOC on this subject matter. Their voices are silenced and ignored throughout multiple forms of systemic racism in Canada, apart from the legal system. The lack of diversity and representation in post-graduate programs in all disciplines, along with anecdotal and reported incidents of racism by faculty is very alarming. Even in non-academic settings, these voices must be uplifted, identified as valid and legitimate, and listened to. Their experiences of racism, discrimination, xenophobia and violence should be told from the perspectives of those who have lived it and are willing to share them instead of the white settler

perceptions or opinions on injustice. These individuals can also provide insight into policies, laws, programs and other tangible things that can be implemented. Unlike forms of "slacktivism" (false, lazy activism, such as virtually "liking" a post about racism but not addressing your own biases and unlearning them), these methods will legitimately benefit these communities and help bring about change.

When looking at wrongful convictions, it says a lot about the impact that living as a visible minority in Canada has on everyday life in the 21st Century. Yet, it also demonstrates the role of this status in the 20th century, since the Marshall Jr. case was in the 1970s and Hay's was in the 2000s. There are certain areas of racism that have been absolved and improved, yet there are many areas that are either unaddressed, remain a problem, or are a work in progress. The fact that wrongful convictions still occur and do so overwhelmingly, in racialized populations reinforces the need for reform and change. Racism still exists, but when race is seen as something that causes unequal treatment and discrimination, the problems can be addressed, and race can be seen in a positive manner. Progress has been made and while the successes of today should be celebrated, there is always more that can be done.

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