

REMARKS TO THE *RUTGERS UNIVERSITY LAW REVIEW*
SYMPOSIUM: BARRIERS TO INNOCENCE

*Karen Thompson**

As wrongful conviction practitioners, we all know the photograph. A person, often a Black man, stands in the center. He has a broad smile on his face and is flanked by his lawyers, family members, and friends. Their hands are often interlinked and raised overhead in triumph. This photo—usually taken in the moments after a court has found a person innocent of the crime for which they had been “duly convicted”—has become familiar; iconic. The photo is certainly all about the celebratory present, which it undoubtedly should be. Freedom is freedom, particularly when it has been unjustly denied.

That photo has become the first volley in trying to move public attention past/through the seconds, hours, months, years, decades, the collective twenty-nine millennia of wrongful imprisonment¹, to freeze in place a “perfect” defendant who is free at last. A picture that, unfortunately, avoids hard conversations about the penumbral effects of incarceration, anger and rage, mental illness, self-medication, trauma, and the profound and particular layers of loss irrevocably tied to the debilitating reality of wrongful conviction.²

* At the time of the delivery of these remarks, Karen Thompson was a senior staff attorney at the American Civil Liberties Union of New Jersey. Prior to joining the ACLU, she was a senior staff attorney at the Innocence Project, where she successfully represented clients in post-conviction and appellate proceedings, winning several motions for DNA testing and vacating the wrongful convictions of clients in Oklahoma, South Carolina, West Virginia, Arkansas and Pennsylvania. She is currently the Legal Director of Pregnancy Justice, a legal not-for-profit that defends the civil and human rights of women and all people who can become pregnant, focusing on those most likely to be targeted for investigation, arrest, detention, or family separation —poor people, people of color, and people who use drugs.

1. See THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct. 16, 2023).

2. This is a reality in which I am squarely implicated and intimately aware, given the life and case of my former client, Johnny Tall Bear, whose wrongful conviction exacerbated many of these factors, ending tragically in his death and that of two others in 2019. See Innocence Staff, *Tall Bear, Member of Iowa Tribe, Exonerated After Serving 26 Years for a Murder DNA Evidence Proves He Didn't Commit*, INNOCENCE PROJECT (June 11, 2018), <https://innocenceproject.org/oklahoma-man-exonerated-after-serving-26-years-for-a-murder-dna-evidence-proves-he-didnt-commit/>; *No Drugs Detected in Man Found Charred*

But as the innocence movement heads towards its fortieth decade, we must move beyond this photograph and re-examine the circumstances fertilizing the ground that produces an incarceration that is a miscarriage of justice, whether factual or nonfactual in nature. While the legislative and policy wins of the innocence movement have been world-shifting and significant,³ resolution of basic issues of inequity seem to remain just out of reach. Race, however, remains a central truth for every aspect of criminal justice in the United States and we must name it for what it has been, what it is, and what it has turned the criminal justice system into.⁴

While we often hear the maxim that the past is past and unrelated to our individual present, we, confusingly, as a culture, also simultaneously speak of those times' communal successes, from "when WE won the war," or "WE went to the moon," to "when WE won the Superbowl." We are entirely capable of understanding our collective ability for good or for talent; accordingly, we must school ourselves on our collective appetite for injustice and trauma as witnesses and willing or unwilling participants. WE must face the reality of how white supremacist principles are reproduced in the law, and how the structure of that reproduction informs wrongful convictions. WE must look at the creations of the criminal legal system that require and reward discrimination and violence against Black people and how state-sponsored dehumanization aids in, and is dependent on, that reproduction to justify itself. WE must understand the space from which the recalcitrance towards overturning wrongful convictions emerges and understand why it so often takes months/years/decades of litigation to right those wrongs. This understanding is one that requires a brief examination of the legal genealogy that created it.

in Vehicle After Seminole Co. Wreck, NEWS 9, (Apr. 25, 2019, 3:17 PM), <https://www.news9.com/story/5e3479bd527dcf49dad73091/no-drugs-detected-in-man-found-charred-in-vehicle-after-seminole-co-wreck>.

3. See INNOCENCE PROJECT, *Policy Reform*, <https://perma.cc/ZM96-PFLZ> (last visited Nov. 14, 2022).

4. We are all "raced" people, to the extent that race is a social organizing tool invented to justify specific economic and political outcomes. That being said, in the United States, based on the uniqueness of our socio-cultural, economic, and political system, race in the criminal legal system has been deliberately and carefully crafted to be a proxy for Black pathology, one used as a shorthand for, among other things, who law enforcement officers stop and question and that juries will use to determine who to sentence to death. New York Civil Liberties Union, *Stop and Frisk Data*, <https://www.nyclu.org/en/stop-and-frisk-data>; *Report: Death penalty cases show history of racial disparity*, ASSOCIATED PRESS (Sept. 15, 2020, 9:18 AM), <https://apnews.com/article/united-states-lifestyle-race-and-ethnicity-discrimination-racial-injustice-ded1f517a0fd64bf1d55c448a06acccc>.

On May 10, 1740, the South Carolina Assembly enacted the Negro Act of 1740⁵, which codified the institution of chattel slavery in South Carolina and became an exemplar for the more economically slave-dependent states. The Bill, “for the better Ordering and Governing [of] Negroes and other Slaves,” set out to keep enslaved persons “in due subjection and obedience.”⁶ Then a British Colony, South Carolina enacted the law after the Stono Rebellion, wherein the self-liberatory efforts of armed enslaved Black people resulted in the deaths of several white enslavers and other enslaved Blacks.⁷ In response to this armed conflict, The Negro Act laid out the legal basis for punishment of Black people in a colonial society and removed almost entirely the legal rights of the criminally accused enslaved person.⁸ It authorized that if “any slave who shall be out of the house or plantation where such slave shall live, or shall be usually employed, or without some whiter person in company with such slave, shall refuse to submit or undergo the examination of any white person, it shall be lawful for any such white person to pursue, apprehend, and moderately correct such slave; and if any such slave shall assault and strike such white person, such slave may be lawfully killed.”⁹ Psychologically, the “we” of the body politic normalized in law the idea that Black refusal of mistreatment, or subjugation to white authority, legally justified, and, in fact, required, a collective “whiter” response of violence and “lawful killing.”¹⁰

5. See 7 DAVID J. MCCORD, *THE STATUTES AT LARGE OF SOUTH CAROLINA* 397–417 (1840), https://www.carolana.com/SC/Legislators/Documents/The_Statutes_at_Large_of_South_Carolina_Volume_VII_David_J_McCord_1840.pdf. “[N]egroes, Indians, mulattoes and mustizoes, have been deemed absolute slaves, and the subjects of property in the hands of particular persons, the extent of whose power over such slaves ought to be settled and limited by positive laws, so that the slave may be kept in due subjection and obedience, and the owners and other persons having the care and government of slaves may be restrained from exercising too great rigour and cruelty over them, and that the public peace and order of this Province may be preserved” *Id.* at 397.

6. *Id.*

7. *South Carolina Passes Negro Act of 1740, Codifying White Supremacy*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/may/10> (last visited Oct. 14, 2023).

8. See MCCORD, *supra* note 5, at 397.

9. *Id.* at 399.

10. As one judge put it: “[t]he tribunal for the trial of slaves and free negroes is the worst system which could be devised. The consequence is, that the passions and prejudices of the neighborhood arising from a recent offense, enter into the trial, and often lead to the condemnation of the innocent.” H. M. HENRY, *THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA*: A DISSERTATION 59 (1914), <https://ia601606.us.archive.org/9/items/policecontrolofs00henr/policecontrolofs00henr.pdf>.

Forty-one years later, Thomas Jefferson would muse in his *Notes on the State of Virginia* that Black people should be removed from the United States because “[d]eep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race.”¹¹ Jefferson’s genocidal projection has, thankfully, proven itself incorrect, even as well-funded efforts to retard the remembering of sustained injuries continue on apace. However, due in part to Jefferson’s own embarrassing personal conflict of believing all men equal and endowed with unalienable liberty rights, whilst simultaneously “owning” his own children,¹² Black people do not appear in the Constitution at all, except as a definition of white representation in Congress as defined by the three-fifths compromise in Article I, Section II.¹³ While the Fourteenth Amendment¹⁴ would later supersede this representational foundation, our present-day Electoral College remains interlinked with it. As James Madison would state: “[t]he right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on

There is a distinctly American psychological thread that is deeply connected to these legal roots. Indeed, in April 2023, Ralph Yarl, a sixteen-year-old Black child, was shot by Andrew Lester, an eighty-four-year-old white man in Missouri when Yarl mistakenly rang his doorbell. Margaret Stafford & Jim Salter, *Man Charged in Front-door Shooting of Black Teen Ralph Yarl*, ASSOCIATED PRESS (Apr. 17, 2023, 10:49 PM), <https://apnews.com/article/kansas-city-black-teen-shooting-9602deefd974b9b91220aaa8a94f25c7>. While prosecutor Zachary Thompson noted a “racial component” to the case existed, no details were provided in Mr. Lester’s charging documents. *Id.* In the case of Jordan Neely, a Black man with a history of mental illness who was put in a chokehold and killed by Daniel Penny, a white former marine, on a New York City subway F-train in May 2023, Mr. Neely’s “aggressive[] threatening” served as justification for his “untimely death” in Mr. Penny’s arms and was named by Mr. Penny as an act of protection. Ari Blaff, *History of Violent and Erratic Behavior: Daniel Penny Releases Statement on Jordan Neely Death*, NAT’L REV. (May 6, 2023, 8:43 AM), <https://www.nationalreview.com/news/history-of-violent-and-erratic-behavior-daniel-penny-releases-statement-addressing-neely-death/>. Lester and Penny were both initially released after being questioned by police. *Id.*

11. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 147 (1787), <https://docsouth.unc.edu/southlit/jefferson/jefferson.html>.

12. See *Report of the Research Committee on Thomas Jefferson & Sally Hemings*, MONTICELLO.ORG, <https://www.monticello.org/thomas-jefferson/jefferson-slavery/thomas-jefferson-and-sally-hemings-a-brief-account/research-report-on-jefferson-and-hemings/conclusions/> (last visited Oct. 14, 2023).

13. U.S. CONST. art. I, § 2.

14. U.S. CONST. amend. XIV.

the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to fewest objections.”¹⁵

By 1850, faced with the ongoing struggle over slavery’s role in the expanding territorial occupation in the West, Congress amended the Fugitive Slave Act of 1793.¹⁶ This new Fugitive Slave Act conferred federal government power to local governments and individuals and required them to seize and return free Black people to enslavers.¹⁷ As if that wasn’t bad enough, the Act made federal marshals responsible for finding, returning and prosecuting Blacks who escaped slavery; whites who refused to enforce the law and individuals who helped slaves escape it were fined \$1,000 (\$40,000 in modern dollars) and also faced imprisonment.¹⁸ Special commissioners—not a judge or jury—were given concurrent jurisdiction with U.S. courts to enforce the Act.¹⁹ They were paid \$10 to rule in favor of slave owners (about \$400 today), but they only received \$5 if they sided with self-liberated Black people.²⁰

Seven years after that, the Supreme Court ruled in *Dred Scott v. Sandford* that as a white person’s property, Black people could not expect citizenship or protection from the federal government or courts, much less their freedom.²¹

We might take a deep breath knowing the Thirteenth Amendment was ratified in 1865.²² However, New Jersey, kicking and screaming, only ratified the Amendment in January 1866—six months *after* June 19, 1865, (known as Juneteenth)—with at least sixteen people still enslaved

15. *Method of Appointing the Executive*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-10-02-0065> (last visited Oct. 14, 2023).

16. See *Fugitive Slave Act, 1850*, BILL OF RTS. INST., <https://billofrightsinstitute.org/activities/fugitive-slave-act-1850> (last visited Oct. 14, 2023).

17. See Fugitive Slave Act of 1850, 9 Stat. 462, 462.

18. Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161, 171 (1921).

19. *Id.* at 171–72.

20. *Id.* at 172.

21. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. The Court’s “distinction” between Black Americans and indigenous people in the United States must be noted here: while considered citizens “associated together in nations or tribes, and governed by their own laws,” the Court underscored that this was true only so long as that citizenship did not impede the taking of Native land: “[i]t is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy.” *Id.* at 403–04.

22. U.S. CONST. amend. XIII.

in the State.²³ Even ratified, however, we must remain clear about what the Thirteenth Amendment says, and what it does and does not proscribe; put simply: “slavery, as a punishment for crime whereof the party shall have been duly convicted, *shall* exist within the United States.”²⁴

That is the truth. That is purposeful. It is a phrase debated and included in the Constitution as an answer or solution . . . to something. The *to what* thought bubble that should be popping up when you ask yourself that question, however, should make your skin crawl. Especially here, where we are gathered because we are acutely aware of the fragility of being *duly convicted* of a crime. Of the many courageous things the late, great, State Senator Ronald Rice did for the State of New Jersey, one of the most notable was his sponsorship of a New Jersey constitutional amendment in 2020 to end involuntary servitude, for any purpose, everywhere in New Jersey.²⁵

But I digress.

Enter Reconstruction and The Reconstruction Amendments, citizenship for Black people and thus the extension of due process and equal protection principles to Black people as well as the right to vote for Black males.²⁶ Enter Section 1983²⁷ and the other enforcement acts passed to provide federal civil rights claims against those engaging in state-sanctioned racial terrorism; protections we now use to challenge violations of civil rights by police officers, public officials, prison guards and wardens. But enter too the April 24, 1877, removal of Union troops from the former Confederacy (ushered in by compromises to settle the election of a President!²⁸), the end of Reconstruction and all of its attendant rights, the birth of Jim Crow, and the unfiltered white mob

23. See Noelle L. Williams, *New Jersey, The Last Northern State to End Slavery*, N.J. HIST. COMM'N, <https://nj.gov/state/historical/his-2021-juneteenth.shtml> (last visited Oct. 14, 2023).

24. U.S. CONST. amend. XIII, § 1 (emphasis added).

25. See Matt Friedman, *New Jersey Moves Constitutional Amendment That Would Ban Slavery, Involuntary Servitude*, POLITICO (July 22, 2020, 2:31 PM), <https://www.politico.com/states/new-jersey/story/2020/07/22/new-jersey-moves-constitutional-amendment-that-would-ban-slavery-involuntary-servitude-1303072>.

26. See *The African American Odyssey: A Quest for Full Citizenship*, LIBR. OF CONG., <https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html> (last visited Nov. 7, 2023).

27. 42 U.S.C. § 1983.

28. Vincent P. DeSantis, “Rutherford B. Hayes and the Removal of the Troops and the End of Reconstruction,” 417-450 in J. Morgan Kousser and James M. McPherson, eds., *REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD* (1982); see generally ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-77*, at 785-794 (1988).

violence unleashed against thriving Black communities all over the country coupled with the vicious exclusion of Black people from political and economic life.²⁹

Here in New Jersey, with the racial violence of the Red Summer peeking over the horizon, New Jersey social scientist Paul Willard Garrett made the argument to the New Jersey State Chamber of Commerce in 1917 for creating a New Jersey State Police force by citing to everyday Pennsylvanians' admiration of their own state police force for their ability to "shoot down a nigger a mile off."³⁰ Willard noted, and I'm sure he thought quite generously, "[t]his remark, of course, has to do with ability rather than personal character."³¹

Fast forward to 1968. The all-white Kerner Commission, assembled by President Johnson to address the causes for the 158 riots/rebellions/uprisings/civil disorders across the country, including in Newark, most of which stemmed from incidents between Black people and white police officers, stated the obvious: Black people, fleeing white racist violence in the South during the Great Migration, arrived in cities as industrialization was winding down and access to unskilled jobs plummeted; racial discrimination limited Black people's ability to escape from poverty, and arming police officers with more deadly weapons to use in heavily populated urban neighborhoods was not the answer.³² As Fred Harris, an Oklahoman senator who was a member of the Commission would later state: "[f]amilies were living in really terrible

29. See generally FONER, RECONSTRUCTION, *supra* note 28; WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869–79 (1979); *A Brief History of Jim Crow*, TEACH DEMOCRACY, <https://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow> (last visited Nov. 8, 2023).

30. PAUL WILLARD GARRETT, BUREAU OF STATE RSCH., THE STATE POLICE PROBLEM IN AMERICA: INCLUDING A SPECIAL STUDY OF THE PROBLEM IN NEW JERSEY 10 (1917), <http://hdl.handle.net/10929/33525>.

31. *Id.* Sadly, Willard's admiration of these violent behaviors now ties historical threads to modern day acts of policing that have resulted in unconstitutional policing practices detailed in numerous investigations, Consent Decrees, and condemnation by the State Comptroller. See e.g., W. Carsten Andresen, *New Jersey State Police's First 100 Years Characterized by Racial Prejudice*, THE CONVERSATION (Mar. 11, 2021, 3:11 PM), <https://theconversation.com/new-jersey-state-polices-first-100-years-characterized-by-racial-prejudice-156451>; Consent Decree, *U.S. v. New Jersey*, Civil No. 99-5970 (MLC) (D.N.J. 1999), <https://www.nj.gov/oag/jointapp.htm>; *Eighth Periodic Review on Law Enforcement Professional Standards*, N.J. OFF. OF THE STATE COMPTROLLER (Nov. 11, 2022), <https://www.nj.gov/comptroller/reports/2021/20221110.shtml>.

32. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968), https://belonging.berkeley.edu/sites/default/files/kerner_commission_full_report.pdf?file=1&force=1. As the introduction noted, "[d]iscrimination and segregation have long permeated much of American life; they now threaten the future of every American." *Id.*

conditions . . . [a]wful housing, no jobs, and almost criminally inferior schools.”³³

Yet, in 2015, the Department of Justice, after yet another investigation resulting in a consent decree, found that 75% of pedestrian stops by police in Newark lacked a constitutional basis; that one out of every five uses of force by police in Newark was excessive and unconstitutional; that from 2007 to 2012, Newark’s Internal Affairs Department sustained only one excessive force allegation out of hundreds; and that Newarkers who merely criticized police or were disrespectful to them were being detained and arrested (remember that Eighteenth Century Act about Negro obedience?).³⁴ Earlier this week, Attorney General Matt Platkin announced his office would take over the Paterson Police Department (“PPD”) after officers shot and killed Najee Seabrooks, a violence interrupter in the midst of a mental health crisis, the latest in an unacceptable litany of PPD violence and abuse.³⁵

I hope this slight history has revealed the conditional nature of American constitutional and civil rights; rights that are malleable and never meant to be wholly extended to Black people in America.³⁶ That is our common law; these are our precedents. This is the pot in which we have been seasoned. These are our self-evident truths. And we are here, at this Symposium today, to think through and imagine up some new self-evident truths.

We have work to do.

33. Mycah Hazel, *The Kerner Commission’s Last Living Member Says We Still Need to Talk About Racism*, NPR (Sept. 27, 2021, 2:18 PM), <https://www.npr.org/2021/09/26/1040791834/the-kerner-commissions-last-living-member-we-still-need-to-talk-about-racism>.

34. See Consent Decree, *U.S. v. City of Newark*, Civil No. 16-01731-MCA-MAH (D.N.J. 2016), <https://www.justice.gov/crt/file/868131/download>; DEPT. OF JUST., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 9, 10, 13, 35 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

35. See Taylor Jung, *AG Takes Over Paterson Police But Concerns Remain*, N.J. SPOTLIGHT NEWS (Mar. 28, 2023), <https://www.njspotlightnews.org/2023/03/new-jersey-attorney-general-matt-platkin-announces-paterson-police-takeover/>; see also Press Release, U.S. Att’y’s Off., Dist. of N.J., Two Paterson Police Officers Charged with Assaulting Victim and Filing False Police Report (Apr. 27, 2021), <https://www.justice.gov/usao-nj/pr/two-paterson-police-officers-charged-assaulting-victim-and-filing-false-police-report>; *Exclusive: 7 On Your Side Investigates Claims of Excessive Force by Paterson Police*, WABC-TV (May 8, 2019) <https://abc7ny.com/7-on-your-side-investigation-paterson-police-brutality/5290671/>.

36. There is a clear reason why the first reactions to video of a Black person being brutalized by police or citizens usually includes some form of “well, if they had only complied with commands” or “they had a criminal record, so . . .” Constitutional protections for the criminally accused or to those subject to arrest have asterisks if that person is Black.

And before I go any further, I acknowledge the deep complexities of advocating for social equality and racial repair in the criminal legal system, particularly in the immediate political climate where what Patricia Williams has named the “definitional theft” of the articulation of racial realities in the United States makes forward movement in this arena particularly tough.³⁷ But “from each, according to [her] ability; to each, according to [her] needs.”³⁸ There are spaces where we can address these unhealed wounds. There are actions we can take to reframe the ugly sticking places that result in wrongful convictions (regardless of guilt or innocence) that have been obtained through unjust means.

Incorporate racial analyses into litigation. When we talk about Rule 7:10-2³⁹ motions for Post-Conviction Relief (“PCR”) in New Jersey, our arguments and analyses should present facts (where they exist) about how and why fundamental racial injustices have occurred or have informed the wrongfulness of the conviction. Every PCR brief, for DNA testing or otherwise, must mention how our criminal jurisprudence emerges from this crucible. We have three decades of incontrovertible data gleaned from the experiences and survival of the wrongfully incarcerated. That Black people are 13% of the U.S. population but make up 53% of its exonerations and are seven times more likely than white Americans to be falsely convicted of a crime.⁴⁰ That cases involving exonerated Black people convicted of murder were almost 50% more likely to include misconduct by police officers than white defendants.⁴¹

Does this strategy strike as a little . . . extra? If so, I point you to the recent exoneration of Lamar Johnson in Missouri, and the response of the Midwest Innocence Project that day: “[i]t took an innocence organization, three law firms, the Circuit Attorney, both chambers of Missouri’s legislature and the Governor’s signature on a law passed for him, to free Lamar Johnson. That is intolerable. That is not justice. We can and must do better.”⁴² Be a little extra, because there are forces who

37. Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), <https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory>.

38. Karl Marx, *Critique of the Gotha Programme*, in 3 MARX/ENGELS SELECTED WORKS 13, 20 (Progress Publishers 1970).

39. N.J. Ct. R. 7:10-2.

40. SAMUEL R. GROSS, ET AL., NATIONAL REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2022).

41. SAMUEL R. GROSS, ET AL., NATIONAL REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 11 (2020).

42. Press Release, Tricia R. Bushnell, Midwest Innocence Project, et al., Lamar Johnson’s Conviction Overturned (Feb. 14, 2023), <https://themip.org/wp-content/uploads/2023/02/2023.02.14-Johnson-Press-Release.pdf>.

are willing to use every lever in the social, political, and legal system to, “duly,” not correctly, convict people and thus make Black people slaves, despite all evidence to the contrary.

Disturb the normalization of legal racism. Stop using the exonerative voice for unjustifiable state actions. Are you arguing *Miller* factors⁴³ for someone sentenced as a child who was painted as being a “superpredator”? Do you have a client who is a Black woman still incarcerated because of sentence enhancements related to using crack while pregnant? Challenge the legality of these sentences by pointing out to the court that by relying on the superpredator/“crack-baby” myths, the court relied on factually inaccurate information that was materially false and unreliable.⁴⁴ Discuss the fundamentally racist core of both now-disproven theories. We do this regularly in courts and through policy with regard to bad science, bad witness identification, and bad law enforcement. We can do it with regards to bad racial and racist pathologizing theories.

Name what you are seeing so that what you are seeing cannot be ignored. In New Jersey, the cumulative-errors doctrine can become a powerful tool, rejecting the traditional approach of evaluating errors singly, which is inconsistent with what we know to happen when a manifest injustice has occurred. As Stephanie Hartung has articulated, the contributing causes of wrongful convictions involve multiple types of evidentiary errors.⁴⁵ Combined with the research on infection of racial bias at every inflection point in cases, a holistic review can be an effective way to comprehensively challenge and reverse wrongful convictions and empower judges to consider the law, facts (old and new), and circumstances that may render a sentence unjust. It can also keep at the forefront the how *we* get to those unjust sentences.

To be an American, to be socialized in America, is to be in a constant state of willful or strategically enforced forgetting. As James Baldwin put

43. See *Miller v. Alabama*, 567 U.S. 460 (2012).

44. See *State v. Belcher*, 268 A.3d 616, 624 (Conn. 2022) (holding that the trial court’s denial of a motion to correct an illegal sentence was an abuse of discretion where “[e]xtensive research data and empirical analysis quickly demonstrated that the superpredator theory [upon which the sentence was based] was baseless.”); see also Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 854–56 (2010); Susan Okie, *The Epidemic That Wasn’t*, N.Y. TIMES (Jan. 26, 2009), <https://www.nytimes.com/2009/01/27/health/27coca.html>.

45. Stephanie R. Hartung, *The Confluence of Factors Doctrine: A Holistic Approach to Wrongful Convictions*, 51 SUFFOLK U. L. REV. 369, 369–70 (2018) (“[C]ourts should reevaluate the way postconviction innocence claims are addressed, and favor an approach that accounts for the complex ways in which seemingly independent errors may intersect with and infect one another to generate a wrongful conviction.”).

it: “[p]eople who remember court madness through pain, the pain of the perpetually recurring death of their innocence; people who forget court another kind of madness, the madness of the denial of pain and the hatred of innocence; and the world is mostly divided between madmen who remember and madmen who forget.”⁴⁶

It is time to be offensive to injustice and offensive in fighting injustices. We have innovative tools in front of us. We have—in thirty years—changed the landscape of the criminal legal system. We have brought large-scale awareness to the globe about the failings of criminal justice. We have created ways to address those failings. We have learned that “every tool is a weapon if you hold it right.”⁴⁷

Now, we have a new mandate. Let’s not rely on iconic photos, but create preventative change. Let us choose which type of madmen we want to be and let us be the madmen who remember.

46. JAMES BALDWIN, *GIOVANNI’S ROOM 25* (Everyman’s Library 2016) (1965).

47. ANI DIFRANCO, *My I.Q.*, *on* PUDDLE DIVE (Righteous Babe Records 1993).

